# THE CORROSION CRITIQUE OF BENEFIT CORPORATIONS

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ABSTRACT

*This Article evaluates what it labels the corrosion critique of benefit corporation statutes. These statutes have emerged as the new leading statutory alternative to enable and encourage social enterprises. Some supporters of social enterprises have criticized benefit corporation statutes, arguing that they create a mistaken impression that companies organized under ordinary corporation statutes must focus exclusively on pursuing profits as their ultimate goal. This corrosive effect on the understanding of most corporations may impede the adoption of socially responsible behavior.*

*This Article examines the validity of the corrosion critique. It delivers a mixed verdict. The critique is valid in states with corporate constituency statutes but not other states, most significantly Delaware. The problem is that benefit corporation statutes have been widely understood as justified in order to enable social enterprises to consider stakeholder interests. That enabling justification is (partially) subject to the corrosion critique because its implication that ordinary corporations must ultimately focus on profits for shareholders is false in states with constituency statutes, but true elsewhere. But if benefit corporations are useful, it is because they offer social enterprises a way to brand themselves by committing to the pursuit of stakeholder interests, not because they simply enable companies to consider those interests. Advocates of benefit corporations should focus on this branding justification.*

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CONTENTS

## INTRODUCTION

What can the law do to encourage corporations to help society? Should directors and officers consider the interests of persons besides their shareholders? Debate over the social responsibility of corporations goes back many decades and has become prominent again in recent years.[1] Recently, some entrepreneurs and investors have become interested in forming social enterprises. These businesses have dual purposes, seeking both to generate financial returns for their investors while also pursuing social missions.[2] In legal circles, there has been much interest in how law can be reformed to help support social enterprises, and a variety of new legal forms of business associations have been created in response.[3] The most widely adopted new business form has been the benefit corporation.[4]

And yet, some people who strongly advocate for social enterprise and corporate social responsibility ("CSR") have been quite critical of benefit corporation statutes. In part, that is because they doubt whether the statutes are likely to provide much real support for social enterprises, a concern I share.[5] But some go further to argue that benefit corporation statutes may affirmatively harm the promotion of socially responsible businesses. They worry that the way benefit corporations have been justified and promoted creates a false implication about ordinary corporations. That false implication is that such corporations are legally obliged to focus exclusively on the financial interests of their shareholders and can consider the interests of other stakeholders only to the extent that doing so will help their shareholders.[6] I call this criticism of benefit corporation statutes the "corrosion critique," because it posits that the new statutes are having a corrosive effect on our understanding of traditional corporations and corporate law.

This Article examines the validity of the corrosion critique. It delivers a mixed verdict. The critique is valid in states with corporate constituency statutes but

[1] *See infra* notes 27-48 and accompanying text.

[2] *See infra* notes 23-25 and accompanying text.

[3] Benjamin Means & Joseph W. Yockey, *Introduction*, *in* THE CAMBRIDGE HANDBOOK OF SOCIAL ENTERPRISE LAW 1, 2 (Benjamin Means & Joseph W. Yockey eds., 2018) ("This Handbook seeks to take stock of the social enterprise movement and to chart a course for its future development."); *see also* DANA BRAKMAN REISER & STEVEN A. DEAN, SOCIAL ENTERPRISE LAW: TRUST, PUBLIC BENEFIT, AND CAPITAL MARKETS 52-76 (2017) (evaluating various legal forms for social enterprise).

[4] Benefit corporations have both the purpose of creating profits for their shareholders and pursuing "general public benefit." Their directors and officers have a duty to consider the interests of a variety of stakeholders beyond just shareholders. They must regularly report on what they have done to pursue their purpose and abide by their duties. *See infra* notes 70-78 and accompanying text. *See generally* FREDERICK H. ALEXANDER, BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE (2017) (discussing law of benefit corporations).

[5] *See infra* notes 310-11 and accompanying text.

[6] *See infra* notes 90-122 and accompanying text.

not other states, most significantly Delaware. The problem is that benefit corporation statutes have been widely understood as justified in order to enable social enterprises to consider stakeholder interests, and that enabling justification is (partially) subject to the corrosion critique. But if benefit corporations are useful, it is because they offer social enterprises a way to brand themselves by committing to pursuing stakeholder interests. Advocates should focus on this branding justification.

The exploration of the corrosion critique proceeds in five parts after this Introduction. Part I describes the legal and practical background leading to the adoption of benefit corporation statutes. It sets out the longstanding debate over the nature of corporate purpose and duty and describes the adoption of benefit corporation statutes. It also surveys articles that have made the corrosion critique.[7]

Part II describes two sets of categorizations that lay the intellectual groundwork for evaluating the validity of the corrosion critique. First, it presents three differing conceptions of the legal purpose of corporations and the duties of their directors and officers:

- The *shareholder-only conception* maintains that directors and officers must ultimately base their decisions only on what they think will lead to the highest risk-adjusted returns for their shareholders, in the long run.[8]
- The *stakeholder-optional conception* allows directors and officers to consider the interests of a variety of corporate stakeholders without having to tie such consideration to any ultimate benefit to shareholders.[9]
- The *stakeholder-mandatory conception* requires directors and officers to consider the interests of a variety of corporate stakeholders other than shareholders.[10]

Part II then makes a variety of claims relating these three conceptions to differing corporate law statutes:

- States with benefit corporation statutes follow the stakeholder-mandatory conception.[11]
- States with constituency statutes follow the stakeholder-optional conception.[12]

[7] *See infra* notes 87-122 and accompanying text.
[8] *See infra* notes 128-32 and accompanying text.
[9] *See infra* notes 133-35 and accompanying text.
[10] *See infra* notes 136-39 and accompanying text.
[11] *See infra* notes 140-42 and accompanying text.
[12] *See infra* notes 143-63 and accompanying text.

- Delaware follows the shareholder-only conception.[13]
- The remaining states mostly follow the shareholder-only conception.[14]

Part II finishes by distinguishing the two leading justifications for benefit corporation statutes. The *enabling justification* asserts that corporate law constrains the ability of directors and officers to consider the interests of other stakeholders.[15] The *branding justification* asserts that benefit corporation statutes can help social enterprises attract investors, customers, and employees by helping them credibly commit to considering other stakeholders.[16] The statutes may also help create an ecosystem that will aid managers in balancing competing interests when none has legal priority.

Part III analyzes the validity of the main version of the corrosion critique, what I call the descriptive version. It makes several claims:

- *The critique is not valid as applied to the branding justification*, since that justification requires adopting a stakeholder-mandatory approach, and no ordinary corporate statute currently takes such an approach, so the branding justification creates no false implications about corporate law.[17]
- *The critique is mostly valid as applied to the enabling justification in states with constituency statutes*, since that justification incorrectly asserts that corporations in such states cannot legally give independent weight to the interests of stakeholders other than shareholders.[18]
- *The critique is not valid as applied to the enabling justification in Delaware*, since it is true that Delaware corporations are required to ultimately consider only the interests of shareholders. Strong social enterprises are committed to giving independent priority to social missions beyond profits for shareholders, and they should rightly resist any legal requirement to frame that commitment as just being for the good of shareholders.[19]
- *The critique is probably not valid as applied to the enabling justification in the remaining states*, since they probably, like Delaware, also follow the shareholder-only conception.[20]

Part IV describes and analyzes several normative versions of the corrosion critique. These concede that in some states the shareholder-only conception does prevail, and so the descriptive version of the critique is incorrect in those states.

[13] *See infra* notes 164-95 and accompanying text.
[14] *See infra* notes 196-207 and accompanying text.
[15] *See infra* notes 208-16 and accompanying text.
[16] *See infra* notes 217-23 and accompanying text.
[17] *See infra* notes 233-42 and accompanying text.
[18] *See infra* notes 244-51 and accompanying text.
[19] *See infra* notes 252-71 and accompanying text.
[20] *See infra* notes 273-74 and accompanying text.

However, the normative version asserts that benefit corporation statutes are counterproductive. The statutes change the conception for those companies that adopt the new form, but not for other corporations, and the existence of benefit corporations may make it more likely that judges and legislators will leave things as they are for ordinary corporations. I respond that at least benefit corporation statutes create some space in such states for an alternative approach.[21]

The Conclusion reflects upon the arguments in the previous parts and asks what might be done in response to the corrosion critique. The arguments here show much complexity and confusion arising from several sources. I urge advocates to stop using the enabling justification for benefit corporation statutes. The branding justification is not subject to the corrosion critique, and it focuses us on the right question: Does becoming a benefit corporation help social enterprises credibly commit to pursuing stakeholder interests? The answer may well be that it does not, and so ultimately the branding justification also fails, though not because of the corrosion critique.[22] We need more experience to figure that out, but setting aside the enabling justification and focusing on the branding justification helps us understand what we are trying to accomplish with benefit corporations while avoiding the corrosion critique.

## I. SOCIAL ENTERPRISE, SHAREHOLDER PRIMACY, AND BENEFIT CORPORATIONS

In recent years, many entrepreneurs and investors have become interested in "social enterprise," an elastic term which has been used in a variety of ways. It covers enterprises that fall somewhere on a spectrum between pure nonprofit enterprises, dedicated to one or more charitable purposes with no purpose whatsoever of generating financial returns for those involved, and pure for-profit businesses, dedicated only to generating financial returns for their equity investors.[23] I will use the term here in a limited way to cover businesses with dual purposes. So defined, a social enterprise has as one purpose generating financial returns for its equity investors. It has as another purpose pursuing one or more social goals, seeking to benefit one or more groups other than its investors or more abstractly defined social benefits.[24] Neither shareholder profit nor social purpose has priority over the other—those running the enterprise give independent weight and value to both purposes.

So understood, social enterprises are a subtype of a broader movement advocating CSR. The CSR movement seeks to persuade businesses to behave in ways that are more ethically responsible by imposing fewer harms on others and

[21] *See infra* notes 277-96 and accompanying text.

[22] I have increasingly come to believe that benefit corporations are inadequate for creating a credible commitment to stakeholders and that other tools are needed. *See* Brett H. McDonnell, *From Duty and Disclosure to Power and Participation in Social Enterprise*, 70 ALA. L. REV. 77, 78-79 (2018).

[23] *Id.* at 85.

[24] *Id.* at 86.

doing more good for the world. Much of the time, acting responsibly can be good business. For instance, donating to charities can build goodwill, inducing more customers and employees to buy a company's products or inducing more people to work for the company. Many consumers and employees want to be involved with businesses that are making the world a better place, or at least not making it a worse place. Thus, much of the time, a business does not need to choose between responsibility and profit. It can proclaim that it is pursuing both simultaneously.[25] In contrast, companies with a strong commitment to social purposes, as I define social enterprises, proclaim that they are willing to pursue their social purposes even if that sometimes means that they will reduce the financial value of the business, even in the very long run after taking into account whatever reputational benefits might accrue from doing good.

An issue for both social enterprises and for socially responsible business more generally is what types of legal forms of business association make sense for them to adopt. Much attention has focused on the suitability of the most prevalent form of business association, the business corporation.[26] That form totally dominates for large, publicly traded entities, although for closely held entities, other legal forms, especially the limited liability company, have become more common in recent years. Can and should social enterprises be business corporations? Attempts to answer that question lie at the heart of the corrosion critique of benefit corporations.

### A. *The Debate over Corporate Purpose and Duty*

Social enterprises put the long-standing debate over the nature of purpose and duty in business corporations to the test. This debate pits the shareholder and the stakeholder conceptions of the corporation against each other. The celebrated initial round in this debate was the Berle-Dodd exchange in the *Harvard Law Review* in the 1930s.[27] Adolf Berle, a leading New Deal figure and coauthor of the key book characterizing the emergence of modern public corporations dominated by their managers, advocated for an understanding of fiduciary duty in the corporation that runs to the benefit of its shareholders.[28] E. Merrick Dodd argued that duty runs in favor of the corporation more broadly, encompassing the interests of other stakeholders and society in general.[29] This debate has ebbed and flowed in the decades since. In the early postwar years, a managerialist

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[25] *See* ALEXANDER, *supra* note 4, at 47-48. (describing the "do well by doing good" argument).

[26] *See id.* pt. 1 and the literature cited therein.

[27] *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1147 (1932).

[28] ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 124 (1932); Berle, *supra* note 27, at 1049; A. A. Berle, Jr., *For Whom Corporate Managers* Are *Trustees: A Note*, 45 HARV. L. REV. 1365, 1367 (1932).

[29] Dodd, *supra* note 27, at 1148.

ideology more generally consistent with Dodd's position dominated, leading Berle to concede defeat in the debate in the 1950s.[30]

But in the 1970s and 1980s, the shareholder conception of the corporation came roaring back. Economists and legal scholars articulated a conception of the corporation focused sharply on the interests of shareholders as a way of increasing the accountability of corporate managers.[31] An early and still-influential statement of this wave of thinking came from Milton Friedman.[32] A focus on the interest of shareholders came to dominate the heavily economics-influenced corporate law scholarship that grew in the 1980s and 1990s, with quite disparate scholars such as Easterbrook and Fischel,[33] Romano,[34] Bebchuk,[35] Macey,[36] Gordon,[37] Roe,[38] and Bainbridge[39] all understanding the maximization of shareholder value as the actual and proper legal goal of corporate fiduciaries.

But this shareholder-focused scholarship generated a backlash. Some scholars argued that corporate law does and should allow or require managers to give independent weight to other goals beyond maximizing the wealth of

[30] ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954). My brief account here greatly telescopes the complicated and shifting understanding of Berle, an important and fascinating figure. For a much fuller accounting, see William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and* The Modern Corporation, 34 J. CORP. L. 99, 122-35 (2008).

[31] *See, e.g.*, Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 33.

[32] *Id.*

[33] FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36-39 (1991) (arguing profit-maximization objective benefits constituencies besides shareholders).

[34] Roberta Romano, *A Cautionary Note on Drawing Lessons from Comparative Corporate Law*, 102 YALE L.J. 2021, 2031 (1993) (observing that states tend to adopt laws that maximize shareholder wealth).

[35] Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 838 (2005) (arguing that increased shareholder power ensures corporate governance arrangements that maximize shareholder value).

[36] Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991) ("Directors and officers are legally required to manage a corporation for the exclusive benefit of its shareholders . . . .").

[37] Jeffrey N. Gordon, *Pathways to Corporate Convergence? Two Steps on the Road to Shareholder Capitalism in Germany*, 5 COLUM. J. EUR. L. 219, 219 (1999) (describing Anglo-American model of corporate governance as one "whose features are shaped by the shareholder primacy norm").

[38] Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065 (2001) ("Shareholder wealth maximization is usually accepted as the appropriate goal in American business circles.").

[39] Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 550 (2003) (arguing in favor of director primacy model of corporate governance under which shareholder wealth maximization remains proper goal).

shareholders. In Blair and Stout's leading legal theory of corporations, the team production model, they argued for a stakeholder conception of corporations, with the board mediating the interest of a variety of groups.[40] A later book by Stout strongly attacked the shareholder-focused conception.[41] The stakeholder conception of the corporation tends to be associated with more politically progressive scholars, such as Mitchell,[42] Greenfield,[43] Millon,[44] and myself.[45] However, a religiously influenced approach to corporations is another path to a stakeholder conception of the corporation,[46] as seen in Lyman Johnson's scholarship[47] and in *Burwell v. Hobby Lobby Stores, Inc.*[48]

The leading developments in both case law and statutes are varied, somewhat contradictory, and disputed. For a long time, the leading—and basically the only—case that explicitly prescribed a shareholder-only conception of corporate purpose and duty was *Dodge v. Ford Motor Co.*[49] This was odd in itself, as one would not expect a 1919 case from Michigan to be the leading authority for a central proposition in corporate law, in which Delaware is the most important state.

The explosion of hostile takeovers in the 1980s, and the reaction by potential targets with various anti-takeover defenses, forced the Delaware courts to

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40 Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

41 LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 2-4 (2012).

42 LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 4-7 (2001) (lambasting American stockholder profit maximization model for its focus on short term).

43 KENT GREENFIELD, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 1-2 (2006) (claiming that corporate law should protect public good and corporation stakeholders).

44 David Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013, 1013-14 (2013) (distinguishing today's "radical shareholder primacy" from "traditional shareholder primacy" that allowed corporate management to consider stakeholder interests).

45 Brett H. McDonnell, *Employee Primacy, or Economics Meets Civic Republicanism at Work*, 13 STAN. J.L. BUS. & FIN. 334, 335 (2008) (challenging shareholder primacy model in favor of employee primacy model).

46 Brett H. McDonnell, *Between Sin and Redemption: Duty, Purpose, and Regulation in Religious Corporations*, 74 WASH. & LEE L. REV. 1043, 1044 (2017) (discussing how religious understanding can influence ways corporations may "pursue the public interest").

47 Lyman Johnson, *Re-Enchanting the Corporation*, 1 WM. & MARY BUS. L. REV. 83, 87 (2010) (arguing that faith may influence business decisions and that corporations need not uniformly pursue shareholder wealth maximization).

48 573 U.S. 682, 710-12 (2014) (recognizing that American corporate law allows management to pursue charitable, humanitarian, and other altruistic objectives); *see also* Brett H. McDonnell, *The Liberal Case for* Hobby Lobby, 57 ARIZ. L. REV. 777, 779-80 (2015) (arguing that *Hobby Lobby*'s conception of the corporation resembles conceptions favored by progressive corporate law scholars).

49 170 N.W. 668, 684-85 (Mich. 1919) (holding that corporation must pay dividend to shareholders even if failure to do so was to protect interests of other stakeholders).

confront fundamental issues of power and purpose in corporate law. Two cases introduced new intermediate standards of review in considering fiduciary duty suits in the context of potential changes in corporate control, and each case includes important language on the corporate purpose controversy. In *Unocal Corp. v. Mesa Petroleum Co.*,[50] the Delaware Supreme Court introduced a standard of review when boards adopt anti-takeover defenses.[51] The *Unocal* standard introduced a two-step analysis. First, the board must show that it has identified a threat to corporate policy and effectiveness.[52] Then, it must show that its response was reasonable in relation to the threat posed.[53] In considering the effect of a takeover bid on the corporate enterprise, the court said the board could consider "the impact on 'constituencies' other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally)."[54] This seemed to open the door to a stakeholder conception of the corporation, although it did not answer whether the board could give independent weight to the impact on other constituencies, or whether they ultimately mattered only insofar as effects on other constituencies might eventually affect shareholders.

Another Delaware case from the 1980s created an additional new legal standard of fiduciary duty analysis in circumstances where boards put their companies up for sale. In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*,[55] the Delaware Supreme Court said that once the company was up for sale, "[t]he whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."[56] Thus, in this specific and important but limited circumstance, the shareholder conception of duty came to prevail in Delaware. But it remained an open question whether that was true in other circumstances. In a 2010 case, *eBay Domestic Holdings, Inc. v. Newmark*,[57] the Chancery Court extended that shareholder conception of duty to the *Unocal* anti-takeover defense setting.[58] It said that "the fiduciary duties and standards that accompany" the business corporation form (which it calls the "for-profit corporate form") include "acting to promote the value of the corporation for the benefit of its stockholders,"[59] because the time horizon collapses for selling shareholders.[60] *Unocal*'s reference to other constituencies did not grant the flexibility to give independent weight to other interests. Rather,

[50] 493 A.2d 946 (Del. 1985).

[51] *Id.* at 954.

[52] *Id.* at 955.

[53] *Id.*

[54] *Id.*

[55] 506 A.2d 173 (Del. 1986).

[56] *Id.* at 182.

[57] 16 A.3d 1 (Del. Ch. 2010).

[58] *Id.* at 34.

[59] *Id.*

[60] *See infra* notes 174-75 and accompanying text.

the board ultimately needed to show a connection between considering other constituencies and the promotion of shareholder value.[61] Several subsequent articles by Leo Strine, the former Chief Justice of the Delaware Supreme Court, show that he strongly shares this understanding.[62]

Meanwhile, in another response to the takeover wave of the 1980s, thirty-three states adopted corporate constituency statutes.[63] Delaware has not adopted such a statute. These statutes state that boards may consider the interests of specified corporate constituencies other than shareholders.[64] The exact groups specified vary somewhat across statutes, but they typically include employees, suppliers, customers, creditors, the local community, and the environment.[65] These statutes thus pretty explicitly allow companies to give weight to interests other than those of shareholders, in contrast with the Delaware case law in

[61] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985) (noting corporation's board of directors' duty of care includes protecting corporation from perceived harm, whether from third parties or other shareholders).

[62] Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 770 (2015) (noting that, in *Revlon*, the Supreme Court of Delaware held that boards of directors can regard corporate constituencies other than shareholders, but that there still must be benefits accruing to stockholders); Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012) ("[S]tockholders' best interest must always, within legal limits be the end. Other constituencies may be considered only instrumentally to advance that end."). Strine derives shareholder primacy from the structural power given exclusively to shareholders, namely the right to elect the board and to sue. His own personal values do not necessarily reflect that allocation—in other work he has called for giving a degree of power to other stakeholders, particularly employees. *See* Leo E. Strine, Jr., Toward Fair and Sustainable Capitalism 5 (Aug. 2020) (unpublished manuscript) (on file with the Roosevelt Institute), https://rooseveltinstitute.org/wp-content/uploads/2020/08/RI_TowardFairandSustainableCapitalism_WorkingPaper_202008.pdf [https://perma.cc/D3Z4-VHLV].

[63] *See e.g.*, Act of Apr. 29, 2014, ch. 172, 2014 Minn. Laws 257 (codified as amended at MINN. STAT. §§ 304A.001-.301 (2020)); Act of Nov. 27, 2017, ch. 204, 2017 Wis. Sess. Laws 549 (codified as amended at WIS. STAT §§ 204.101-.401 (2021)); *see also* WILLIAM H. CLARK, JR., DRINKER BIDDLE & REATH LLP; LARRY VRANKA, CANONCHET GRP. LLC, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC 9 n.30 (2013), https://benefitcorp.net/sites/default/files/Benefit_Corporation_White_Paper.pdf [https://perma.cc/KZ2P-K24Y] (citing various state statutes that are constituency statutes).

[64] *See, e.g.*, IOWA CODE § 490.1108A (2021) (stating director "may consider any or all of [various listed] community interest factors, in addition to consideration of the effects of any action on shareholders" when determining what is in corporation's best interest); MINN. STAT. § 302A.251 (2020) (stating director may consider interests of non-shareholders in considering best interests of corporation).

[65] Christopher Geczy, Jessica S. Jeffers, David K. Musto & Anne M. Tucker, *Institutional Investing When Shareholders Are Not Supreme*, 5 HARV. BUS. L. REV. 73, 96 (2015).

*Revlon* and *eBay*.[66] Thus, there is apparently a divergence between the leading state for corporate law and a majority of the other states in how they position themselves in the shareholder versus stakeholder debate.

### B. *Benefit Corporation Statutes*

Given these intellectual and legal developments, some lawyers and scholars who advocate for social enterprises have been concerned that the existing business corporation legal form is not a good fit for social enterprises.[67] B Lab, a nonprofit organization, has for some time provided an elaborate standard for measuring how well businesses perform with respect to a variety of social purposes, and, for a fee, provides certification to individual businesses "with exceptional positive social and environmental impact[s]."[68] B Lab became concerned about social enterprises using the corporate form and proposed a new form, the benefit corporation.[69] B Lab developed the Model Benefit Corporation Legislation ("Model Legislation") to instantiate this new form.[70]

The benefit corporation is an add-on to business corporation statutes. That is, benefit corporations are incorporated under a standard business corporation act.[71] But benefit corporations add several new provisions on top of the standard rules that address purpose, duty, and reporting. Each benefit corporation must have as one purpose "creating general public benefit,"[72] which is defined as a "material positive impact on society and the environment, taken as a whole, from the business and operations of a benefit corporation assessed taking into account the impacts of the benefit corporation as reported against a third-party standard."[73] A benefit corporation may have as an additional purpose the creation of one or more "specific public benefits,"[74] defined as including one of a variety of specified charitable purposes.[75] The directors and officers of a benefit corporation must consider the effects of any action or inaction on the shareholders and a variety of specified constituencies, similar to those in the

[66] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986); eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010). However, we shall consider a narrowing interpretation of constituency statutes which basically treat the statutes as similar to the treatment of other constituencies in *Unocal* as interpreted by the court in *eBay*.

[67] *See* CLARK & VRANKA, *supra* note 63, at 1.

[68] *The B Economy*, B LAB, https://bcorporation.net/b-economy [https://perma.cc/B7M8-95H3] (last visited Sept. 1, 2021).

[69] *Id.*

[70] MODEL BENEFIT CORP. LEGIS. (B LAB 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/8QDQ-UYAR].

[71] CLARK & VRANKA, *supra* note 63, at 1.

[72] MODEL BENEFIT CORP. LEGIS. § 201(a).

[73] *Id.* § 102.

[74] *Id.* § 201(b).

[75] *Id.* § 102.

constituency statutes, and on the ability of the corporation to accomplish its general public benefit.[76] A benefit corporation must prepare an annual benefit report that describes how it has pursued general public benefit and any given specific public benefit and assess its performance against a third-party standard.[77] Benefit corporation statutes, most but not all based on the Model Legislation, have been enacted in forty states.[78]

The White Paper presenting, describing, and explaining the need for the Model Legislation gives two basic reasons for the need for the new form of business corporation.[79] One of those reasons, which I shall call the enabling justification, argues that the shareholder wealth maximization norm in corporate law makes it risky for a social enterprise to operate as a traditional business corporation.[80] The White Paper distinguishes between day-to-day decision making contexts, anti-takeover defenses, and changes of control.[81] It recognizes that boards have much discretion in day-to-day decisions, but argues that even there, mission-driven executives committed to goals that will sometimes lead to below-market returns face legal uncertainty that "can have a chilling effect on the pursuit of social missions."[82] The White Paper further argues that there is some legal uncertainty even in states with constituency statutes, given the undeveloped case law and a potential limiting interpretation of those statutes that would require that the impact on other constituencies ultimately be tied back to shareholder value.[83]

The White Paper also suggests a different reason why social enterprises could use benefit corporation statutes, which I shall call the branding justification.[84] It notes that many entrepreneurs, investors, and consumers increasingly want to be associated with social enterprises.[85] The White Paper says that the "new benefit corporation form facilitates greater recognition of these businesses by consumers, investors and policy makers by establishing a higher bar of corporate

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[76] *Id.* §§ 301(a), 303(a).

[77] *Id.* § 401 (describing contents of required annual benefit, including "[t]he ways in which the benefit corporation pursued general public benefit").

[78] *See Status Tool,* SOC. ENTER. L. TRACKER, https://socentlawtracker.org/#/bcorps [https://perma.cc/PCJ5-UXJN] (last visited Sept. 1, 2021). Correlating a 2013 list of states that have enacted a constituency statute, CLARK & VRANKA, *supra* note 63, at 9 n.30, with those that have enacted a benefit corporation statute as of 2020, you will find that twenty-seven states have enacted both, while four have enacted neither.

[79] *See* CLARK & VRANKA, *supra* note 63, at 1.

[80] *Id.* at 7-14.

[81] *Id.* at 11.

[82] *Id.* at 12.

[83] *Id.* at 9-11 ("[T]he lack of case law interpreting constituency statutes, coupled with the context in which many of these statutes were enacted, makes it difficult for directors to know exactly how, when and to what extent they can consider [non-shareholder] interests.").

[84] *See id.* at 4.

[85] *Id.*

governance without requiring certification by a third party for a fee and without prescribing specific corporate activities."[86]

### C. *The Corrosion Critique*

Though the White Paper argues for both the enabling and the branding justifications of benefit corporation statutes, it emphasizes the enabling justification. Subsequent scholarship has scrutinized both of these justifications at length. It is probably safe to say that the enabling justification has received more attention and is widely seen as the main reason for the enactment of benefit corporation statutes. Scholars have questioned whether the enabling justification gives a good reason for adopting benefit corporation statutes.[87] Given both constituency statutes in many states and the broad discretion granted by the business judgment rule in Delaware, these scholars argue that social enterprises could pursue their dual purposes of profit and social good while being ordinary business corporations.[88]

Some have pushed this criticism further, suggesting benefit corporations are not just unnecessary but also harmful.[89] By invoking the enabling justification, advocates have created the false inference that ordinary business corporations cannot pursue social goals. Benefit corporations thus may have a corrosive effect on our understanding of ordinary business corporations. This is what I call the corrosion critique. When I say "our understanding" of ordinary business corporations, I mean the understanding of judges, lawyers, scholars, and business people. In the case of judges, the concern is that benefit corporation statutes may cause them to push ordinary corporate law in a more shareholder-focused direction. In the case of lawyers and business people, the concern is that benefit corporations will affect how those running ordinary corporations understand the extent to which they can and should consider stakeholder interests and behave in socially responsible ways.

The first articulation of the corrosion critique of which I am aware was a blog post by Mark Underberg, a retired Paul, Weiss, Rifkind, Wharton & Garrison LLP partner, at the Harvard Law School corporate governance web site.[90] In a pithy statement of the critique, Underberg wrote:

> The broader interests of responsible corporate governance are ill-served by creating a false dichotomy between "good" and "bad" companies based on the law that governs their conduct rather than on the choices made by those

[86] *Id.* at 6.

[87] *See, e.g.*, Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 273-78 (2013).

[88] *See, e.g.*, *id.* (asserting legal foundation for shareholder primacy is rather weak).

[89] *See, e.g.*, Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 13, 2012), https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/ [https://perma.cc/C2VM-8HSF].

[90] *Id.*

> who run them. There's no legal reason that all companies can't consider a wide range of interests in order to make responsible corporate decisions. . . . It is also unfortunate that this rationale is now enshrined in the legislative histories of the B Corp laws, which could have unintended consequences in future court rulings further defining the scope of directors' fiduciary obligations.[91]

Notably, Underberg added the following:

> That's not to say that providing the option for companies to organize as B Corps is a bad idea. It seems likely that the laws' mandatory mission statements and accountability provisions will help attract patient capital and thus provide a B Corp with a shareholder base less likely to apply pressure for short-term results. It's also possible that companies will derive marketing or other commercial advantages from the B Corp designation.[92]

In the terminology of this paper, Underberg thus said that the corrosion critique does not apply to the branding justification for benefit corporation statutes.[93]

Critics soon started to expand on the corrosion critique. Two early papers questioning benefit corporations made a similar point citing Underberg. J. William Callison argued "the benefit corporation movement arguably harms the broader interests of 21st century corporate governance by creating a bipolar world of regular corporations that maximize private profits and other corporations that consider social and environmental sustainability and other public goods."[94] Lyman Johnson also expressed concern that "Delaware's new benefit corporation law laudably advances the goal of institutional pluralism, but does so at the ironic risk of reinforcing a belief that business corporations themselves are legally permitted only to maximize profits."[95]

Kevin Tu explores the corrosion critique further.[96] Tu starts with an extended analysis of the shareholder wealth maximization norm in corporate law.[97] He finds the legal environment indeterminate, arguing that the "structure of the current legal framework recognizes the fundamental need to protect shareholders while also respecting the important role of managerial discretion."[98] He then explores the rise of benefit corporations and the role of

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[91] *Id.*

[92] *Id.* (footnote omitted).

[93] *See id.*

[94] J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 105 (2012).

[95] Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 405-06 (2013).

[96] Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 126 (2016).

[97] *Id.* at 127-36.

[98] *Id.* at 140.

the enabling justification. He argues that given the ambiguity of corporate law, the new statutes do somewhat reduce uncertainty and risk for those that choose to be benefit corporations.[99] However, he argues that more attention should be paid to the effect on companies that remain ordinary business corporations.[100] When he does that, he raises the corrosion critique:

> [T]he rhetoric surrounding Benefit Corporations may be overly simplified such that Benefit Corporations are viewed as necessary because traditional for-profits prohibit the consideration of broader stakeholder interests and the pursuit of a public benefit. Accordingly, traditional for-profit corporations may be mistakenly relegated to the pursuit of shareholder profit alone.[101]

Moreover, "[m]anagers of a traditional for-profit corporation might decide to reduce or eliminate broader social endeavors to mitigate the risk of an increasingly unpredictable legal environment."[102] Thus, Tu sees the corrosive effect of benefit corporation statutes operating in both how outsiders understand ordinary corporations and in how insider managers understand their role.

Joshua Fershee also makes a version of the corrosion critique.[103] Fershee extensively critiques the *eBay* case, criticizing it both for imposing a narrow focus on shareholder wealth maximization, but more centrally for eroding the central principal of director primacy.[104] He then argues that "the erosion of director primacy and a more intrusive application of the business judgment rule is already a concern for business-leader decision making. With the addition of social benefit entities, courts are even more likely to question the business purpose of traditional entities."[105]

Three student notes also explore the corrosion critique.[106] Jessica Chu argues that shareholder primacy is a matter of public perception, not binding law, and

[99] *Id.* at 143-48.

[100] *Id.* at 158.

[101] *Id.* at 173 (footnote omitted).

[102] *Id.* at 174.

[103] *See generally* Joshua P. Fershee, *The End of Responsible Growth and Governance?: The Risks Posed by Social Enterprise Enabling Statutes and the Demise of Director Primacy*, 19 TRANSACTIONS 361 (2017).

[104] *Id.* at 366-79 ("One of the main problems with the *eBay* case is that it has helped reinforce the incorrect notion that 'it is literally malfeasance for a corporation not to do everything it legally can to maximize its profits.'" (quoting Todd Henderson, *The Shareholder Wealth Maximization Myth*, TRUTH ON THE MKT. (July 27, 2010), https://truthonthemarket.com/2010/07/27/the-shareholder-wealth-maximization-myth/ [https://perma.cc/E2XV-THC8])).

[105] *Id.* at 384.

[106] Jessica Chu, Note, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. CAL. INTERDISC. L.J. 155, 156 (2012); Kennan El Khatib, Note, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 154-55 (2015); Dustin Womack, Note, *Solely Beneficial: How Benefit Corporations May Change the Duty*

that benefit corporations will strengthen that perception.[107] Dustin Womack argues that the availability of the benefit corporation option may drive courts to apply the business judgment rule and waste doctrines more strictly against corporations that have chosen not to be benefit corporations.[108] Kennan El Khatib argues that traditional corporate law provides an adequate framework for accommodating for-profit mission-driven companies, and that benefit corporation statutes create a risk that consumers will judge businesses by legal status rather than actual practices.[109]

Joan Heminway also references the corrosion critique in a recent article, though she does not quite herself endorse the critique.[110] The bulk of her article fights the notion that social enterprises cannot organize as ordinary business corporations.[111] She explores the Delaware jurisprudence and argues that it does not compel a contrary conclusion.[112] She also argues that corporate theory and policy leave plenty of room for social enterprise organized as business corporations.[113] She then references several of the corrosion critique articles and argues that the best way to avoid benefit corporations' corrosive effect is by understanding them as a menu option for companies that want to adopt a multi-stakeholder governance brand (what I label the branding justification).[114]

Finally, David Yosifon identifies a related but different critique of benefit corporation statutes.[115] Unlike the proponents of the corrosion critique, Yosifon assumes that the shareholder wealth maximization norm is the default rule for Delaware public corporations.[116] But, Yosifon argues that ordinary business corporations may opt out of that norm with a provision in their certificate of incorporation.[117] I have previously argued that this is the case, so I do not dispute that point.[118] Yosifon makes the point in a much more detailed way, citing a

*of Care Analysis for Traditional Corporate Directors in Delaware*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 151, 163 (2018).

107 Chu, *supra* note 106, at 183.

108 Womack, *supra* note 106, at 163.

109 Khatib, *supra* note 106, at 154-55.

110 Joan MacLeod Heminway, *Let's Not Give Up on Traditional For-Profit Corporations for Sustainable Social Enterprise*, 86 UMKC L. REV. 779, 779 (2018) (noting that rise in benefit corporations "calls into question, for many, the continuing role of the traditional for-profit corporation").

111 *Id.* at 785.

112 *Id.* at 782-87.

113 *Id*. at 787-99.

114 *Id.* at 799-800. This is my conclusion here as well.

115 David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 461 (2017).

116 *Id.* at 462 ("The central command of corporate governance law is that directors must serve the shareholder interest.").

117 *Id.* at 467-80.

118 *See* McDonnell, *supra* note 48, at 797.

variety of statutory provisions, cases, and policy arguments.[119] His most persuasive point is that Delaware unusually uses its basic corporation statute for nonprofit corporations, and those nonprofits clearly have opted out of the shareholder wealth maximization norm.[120] Yosifon's critique of benefit corporation statutes is that they may create the mistaken impression that ordinary corporations cannot opt out of the shareholder wealth maximization norm and may indeed lead courts to mistakenly assume that corporations must choose to be benefit corporations in order to opt out of the norm.[121] Yosifon argues, like Heminway (who draws this point from Yosifon), that benefit corporations should be treated as a menu option for corporations that want to commit to a social enterprise brand, although he also argues that the new form is a weak response to the need for more social enterprises.[122]

Yosifon's argument provides another reason for thinking that the enabling justification of benefit corporation statutes is weak, since if he is right (and he probably is), ordinary business corporations can already opt out of the shareholder wealth maximization norm through a charter amendment.[123] However, his critique is importantly different from the corrosion critique that the present article addresses. Under that critique, benefit corporation statutes create the mistaken impression that ordinary business corporations are subject to a shareholder wealth maximization norm. Yosifon, by contrast, thinks that the impression is not mistaken, it is true: Delaware corporations really are subject to a shareholder wealth maximization norm, with the caveat that this is so only if they have not adopted a countervailing charter amendment.[124] That caveat is theoretically important, but practically not, given that few if any corporations have adopted such a provision.

The above articles offer the most sustained arguments in favor of the corrosion critique of benefit corporation statutes of which I am aware; although other articles reference the argument more briefly. It is important to note that the

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[119] Yosifon, *supra* note 115, at 462-63.

[120] *Id.* at 480-86. I must admit, until I read Yosifon's article, I did not realize that Delaware lacks a separate statute for nonprofit corporations. The longer I teach and write on corporations, the stranger I find Delaware.

[121] *Id.* at 480-504 ("It is quite possible that Chancery would now say that the implied public policy of the Delaware General Corporation Law is that deviation from shareholder primacy has to be done in the way prescribed by the [public benefit corporation], or not at all.").

[122] *Id.* at 505-06; *see also* Heminway, *supra* note 110, at 800.

[123] *See* Yosifon, *supra* note 115, at 499. Yosifon does not quite address one counterargument that could be a problem for his position. Section 102(b)(7), which allows corporations to exculpate directors from personal liability for some duty violations, does not allow exculpation for the duty of loyalty and behavior not in good faith. DEL. CODE ANN. tit. 8, § 102(b)(7) (2021). One could argue that a certificate provision allowing directors to consider other stakeholders even where doing so goes against the interests of shareholders is exculpating some behavior that is not in good faith. *See* ALEXANDER, *supra* note 4, at 149-52. Still, on balance, I think the stronger argument is that such certificate provisions are valid.

[124] *See* Yosifon, *supra* note 115, at 499.

drafters of benefit corporation statutes have anticipated the corrosion critique and tried to guard against it. The Model Legislation contains the following provision right at the beginning:

> The existence of a provision of this [*chapter*] shall not of itself create an implication that a contrary or different rule of law is applicable to a business corporation that is not a benefit corporation. This [*chapter*] shall not affect a statute or rule of law that is applicable to a business corporation that is not a benefit corporation.[125]

Some states' laws not based on the Model Legislation have similar provisions.[126] Some of the proponents of the corrosion critique acknowledge these provisions, but they doubt they are adequate to prevent the corrosive effects of benefit corporation legislation on the perception of ordinary business corporations.[127]

We have now seen a basic outline of the corrosion critique. The next three Parts will explore how valid that critique is.

## II. THREE CONCEPTS OF CORPORATE DUTY AND TWO JUSTIFICATIONS OF BENEFIT CORPORATIONS

This Part lays the analytical groundwork for exploring the validity of the corrosion critique. It sets out three conceptions of the corporation that may be embodied in different corporate law statutes. It then argues that benefit corporation statutes follow the stakeholder-mandatory conception, corporation statutes containing constituency provisions follow the stakeholder-optional conception, and the corporation statutes of the remaining states, particularly Delaware, follow the shareholder-only conception. The Part concludes by distinguishing and briefly exploring the two leading justifications for benefit corporation statutes, the enabling justification and the branding justification. These distinctions are important in sorting out the validity of the corrosion critique. I will argue in Part III that the critique does not apply to the extent that the statutes are understood as based on the branding justification. If instead benefit corporation statutes are understood as based on the enabling justification, then the critique is valid for states with corporation statutes embodying the stakeholder-optional conception, but not for states such as Delaware with corporation statutes embodying the shareholder-only conception.

[125] MODEL BENEFIT CORP. LEGIS. § 101(b) (B LAB 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/8QDQ-UYAR].

[126] *See, e.g.*, TENN. CODE ANN. § 48-28-109 (2017) ("This chapter shall not affect a statute or other rule of law applicable to a domestic business corporation that is not a for-profit benefit corporation . . . .").

[127] Fershee, *supra* note 103, at 385-86; Tu, *supra* note 96, at 173-74.

### A. *Three Conceptions of Corporate Purpose and Duty*

Under the *shareholder-only* conception of corporate purpose and duty, directors and officers ultimately may only be concerned with advancing the interests of the shareholders of the corporation.[128] That does not mean that they must always ignore the interests of other stakeholders—doing so would be crazy and destructive of the interests of shareholders. Paying employees a pittance and providing wretched work conditions will guarantee that a company will attract only poor employees, leading in many businesses to poor products and services and to lower profits. Treating one's customers shabbily will lead to fewer customers and often thus fewer profits. Reneging on debts will make it harder to get credit in the future. And so on. But on the shareholder-only conception, managers can care about other stakeholders only to the extent that doing so advances the interests of the shareholders.

An issue within the shareholder-only conception is how one understands the interests of shareholders. The standard version frames the interest of shareholders in terms of the financial value of their shares.[129] One could understand shareholder interests more broadly than that—shareholders may care about things other than money, and may not always want the companies they own to maximize expected profits at the expense of other values.[130] Moreover, even if one focuses only on financial returns, diversified shareholders may care about the effects one company they own will have on the profits of other companies they own.[131] Still, I will focus on the wealth maximization version of the shareholder-only conception, as this is the version of that conception generally used by scholars, practitioners, and judges who defend the shareholder-only conception.[132]

Under the *stakeholder-optional* conception of corporate purpose and duty, directors and officers *may* consider the interests of a variety of corporate constituencies.[133] They may do so without any need to relate that interest to advancing the interests of shareholders, and indeed they may sometimes take an action that advances the interests of other constituencies when doing so harms the interests of shareholders. Many variations of the stakeholder-optional

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[128] *See* Lynn A. Stout, *New Thinking on "Shareholder Primacy,"* ACCT. ECON. & L., June 2012, at 2.

[129] *Id.*

[130] *See generally* Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247 (2017) (arguing that shareholder welfare and market value are distinct and that firms should maximize the former, not the latter).

[131] ALEXANDER, *supra* note 4, at 51-55; Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 66-67 (2020).

[132] As captured in the title of the most famous articulation of the shareholder-only conception, Friedman's *The Social Responsibility of Business Is to Increase Its Profits*. *See* Friedman, *supra* note 31.

[133] *See, e.g.*, MINN. STAT. § 302A.251 (2020) (including groups other than shareholders among those whose interests corporation directors can consider in discharging their duties).

conception are possible. For instance, variations may permit consideration of differing groups of stakeholders—for my purposes here, nothing much hinges on variations along that dimension. I shall assume the standard groups are those listed in most constituency statutes, including employees, creditors, customers, the community in which a company is based, the environment, and so on.[134] Versions of this conception may also differ on whether and how they give guidance as to how to balance the interests of different constituencies.[135] Though important, that too does not matter for the argument in this Article.

Under the *stakeholder-mandatory* conception of corporate purpose and duty, directors and officers *must* consider the interests of a variety of corporate constituencies.[136] They must do so whether it arguably helps shareholders in the long run or not. Again, the list of relevant constituencies may vary in different versions of this conception. The versions may vary in whether and how they give guidance as to how to balance the interests of different constituencies.[137] They may also vary on whether they give standing to members of constituencies other than shareholders to sue for an alleged violation of the duty.[138] For my purposes here, the core common element of this conception is that it mandates consideration of the interests of some groups other than shareholders and independent of the effect on shareholders.[139]

### B. *Corporation Statutes and the Conceptions of Purpose and Duty*

How do the three conceptions of purpose and duty fit with different corporation statutes? For benefit corporation statutes, that is easy: they follow the stakeholder-mandatory conception. In the Model Legislation, the provisions

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[134] *See, e.g.*, *id.*

[135] *See, e.g.*, *id.* (providing no guidance for how to balance various constituency interests).

[136] *See generally* MODEL BENEFIT CORP. LEGIS. (B LAB 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/8QDQ-UYAR] (embodying stakeholder mandatory approach to benefit corporations).

[137] For instance, the Minnesota statute states that directors "may not give regular, presumptive, or permanent priority to . . . the pecuniary interests of the shareholders . . . or any other interest or consideration unless the articles identify the interest or consideration as having priority." MINN. STAT. § 304A.201 (2020).

[138] MODEL BENEFIT CORP. LEGIS. § 305(c) (B LAB 2017), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/8QDQ-UYAR] (giving standing only to shareholders to sue for enforcement of public benefit).

[139] These are not the only possible ways to conceive of how statutes may frame corporate purpose and duties. Fiduciary duties can be conceived of as advancing abstract purposes, rather than the interests of particular persons or groups of persons. *See* Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 57 WM. & MARY L. REV. 513, 513 (2015). Benefit corporations could be conceived of as creating a duty to pursue one or more such abstract purposes. *See id.* at 579-80. This is an interesting and important insight, but I shall simplify an already-complicated analysis by focusing on duties that flow to groups of persons, rather than abstract purposes.

on duty specifically state that directors and officers "*shall* consider the effects of any action or inaction upon" various listed constituents, including employees, customers, the community, and the environment.[140] In Delaware, the benefit corporation statute states that directors and officers "shall" manage the business 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."[141] That phrase "the best interests of those materially affected by the corporation's conduct" points to consideration of the effect on stakeholders other than shareholders.[142] In both statutes, the "shall" makes this duty mandatory.

How about ordinary business corporation statutes? Which conception of corporate purpose and duty do they embody? That is a less straightforward question. The answer varies by state. Let us consider the states in three groups: those with constituency statutes, Delaware, and the remaining states.

*States with constituency statutes most likely have a stakeholder-optional conception*. Consider my home state of Minnesota's version of a constituency statute, which is typical:

> In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.[143]

The text says that directors *may* consider the interests of various stakeholders in considering the best interests of the corporation.[144] According to both obvious ordinary usage and a common textual canon of statutory interpretation, "may" is permissive, not mandatory. Thus, this would seem to clearly not embody the stakeholder-mandatory conception.

Despite clear language, Larry Mitchell and David Millon argued that constituency statutes should be interpreted as imposing an obligation on directors to consider the interests of the named stakeholders, and that those stakeholders should have standing to sue when directors ignored those

[140] MODEL BENEFIT CORP. LEGIS. §§ 301(a), 303(a) (B LAB 2017) (emphasis added), https://benefitcorp.net/sites/default/files/Model%20benefit%20corp%20legislation%20_4_17_17.pdf [https://perma.cc/8QDQ-UYAR].

[141] DEL. CODE ANN. tit. 8, § 365(a) (2021).

[142] *Id.*

[143] MINN. STAT. § 302A.251 (2020).

[144] Connecticut's statute was originally mandatory but was later amended to be permissive. Act of May 10, 2010, 2010 Conn. Acts 298, 302 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. ANN. § 33-756(d) (West 2015)).

obligations.[145] Both admit that the permissive rather than mandatory language of almost all (now all) of the statutes is an obstacle to this interpretation.[146] Both then go on to argue for their preferred interpretations as good for public policy reasons without making any attempt to ground those interpretations in legislative language or intent.[147] Not many students of statutory interpretation would accept such a naked rewriting of statutory language based solely on policy preferences,[148] and I see it as clearly unacceptable.

An opposite interpretation of constituency statutes, equally aggressively based in policy, sees them as consistent with a shareholder-only conception. Under this interpretation, directors may consider stakeholder interests only to the extent that doing so can be related to benefits to shareholders. The Committee on Corporate Laws of the American Bar Association (the "Committee"), which maintains the Model Business Corporation Act, wrote a widely cited article suggesting this interpretation.[149] Like Mitchell and Millon, the Committee based its interpretation on its own policy preferences, and the Committee admitted that its interpretation is in some tension with the statutory language.[150]

However, the violence to the text itself is somewhat less in this case. Mitchell and Millon in essence interpret "may" as "shall," which is generally a quite dubious move.[151] By contrast, the Committee's interpretation does not clearly contradict any specific word or phrase in the statutes. Instead, it implies a restriction to the application of the statutes that does not explicitly appear in the statutes themselves.[152] The Committee's interpretation can be defended as an application of the hoary old canon that statutes in derogation of the common law should be construed narrowly. However, the Committee itself admits that "[o]rdinarily legislatures do not adopt statutes that merely confirm the state of existing law."[153] There is little judicial interpretation of the constituency statutes that provides more authoritative guidance. In arguing that even states with constituency statutes may not be safe for social enterprises, the White Paper (the

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[145] David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 255-70 (1991); Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 635-36 (1992).

[146] Millon, *supra* note 145, at 255-70; Mitchell, *supra* note 145, at 635-36.

[147] Millon, *supra* note 145, at 255-70; Mitchell, *supra* note 145, at 635-36.

[148] Perhaps Richard Posner would be an illustrious exception. *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 262-309 (1990) (arguing that it is unproductive and fruitless to try to determine statute's "plain meaning").

[149] Comm. on Corp. L., *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2268 (1990).

[150] *Id.* at 2262.

[151] Although, like all canons of interpretation, the may/shall canon contains a free-standing out clause if circumstances suggest the canon should not apply. *Mandatory/Permissive Canon*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[152] Comm. on Corp. L., *supra* note 149, at 2262.

[153] *Id.* at 2266.

document giving the original justification for the Model Legislation) does point to one case[154] that cites Pennsylvania's constituency statute but then speaks of "the fiduciary duty of corporate directors 'to act in the best interests of the corporation's shareholders . . . .'"[155] But that is a 1986 case from federal district court, and the reference is only in passing and not clear or argued-for, so it does not go far in supporting the Committee's interpretation.

As others have noted, the Committee's position is suspect as a matter of proper statutory interpretation.[156] Even Stephen Bainbridge, a strong advocate of shareholder wealth maximization as the proper goal of corporate fiduciary duty, criticizes the Committee's interpretation as not in keeping with the language of the statutes.[157] There are two leading mainstream approaches to statutory interpretation. One is textualism, which focuses on attempting to discern the plain meaning of the text as it would be understood by most speakers.[158] As noted above, the Committee's interpretation in effect reads a major restriction into the application of the statutes that is not at all apparent in the statutory language. Although textualists are sometimes willing to use canons such as derogation of the common law, such canons are problematic under the textualist approach, with Justice Scalia himself expressing considerable skepticism about the derogation canon.[159] There is no real ambiguity here. The Committee finds it only because it is unwilling to accept clear language that leads to a result it dislikes.

The other main approach to statutory interpretation is intentionalism, which focuses on the intent of the adopting legislature, as seen both through text and legislative history.[160] In this case, the constituency statutes were passed to help company boards defend against hostile takeovers. As Bainbridge notes, they should be understood in part as a response to *Revlon*, the Delaware case that imposed shareholder wealth maximization clearly for the first time, at least in the circumstances of a sale of control.[161] In many cases, the statutes were passed with urgency. In my home state of Minnesota, the constituency statute was passed in a special legislative session when an iconic Minnesota corporation,

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[154] CLARK & VRANKA, *supra* note 63, at 10.

[155] Baron v. Strawbridge & Clothier, 646 F. Supp. 690, 697 (E.D. Pa. 1986) (quoting Enterra Corp. v. SGS Assocs. 600 F. Supp. 678, 686 (E.D. Pa. 1985)).

[156] Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 71-79 (1992) (criticizing Committee's interpretation of constituency statutes as ignoring their plain language and legislative history).

[157] Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 990-94 (1992).

[158] ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 23-25 (1997).

[159] *Id.* at 29.

[160] WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON STATUTORY INTERPRETATION 152-55 (2012).

[161] Bainbridge, *supra* note 157, at 993-94.

Dayton's, was threatened with a hostile takeover.[162] If the statutes merely restated the obvious point that directors may consider other constituencies to the extent that doing so is also good for shareholders, that urgency would be hard to understand.

Thus, constituency statutes are best understood as imposing the stakeholder-optional conception of purpose and duty on business corporations in the thirty-three states with such statutes.[163] There is some uncertainty surrounding this, with some support for the position that the shareholder-only conception still prevails in such states. But the support for that position is weak. In the next section, we shall discuss the consequences of both the likely outcome of this analysis and the uncertainty surrounding it for the corrosion critique as applied in states with constituency statutes.

*Delaware very likely has a shareholder-only conception.* We saw above the two key Delaware cases that appear to impose the shareholder-only conception, *Revlon* and *eBay*,[164] along with several recent articles by former Chief Justice Leo Strine that clearly support that conception.[165] However, a number of scholars, including many of the proponents of the corrosion critique, have tried to resist this understanding of Delaware law. That resistance works at several different points in the Delaware case law. It is hard to dispute that a shareholder wealth maximization norm operates in the change of control circumstances where *Revlon* applies—the case is very clear in stating that norm, it is a Supreme Court case from decades ago, and numerous cases since then have affirmed and applied the *Revlon* rule. But critics attempt to cabin the effect of *Revlon*. Part of that argument is to emphasize that *Revlon* applies only in a limited set of circumstances, and that the courts have chipped away at that set over time,[166] though there is some dispute as to how far that chipping away has gone.[167] Moreover, directors have control over whether or not they choose to put their company into those circumstances, i.e., to put it up for sale as defined under *Revlon*.[168]

But *eBay* makes that cabining of *Revlon* harder to maintain, as it extends the shareholder wealth maximization norm to the *Unocal* context of review of

[162] *See* Associated Press, *Minnesota Passes Law to Help Thwart Takeover of Dayton Hudson*, L.A. TIMES, June 26, 1987, at E1.

[163] Although case law on constituency statutes is limited, what there is mostly agrees that the statutes do not merely reinforce existing common law rules. Geczy et al., *supra* note 65, at 114-16.

[164] *See supra* notes 57-61 and accompanying text.

[165] *See supra* note 62 and accompanying text (discussing articles by former Chief Justice Strine about shareholder conception of duty in Delaware).

[166] Lyman Johnson & Robert Ricca, *The Dwindling of* Revlon, 71 WASH. & LEE L. REV. 167, 172-73 (2014) (arguing *Revlon*'s relevance is limited outside of M&A context).

[167] Mohsen Manesh, *Nearing 30, Is* Revlon *Showing Its Age?*, 71 WASH. & LEE L. REV. ONLINE 107, 110 (2014). *But see* Lyman Johnson & Robert Ricca, *The Still-Dwindled* Revlon, 71 WASH. & LEE L. REV. ONLINE 150, 150 (2014).

[168] Chu, *supra* note 107, at 180-81.

defensive mechanisms.[169] Critics of the norm have a variety of responses. For one, many are quite critical of the court's reasoning in *eBay*.[170] Some note that it is a Chancery Court decision that has not yet been affirmed by the Delaware Supreme Court.[171] Another move is to argue that *eBay* is not a sweeping declaration of a shareholder maximization norm in all contexts, but a decision that should be read narrowly in the context of its particular facts.[172] Tu suggests that, like *Dodge*, *eBay* could be read as a case about a majority shareholder violating its duty by oppressing the minority.[173]

These attempts to cabin *eBay* are unpersuasive. I too am not a fan of the reasoning in *eBay*, but that doesn't make it any less authoritative. And at least one element of that reasoning is correct. Chancellor Chandler is right to point out that the reasoning of *Revlon* limits the other constituency language in *Unocal*.[174] Recall, *Unocal* says that directors may consider the interests of other constituencies in identifying threats to corporate policy.[175] But *Revlon* says that ceases to be true once the board puts a company up for sale.[176] Why does it cease to be true? Because once a company is up for sale, the time horizon for the shareholders to extract value from the company collapses. They no longer care about the long-term effectiveness of corporate policy because they are no longer in it for the long term. Thus, only the price to be realized in the sale matters. But if the *Unocal* statement that directors could consider the interests of others meant they could do so independently of the effect of those interests on shareholder value, the *Revlon* logic would not hold. The fact that other constituencies no longer matter in *Revlon* implies that they only matter at all to the extent that considering them is in the interests of shareholders.

The argument that *eBay* is only a Chancery Court opinion has a bit going for it, but not much. The former Chief Justice of the Delaware Supreme Court has made very clear he agrees with the opinion.[177] It is true that he has done so in law review articles, not legally binding opinions. But using such informal methods is an important part of how Delaware law often spreads its influence.[178]

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

[170] *See, e.g.*, Fershee, *supra* note 103, at 370-81; Heminway, *supra* note 110, at 785-87; Johnson, *supra* note 95, at 438-44.

[171] Heminway, *supra* note 110, at 787.

[172] *Id.* at 802-03; Tu, *supra* note 96, at 135-36.

[173] Tu, *supra* note 96, at 136.

[174] *eBay Domestic Holdings, Inc.*, 16. A.3d at 33-34.

[175] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (noting directors could consider concerns of "'constituencies' other than shareholders").

[176] Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986).

[177] *See supra* note 62 and accompanying text. Strine has resigned as Chief Justice, somewhat reducing the predictive value of his nonjudicial writing, but it likely remains an indicator of the Court's thinking.

[178] *See e.g.*, Claire Hill & Brett McDonnell, *Executive Compensation and the Optimal*

The strong betting odds are that the Delaware Supreme Court would affirm *eBay* if an appropriate opportunity for doing so were to arise.

As for whether *eBay* is a narrow holding based on the particular facts before it, that remains to be seen. I am not convinced by the argument that *eBay* is really a controlling shareholder oppression case in drag.[179] I think that may be accurate for *Dodge*, but not *eBay*. eBay (the minority shareholder in that case) knew full well what kind of company Craigslist was when it invested—the Craigslist culture and disinterest in profit were obvious and indeed were the reasons that the shareholder eBay bought from wanted to sell. Moreover, the real glaring misbehavior in the case came from eBay, not Craigslist, as eBay used its position on the Craigslist board to steal corporate information and use it to set up a competitor. Craigslist's reaction was natural and justified, not oppressive. A better argument for the unusualness of the circumstances in *eBay* is that Craigslist was very blunt about putting community interests over profit. That is significant and rare. We will explore the significance of this point for social enterprise (including drilling down more deeply into what we really mean by social enterprise) in the next Part.[180]

The final and most widespread move to limit the import of *eBay* comes in noting that it is still a case about defensive measures, applying the *Unocal* standard. It is not a case about ordinary operating decisions where the business judgment rule applies. The business judgment rule remains and gives directors extraordinarily wide discretion in making decisions subject to that rule. For such decisions (that is to say, most decisions), the directors and officers of social enterprises can still consider and weigh the interests of other constituencies to their hearts' content and not fear legal liability,[181] though they may have to be just a bit careful about what they say.[182] Some advocates of the corrosion critique thesis worry that the advent of benefit corporation statutes could change that analysis, giving the business judgment rule more bite for ordinary business corporations than it currently has or should have.[183]

*Penumbra of Delaware Corporation Law*, 4 VA. L. & BUS. REV. 333, 335-36 (2009) (arguing that Delaware corporate law is influenced by "extra-legal" forces, such as participation of Delaware corporate judiciary in corporate law debate outside of court); Lyman Johnson, *Counter-Narrative in Corporate Law: Saints and Sinners, Apostles and Epistles*, 2009 MICH. ST. L. REV. 847, 873 n.156 (detailing extrajudicial writings, policymaking actions, and speeches of Delaware judges); Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1068-70 (1997) (discussing impact of "extrajudicial utterances" on Delaware law).

[179] Tu, *supra* note 96, at 136.

[180] *See infra* notes 260-71 and accompanying text.

[181] *See, e.g.*, Chu, *supra* note 106, at 178-80; Heminway, *supra* note 110, at 785-86; Khatib, *supra* note 106, at 158-59; Tu, *supra* note 96, at 138-40; Womack, *supra* note 106, at 155.

[182] *See* Heminway, *supra* note 110, at 785-86 (indicating alternative statements by Craigslist directors may have led to different outcome in *eBay*).

[183] Fershee, *supra* note 103, at 384.

But *eBay does* have implications for the application of the business judgment rule, though it is certainly the case, even after *eBay*, that the rule leaves directors with vast discretion in almost all circumstances, and that the chances of being held liable where the business judgment rule applies (i.e., outside of interested transactions or changes in control) remain extremely small.[184] In Delaware's leading formulation of the business judgment rule, it is "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company."[185] This focuses on three ways that plaintiffs can attempt to rebut the presumption. One of those ways, showing that the directors were not adequately informed, is not affected by *eBay*.

But the other two prongs of the business judgment rule may be affected. The final prong considers the best interests of the company.[186] To prevail on this prong, plaintiffs must show that the disputed transaction was a waste of corporate assets.[187] That is an extraordinarily hard task for plaintiffs, but *eBay* may make the task a bit easier in certain circumstances.[188] The waste standard has a variety of formulations, but the most informative for our purposes here comes from *Sinclair Oil Corp. v. Levien*,[189] saying that "decisions will not be disturbed if they can be attributed to any rational business purpose."[190] But *eBay* tells us that a purpose to help other constituencies that cannot be tied ultimately to benefiting shareholders is not an allowable business purpose.[191] Thus, it would seem that defendants cannot use such a purpose to justify a decision under the waste standard. Still, the standard says a decision will stand so long as the defendant can come up with "*any* rational business purpose," so as long as there exists some purpose that one can in some way link to helping shareholders, that should be enough.[192] What would a court do, though, if it seems clear that the real motivating purpose is not in fact linked to shareholders? Perhaps under the waste standard that wouldn't matter, so long as the defendant is prepared to assert in court another purpose that passes muster.

Even so, the good faith prong of the business judgment rule could cause a problem. Imagine a case where the evidence is clear that the true purpose

[184] *See* eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 33 (Del. Ch. 2010) (noting that, under business judgment rule, decisions pursuing non-stockholder interests must lead to "stockholder value").

[185] Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

[186] *Id.*

[187] Jamie L. Kastler, Note, *The Problem with Waste: Delaware's Lenient Treatment of Waste Claims at the Demand Stage of Derivative Litigation*, 95 MINN. L. REV. 1899, 1901 (2011); Harwell Wells, *The Life (and Death?) of Corporate Waste*, 74 WASH. & LEE L. REV. 1239, 1240 (2017).

[188] *eBay Domestic Holdings, Inc.*, 16 A.3d at 36.

[189] 280 A.2d 717 (Del. 1971).

[190] *Id.* at 720.

[191] *eBay Domestic Holdings, Inc.*, 16 A.3d at 40-41.

[192] *Levien*, 280 A.2d at 720 (emphasis added).

underlying a decision was helping a non-shareholder constituency, with no concern for whether that can be tied to helping shareholders in the long run. A shareholder-focused argument can be given, but it is clearly not the real motivation. The Delaware court in *Disney* has formulated the standard for judging the good faith of a decision as "intentional dereliction of duty" or "a conscious disregard for one's responsibilities."[193] If the board was consciously hurting shareholders, after *eBay* that would seem to be intentional dereliction, and hence not in good faith. Of course, this assumes that the non-shareholder-focused motivation is clear enough, with no additional motivation of helping shareholders as well, that the court is moved to find a duty violation. But a chance for liability along these lines does seem possible combining *eBay* with *Disney*.

Where does that leave the law in Delaware? It seems clear that Delaware has adopted a shareholder-only conception of corporate purpose and duty.[194] That conception does, though, allow for plenty of consideration of other constituencies as long as that can be tied to benefitting shareholders in the long run, and the business judgment rule definitely remains in place in evaluating such justifications. We shall explore in the next Part what that means for social enterprises.[195]

We have considered Delaware and states with constituency statutes. What about the remaining sixteen states? The situation for them is murkier. It seems, though, that *most of the remaining states more likely than not have a shareholder-only conception*.[196] The analysis will vary among the states, depending upon particular statutory language and whether there is any relevant case law. As for statutes, in its *Benefit Corporation White Paper*, the ABA Corporate Laws Committee discussed the statute it maintains, the Model Business Corporation Act.[197] The Act's duty of care states that "a director . . . shall act . . . in a matter the director reasonably believes to be in the best interests of the corporation."[198] The Official Comment says that

> [t]he term "corporation" is a surrogate for the business enterprise as well as a frame of reference encompassing the shareholder body. In determining the corporation's "best interests," the director has wide discretion in deciding how to weigh near-term opportunities versus long-term benefits

[193] *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 66 (Del. 2006).

[194] *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173, 182 (Del. 1986); *eBay Domestic Holdings, Inc.*, 16 A.3d at 40-41.

[195] *See infra* notes 263-71 and accompanying text.

[196] *See infra* notes 274-77 and accompanying text.

[197] Corp. L. Comm., *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1083 (2013) Although the Corporate Laws Committee changed its name from the Committee on Corporate Laws, I continue to refer to it as the Committee for simplicity.

[198] MODEL BUS. CORP. ACT § 8.30(a) (AM. BAR ASS'N 2020).

as well as in making judgments where the interests of various groups of shareholders or other corporate constituencies may differ.[199]

The Committee notes that this statement "illustrates the continuing ambiguity surrounding these issues."[200] As for case law, the relative lack of corporate case law in other states suggests there will not be a lot of guidance, given that even Delaware has such limited case law on point. There are a few cases that do suggest, without extensive analysis, that directors may consider the interests of constituencies other than shareholders.[201] At least one other case follows Delaware's shareholder maximization norm.[202]

Absent clear statutory or case guidance, what seems the best way to understand laws in the remaining states? The most likely option seems to be the shareholder-only conception. That is so for several reasons. For one, it is the prevailing conception among scholars, lawyers, and business people, and has been so for a generation or two now (going back at least to the 1980s, and perhaps much further).[203] Second, it is the prevailing conception in Delaware, the leading state for American corporate law, with powerful influence on other states.[204] And third, consider the argument above concerning states with constituency statutes.[205] One of the most compelling arguments that such states have adopted a stakeholder-optional conception was that the significant attention given to the statutes at the time of adoption would have been odd if they merely maintained the status quo common law shareholder-only conception.[206] But that assumes that the status quo conception was indeed the shareholder-only conception. If the status quo was the stakeholder-optional conception, then what was the need or point of adopting the constituency statutes? And if the status quo was a stakeholder-mandatory conception, then the constituency statutes would have been truly strange, since they were clearly a response to hostile takeovers meant to make it easier to adopt defensive measures, and a stakeholder-mandatory conception is better for that than a stakeholder-optional conception. So, the constituency statutes themselves strongly suggest that the

[199] *Id.* § 8.30(a) cmt. 1.

[200] Corp. L. Comm., *supra* note 197, at 1091.

[201] Herald Co. v. Seawell, 472 F.2d 1081, 1094-95 (10th Cir. 1972) (noting validity of taking into account interests of public, corporation, and its employees in addition to shareholders' interests); GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1019-20 (S.D.N.Y. 1985) (identifying employees' pension benefits and severance benefits as legitimate considerations of directors).

[202] Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1543 (E.D. Mich. 1986) (discussing directors' "cardinal fiduciary duty" to sell company for as much as possible for shareholders' benefit).

[203] For a good historical overview of the cycles of arguments over corporate purpose and duty, see C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 82-99 (2002).

[204] *See supra* note 194 and accompanying text.

[205] *See supra* notes 143-63 and accompanying text.

[206] *See supra* notes 157-62 and accompanying text.

common law approach, still prevailing in states without clear statutory or case law statements to the contrary, follows the shareholder-only conception.[207]

C. *Two Justifications of Benefit Corporation Statutes*

We have thus finished examining which of the three conceptions of corporate purpose and duty prevails in each state. This will be key to understanding the corrosion critique, and we can already see that the validity of that critique may well vary by state. But before turning to that critique, we must first define and briefly explore the two leading justifications usually given for adopting benefit corporation statutes.

The first of these is the *enabling justification*. Under this justification, ordinary corporate law constrains social enterprises from considering other constituencies because of the shareholder wealth maximization norm.[208] It is the leading justification for benefit corporation statutes in the White Paper that accompanies the Model Legislation, and it has gotten the most attention in the literature on benefit corporations.[209] The argument in the White Paper is fairly nuanced. It distinguishes between constituency statute states and other states, but argues that even in the former, the existence of a limiting interpretation, such as that from the Committee on Corporate Law,[210] and the lack of case law create some risk of liability for clearly pursuing a stakeholder interest at the expense of shareholders.[211] The White Paper also distinguishes between different types of decisions which will receive different levels of scrutiny, considering day-to-day decisions, defensive decisions, and changes of control.[212] It recognizes that most decisions are day-to-day and protected by the business judgment rule, but argues that even for such decisions there is some small risk of liability for clearly mission-driven actions, and that uncertainty can have a chilling effect.[213] Suits are more likely, with more risk of liability, for defensive actions and changes in control.[214] There is a strong emphasis on the role of legal uncertainty and its potential chilling effect.[215] How one reacts to the corrosion critique will depend in part upon how much legal risk one believes social enterprises and their legal advisors should be willing to bear.[216]

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[207] *See supra* note 163 and accompanying text.

[208] CLARK & VRANKA, *supra* note 63, at 7.

[209] *Id.* at 7-14.

[210] *See* Comm. on Corp. L., *supra* note 149, at 2254.

[211] CLARK & VRANKA, *supra* note 63, at 9-11 ("Without clear authority explicitly permitting directors to pursue both profit and a company's mission, even directors of mission-driven companies in constituency statute jurisdictions may be hesitant to 'consider' their social missions for fear of breaching their fiduciary duty.").

[212] *Id.* at 11-13.

[213] *Id.* at 12.

[214] *Id.* at 12-13.

[215] *Id.* at 11-13.

[216] *See infra* notes 245-48 and accompanying text.

The second justification for benefit corporation statutes is the *branding justification*.[217] Under this justification, benefit corporation statutes can help social enterprises attract investors, consumers, and employees.[218] Social enterprises face commitment and coordination problems.[219] Genuine social entrepreneurs want to run businesses that generate profits for themselves and other investors while also pursuing social missions.[220] A number of investors, consumers, and employees would like to be involved in such businesses.[221] But the outsiders need to assure themselves that those running the business will do as they wish them to when it comes to mixing profits and mission. In part this is a matter of honesty and commitment: outsiders may fear greenwashing, where companies paint themselves as virtuous when they really are not. The fiduciary duty rules of benefit corporation statutes may help protect against that by providing a remedy where companies have misled investors.[222] But there is also a question of coordination. Even if we could assume complete honesty, there are still tough questions as to what exactly the grand goal of blending profit and mission actually entails in operational reality. Different persons could have honest differences in their expectations as to how such companies will react to varied situations. Benefit corporation statutes may help transactional lawyers and other advisors counsel companies that have chosen benefit corporation status on how to comply with their stated purpose and accompanying duties.[223]

## III. THE DESCRIPTIVE CORROSION CRITIQUE AND ITS VALIDITY

We have explored three different conceptions of corporate purpose and duty, how those conceptions fit the laws of the various states, and two different justifications for benefit corporation statutes. We are now in position to evaluate the validity of the corrosion critique.

Let us first be more precise about what we mean by the corrosion critique. The critique posits that the justification for benefit corporation statutes creates a mistaken impression that, under the prevailing rules of corporate law, corporations are legally committed to a shareholder-only conception that is

[217] I stressed this justification in Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 29 (2014), but the best elaboration of it is Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 767 (2015) (arguing that social enterprise law creates new institutional structure that motivates "the development of self-regulatory standards and provide[s] a helpful coordinating mechanism for legal advisors and pro-social investors").

[218] CLARK & VRANKA, *supra* note 63, at 6.

[219] *Id.* at 9.

[220] *Id.* at 12.

[221] *Id.* at 3-4.

[222] McDonnell, *supra* note 217, at 62-63.

[223] *Id.* at 67; Yockey, *supra* note 217, at 797-800 ("Benefit corporation statutes also provide default rules for a corporate form but combine them with provisions that are more public or regulatory in nature.").

inconsistent with being a social enterprise.[224] There are two alleged false implications within this critique. One is a false implication about the companies that choose to remain ordinary corporations. These companies are implied to be committed to a focus on shareholders alone, when in fact they can be and often are much more socially responsible than that. This effect focuses on the understanding of business people and transactional lawyers. The core concern is that the vast majority of businesses that remain ordinary corporations, as opposed to benefit corporations, will falsely believe that they are legally constrained in their ability to behave responsibly, leading to a reduction in socially responsible behavior by corporations.

The other false implication is about the nature of corporate law. It is alleged that benefit corporations create a mistaken idea that the shareholder-only conception prevails in corporate law, when in fact that is not the current state of the law. This effect may occur for judges as well as lawyers and business people. The effect on judges leads some proponents of the critique to take this point a step further.[225] They argue that benefit corporation statutes may lead to disturbing developments in the law.[226] Although these proponents maintain that the current law leaves plenty of room for social enterprises, they admit that there is a mistaken understanding of that current law. They worry that benefit corporations will lead courts to implement the shareholder-only conception for ordinary corporations.[227] The courts aren't there yet, but there's a tendency to go there, and benefit corporation statutes may reinforce that tendency.[228]

At some point this argument about the potential effects of benefit corporations on future cases shades over into what I will call the normative corrosion critique, explored in the next Part. In that version of the critique, it is admitted that current case law adopts the shareholder-only conception, and that this causes a problem for social enterprises. But that law is seen as regrettable and something to be fought.[229] It is then argued that although benefit corporations carve out a territory where the shareholder-only conception does not apply, they will also reinforce that conception for ordinary corporations, and that the latter effect will do more harm than the good done by the former.[230] The distinction between the descriptive version and the normative version at the border is murky, but turns upon how far down the road to the shareholder-only conception one thinks the courts have gone. If it is only a relatively short distance down that path, so that one thinks the correct current conception is still not shareholders-only, then one

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224 *See supra* notes 90-114 and accompanying text.

225 Heminway, *supra* note 110, at 799-800; Tu, *supra* note 96, at 153-54.

226 Heminway, *supra* note 110, at 799-800; Tu, *supra* note 96, at 153-54.

227 Heminway, *supra* note 110, at 799-800; Tu, *supra* note 96, at 153-54.

228 Heminway, *supra* note 110, at 799-800; Tu, *supra* note 96, at 153-54.

229 *See* Fershee, *supra* note 103, at 384-86; Heminway, *supra* note 110, at 799-800.

230 Fershee, *supra* note 103, at 386-87 ("[C]ourts [could] determine that publicly traded entities do not have the latitude to pursue public benefit that is not directly and clearly linked to profit motive.").

has the descriptive critique: the implication of benefit corporation statutes for ordinary corporate law is mistaken as a matter of the best interpretation of current law. If one instead thinks the case law has already gone down the path towards a shareholder-only conception, then one gets the normative critique: benefit corporation law is right to imply that the current corporate law has taken a bad shareholder-only turn,[231] but benefit corporation statutes are a strategic error that will reinforce that mistake. I deal with the descriptive critique in this Part and the normative critique in the next.

### A. *The Corrosion Critique and the Branding Justification*

With that clarified (I hope), we can now proceed to ask about the validity of the descriptive corrosion critique. Here are a few propositions that follow from the framework and analysis of the previous Part.

*The descriptive corrosion critique is not valid as applied to the branding justification of benefit corporation statutes*. The critique argues that benefit corporation statutes create a mistaken impression that ordinary corporations and corporate law are committed to a shareholder-only conception of the corporation when they are not in fact, but rather allow companies to consider other constituencies.[232] But the branding justification does not assert that companies organized under ordinary corporate law statutes *cannot* consider other constituencies, even to the extent of giving their interests independent weight where pursuing those interests may hurt shareholders. Rather, the branding justification addresses coordination and commitment problems that social enterprises face in persuading various constituencies that they will indeed pursue interests other than profits for shareholders.[233] The branding justification thus requires a law that imposes a stakeholder-mandatory conception of the corporation. Even if ordinary corporate law takes a stakeholder-optional approach, that's not enough for social enterprises that want a law to help with their branding concerns—they need a law imposing a stakeholder-mandatory conception, as benefit corporation statutes do.[234]

Thus, the only negative implication that flows from the branding justification is that existing corporate law does not in fact impose a stakeholder-mandatory conception of purpose and duty. So, the corrosion critique could be valid even

[231] When I label this a bad turn, I am of course taking the position of those who oppose the shareholder-only conception. That is in fact my personal position. *See* McDonnell, *supra* note 45, at 335. I do not argue for that normative position here. All proponents of the corrosion critique will share this normative position with me—the critique is an argument among friends who agree about where they would like to see corporate law go, but disagree about the legal strategy for getting there. For readers who have gotten this far but do not share that normative conception, I hope that the arguments here at least help clarify the state of the debate, both around ordinary corporate law and the law of benefit corporations.

[232] *See* Yosifon, *supra* note 115, at 480-86.

[233] *See supra* notes 217-23 and accompanying text.

[234] *See supra* notes 140-41 and accompanying text.

for the branding justification if one believed that ordinary corporate law already does in fact impose a stakeholder-mandatory conception. Indeed, we saw above that Mitchell and Millon did make that argument about constituency statutes.[235]

Perhaps the most influential attempt to argue that existing corporate law embodies a stakeholder-mandatory conception is the team production theory of Blair and Stout.[236] They argue that corporate law essentially only allows shareholders to sue for duty violations successfully in circumstances where director actions have hurt other constituencies as well as shareholders.[237] In addressing Delaware law, they cite the business judgment rule and the language in *Unocal* that allows the consideration of other stakeholders.[238] They creatively try to cabin *Revlon* as applying only in cases where a company is in essence going private, where their stakeholder-mandatory conception no longer applies.[239] Their article was written before the *eBay* case, as well as former Chief Justice Strine's recent articles, which present serious problems for their preferred interpretation.[240] They also do not address the "may" as opposed to "shall" language of the constituency statutes, which also presents a problem for their preferred interpretation. Indeed, on their theory of the common law as embodying a stakeholder-mandatory conception, the constituency statutes would seem to be a step backwards, giving less emphasis to the interests of stakeholders. That seems extremely hard to square with the legislative history of those statutes.[241]

Thus, since it is highly implausible to maintain any U.S. state currently takes a stakeholder-mandatory approach to corporate purpose and duty, the corrosion critique is not valid to the extent that benefit corporation statutes are understood to be justified according to the branding justification. Were that the prevailing understanding of why states are and should be adopting benefit corporation statutes, then we could stop here. However, going back to the White Paper and the arguments made by the initial advocates of benefit corporation statutes,[242] it is probably fair to say that the branding justification has taken a back seat to the enabling justification. Thus, we need to ask whether the corrosion critique is valid as applied to the enabling justification.

### B. *The Corrosion Critique in States with Constituency Statutes*

*The descriptive corrosion critique is mostly valid as applied to the enabling justification of benefit corporation statutes in states with constituency statutes*. This follows from several points already made. The descriptive corrosion

[235] Millon, *supra* note 145, at 255-70; Mitchell, *supra* note 145, at 635-36.
[236] *See* Blair & Stout, *supra* note 40, at 254-56.
[237] *Id.* at 298 (arguing survey of corporate law cases displays this pattern).
[238] *Id.* at 308.
[239] *Id.* at 309.
[240] *See supra* notes 58-62 and accompanying text.
[241] *See supra* notes 160-62 and accompanying text.
[242] *See supra* notes 79-86 and accompanying text.

critique asserts that the prevailing justification for benefit corporation statutes creates a mistaken impression that corporations that do not choose to become benefit corporations are legally committed to a shareholder-only conception. The prevailing justification we are now considering is the enabling justification. The enabling justification contends that prevailing corporate law constrains social enterprises from considering other constituencies because of the shareholder wealth maximization norm.[243] But in states with constituency statutes, the shareholder wealth maximization norm does not apply. Rather, the stakeholder-optional conception applies.[244] Thus, in such states, even ordinary corporations can consider the interests of other stakeholders without having to show any tie to shareholder benefits. The implication that they cannot do so, which is inherent in the enabling justification, is false.

This would seem to make it clear that the corrosion critique is correct in states with constituency statutes. Why then do I say that it is only "mostly" valid? That is because we saw above that it is "most likely" that states with constituency statutes have a stakeholder-optional conception. There is the possibility of a narrow interpretation, in which constituency interests can be considered only to the extent that doing so is consistent with helping shareholders, the interpretation most notably advocated by the ABA Committee on Corporate Laws.[245] We saw that this narrow interpretation is quite implausible as a matter of basic statutory interpretation, but it can't be completely ruled out. The White Paper justifying benefit corporation statutes points to this uncertainty as creating a need for social enterprises to have a different statute to avoid that uncertainty and the potential chilling effect it may have on social missions.[246] But how much uncertainty is required to justify an entire new statute and type of legal entity? If the narrow interpretation of constituency statutes had a good deal of plausibility, then the enabling justification would appear plausible and the corrosion critique would not be valid, or at least not very valid, because the implication that corporations in constituency statute states are subject to the shareholder-only conception would be justified, at least as a plausible-enough interpretation of constituency statutes.

That narrow interpretation of constituency statutes is deeply implausible though.[247] To advocate a whole new type of corporation for fear of being caught by that narrow interpretation gives too much credence to an extremely bad interpretation, making it appear more valid than it is, to lawyers, business people, and judges. And that is precisely the corrosion critique. Admittedly, there is some tension here between how transactional lawyers may plausibly want to advise individual clients and the effect of those choices on public

[243] CLARK & VRANKA, *supra* note 63, at 7-14.

[244] *See supra* notes 143-63 and accompanying text.

[245] *See supra* notes 149-62 and accompanying text.

[246] *See* CLARK & VRANKA, *supra* note 63, at 6.

[247] *See supra* notes 156-63 and accompanying text.

understanding.[248] Transactional lawyers are often quite risk averse, and if possible want to avoid even a small chance of causing their clients to be sued. But here, such suits are extremely unlikely to even be brought, much less succeed. Furthermore, giving credence to such suits involves giving credence to a wrong and destructive understanding of existing law in constituency statute states. Thus, the better response would seem to be to accept such limited uncertainty.

There is another possible limit to the corrosion critique of the enabling justification in states with constituency statutes. Even though the enabling justification does logically create a mistaken inference about the law governing ordinary corporations, it may be that the law has little to no effect on the understanding of most lawyers and business people, in which case there would be no actual corrosive effect on the understanding of how ordinary corporations are required to behave. This could be either because lawyers and business people assume the shareholder-only conception prevails even in constituency statute states, or because they are mostly or entirely unaware of benefit corporations and the possible negative implication they may have for ordinary corporations. To what extent the statutory and case law of corporate purpose and duty really affects the understanding of people running businesses in practice is not well-understood. Some argue that personal values and cultural norms have a much stronger effect on the behavior and understanding of directors and officers than legal rules do.[249] But others argue that even laws that impose a very low chance of liability, such as *eBay*, might have a strong influence on norms and behavior.[250]

I cannot resolve the hard empirical question of how the corporate law of purpose and duty affects practical norms and behavior here. I am on record as believing the effect is significant even where the chances of liability are low,[251] and that still seems the more plausible story to me, though I grant the strength of the counter-story. I also find it a bit unseemly as a law professor to defend a law by arguing that in fact the law does not have any effect. That point also

[248] Tu, *supra* note 96, at 158.

[249] Renée B. Adams, Amir N. Licht & Lilach Sagiv, *Shareholders and Stakeholders: How Do Directors Decide?*, 32 STRATEGIC MGMT. J. 1331, 1332-33 (2011) (finding that directors and CEOs are more "pro-shareholder" the more they personally endorse entrepreneurial values); Amir N. Licht & Renée B. Adams, *Shareholders and Stakeholders Around the World: The Role of Values, Culture, and Law in Directors' Decisions* 2 (Ctr. for Advanced Stud. on the Founds. of L. & Fin., LawFin Working Paper No. 13, 2020) (available at https://ssrn.com/abstract=3766934) (finding that directors were "more likely to side with shareholders the more compatible [their] values and social institutional environment are with an entrepreneurial conception of equity investment").

[250] *See supra* note 178 and accompanying text (explaining how Delaware law spreads its influence informally); *see also* Claire A. Hill, *Marshalling Reputation to Minimize Problematic Business Conduct*, 99 B.U. L. REV. 1193, 1193-94 (2019); Claire A. Hill, Caremark *as Soft Law*, 90 TEMP. L. REV. 681, 681 (2018).

[251] *See* Hill & McDonnell, *supra* note 178, at 372.

suggests that this argument for countering the corrosion critique would be a rather Pyrrhic victory for defenders of benefit corporations: although it would allay concern that the new statutes will have a negative effect, it would do so by claiming that they will not really have any effect at all. So let us assume that the law does matter, even though it may not.

### C. *The Corrosion Critique in Delaware*

*The descriptive corrosion critique is not valid as applied to the enabling justification of benefit corporation statutes in Delaware*. Key to the logic of the corrosion critique is that benefit corporation statutes create a *mistaken* implication that corporations organized under ordinary corporate law are legally committed to a shareholder-only conception of purpose and duty. But in Delaware, that assumption is not mistaken; it is true. That is, Delaware law does truly commit corporations organized under it to a shareholder-only conception of purpose and duty. Benefit corporation statutes did not cause that to be true. The Delaware courts did it on their very own in *Revlon* and *eBay*, with former Chief Justice Strine making it clear to all who care to listen that this is what the law says.[252]

Those who resist that description of Delaware law try to argue that there is plenty of room for social enterprises to operate without fear under Delaware law. But the analysis of Delaware law above[253] calls those attempts into question. First, although the shareholder-only conception clearly applies with considerable bite only in sale of control circumstances that invoke *Revlon*, those circumstances matter.[254] Entrepreneurs know that they may want to sell their company at some point, and socially inclined entrepreneurs should indeed worry about how the law may constrain their ability to do so. The adoption of defensive mechanisms to block either hostile takeovers or activist shareholders may be of particular importance for social enterprises.[255] Social enterprises may want to protect against activist shareholders who could impose pressure to pursue profits at the expense of the company's social mission, especially in public

[252] *See supra* notes 55-62 and accompanying text. The enabling justification is still weak even in Delaware for other reasons—companies could choose to be LLCs, to incorporate in another state, or to adopt a certificate provision modifying the duty. *See infra* note 306 and accompanying text. But the key to the corrosion critique is that benefit corporations create a mistaken understanding about ordinary corporations, and these other reasons for rejecting the enabling justification do not imply that.

[253] *See supra* notes 164-95 and accompanying text.

[254] *See* Johnson & Ricca, *supra* note 166, at 182 (noting application of *Revlon*'s initial profit maximization theory in merger negotiations).

[255] *See, e.g.*, Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029, at *19-21 (Del. Ch. May 2, 2014) (upholding adoption of poison pill to ward off activist hedge funds proxy contest).

companies.[256] The *Unocal* standard as interpreted in *eBay* limits the ability of social enterprises to explicitly rely on protecting other constituencies when doing so will not help shareholders, but defending against shareholder activists may be precisely about protecting various stakeholders.[257]

The strongest argument that Delaware law leaves plenty of room for social enterprises is that the vast majority of corporate decisions will fall under the business judgment rule, which leaves almost complete discretion in the hands of the board.[258] But, as I argue above, *eBay* has implications for the application of the business judgment rule.[259] Companies risk running afoul of a good faith analysis if the court concludes that their real purpose was to advance the interest of other constituencies even if that hurts shareholders, as this would then become an intentional dereliction of the duty to follow the shareholder wealth maximization norm.[260] Companies could avoid that as long as they speak somewhat carefully, at least in public. Companies must point to the interests of other constituencies, but always be careful to add that advancing those interests will also help shareholders in the long run.[261] As long as that reference to long-run shareholder benefits is not too transparently in bad faith, that should be enough to protect the company in court and allow it to pursue the interests of other constituencies as far as it pleases without any effort to determine whether doing so is really good for shareholders.[262]

Even if such a strategy would work to avoid any serious chance of legal liability, it is deeply problematic for a true social enterprise as I use the term here.[263] Essentially, we are asking the directors and officers of social enterprises to dissemble their true motives to the public. We should not do that. The duty of candor is a core obligation for directors and officers.[264] We should not ask them to violate it. Moreover, persons who are willing to dissemble in this way may be willing to do other, worse things.

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256 Brett H. McDonnell, *Benefit Corporations and Public Markets: First Experiments and Next Steps*, 40 SEATTLE U. L. REV. 717, 724 (2017) ("[P]ressure of effective shareholder activism raises a major concern that benefit corporations that go public will face mission drift and, over time, come to prioritize profits over social benefits, thereby challenging their core defining feature and purpose."); *see also* Sarah Dadush, *Regulating Social Finance: Can Social Stock Exchanges Meet the Challenge?*, 37 U. PA. J. INT'L L. 139, 178 (2015) (finding "mission drift" occurs when businesses expand and target "better-off" customers, sidelining social goals).

257 eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 36 (Del. Ch. 2010).

258 *See* Heminway, *supra* note 110, at 801; Khatib, *supra* note 106, at 163-64; Tu, *supra* note 96, at 138-39.

259 *See supra* notes 51-62 and accompanying text.

260 *See supra* note 193 and accompanying text.

261 Heminway, *supra* note 110, at 785-86.

262 *See id.*

263 *See* ALEXANDER, *supra* note 4, at 47-48; McDonnell, *supra* note 22, at 85-86.

264 Reza Dibadj, *Disclosure as Delaware's New Frontier*, 70 HASTINGS L.J. 689, 700-02 (2019).

Furthermore, how directors and officers publicly justify their decisions and speak about the company's purpose matters. It plays a major role in generating the internal corporate culture of the company. Social enterprises want to create a culture that is firmly committed to their social mission. If their managers are publicly treating following that mission statement as contingent on generating profits eventually, the company's commitment to the social mission is lessened. Social enterprises also want to attract investors and customers who believe in their mission.[265] A public message making that mission contingent on maximizing profits renders the company less attractive to the target investors and customers.

None of this should be a problem for most companies engaged in CSR. Most such companies, especially public corporations, avoid trying to make any clear statement about the relative priority of mission over profit. They say that pursuing various social goods and achieving long run profits are consistent with each other, and leave it at that.[266] They are mostly right about that.[267] For such socially-responsible entities, Delaware law works fine, as Heminway and others emphasize.[268]

But social enterprises, as I use the term, give their social mission strong independent weight. They are willing to pursue it even if doing so reduces profits—even in the long run. They look to attract investors willing to accept below-market returns as a consequence of investing in a business they believe in. Below-market returns are far from inevitable—very often doing good is indeed quite consistent with strong profitability.[269] But that is not always true, and a genuine social enterprise is willing to trade profits for mission, at least some of the time. It is important for social enterprises to be able to proclaim to their employees, investors, and customers that they understand themselves and their corporate purpose in that way. Doing so in Delaware is a violation of their fiduciary duty.[270] It is a violation that is unlikely to lead to actual legal liability

[265] *See* McDonnell, *supra* note 217, at 26.

[266] *See id.*

[267] There is much debate over the relationship between CSR and financial performance. The literature is voluminous with conflicting results. For some literature reviews and meta-analyses suggesting a positive relationship, see Pieter van Beurden & Tobias Gössling, *The Worth of Values—A Literature Review on the Relation Between Corporate Social and Financial Performance*, 82 J. BUS. ETHICS 407, 420 (2008); Marc Orlitzky, Frank L. Schmidt & Sara L. Rynes, *Corporate Social and Financial Performance: A Meta-Analysis,* 24 ORG. STUD. 403, 427 (2003); and Joshua D. Margolis, Hillary Anger Elfenbein & James P. Walsh, Does It Pay to Be Good . . . and Does It Matter? A Meta-Analysis of the Relationship Between Corporate Social and Financial Performance 23 (Mar. 1, 2009) (unpublished manuscript) (available at https://ssrn.com/abstract=1866371).

[268] Heminway, *supra* note 110, at 782-87.

[269] *See supra* note 267 and accompanying text.

[270] *See supra* note 267 and accompanying text.

under the business judgment rule, but Delaware law helps shape norms even where liability is only remotely possible.[271]

Thus, the corrosion critique is wrong even for the enabling justification as applied to Delaware corporations because Delaware's articulation of the shareholder wealth maximization norm does impose a barrier to social enterprises with a genuine independent commitment to a social mission.[272] That barrier may not be likely to result in legal liability, but the directors and officers of such a corporation would be violating their fiduciary duty if they are incorporated in Delaware—and that matters. Proponents of the corrosion critique in Delaware are either fooling themselves about the current state of Delaware law, or are taking an overly instrumentalist view of how the law of fiduciary duty works, focusing too much on the small chances of legal liability and not enough on the expressive and normative side of the law.

### D. *The Corrosion Critique in Other States*

*The descriptive corrosion critique is probably not valid as applied to the enabling justification of benefit corporation statutes in the remaining states other than Delaware or states with constituency statues*. As noted above, the analysis for the remaining states depends in part upon whether there is any particular statutory or case law language in a particular state that suggests either a shareholder-only or a stakeholder-optional conception prevails in that state. There is such language in the case law of a few states.[273] Where such language suggests that a stakeholder-optional conception prevails, the argument above that the corrosion critique applies to states with constituency statutes may apply to states with such language imposing the stakeholder-optional conception by other statutory means or by case law. But the applicability of the corrosion critique may be weaker to the extent that the language does not imply the stakeholder-optional conception as strongly and decisively as constituency statutes do.

Where there is either language suggesting a shareholder-only conception or no relevant language, the analysis above suggests that a shareholder-only conception should probably be understood to prevail.[274] In that case, the corrosion critique would not seem to hold for the same reason that it does not hold in Delaware, namely the implication that corporations under the prevailing

[271] *See* Hill & McDonnell, *supra* note 178, at 336.

[272] Again, that is easy enough to get around in various ways, but the point is that, for ordinary Delaware corporations without a certificate provision revising the duty, the law does create a duty to pursue the interests of shareholders only. *See supra* notes 164-95 and accompanying text.

[273] *See* Herald Co. v. Seawell, 472 F.2d 1081, 1090-91 (10th Cir. 1972); Plaza Sec. Co. v. Fruehauf Corp., 643 F. Supp. 1535, 1543 (E.D. Mich. 1986); GAF Corp. v. Union Carbide Corp., 624 F. Supp. 1016, 1019-20 (S.D.N.Y. 1985).

[274] *See generally* Wells, *supra* note 203 (discussing how shareholder-only conception has developed and changed over time).

law are bound to a shareholder-only conception is true, not mistaken. But here again, that reasoning may be weaker than in Delaware, insofar as the guidance or arguments suggesting that the shareholder-only conception prevails is weaker than it is for Delaware.

We have thus found that the corrosion critique is not valid as applied to the branding justification of benefit corporation statutes. As applied to the enabling justification, the corrosion critique is mostly valid in states with constituency statutes, and mostly invalid in Delaware and most other states that do not have a constituency statute.[275] There are several sources for complexity and confusion here. First, the validity of the critique depends upon whether we understand the enabling justification or the branding justification as the rationale driving the adoption and legitimation of benefit corporation statutes. Second, as applied to the enabling justification, the validity of the corrosion critique depends upon whether a state has a constituency statute. A majority of the states do have such a statute, but many states do not, and that includes the leading state for corporate law, Delaware.[276] Delaware law plays a quite disproportionate role in our understanding of corporate law, and arguments that apply to Delaware tend to bleed over into our understanding of other states, even where there are significant differences. That might help explain why the enabling justification has come to dominate the discussion surrounding benefit corporations, because it makes more sense in Delaware than other states. But that justification then has a corrosive effect in the other states that have constituency statutes. Another source of complexity and confusion is that the arguments on the validity of the corrosion critique for both constituency states, Delaware, and the remaining states are somewhat uncertain and debatable because the state of the law as to which conception of corporate purpose and duty prevails in each state is itself uncertain and highly debated. A final source of complexity is the uncertain and possibly highly limited effect that the law of corporate purpose and duty has on actual norms and behavior. Put all of these sources of complexity and confusion together, and it becomes very hard to speak precisely and clearly about the corrosion critique in general.

## IV. THE NORMATIVE CORROSION CRITIQUE AND ITS VALIDITY

The previous Part described the core corrosion critique, what I call the descriptive version. On that version, use of the enabling justification for benefit corporation statutes creates a mistaken implication that the corporation statute legally obliges the directors of ordinary corporations to focus only on profitability and maximizing the financial value of the corporation for shareholders. This may induce managers of ordinary corporations to reduce the degree to which they engage in CSR measures. The critique is sometimes extended to argue that the existence of benefit corporations tied to the enabling

[275] *See supra* notes 243-74 and accompanying text.

[276] CLARK & VRANKA, *supra* note 63, at 9 n.30.

justification may also induce courts to move from the correct current interpretation of the law as stakeholder-optional towards a mistaken shareholder-only conception, a temptation that exists in part because that mistaken understanding already has a number of adherents.

As noted above, this final point can shade over into a rather different criticism, what I call the normative corrosion critique.[277] On this critique, it is admitted that the shareholder-only conception has, although contested, indeed become the dominant legal understanding, and that this poses problems for social enterprises incorporated under the main corporation statute. These critics dislike the shareholder-only conception, and so they are sympathetic to what benefit corporation statutes are trying to accomplish. But they fear that benefit corporation statutes will further entrench the shareholder-only conception for other corporations, and that since few companies have chosen to become benefit corporations, this will make the overall situation worse for social enterprises and CSR.[278]

Might the normative version of the corrosion critique be valid in circumstances where the descriptive version is not? It is possible, but I have my doubts. Let us consider the two main circumstances in which the normative corrosion critique might apply.

A. *The Normative Critique in Delaware*

*First, the normative corrosion critique could be correct for Delaware, but it seems relatively unlikely.* If we take as given that the shareholder-only conception is unattractive,[279] and that this conception has prevailed in Delaware corporate law, as argued above,[280] then the validity of the normative critique turns on political economy arguments about what strategy is most likely to be able to change current Delaware law. That law could be changed either by getting the legislature to enact a constituency statute (which would in turn very likely require getting the Delaware corporate bar to support such a statute), or by getting the Delaware courts to reverse course on *eBay* and *Revlon*. Does the existence of Delaware's benefit corporation statute make one or the other of those strategies more or less likely to succeed?

In favor of the normative critique's claim that benefit corporations make those strategies less likely, one could argue that judges, lawyers, and legislators may point to the benefit corporation as an escape valve—a way that the state already

[277] *See supra* text accompanying notes 230-31.

[278] *See e.g.*, Fershee, *supra* note 103, at 384-86 ("With the addition of social benefit entities, courts are even more likely to question the business purpose of traditional entities."); Heminway, *supra* note 110, at 799-800 ("[S]hareholder wealth maximization doctrine in the TFPC and the nature of benefit corporation doctrine conspire to decrease director discretion . . . .").

[279] *See* McDonnell, *supra* note 46, at 1048. I am here simply positing this normative position, as it underlies the scholarship I am considering.

[280] *See supra* notes 164-95 and accompanying text.

gives room for social enterprise so that they do not need to reform the ordinary corporation statute. We can already see Leo Strine citing the state's benefit corporation statute in his defense of the shareholder-only conception for ordinary corporations.[281] The rise of environmental, social, and governance ("ESG") activism by public company shareholders is putting a focus on the demand for CSR, and Delaware may feel pressure to defend its shareholder-only conception.[282] Pointing to the benefit corporation statute may help, combined with pointing to the business judgment rule for companies that choose not to become benefit corporations. On the other hand, perhaps the benefit corporation statute will prove to be the camel's nose under the tent. Maybe positive experiences with benefit corporations will convince either Delaware judges or the corporate bar and the legislature that a stakeholder approach works well, leading eventually to reform of the core business corporation statute or case law for all corporations.

I do not find either of these scenarios very likely. The main wave of constituency statute adoption occurred several decades ago, and Delaware has shown no sign of joining the majority of states.[283] The Delaware courts seem quite locked into the shareholder-only conception, with former Chief Justice Strine, in particular, proselytizing for it in a series of articles where he is quite critical of those who try to deny what the law really is.[284] With or without benefit corporations, it seems to me that the chances of either the legislature or the courts changing course at any point in the foreseeable future are slim.

If that is right, then the normative corrosion critique is unpersuasive as applied to Delaware. The benefit corporation statute at least provides a space for social enterprises to function free from the shareholder-only conception of purpose and duty. It is true that not many companies have yet chosen to become benefit corporations, but that could change.[285] And even as things stand, at least the

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[281] *See* Strine, *The Dangers of Denial*, *supra* note 62, at 785-86; Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 107 (2015).

[282] *See, e.g.*, Jill E. Fisch, *Making Sustainability Disclosure Sustainable*, 107 GEO. L.J. 923, 925 (2019); Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. COLO. L. REV. 731, 741 (2019); Paul Rissman & Diana Kearney, *Rise of the Shadow ESG Regulators: Investment Advisers, Sustainability Accounting, and Their Effects on Corporate Social Responsibility*, 49 ENV'T L. REP. 10155, 10187 (2019); Michael J. Vargas, *In Defense of E. Merrick Dodd: Corporate Social Responsibility in Modern Corporate Law and Investment Strategy*, 73 BUS. LAW. 337, 337 (2018).

[283] CLARK & VRANKA, *supra* note 63, at 9 n.30.

[284] *See supra* note 62 and accompanying text.

[285] In 2018, Frederick Alexander, a leading benefit corporation advocate, asserted that there were over 5,000 benefit corporations. Frederick Alexander, *Benefit Corporations Are Ready for 2018*, FREDERICKALEXANDER.NET (Jan. 9, 2018), https://frederickalexander.net/2018/01/09/benefit-corporations-are-ready-for-2018/ [https://perma.cc/68WW-BNHM]. That is not a completely negligible number, but it is tiny

statute and the companies that have chosen it do present a potential model to the rest of the world. Why turn our backs on that and oppose benefit corporation statutes in order to improve our chances of reforming the core corporation statute if it is not at all clear that doing so will increase the chances of reform? Further, even if the chances do increase, they remain distressingly close to zero.

### B. *The Normative Critique and the Branding Justification*

The normative corrosion critique could also apply to the branding justification of benefit corporation statutes.[286] *However, it seems highly unlikely that the normative corrosion critique is valid as applied to the branding justification*. Recall that the descriptive critique does not apply to the branding justification because that justification requires that the statute impose a stakeholder-mandatory conception of purpose and duty, and no existing corporation statutes can plausibly be described in that way.[287] However, a normative version of the critique could start by positing that the law for *all* corporations *should* impose a stakeholder-mandatory conception of purpose and duty, even if it does not currently do so. We have already seen that scholars such as Blair and Stout,[288] Mitchell,[289] and Millon[290] support that conception. Another example of advocacy for such a version of corporate law is the Sustainable Companies Project, which sees a stakeholder-mandatory conception as critical to efforts to promote environmental sustainability.[291] Scholars with this view do have sympathy for benefit corporation statutes, which, after all, embody the conception they advocate.

But one could argue from this normative starting point that benefit corporations so far have been adopted by only a small number of corporations, almost none of them public and most of them quite small. One could fear that as proposals are made to apply a stakeholder-mandatory conception more broadly, opponents could point to the availability of benefit corporations for those who want them as a reason for not imposing the conception on all companies. Indeed,

in relation to the total number of corporations in the United States. Scott A. Hodge, *The U.S. Has More Individually Owned Businesses than Corporations*, TAX FOUND. (Jan. 13, 2014) https://taxfoundation.org/us-has-more-individually-owned-businesses-corporations/ [https://perma.cc/9YC9-HUDT] (noting there were over 1.7 million traditional C corporations in United States in 2014).

[286] Recall that the descriptive critique is invalid as applied to the branding justification. *See supra* text accompanying notes 217-32; *supra* text accompanying notes 233-42.

[287] *See supra* text accompanying notes 217-23; *supra* text accompanying notes 233-42.

[288] Blair & Stout, *supra* note 40, at 327-28.

[289] Mitchell, *supra* note 145, at 642-43.

[290] Millon, *supra* note 145, at 225.

[291] Beate Sjåfjell, Andrew Johnston, Linn Anker-Sørenson & David Millon, *Shareholder Primacy: The Main Barrier to Sustainable Companies*, *in* COMPANY LAW AND SUSTAINABILITY: LEGAL BARRIERS AND OPPORTUNITIES 79, 120-21 (Beate Sjåfjell & Benjamin J. Richardson eds., 2015) (describing how shareholder primacy has led to prioritization of high share prices over sustainability or environmental goals).

I myself have made an argument along the lines that these proponents fear. Senator Elizabeth Warren has introduced the Accountable Capitalism Act, which imposes a stakeholder-mandatory fiduciary duty on all corporations with annual revenue of over $1 billion.[292] I have argued that the Act should not be mandatory, but rather that companies adopting the corporate charter proposed in the Act should be given incentives for doing so, such as a substantial reduction in their corporate income tax rate.[293]

Why would I argue that? Partly it is because I think that Senator Warren's proposal is politically quite unrealistic; a more voluntary approach would have a better chance of success.[294] This resembles the point made above about the normative critique as applied to Delaware law and the enabling justification.[295] The political feasibility point is even stronger here, where we are talking about imposing a stakeholder-mandatory conception that is a more drastic change from the status quo than imposing a stakeholder-optional conception with a constituency statute. But in addition, there are costs as well as benefits for companies to which the Accountable Capitalism Act applies, and a voluntary approach would avoid the costs of imposing rules on companies where those rules would not work well.[296] A stakeholder-mandatory approach applied to all corporations would be quite a departure in the United States. We should be wary before applying it to all corporations, or even just all corporations above a certain size. It would be better to proceed slowly with new statutory options that companies may choose or not, like the benefit corporation, and see how those experiments go.

## CONCLUSION: WHAT IS TO BE DONE?

We have now explored the corrosion critique in a variety of iterations. Our verdict is a mixed bag. Recapitulating briefly, the corrosion critique applies only to the enabling justification, which asserts that, under the prevailing understanding of corporate purpose and duty, it is problematic for the directors and officers of social enterprises to make decisions that prioritize their social mission at the expense of shareholders.[297] The corrosion critique asserts that corporate directors and officers are already free to consider the interests of other stakeholders. Worse, asserting the mistaken enabling justification may have the corrosive effect of making it incorrectly appear to business people and lawyers that ordinary corporations are legally bound to focus on shareholder wealth as

[292] Accountable Capitalism Act, S. 3215, 116th Cong. § 5 (2020).

[293] McDonnell, *supra* note 22, at 121.

[294] *Id.*

[295] *See supra* note 284 and accompanying text.

[296] McDonnell, *supra* note 22, at 121. In the case of the Accountable Capitalism Act, I think the more important element, for both better and worse, is not the fiduciary duty element, but rather the requirement that forty percent of the board be elected by a company's employees. S. 3215 § 6.

[297] *See supra* notes 208-14 and accompanying text.

their sole objective. Worst of all, this false understanding of the law could be self-fulfilling if it induces judges to apply the shareholder-only conception for corporations that do not choose to become benefit corporations.[298]

This critique does not apply to the branding justification for benefit corporations. As applied to the enabling justification, it is true in states with constituency statutes, as the stakeholder-optional conception prevails in those states.[299] But the corrosion critique is not true in Delaware, because Delaware has indeed adopted the shareholder-only conception.[300] The implication that ordinary Delaware corporations are legally obliged to ultimately serve the financial interests of shareholders alone is not mistaken at all. For true social enterprises acting as ordinary corporations in Delaware, this forces them to dissemble about their real purposes. That is both dishonest and could have real consequences for the ability of the enterprise to maintain and live up to its purposes.[301] This argument against the corrosion critique for Delaware corporations probably also applies to other states without constituency statutes, as they most likely follow the shareholder-only conception.[302] Finally, we have considered normative versions of the corrosion critique. These accept that the shareholder-only conception does currently prevail in Delaware, and that in all states the stakeholder-mandatory conception does not prevail. The normative critiques then argue that though benefit corporation statutes embody an attractive understanding of corporations, they make it less likely that such an understanding will be adopted for all corporations.[303] I argue that these normative versions of the critique unwisely oppose a step forward in the vain hope of a bigger step that is unlikely to come.[304]

This is a complicated situation. A variety of factors drive the complication.[305] There are two leading justifications for benefit corporations, and the corrosion critique applies (sometimes) to one but not the other. The critique applies in states with constituency statutes, but not others. A majority of states do have constituency statutes, but many do not, and those that do not include Delaware, by far the most important and influential state for corporate law. Moreover, the arguments as to what the actual currently prevailing conception of corporate duty is for each of the states are uncertain and debated, so the claims I have made for how the critique applies in each state must be taken with a grain of salt. And it is also unclear to what extent any of this actually filters through to business managers and lawyers and affects their norms and behavior.

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298 *See supra* notes 228-48 and accompanying text.
299 *See supra* notes 242-48 and accompanying text.
300 *See supra* notes 272-74 and accompanying text.
301 *See supra* notes 249-71 and accompanying text.
302 *See supra* notes 273-74 and accompanying text.
303 *See supra* notes 281-85 and accompanying text.
304 *See supra* Part V.
305 *See supra* text accompanying note 274.

So how should we react to the real but limited validity of the corrosion critique of benefit corporation statutes? Repealing benefit corporation statutes, or even just declining to further expand those statutes to states with constituency statutes, is too strong a response. The branding justification is not subject to the corrosion critique and points to a way the statutes may support social enterprises. Until we are confident that we have a better statutory response in place, we should not retreat from the best solution we have come up with so far.

A better response to the corrosion critique is to simply stop using the enabling justification for benefit corporation statutes. The corrosion critique only applies to that justification. So, were that justification to stop being used, the negative inference about ordinary corporations that lies at the heart of the critique would go away.

Strengthening this response, there are other reasons to reject the enabling justification. Social enterprises have plenty of legal entity choice options that allow them to prioritize interests other than shareholder wealth. They can become LLCs.[306] They can incorporate in states with constituency statutes. They can probably even incorporate in Delaware (without becoming benefit corporations) by adopting a certificate provision modifying the shareholder primacy norm.[307] So the enabling justification is weak for various reasons, and since the corrosion critique points to a serious harm it may create, we should stop invoking it.

Dropping the enabling justification for benefit corporation statutes has the added advantage of focusing attention on the branding justification. The branding justification helps counsel and companies focus on the essential factors they should consider in deciding whether a particular business should choose to be a benefit corporation. Are the founders or those in charge genuinely committed to both creating wealth for equity investors and pursuing one or more social missions? Does the company have potential investors who care about their mission, and who may be willing to sacrifice some (but not all) financial return in order to invest in a company dedicated to that mission? Are there potential employees and customers who would be attracted to such a company? Will the duties and reporting requirements of the benefit corporation statute help the company convince those potential investors, employees, and customers that the company is genuinely committed to its multiple missions? Will those duties and reporting requirements, as understood through emerging best practices, help give some guidance as to how best to reconcile the pursuit of multiple missions? These are the questions that company leaders should be asking as they decide whether or not to become a benefit corporation. The branding justification focuses on these questions; the enabling justification does not.

The branding justification's focus on these questions also helps us ask the right questions about benefit corporations when we are creating public policy.

[306] *See* Mohsen Manesh, *Introducing the Totally Unnecessary Benefit LLC*, 97 N.C. L. REV. 603, 603 (2019) (arguing flexibility LLCs provide render Benefit LLCs superfluous).

[307] *See id.*

The questions in the previous paragraph tell us how we would like a new statutory entity to help social enterprises. Do the duty and reporting requirements of benefit corporations actually help address these needs? Some, including myself, have suggested how the statutes might help.[308] Many are skeptical though, claiming that the duty and reporting requirements are overly weak commitment devices.[309] A company that becomes a benefit corporation but then actually does not truly commit to any social mission and instead behaves like any old for-profit corporation probably will pay little or no legal cost for doing so.[310] I myself believe that is probably true, and suggest that we should focus more on corporate governance provisions that give decision-making power to stakeholders other than shareholders if we want to provide ways for social enterprises to truly commit to pursuing the needs of persons other than shareholders.[311] Thus, it may well be that in the end benefit corporation statutes do not live up to the branding justification. Debate will continue as we get more experience with this new type of legal entity. Still, focusing on the branding justification, rather than the enabling justification, will help ensure that we are asking the right questions as we evaluate the performance of benefit corporations.

Of course, I cannot simply wave a magic wand and get all supporters of benefit corporation statutes to stop invoking the enabling justification. Would that it were so. By now, the justification is fairly deeply embedded. But it is not *that* deeply embedded. Most people, including most business people and even most transactional lawyers, know little or nothing about this new type of entity. If most of us who are writing and talking about benefit corporations were to move away from using the enabling justification, that could shift the public discourse and understanding, and in the process eliminate the false implications about ordinary corporations that the corrosion critique, sometimes rightly and sometimes not, accuses benefit corporation statutes of creating.

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[308] *See, e.g.*, McDonnell, *supra* note 217, at 21.

[309] Callison, *supra* note 94, at 109-10; J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 33 (2012); Antony Page, *New Corporate Forms and Green Business*, 37 WM. & MARY ENV'T L. & POL'Y REV. 347, 364 (2013).

[310] Callison, *supra* note 94, at 109-10 ("All that is necessary for a corporation to be a benefit corporation is for the corporation, at the formation or through shareholder election, to elect the status and include two words in its articles of incorporation."); Murray, *supra* note 309, at 33 ("[W]ithout at least some minimal level of board accountability, the benefit corporation statute could be an avenue to greenwashing and faux CSR rather than an antidote to them."); Page, *supra* note 309, at 364 (noting that accountability is necessary factor in having efficient benefit corporations).

[311] McDonnell, *supra* note 22, at 84. Note, such a focus on directly empowering stakeholders responds to Leo Strine's argument for the shareholder primacy norm, namely that it arises from the law's giving only shareholders the power to elect directors and sue. *See supra* note 62 and accompanying text.

Both social enterprise, and CSR in a more broad and less limiting sense, are important and welcome developments in contemporary business. Figuring out ways to encourage them are critical questions for business law today. Benefit corporation statutes are the leading statutory response to the needs of social enterprises so far. Those statutes raise crucial but hard and disputed questions about how to understand the legal purposes and duties of ordinary business corporations under current U.S. law. The corrosion critique suggests answers to those questions, and claims that though well-meaning, benefit corporation statutes may actually undermine the goal of encouraging more social enterprise and CSR. We have seen that the critique is right in some ways and wrong in other ways, though the answers in both directions are not clear-cut because corporate law is not clear-cut. Switching our focus to the right reason for having benefit corporations, the branding justification, should help avoid the harmful implications suggested by the corrosion critique while also focusing our attention on the right questions about what social enterprises need and how the law might help them.