6-2018

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Research Paper #353
July 2018

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86 UMKC Law Review 779 (2018)

LET'S NOT GIVE UP ON TRADITIONAL FOR-PROFIT CORPORATIONS FOR SUSTAINABLE SOCIAL ENTERPRISE

Joan MacLeod Heminway*

The past ten years have witnessed the birth of (among other legal business forms) the low-profit limited liability company (commonly known as the L3C), the social purpose corporation, and the benefit corporation.[1] The benefit corporation has become a legal form of entity in over 30 states.[2] The significant number of state legislative adoptions of new social enterprise forms of entity indicates that policy makers believe these alternative forms of entity serve a purpose (whether legal or extra-legal).

The rise of specialty forms of entity for social enterprise, however, calls into question, for many, the continuing role of the traditional for-profit corporation (for the sake of brevity and convenience, denominated "TFPC" in this essay) in social enterprises, including green economy ventures.[3] This essay argues that TFPCs continue to be a viable—and in many cases desirable or advisable—choice of entity for sustainable social enterprise firms. The arguments presented are founded in legal doctrine, theory, and policy and include both legal and practical elements.

I. INTRODUCTION: THE NATURE OF SUSTAINABLE SOCIAL ENTERPRISE

It is commonly understood that social enterprises are businesses that generate positive social or environmental welfare in some sense. Most definitions of social enterprise comport with that broad conception. Definitions of social enterprise abound in legal scholarship and elsewhere. Context often matters. Social enterprise defined too narrowly in context may fail to capture business conduct that is important to a particular inquiry. Yet, social enterprise defined too broadly in context includes business conduct that may not be valued

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* Rick Rose Distinguished Professor of Law, The University of Tennessee College of Law. New York University School of Law, J.D. 1985; Brown University, A.B. 1982. I gratefully acknowledge the roles of Tony Luppino, Irma Russell, and John Tyler, among others, in encouraging my work on this essay.

[1] *See*, *e.g.*, J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 543-55 (2016).

[2] *See State by State Status of Legislation*, BENEFIT CORPORATION, http://benefitcorp.net/policymakers/state-by-state-status (last visited Feb. 1, 2018) (tallying states that have adopted what B Lab classifies as benefit corporation legislation, which does not include all states with benefit corporation legislation, e.g., Tennessee.).

[3] *See*, *e.g.*, Kennan Khatib, Comment, *The Harms of the Benefit Corporation*, 65 AM. U. L. REV. 151, 151 (2015) (arguing, among other things, that, "due to the increasingly accepted notion that profitability and the pursuit of social and environmental impact are no longer mutually exclusive concepts," the TFPC is an appropriate choice for social enterprises in most contexts.).

in a particular analysis. One scholar-practitioner in the field summarizes the quandary nicely:

> The term "social enterprise" does not have a precise definition and as such, while often used, it is also commonly misunderstood. The term is evolving as it continues to be refined and contoured by business and legal practitioners and scholars. As the term suggests, it describes those business enterprises that intentionally impact societal good. Precise definitions matter because there is misuse and confusion about how business ventures are determined to be social enterprises. The definitional variations are diverse enough to inspire a semester-long course I teach aimed at better understanding the meaning of the term social enterprise.[4]

Accordingly, it is always best to define the concept of social enterprise in a situational manner—for the specific setting in which the term is being used.

The thesis of this essay was conceived in connection with The Bryan Cave/Edward A. Smith Symposium: The Green Economy, held in October 2017 at the University of Missouri-Kansas City School of Law.[5] As a result, the type of social enterprise it most centrally contemplates is a for-profit firm operating in the green economy. The green economy is itself a contended concept,[6] further complicating the process of defining social enterprise for use in this essay. In general, however, "the term 'green economy' describes economic development that is limited by 'green' considerations, which means, above all, environmental considerations."[7]

This essay also qualifies its target subject firm by reference to sustainability. Sustainability, broadly writ, focuses on the capacity of a firm to operate and grow while maintaining a limited environmental footprint. As such, sustainability is related closely to conceptions of the green economy. One author links the green economy to sustainability in a compelling manner:

> [T]he idea of green economy is closely related to the notion of green growth: the process of "making growth processes

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[4] Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 926-27 (2016) (footnotes omitted).

[5] *The Bryan Cave/Edward A. Smith Symposium: The Green Economy*, UMKC SCHOOL OF LAW, https://law.umkc.edu/greeneconomysymposium/ (last visited Feb. 1, 2018).

[6] *See*, *e.g.*, Hilary Kao, *Beyond Solyndra: Examining the Department of Energy's Loan Guarantee Program*, 37 WM. & MARY ENVTL. L. & POL'Y REV. 425, 433-34 (2013) (setting forth various definitions of "green economy").

[7] Woong Kyu Sung, *Core Issues in International Sustainable Development: Analysis of Shifting Priorities at U.N. Environmental Conferences*, 44 ENVTL. L. REP. NEWS & ANALYSIS 10,574, 10,592 (2014).

> resource-efficient, cleaner and more resilient without necessarily slowing them." The idea of green economy operates therefore as a possible bridge between the demands of global capitalism and the vision of sustainability.[8]

Thus, sustainability may be conceptualized as a potential specific operating objective of a social enterprise firm operating in the green economy. That objective may involve fundamental changes in the substructure (ideals and fundamental policies) of firms or mere pro-environmental changes in the manner in which they conduct business (the latter sometimes being specifically identified as "sustainability development.").[9]

To synthesize, then, a sustainable social enterprise firm serves public benefit purposes and does so in a manner that ensures the ongoing operations and development of the business in the social, economic, and environmental context in which it exists. "Sustainable development offers a new paradigm that shifts away from the perceived duty businesses have of achieving economic growth solely by maximizing shareholder profits. Instead, it moves toward a more inclusive and desirable business structure that can promote both the economic bottom line and environmental sustainability."[10] Sustainable social enterprises are thus focused on attaining social, environmental, and financial objectives through and in their business operations. In this way, they operate in a manner consistent with the concept of "shared value" championed by Professors Michael Porter and Mark Kramer.[11] They also incorporate both a triple bottom line and a

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[8] Oren Perez, *The Green Economy Paradox: A Critical Inquiry into Sustainability Indexes*, 17 MINN. J.L. SCI. & TECH. 153, 155-56 (2016) (footnote omitted).

[9] *See* Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L L. 417, 423 (2015).

> The sustainability movement explicitly asserts that economic development and employment opportunities are not antithetical to environmental concerns. Consequently, the movement extends sustainability to include social concerns over how environmentally sensitive development can be managed to enhance global equity and equality of material well-being. Sustainability also incorporates political and cultural concerns in economic development, but to a lesser extent than their primary focus. It supports development processes that preserve and respect longstanding diverse cultures, foster development on a human-scale, and are conducive to politically stable democracies.

Id. at 425.

[10] Gina Iacona, *Going Green to Make Green: Necessary Changes to Promote and Implement Corporate Social Responsibility While Increasing the Bottom Line*, 26 J. LAND USE & ENVTL. L. 113, 114 (2010).

[11] *See* Michael E. Porter & Mark R. Kramer, *Creating Shared Value*, HARV. BUS. REV., Jan. - Feb. 2011, at 62.

> The concept of shared value . . . recognizes that societal needs, not just conventional economic needs, define markets. It also recognizes that social

"gearing up" framework.[12] Not all social enterprises are sustainable businesses; not all sustainable businesses are social enterprises.

With the foregoing in mind, this essay focuses on social enterprise in a relatively broad context that incorporates green economy firms. More specifically, the essay hones in on for-profit social enterprise green economy corporations that operate in a sustainable manner. Thus, the target firm that inspires the thought and observations reflected in this essay prioritizes short-term and long-term environmental considerations as well as shareholder wealth generation in its business decision-making.[13]

II. LEGAL DOCTRINAL PRINCIPLES ALLOW FOR THE USE OF TFPCS FOR SUSTAINABLE SOCIAL ENTERPRISE

In a recent essay published in the *Washington & Lee Law Review*, I established that there is little in the way of corporate law—from broad statutory authority regarding, e.g., corporate purpose to decisional law interpreting and filling gaps in the statutory framework—that supports a pure shareholder wealth maximization principle in corporate management.[14] I further noted, however, that public impressions often are to the contrary.[15] These impressions are rooted in the dominant place that Delaware law, and in particular the Delaware Court of Chancery's opinion in *eBay Domestic Holdings, Inc. v. Newmark*,[16] play in discussions about management fiduciary duties as a matter of corporate law. While *eBay* is a single trial court decision, it tends to carry great weight in debates over both corporate board decision-making and the objective of the corporation as a legal form of entity. Accordingly, *eBay* often plays a role in

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> harms or weaknesses frequently create *internal* costs for firms—such as wasted energy or raw materials, costly accidents, and the need for remedial training to compensate for inadequacies in education. And addressing societal harms and constraints does not necessarily raise costs for firms, because they can innovate through using new technologies, operating methods, and management approaches—and as a result, increase their productivity and expand their markets.

Id. at 65.

[12] *See* Judd F. Sneirson, *Green Is Good: Sustainability, Profitability, and A New Paradigm for Corporate Governance*, 94 IOWA L. REV. 987, 991-95 (2009) (identifying the "triple bottom line" and "gearing up" as "[t]wo complementary ways of operationalizing sustainability in business").

[13] Alicia E. Plerhoples, *Social Enterprise As Commitment: A Roadmap*, 48 WASH. U. J.L. & POL'Y 89, 98 (2015) ("[T]he single value common to all social enterprise is commitment to ameliorating a social or environmental problem, whatever that problem may be, rather than pursuing solely shareholder value.").

[14] Joan Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 WASH. & LEE L. REV. 939, 945-56 (2017) (concluding that "[o]verall, . . . it would be over-claiming to assert that U.S. state decisional law—any more than U.S. state statutory law—articulates a clear, legally enforceable shareholder wealth maximization norm as a matter of substantive corporate doctrine.").

[15] *Id.* at 955-56.

[16] eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 46 (Del. Ch. 2010).

choice of entity decisions by affecting the advice that legal counsel offer in entity selection and formation.[17]

The language in the *eBay* opinion is strongly worded and directly implicates the connection between shareholder wealth considerations and entity choice. Specifically, in his *eBay* opinion, Chancellor Chandler avows that:

> Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that. Thus, I cannot accept as valid for the purposes of implementing the Rights Plan a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders—no matter whether those stockholders are individuals of modest means or a corporate titan of online commerce.[18]

This passage from the opinion may be read to relegate sustainable social enterprises—and, more generally, firms that select away from maximizing shareholder economic value in a particular decision—to organizing either as unincorporated (rather than corporate) or nonprofit (rather than for-profit) entities. The latter reading may be given credit notwithstanding the fact that a nonprofit firm may be a corporation and therefore also may have "Inc." at the end of its corporate name.

Delaware's enactment of legislation authorizing the public benefit corporation responds directly to the adoption of social enterprise forms of entity—most particularly the benefit corporation—by legislatures in other states.[19] However, the overall rise of the benefit corporation form (perhaps even including Delaware's adoption of public benefit corporations) also responds to

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[17] *See generally* Heminway, *supra* note 14, at 956 ("[A] shareholder wealth maximization norm also impacts choice of entity, corporate formation, and legal counsel on potential amendments to corporate organic documents—most especially corporate charters.").

[18] *eBay*, 16 A.3d at 34.

[19] *See*, *e.g.*, Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting in?*, 14 U.C. DAVIS BUS. L.J. 247, 253 (2014) ("Statements from the Delaware Governor's office illustrate that the Delaware Bar and government saw Delaware's role as the leader in U.S. corporate law as a primary reason for adopting the public benefit corporation form. . . . Delaware was not going to allow other states to preempt its influence over this version of corporate law."); Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 243 (2014) (" . . . Delaware is the domicile for a majority of American public companies and the preferred domicile for companies seeking to go public. The best pathway forward for benefit corporations that wish to go public may therefore be through use of the Delaware statute, because of Delaware's acceptance among institutional investors, corporate managers, and the intermediaries who raise capital." (footnote omitted)).

the perceived strength of shareholder primacy and the shareholder wealth maximization norm in Delaware corporate law jurisprudence and may be interpreted as a rejoinder to the *eBay* opinion.[20] This doctrinal conversation between the Delaware judiciary and the Delaware legislature has, and seemingly is designed to have, an express, marked impact on entity choice both as to form and jurisdiction.

Yet, a deeper, more comprehensive reading of the *eBay* opinion allows for the construction of a more nuanced view of entity selection in the context of sustainable social enterprise. Specifically, a sustainable social enterprise firm, as defined for purposes of this essay, differs from craigslist, Inc., the subject firm in the *eBay* case ("craigslist"). Even if organized as a TFPC in Delaware, a sustainable social enterprise firm does not maintain "a corporate policy that specifically, clearly, and admittedly seeks not to maximize . . . economic value . .

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[20] *See*, *e.g.*, Dana Brakman Reiser & Steven A. Dean, *Hunting Stag with Fly Paper: A Hybrid Financial Instrument for Social Enterprise*, 54 B.C. L. REV. 1495, 1510 (2013); Benefit corporation statutes . . . explicitly reject shareholder wealth maximization."); Jonathan Brown, *When Social Enterprises Fail*, 62 VILL. L. REV. 27, 51 (2017) ("[T]he passage of benefit corporation legislation transformed the shareholder wealth maximization norm from a mandatory rule to a default rule that parties may contract out of by electing a social enterprise legal form."); William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations Are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817, 838 (2012) ("It is against the paradigm of shareholder primacy that benefit corporation statutes have been drafted."); Bart Houlahan et al., *Berle VIII: Benefit Corporations and the Firm Commitment Universe*, 40 SEATTLE U. L. REV. 299, 300 (2017) ("[A]ll jurisdictions adopting benefit corporation legislation, whatever model they use, allow corporations to reject shareholder primacy, and to place the interests of stakeholders (including employees, the community, and the environment) on par with the interests of shareholders."); Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 448 (2013) ("One legislative response to *eBay* in numerous states already is the adoption of legislation authorizing the formation of benefit corporations."); Brett H. McDonnell, *Committing to Doing Good and Doing Well: Fiduciary Duty in Benefit Corporations*, 20 FORDHAM J. CORP. & FIN. L. 19, 31 (2014) ("[A] core feature of benefit corporations is that their corporate purpose extends beyond maximizing shareholder wealth created by the corporation."); J. Haskell Murray, *supra* note 1, at 548 (citing to the eBay decision and quotes from it as catalysts for benefit corporation legislation); 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, 785 (2015) ("[W]hen the General Assembly wished to provide an option that would allow for the consideration of multiple interests, it adopted . . . the benefit corporation, which may be formed for the purpose of putting non-stockholder ends—such as the environment or its workers—on a footing equal to stockholders as ends."); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 ALA. L. REV. 767, 782 (2015) ("[B]enefit corporation statutes do not preclude making substantial profits; they merely provide that firms are not bound to *maximize* profits."); Michael Vargas, *The Next Stage of Social Entrepreneurship: Benefit Corporations and the Companies Using This Innovative Corporate Form*, BUS. L. TODAY, July 2016, at 1, 2 ("In a traditional corporation, the board is assumed to act on behalf of the shareholders and, either by law or business norms, manages the company in pursuit of profit and shareholder value. A chief goal of the benefit corporation movement was to step away from this narrow corporate purpose . . . .").

. for the benefit of its stockholders."[21] Rather, a sustainable social enterprise business organized as a TFPC, by definition, prioritizes both its sustainable social enterprise mission and shareholder wealth generation in its operations. This, alone, may take sustainable social enterprise firms out of the realm of Chancellor Chandler's observations in the *eBay* decision.

Moreover, facts underlying the *eBay* opinion's discussion of shareholder wealth maximization—addressing the decision of craigslist's board of directors to adopt a shareholder rights plan (also known as a "poison pill")—include the following:

- the board of directors of craigslist was dominated by two of the three shareholders of the corporation;
- the dominating shareholder-directors failed to effectively prove the nature and value of the distinctive firm culture they asserted existed at craigslist;
- the dominating shareholder-directors eschewed any concern for shareholder financial wealth;
- the dominating shareholder-directors failed to engage in an informed assessment of alternatives to the adoption of a shareholder rights plan;
- the dominating shareholder-directors had a personal animus toward their fellow shareholder; and
- the dominating shareholder-directors used board decision-making to punish their fellow shareholder rather than pursue a corporate purpose.[22]

None of these facts found by the court in *eBay* are attributes inherent in the structuring or decision-making of a sustainable social enterprise firm based on the definition included supra Part I.

The facts from *eBay* listed in the preceding paragraph describe a firm and decision-making process that collectively give no credit whatsoever to the generation of shareholder wealth. Because a sustainable social enterprise organized as a TFPC would be cognizant of, consider, and prioritize in its decision-making both its sustainable social enterprise mission and shareholder wealth creation, the *eBay* decision does not, as a matter of black-letter law or practical application, exile a sustainable social enterprise to organization as a non-corporate or non-profit entity, even when the potential corporate law at issue is the General Corporation Law of the State of Delaware (the law under which craigslist was organized and, therefore, the *eBay* case was decided). One must wonder whether the result in the *eBay* decision would have been different if the

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[21] *eBay*, 16 A.3d at 34.
[22] *Id.* at 33-34.

dominant shareholder-directors of craigslist had indicated that they weighed shareholder wealth considerations in the balance and determined that adoption of the shareholder rights plan was nevertheless in the best interest of craigslist and its shareholders over the long term.[23] In fact, one may read the *eBay* opinion to counsel that credible evidence of serious consideration of shareholder wealth effects by a Delaware corporate board of directors is sufficient to avoid the breach of fiduciary duty found by the court in *eBay* (unless, of course, there are other grounds for the assertion of a breach). However, this reading has not been validated expressly in any formal way.[24]

Professor Stefan Padfield eloquently and succinctly substantiates the view that shareholder wealth maximization can co-exist with sustainable social enterprise firms organized as TPFCs. Specifically, he observes that

> it is incorrect to say that "regular corporations ... cannot take into consideration social factors" because social factors impact the shareholder wealth analysis, and not always negatively. In fact, in determining the best path to maximizing shareholder value, corporations arguably must consider social factors in order to satisfy their duty of care to become informed of all material information reasonably available. The only thing a for-profit corporation cannot do in a shareholder wealth maximization

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[23] Delaware Supreme Court Chief Justice Leo Strine addressed the possibility that long-term shareholder wealth maximization may be sufficient to fulfill a manager's fiduciary duty of loyalty in a 2012 law review article:

> [T]he corporate law requires directors, as a matter of their duty of loyalty, to pursue a good faith strategy to maximize profits for the stockholders. The directors, of course, retain substantial discretion, outside the context of a change of control, to decide how best to achieve that goal and the appropriate time frame for delivering those returns.

Leo E. Strine, Jr., *Our Continuing Struggle with the Idea That For-Profit Corporations Seek Profit,* 47 WAKE FOREST L. REV. 135, 155 (2012).

[24] Former Chancellor Chandler, author of the *eBay* opinion, posited a reading somewhat akin to this at an academic symposium in 2016. Anne Tucker reported on his remarks in a contemporaneous blog post:

> Former Chancellor Chandler discussed the Delaware case law interpretation of shareholder value and its place in analyzing corporate transactions. While these aren't words that he used, I have been thinking a lot about this . . . as a question of complimenting or competing . . . . [A] Delaware court will invalidate a board of directors' other serving actions only if they are in conflict with shareholder value, but never when it is complimentary. And there is an expanding appreciation of when "other interests" are seen as complimentary to, and not in competition with, shareholder value maximization.

Anne Tucker, *"Inc." Means Something*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (June 29, 2016), http://lawprofessors.typepad.com/business_law/2016/06/inc-means-something.html#comments.

> regime is knowingly sacrifice shareholder value, whether calculated in the short- or long-term, in pursuit of some social end.[25]

Although his observations are not specifically targeted to sustainable social enterprise firms, they are applicable to and in that context.

It also is significant to note that the *eBay* decision is a trial court decision that construes Delaware corporate fiduciary duties in the context of a single decision made by the dominant shareholder-directors of a private Delaware for-profit corporation with three shareholders.[26] The Delaware Supreme Court has not, as a juridical body, written an opinion that confirms or rejects the analysis of the court in *eBay*, whether for a privately held or publicly held corporation, whether for a corporation with few or many shareholders, or otherwise. Moreover, facts analogous to those in *eBay*, when analyzed in the context of a similar claim under the corporate law of a state other than Delaware, may yield a different legal conclusion.[27] In addition, an argument can be made for looking at individual board decisions not in isolation but, instead, as part of an ongoing record of board decision-making. A corporate board manages through its cumulative decisions, each one having value and context based on the others. Overall, the relatively narrow factual and legal context of *eBay* should be factored into a use of the case in deciding on the appropriate choice of entity for a sustainable social enterprise.

Legal doctrine does not, then, preclude the organization of sustainable corporate enterprises as TFPCs. But it is fair to say that the choice of a TFPC for sustainable social enterprise is not without doctrinal risk, at least in certain circumstances, especially in Delaware.[28] The outcome of any controversy regarding the application of the shareholder wealth maximization norm to management decision-making for a sustainable social enterprise firm organized as a for-profit corporation is likely to be dependent on many factors, including the statutory corporate law of the state in which the corporation is organized, the existence of judicial precedent, management's decision-making process, and the rationale for the board's (or any officer's) decision.[29]

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[25] Stefan J. Padfield, *The Role of Corporate Personality Theory in Opting Out of Shareholder Wealth Maximization*, 19 TRANSACTIONS: TENN. J. BUS. L. 415, 443 (2017).

[26] The *eBay* court classified craigslist as a closely held corporation. For some, however, the existence of a corporate shareholder as one of the three shareholders of the corporation may take craigslist out of the ambit of closely held firms.

[27] *See*, *e.g.*, Heminway, *supra* note 14, at 954 (noting and quoting from a Tennessee case that references non-shareholder constituencies).

[28] *Id.* at 969 ("Faced with a challenge to firm-level board decision making that incorporates significant attention to non-shareholder constituencies or non-wealth maximizing corporate objectives benefiting or serving shareholders, directors run the risk of liability for violating a judicial interpretation of positive law (statutory or decisional) or salient public policy.").

[29] *Id.* at 968-69.

III. THEORIES OF THE CORPORATION ALLOW FOR THE USE OF TFPCS FOR SUSTAINABLE SOCIAL ENTERPRISE

A pair of authors who wrote about the separation of ownership and control in the corporate form 85 years ago catalyzed modern theories of the corporation.[30] Agency-oriented, contractarian, stakeholder, and communitarian theories—variously labeled—all followed.[31] Predecessor theories of the corporation included (again, variously denominated and described): the artificial person (or entity) theory; the charter theory; the contractual theory; the trust theory; the real (or natural) entity theory; related early embodiments of a shareholder primacy theory; and the aggregate theory.[32] Although none of the modern or early theories of the corporation fully explain the nature of the incorporated firm in all contexts or foretell its fate in all circumstances, all hold some descriptive power and predictive force. Significantly, certain foundational theoretical conceptions that emanate from public policy as expressed through legal doctrine (especially grant or concession theories) describe the corporation as an organization providing public benefit.[33]

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[30] *See* ADOLF A. BERLE & GARDNER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (1932); *see generally* Joan Heminway, *Theoretical and Methodological Perspectives*, *in* THE SAGE HANDBOOK OF CORPORATE GOVERNANCE 96, 97-99 (Thomas Clarke & Douglas Branson eds., 2012) (identifying the basic attributes of Berle & Means's formative work).

[31] *See* Heminway, *supra* note 30, at 99-102; Margaret M. Blair, *Corporate Personhood and the Corporate Persona*, 2013 U. ILL. L. REV. 785, 814-20; Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719, 1740-48 (2016) [hereinafter Chaffee, *Collaboration Theory*]; Eric C. Chaffee, *The Origins of Corporate Social Responsibility*, 85 U. CIN. L. REV. 353, 361-68 (2017) [hereinafter Chaffee, *Origins*]; Eric Engle & Tetiana Danyliuk, *Emulating the German Two-Tier Board and Worker Participation in U.S. Law: A Stakeholder Theory of the Firm*, 45 GOLDEN GATE U. L. REV. 69, 92-100 (2015).

[32] *See* Blair, *supra* note 31, at 799-808; Engle & Danyliuk, *supra* note 31, at 89-92.

[33] *See*, *e.g.*, Granada Inv., Inc. v. DWG Corp., 823 F. Supp. 448, 458-59 (N.D. Ohio 1993) ("[I]n his discussion of the early history of business corporations, Professor Williston refers to the public purpose of corporations; he referred to an early commentator who stated that "[t]he general intent and end of all civil incorporations is for better government."); Bradley T. Borden, *Residual-Risk Model for Classifying Business Arrangements*, 37 FLA. ST. U. L. REV. 245, 256 (2010) ("[T]he "grant" or "concession" theory of corporations . . . considered state law incorporation a grant or privilege for the pursuit of a public purpose."); Iris H-Y Chiu, *Institutional Shareholders As Stewards: Toward A New Conception of Corporate Governance*, 6 BROOK. J. CORP. FIN. & COM. L. 387, 408 (2012) ("The concession theory is based on the organized collectivity of the corporation as an extension of certain social purposes . . . ."); Gwendolyn J. Gordon, *Environmental Personhood*, 43 COLUM. J. ENVTL. L. 49, 64 (2018) ("This concession theory of the corporation underlay a legal regime that operated to make corporations purpose-limited and generally public works oriented enterprises."); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201 ("According to one view, corporate activity has broad social and political ramifications that justify a body of corporate law that is deliberately responsive to public interest concerns."); David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 256 (2009) ("Large, publicly traded corporations take their present powerful form because of

A significant number of current scholars posit a more private, internally focused conception of the corporation—a shareholder wealth maximization theory of the firm that builds from the shareholder-director conflicts identified in agency theory and related shareholder primacy notions and refutes (or at least subverts) the long-theorized public nature of the corporation.[34] Under a shareholder wealth maximization theory, the board manages the corporation primarily for the financial wellbeing of its shareholders. For many, this continues to be a dominant depiction of the corporate form—one that explains corporate governance in application, guides director conduct, and predicts the outcome of corporate governance disputes. One commentator observed that "the *eBay* case can be interpreted as the codification of the shareholder wealth maximization theory."[35]

Yet the shareholder wealth maximization theory, like earlier theories, fails to adequately explain certain types of corporations and aspects of corporate existence.[36] For example, the shareholder wealth maximization theory does not satisfactorily describe, guide, or predict individual internal governance decisions of a for-profit social enterprise corporation, just as the Delaware Court of Chancery opinion in the *eBay* case does not fully explain the applicability of the shareholder wealth maximization norm as a matter of legal doctrine. Explanatory and predictive shortcomings of extant theory beg for the generation of new theoretical depictions that fill the gaps or provide a more comprehensive conception.

As a result, stakeholder and other communitarian (or collective) theories of the corporation have emerged. These theories bridge the more starkly public and private theoretical representations of the corporation by expressly acknowledging the roles and interrelationships of various internal and external corporate constituents.

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concessions bestowed on them by the state. . . . The state can legitimately grant these concessions only if it does so to advance a public purpose."); *see also* Blair, *supra* note 31, at 800 ("Through the first half of the nineteenth century in the United States, corporate status was granted increasingly for business purposes, but was primarily reserved for business activities that were understood as having some sort of public benefit . . . ."); Millon, *supra*, at 207 ("At least through the mid-19th century, incorporation primarily for private business objectives was relatively unusual. Instead, the typical corporation was chartered to pursue some sort of public function.").

[34] *See*, *e.g.*, Engle & Danyliuk, *supra* note 31, at 92 ("When Milton Friedman first, and most famously, argued that the only duty of the corporation is to maximize shareholder wealth, he based his arguments on a theory of the corporation as contract and agency . . . .").

[35] Michele Benedetto Neitz, *Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors*, 68 SMU L. REV. 243, 248 (2015).

[36] *See*, *e.g.*, Engle & Danyliuk, *supra* note 31, at 93-98 (starting by noting that "the theory that the corporation is but a nexus of contracts and that, consequently, the directors are mere agents, whose only duty is the maximization of shareholders' wealth is *legally inaccurate* and *economically simplistic*" and, after arguing the point, concluding that "the shareholder wealth maximization theory, is incomplete, even incoherent.").

> [M]ost contemporary corporate scholars tend to assume that directors' proper role is to maximize the economic interests of the corporation's shareholders. Recent years, however, have seen the rise of a second, opposing camp of theorists known as "communitarians" or "progressives." These scholars object to shareholder primacy on normative grounds, and argue that directors ought to be required to run corporations with due regard for the interests of other potential stakeholders such as employees, creditors, customers, suppliers, or the local community.[37]

These theories are generally seen to be more descriptive of and friendly to TFPCs that pursue corporate social responsibility or sustainable social enterprise because they conceptualize a private benefit for corporate constituents but, unlike the shareholder wealth maximization and other shareholder primacy theories, do not focus on members of any particular constituency as primary beneficiaries of the corporation in all decision-making contexts.

A popular example of a collective theoretical conception of the corporation is the team production theory.[38] Applied most frequently to public corporations, the team production theory describes a firm in which "productive activity requires the combined investment and coordinated effort of two or more individuals or groups."[39] That coordination occurs through the board of directors.[40]

> In other words, boards exist not to protect shareholders per se, but to protect the enterprise-specific investments of all the members of the corporate "team," including shareholders, managers, rank and file employees, and possibly other groups, such as creditors. Because this view challenges the shareholder primacy norm that has come to dominate the theoretical literature, our analysis appears to parallel many of the arguments raised in recent years by the "communitarian" or "progressive" school of corporate scholars who believe that corporate law ought to require directors to serve not only the shareholders'

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[37] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 287 (1999).
[38] *Id.* at 249.
[39] *Id.*
[40] *Id.* at 251; *see also* Padfield, *supra* note 25, at 416 ("[T]eam production theory aligns with director primacy in locating decision-making power in the board, but conceives of the goal as mediating the often conflicting interests of the various corporate stakeholders in order to allow the corporation to optimally fulfill its various obligations in an arguably sustainable way.").

> interests, but also those of employees, consumers, creditors, and other corporate "stakeholders."[41]

Because the management of a sustainable social enterprise firm prioritizes both shareholder wealth and the firm's social enterprise mission, team production theory offers a description of the corporation consistent with sustainable social enterprise.

A newer communitarian theory of the firm that bears mentioning here is collaboration theory.[42] Collaboration theory, posited by Professor Eric Chaffee, "views the corporation as a collaborative effort among a state government and those individuals organizing, operating, and owning the business entity. The collaborative effort may even extend beyond those entities to other entities, such as customers, debtholders, and society in general."[43]

While the collaboration theory has not been applied specifically to sustainable social enterprises, it has been applied to for-profit corporations operating in a socially responsible manner.[44] In this context, collaboration theory credits the interests of stakeholders other than shareholders, but the corporation must seek profit to the exclusion of social responsibility in certain circumstances because of the nature of the corporation's collaboration with the state.[45] The collaboration between the state and a sustainable social enterprise includes as essential terms both an obligation to seek profit and a commitment to its social enterprise purpose. Governance decision-making in a TFPC organized as a sustainable social enterprise may therefore be more consistent with the collaboration theory than decision-making in a TFPC that adheres to corporate social responsibility principles.

In a recently published essay, Professor Stefan Padfield reinforces the tenets of collaboration theory and relates them expressly and directly to both private ordering and director decision making in the TFPC:

> [P]roponents of socially responsible corporate behavior may leverage Professor Chaffee's collaboration theory to emphasize, perhaps by way of corporate charter or bylaw, that socially responsible corporate behavior should only be found to violate the shareholder wealth maximization norm when it clearly undermines shareholder wealth. In all other situations, including where the corporate socially responsible behavior is shareholder

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[41] Blair & Stout, *A Team Production Theory*, *supra* note 37 at 253 (footnote omitted).
[42] *See* Chaffee, *Collaboration Theory*, *supra* note 31; Chaffee, *Origins*, *supra* note 31.
[43] Chaffee, *Origins*, *supra* note 31, at 371.
[44] *Id.* at 374-78.
[45] *Id.* at 377. ("[B]ecause of the collaboration forged with the government to promote economic growth, a for-profit corporation has an obligation to seek profit, even if it involves acting in a socially irresponsible manner.").

> wealth enhancing, neutral, or has an uncertain impact on shareholder wealth, a board may pursue the socially responsible behavior without violating its obligation to maximize shareholder value, and may even pre-commit to pursuing socially responsible behavior in all these cases.[46]

Professor Padfield's reflections offer a specific path forward for sustainable social enterprises that desire to organize as TFPCs, especially in jurisdictions in which extant corporate law may be unclear on the application of the shareholder wealth maximization norm in a specific situation, allowing for the introduction of stakeholder theory to fill gaps. Accordingly, in an action against corporate managers for breach of fiduciary duty in a jurisdiction and context that allows theory to be offered to explain and support the managers' actions, collaboration theory holds promise.[47]

Although the analysis provided here only touches momentarily on a few significant and relevant theories of the corporation, these theories do not argue against the organization of a sustainable social enterprise as a TFPC. Although shareholder wealth maximization theory appears on its face to be inconsistent with the reality and prospects of a sustainable social enterprise firm, it does not

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[46] Padfield, *supra* note 25, at 452 (footnote omitted).

[47] Professor Padfield argues more broadly in his essay that corporate personality theory should play a stronger role in describing, guiding, and predicting internal corporate affairs than it has played to date. He describes corporate personality theory as follows:

> Assuming corporate personhood, corporate personality theory addresses what type of person the corporation should be treated as. The traditional theories of corporate personality are: (1) artificial entity or concession theory, (2) aggregate or contractarian theory, and (3) real entity theory. Professor Eric Chaffee has recently argued for a fourth theory: collaboration theory.

Padfield, *supra* note 25, at 444 (footnotes omitted). He notes, among other things, that

> [c]orporate personality theory tends to come up more frequently in discussions of the government's ability to regulate corporations, as opposed to discussions of the allocation of power among the primary private corporate stakeholders . . . . However, the lines between external regulation of corporations and their internal affairs can quickly blur, and this Essay will argue, among other things, that corporate personality theory has a role to play in the corporate governance debates surrounding shareholder wealth maximization.

Id. at 418 (footnote omitted). Ultimately, he concludes, in an argument consistent with the assertions made in this essay about collaboration theory more specifically,

> that corporate personality theory can be useful both in debates about the viability of opting out of shareholder wealth maximization, as well as in providing a framework for maximizing the ability of corporations to engage in socially responsible behavior within the shareholder wealth maximization framework.

Id. at 453.

repudiate sustainable social enterprise. Moreover, shareholder wealth maximization theory may not be as powerful a descriptor of the corporation as communitarian theories of the corporation—like the team production and collaboration theories—that take into account both the public and private attributes of the corporate form. These communitarian conceptions provide more comprehensive descriptions of a broader variety of corporations and their governance features rooted in state corporate law. Accordingly, various popular, compelling theories of the corporation are consistent with sustainable social enterprise.

IV. POLICIES UNDERLYING CORPORATE LAW ALLOW FOR THE USE OF TFPCS FOR SUSTAINABLE SOCIAL ENTERPRISE

Corporate law, like other business entity laws, exists at its core to provide business venturers with an off-the-rack set of immutable and default rules to govern their business and, to some extent, that business's relationship with third parties.[48] This time-tested legal framework comprising structural, governance, third-party liability, and financial norms offers constituents an alternative to establishing their business venture through individually negotiated organic documents, instruments, and contracts.[49] In this way, corporate statutes and related decisional law, like the parallel elements of doctrine applicable for the formation of other business associations, offer efficacious, legally enforceable rubrics for business formation, conduct, and maintenance. This general public policy objective underlies business entity law in general and corporate law specifically, as a subset of the law of business associations.

Yet, despite this common central objective, the law governing each form of statutory business entity is, within the greater law of business associations, distinct in individual aspects. Accordingly, each body of business entity law has its own separate subsidiary policy underpinnings. Corporate law is no exception. Moreover, each state may have its own distinct public policy goals in adopting and amending corporate law generally and in its specific aspects.[50] Policy

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[48] *See*, *e.g.*, Harry G. Hutchison, *Choice, Progressive Values, and Corporate Law: A Reply to Greenfield*, 35 DEL. J. CORP. L. 437, 449 (2010); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1328 (2013); Brett H. McDonnell, *Shareholder Bylaws, Shareholder Nominations, and Poison Pills*, 3 BERKELEY BUS. L.J. 205, 237 (2005).

[49] *See*, *e.g.*, R. Kymn Harp, *Give Them Their Due Due Diligence in Commercial Real Estate Transactions*, PROB. & PROP., July/August 2011, at 40, 41 (referencing "[e]ntity organizational documents, such as the following: for a corporation, the corporate charter and bylaws and, in some cases, shareholder agreement and/or voting trust agreement.").

[50] *See* Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 399-400 (2003) (offering that "[d]ifferent types of firms have different needs, and states might provide a corporate law system especially fitting for the type of firms most represented in the state."); Michael Vargas, *supra* note 20, at 2 (noting that "[t]he differences [instate benefit corporation statutes] may reflect the corporate law culture of

determinations may depend on unique attributes of state government, related state functions and considerations (e.g., revenue generation through taxation and otherwise and specific reputational concerns), and different understandings of legal or economic theory and its implications in context. For instance, Delaware (as a national leader in corporate chartering) may have different public policy objectives in constituting and maintaining its corporate law than Tennessee may have.[51]

Most important, perhaps, are the state public policy judgments underlying immutable corporate law rules—rules that corporate promoters and constituents cannot agree around by specified or general private prescription. These rules typically reflect important, core public policy concerns. They are non-negotiable elements of the state's corporate doctrine.

In a recent article published in the *Delaware Journal of Corporate Law*, Professor David Yosifon set forth his view on the fundamental public policy objectives of mandatory provisions in corporate law:

> There are three basic justifications for having mandatory corporate law rules. First, mandatory rules might protect vulnerable parties to the corporate contract (especially shareholders) from exploitation that could occur under a private-ordering regime. Second, mandatory rules might protect against the externalization of harms to third-parties (especially workers, consumers, and communities) brought on by other people's private agreements. Third, mandatory rules may induce efficient, socially desirable "network effects" in organizational design that would not be realized in a system that allowed private-

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the state, with Delaware taking the most flexible and management-friendly approach, or they may reflect an evolution in the law.").

[51] In fact, recent evidence of public policy differences between Delaware and Tennessee in the entity law area were revealed in the course of Tennessee's recent revision of its limited partnership law. *See* Joan Heminway, *Limited Partnership Law: Should Tennessee Follow Delaware's Lead On Fiduciary Duty Private Ordering?*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Sept. 5, 2016), http://lawprofessors.typepad.com/business_law/2016/09/limited-partnership-law-should-tennessee-follow-delawares-lead-on-fiduciary-duty-private-ordering.html. Delaware and Tennessee laws and policies are used here merely as representative examples. A similar observation could be made about the difference between and among the business entity laws of other jurisdictions. *See*, *e.g.*, Robert C. Holmes, *Benefits of Incorporating in Delaware Versus New Jersey: Busting the Myth and Closing the Gap*, 11 RUTGERS BUS. L. REV. 1, 33 (2014) ("[T]he New Jersey brand for corporate law will be based on public policies that go beyond merely increasing the revenue base of the state or supporting the local bar."). The public policy underlying Delaware's corporate law may be particularly distinctive, of course, because of the sheer volume and strong influence of Delaware corporations. Over 40 years ago, a respected commentator described Delaware's corporate law as a function of "public policy based upon the production of revenue, pride in being 'number one,' and the creation of a 'favorable climate' for new incorporations." William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 672 (1974). The public policy underlying Delaware's corporate law could be described in much the same way today.

ordering.[52]

These objectives are largely noncontroversial. The protection of potentially vulnerable corporate constituents and the desirability or benefits of maintaining common, standardized rules as among corporate law adopters (the concept underlying network effects, also known as network benefits)[53] all seem creditable. These policy justifications form a basis for assessing the value of corporate law generally, as well the relative benefits for sustainable social enterprises of the law governing TFPCs and the law governing benefit corporations (as the leading form of social enterprise entity).

A corporation does not exist until a chartering document is filed with the secretary of state of the state of organization.[54] This is an immutable rule; incorporation is a process defined and governed by statutory law, and corporate constituents cannot vary it.[55] Managers, owners, suppliers, and creditors of a corporation, among others, count on that public filing to help identify and protect their rights and benefits. Uncertainty costs are minimized; predictability is enhanced. These are clear benefits of the corporation that incentivize people to use it and interact with it.

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[52] David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 492-93 (2017) (footnotes omitted).

[53] *See*, *e.g.*, Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting (or "The Economics of Boilerplate")*, 83 VA. L. REV. 713, 725 (1997) (defining "network benefits" in contracting as the "set of advantages is available to a firm that adopts a contract term that is or will become contemporaneously used by many firms for a significant period of time."); Brett H. McDonnell, *Getting Stuck Between Bottom and Top: State Competition for Corporate Charters in the Presence of Network Effects*, 31 HOFSTRA L. REV. 681, 700 (2003) ("Network and learning effects refer to mechanisms whereby a leading company, technology, standard, or, in our case, state, becomes more attractive to new adopters of the item in question simply by virtue of being the leader. New adopters therefore tend to adopt the leader, which increases its lead, making it yet more attractive to newer adopters, and so on in a self-reinforcing cycle." (footnotes omitted)).

[54] *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 101(a) ("Any person . . . may incorporate or organize a corporation . . . by filing with the Division of Corporations in the Department of State a certificate of incorporation . . . ."); TENN. CODE ANN. § 48-12-103(a) ("Unless a delayed effective date is specified, the corporate existence begins when the charter is filed by the secretary of state.").

[55] *See*, *e.g.*, DEL. CODE ANN. tit. 8, § 106 ("Upon the filing with the Secretary of State of the certificate of incorporation, . . . the incorporator or incorporators who signed the certificate, and such incorporator's or incorporators' successors and assigns, shall, from the date of such filing, be and constitute a body corporate, by the name set forth in the certificate . . . ."); TENN. CODE ANN. § 48-12-103(b) ("The secretary of state's filing of the charter is conclusive proof that the incorporators satisfied all conditions precedent to incorporation . . . ."); *see also* Ilya Beylin, *Tax Authority As Regulator and Equity Holder: How Shareholders' Control Rights Could Be Adapted to Serve the Tax Authority*, 84 ST. JOHN'S L. REV. 851, 864 (2010) ("Incorporation requires the filing of a certificate of incorporation, or analogous charter document, with an officer of a state.").

Similarly, directors and officers of a corporation owe fiduciary duties of care and loyalty to the corporation.[56] While these duties can be tailored a bit, they cannot be eliminated; in other words, their existence—but not their exact nature and contents—is an immutable rule of corporate law.[57] Shareholders, in particular, rely on the protections provided by this immutable aspect of corporations in choosing to invest in a firm organized as a corporation, but employees, creditors, and other internal and external corporate constituents also may feel more secure in associating with corporations because fiduciary duties protect their interests, albeit (in most cases) less directly. Corporations became and remain attractive to those who organize them because of this standard feature, when taken together with other corporate attributes (including, e.g., limited liability). Even with the advent of limited liability companies (which combine some of the desirable immutable rules of corporations with enhanced structural flexibility and more opportunities for private ordering), most firms that offer equity to the public are corporations,[58] and most venture capitalists prefer to

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[56] *See*, e.g., TENN. CODE ANN. § 48-18-301(a) ("A director shall discharge all duties as a director, including duties as a member of a committee: (1) In good faith; (2) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and (3) In a manner the director reasonably believes to be in the best interests of the corporation."); Gantler v. Stephens, 965 A.2d 695, 708–09 (Del. 2009) ("In the past, we have implied that officers of Delaware corporations, like directors, owe fiduciary duties of care and loyalty, and that the fiduciary duties of officers are the same as those of directors. We now explicitly so hold."); Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006) ("[T]he obligation to act in good faith does not establish an independent fiduciary duty that stands on the same footing as the duties of care and loyalty. Only the latter two duties, where violated, may directly result in liability, whereas a failure to act in good faith may do so, but indirectly.").

[57] *See*, *e.g.*, Kelli A. Alces, *Strengthening Investment in Public Corporations Through the Uncorporation*, 35 SEATTLE U. L. REV. 1009, 1013 (2012) ("The board of directors, mandatory fiduciary duties, and capital lock-in are the defining features of the corporate form."); Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 506–07 (2002) ("For many years, the fiduciary duties imposed on corporate directors have been a mandatory component of state corporate law. In the mid-1980s, however, many states decided to adopt an enabling approach to this issue and grant public companies some choice regarding the scope of director liability." (footnote omitted)); Mohsen Manesh, *Legal Asymmetry and the End of Corporate Law*, 34 DEL. J. CORP. L. 465, 473 (2009) ([C]orporate law . . . imposes upon managers certain fiduciary duties, a legally enforceable minimum standard of conduct developed by courts and intended to ensure managerial accountability."); Eric W. Orts, *The Complexity and Legitimacy of Corporate Law*, 50 WASH. & LEE L. REV. 1565, 1579 (1993) ("Corporate law . . . provides that corporate power must be exercised according to certain mandatory rules . . . . Fiduciary duties of directors and management are . . . mandatory.").

[58] *See*, *e.g.*, Steven C. Alberty, *The S Corporation: Your Best Choice for an Established Small Business*, PRAC. LAW., December 2003, at 11, 15 ("Publicly traded businesses are most often organized as C corporations, although some publicly traded investment ventures take the form of limited partnerships or limited liability companies."); Healy et al., *A Guide to Takeovers in the United States*, 41 THE LAWYER'S BRIEF 2 (Apr. 5, 2011) ("Most domestic U.S. publicly traded businesses are organized as corporations."); Manesh, *supra* note 57, at 469 ("[A]lmost all publicly traded companies are organized as corporations").

invest in businesses organized as corporations (although this may be at least in part for tax and financial reasons).[59]

TFPCs share these and certain other immutable rules with other corporations, including benefit corporations (as well as other social enterprise corporate forms). However, the public policy underpinnings of TFPCs and benefit corporations differ (mainly as to the role that public benefit plays in management decision making),[60] resulting in different immutable governance rules. Although they vary from state to state, many benefit corporation statutes mandate organization for a general public benefit, and all mandate either a general or specific public benefit.[61] Many benefit corporation statutes require the filing of benefit reports; some require specified benefit corporation directors or officers.[62] Finally, director decision-making and fiduciary duty standards of conduct and liability are tailored to achievement of both shareholder and public benefits.[63]

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[59] *See*, *e.g.*, Victor Fleischer, *The Rational Exuberance of Structuring Venture Capital Start-Ups*, 57 TAX L. REV. 137, 185 (2003) ("[T]he venture capitalist's rational emphasis on the tax treatment of gains, not losses, and the various tax and nontax advantages of the corporate form make the corporation the preferred vehicle for financing a venture capital start-up."); Calvin H. Johnson, *Why Do Venture Capital Funds Burn Research and Development Deductions?*, 29 VA. TAX REV. 29, 60 (2009) ("Published accounts have said that use of C corporations 'might be explained partly by lawyers' self-interest in guiding clients toward the corporate form in which lawyers can use their existing expertise.'"); William K. Sjostrom, Jr., *Teaching Business Organizations from A Transactional Perspective*, 59 ST. LOUIS U. L.J. 777, 781 (2015) (noting "venture capitalists' preference for investing in C corporations"); Matthew Wolf, *Delving Deeper into Your Choice of Business Entity*, 27 WESTLAW J. DEL. CORP. 1, 3 (2012) ("[V]enture capitalists prefer C corps.").

[60] *See*, *e.g.*, Felicia R. Resor, *Benefit Corporation Legislation*, 12 WYO. L. REV. 91, 112 (2012) ("Benefit corporation legislation offers voluntary solutions to enhance corporate social responsibility because a corporation's founders, directors, and shareholders can define their own social or environmental purpose as opposed to abiding by one mandated by state or federal regulation."). Professor Yosifon has suggested the potential for a narrow conception of this policy objective in which the benefit corporation is viewed as an exclusive, rather than voluntary, option for corporations desiring to pursue a public benefit purpose. *See* Yosifon, *supra* note 52, at 480 ("It might be argued that the presence of the PBC *within* the corporate code implies that the policy of the General Corporation Law is to offer the Public Benefit Corporation, rather than open-ended private ordering, as the sole alternative to shareholder primacy in corporate governance."). *See also infra* note 70 and accompanying text.

[61] *See* Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 618-19 (2017).

[62] *See id.* at 621.

[63] *See id.* at 622-25. In sum,

> [t]he statutory expressions of benefit corporation management fiduciary duties differ from state to state. However, in each U.S. benefit corporation law, there is an unsurprising, fundamental anchoring proposition: the law requires directors (and, as applicable, officers) to consider the corporation's public benefit in addition to any financial interest of shareholders.

Id. at 625.

The immutable rules specific to benefit corporations create additional costs—costs associated with, e.g., extra reporting requirements and mandatory, untested structural and governance rules—that may not provide a net benefit to shareholders and other investors. These costs and attendant litigation risks also cast doubt on the aggregate advantages of benefit corporations to other stakeholders. None may feel well protected when taking into account the overall effects of the benefit corporation's unique immutable rules. Perhaps as a result of this, social enterprise firms have not flocked in the expected numbers to the benefit corporation form.[64] Network benefits are predicted but have not yet been fully realized.

Thus, the policy rationales for immutable rules forwarded by Professor Yosifon support the organization of sustainable social enterprise firms as TFPCs. Moreover, the potential for private ordering for sustainable social enterprise firms organized as TFPCs (which Professor Yosifon acknowledges is a possibility—even under Delaware law[65]) may compliment the TFPC's immutable rules while limiting the possible detriments of its default rules in the sustainable social enterprise context. Among other things, a transparent, charter-based corporate purpose enables shareholders and third parties contracting and interacting with the corporation to evaluate, understand, and address exploitation risks *ex ante*—or refrain from investing in or engaging with the corporation. Although this may work out differently in closely held, privately held, and publicly held firms (based on their unique attributes), in each case, shareholder and other protections can be built into the firm's chartering documents together with a statement of the agreed sustainable social enterprise purpose of the firm.

Finally, it seems important to note (in terms of network effects) that TFPCs have been and continue to be a friendly alternative for existing and newly forming social enterprises.[66] Only the passage of time will permit an evaluation of the benefit corporation's ability to rival, for instance, the relative certainty and

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[64] *See id.* at 613-14.

[65] *See* Yosifon, *supra* note 52, at 497 ("In summary, then, it seems that neither the Delaware statutory scheme, nor Delaware's common law, nor broader public policy justifications point in favor of prohibiting privately-ordered deviation from shareholder primacy in business corporations, even after the PBC innovation."). This author addresses the same issue but is less certain than Professor Yosifon. Heminway, *supra* note 14, at 966 ("The accumulated evidence is at best unclear about whether a public or private firm incorporated in or outside Delaware can engage in private ordering in its charter to include a corporate purpose that may be interpreted in a manner inconsistent with the shareholder wealth maximization norm.").

[66] *See* Heminway, *supra* note 14, at 965 ("[M]any existing social enterprise firms are organized under the for-profit corporation laws in states adopting benefit corporation statutes--either because these entities were incorporated before adoption of the benefit corporation provisions or because the firms do not want to or cannot by their nature opt into other aspects of the benefit corporation form."); Kevin V. Tu, *Socially Conscious Corporations and Shareholder Profit*, 84 GEO. WASH. L. REV. 121, 174–75 (2016) ("[M]any for-profit corporations have pursued the creation of a public benefit despite historical uncertainty over the compatibility of such an objective with the fiduciary duties owed to the corporation and its shareholders.").

predictability of the TFPC in its many aspects.[67] "If the PBC is a desirable form, it will be used and its use will become ever cheaper over time as precedents make it more predictable."[68]

V. CONCLUSION

The rapid growth of social enterprise business entity laws in the United States presents challenges to longstanding corporate law doctrine, theory, and policy. As a result, the rise of alternative corporate forms for use in social enterprise generates questions relevant to legal practitioners, the judiciary, academics, and lawmakers.[69] These questions point to potential detriments and benefits of laws governing social enterprise forms of entity as currently constituted and as applied over the long term.

For example, law scholars have begun to raise concerns that social enterprise legal forms may be undesirable because they reinforce the doctrinal application of shareholder wealth maximization norms well beyond the factual scenario presented in the *eBay* decision, both in and outside the State of Delaware.[70] In the process, the hands of corporate directors in TFPCs and benefit corporations may be tied in some circumstances because their decision-making discretion is narrowed.[71] These consequences may in turn have the effect of decreasing the relevance or power of director primacy theories of corporate control (since the directors' and officers' decision-making is constrained to some extent by legal doctrine) and increasing the salience of shareholder wealth maximization theory by sharpening that theory's descriptive and predictive effects in TFPC management fiduciary duty disputes.[72] These changes may be

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[67] *See* Murray, *supra* note 1, at 586 ([A]t this early stage it is difficult to tell whether any of the current social enterprise laws will prove attractive enough to draw large numbers of entities.").

[68] Yosifon, *supra* note 52, at 497.

[69] Entrepreneurs and business promoters also have been wrestling with these questions, especially those that raise important choice of entity issues. *See*, *e.g.*, An Entrepreneur's Guide to Certified B Corporations and Benefit Corporations, http://cbey.yale.edu/sites/default/files/CBEY_BCORP_Online.pdf (last visited Feb. 22, 2018).

[70] *See*, *e.g.*, Tu, *supra* note 66, at 172-74 (concluding that "the existence of Benefit Corporation statutes may have the unintended consequence of being construed as a legislative mandate that, under corporate law, considering broader stakeholder interest and creating a public benefit is wholly prohibited unless a business has opted to organize or reincorporate as a Benefit Corporation.").

[71] *See*, *e.g.*, 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: TENN. J. BUS. L. 361, 362 (2017) ("There are two emerging issues that, working together, run the risk of derailing large-scale socially responsible business decisions: the emergence of social enterprise enabling statutes and the demise of director primacy. These issues could have the parallel impacts of limiting business leader creativity and risk taking.").

[72] *See id.* at 362-63 ("Now that many states have alternative social enterprise entity structures, there is an increased risk that traditional entities will be viewed . . . as pure profit vehicles, eliminating directors' ability to make choices with the public benefit in mind, even where the public benefit is

occurring in the absence of any conscious or rigorous consideration of public policy and, therefore, may not well serve articulated, assumed, or aspirational policy objectives. In sum, the stringent application of shareholder wealth maximization doctrine in the TFPC and the nature of benefit corporation doctrine conspire to decrease director discretion within the overall bounds of the board's authority and, in turn, negatively impact the significance of the board decision-making process under corporate law.

Professor Yosifon has expressed concern along these lines about the judicial and practical effects of the benefit corporation on social enterprise firms organized as TFPCs. He offers advice on how to proceed in a manner that has fewer deleterious effects:

> The Public Benefit Corporation should be understood as a "menu option," which promoters may select if they desire a highly specific form of multi-stakeholder governance with a recognizable "brand." But promoters remain free to order "off the menu," and get their own multi-stakeholder corporate design. Delaware jurists would be wise to make this clear in case law. The Delaware legislature would be prudent to sustain these conclusions through statutory clarification, before the exigencies of litigation end up making bad law on the issue.[73]

This advice is welcomed and I endorse it here.

However, shareholder primacists may predictably argue that social enterprise forms of entity are not only desirable, but also may, in fact, be needed to provide a clear structural and governance outlet for social enterprise firms, including sustainable social enterprises. Otherwise, these firms may organize as TPFCs and engage in private ordering to achieve the analogous results. Relatively unfettered private ordering of this kind—to effectively achieve a double or triple bottom line in a TFPC—compromises the validity and value of shareholder primacy theory and, more particularly, shareholder wealth maximization as a matter of doctrine, theory, and policy. Professor Yosifon notes the potential argument that benefit corporations may be needed to ensure shareholder value protections that may not be available under the law governing TFPCs.[74]

With all of this in mind, this essay makes a simple, related (and arguably foundational) contribution to the ongoing discussion—one that offers caution to adherents to both director and shareholder primacy theories of corporate control. The contribution is merely this: under existing corporate law doctrine, theory, and policy, sustainable social enterprises have been, are being, and may be

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also good for business . . . .").

[73] *See* Yosifon, *supra* note 52, at 507.

[74] *See id.* at 493-94 ("A single alternative to the shareholder primacy norm, represented by the PBC, may be necessary to ensure that shareholders are protected in their investments in hybrid enterprises.").

properly and profitably formed, and may continue to exist, as TFPCs—even with the relatively new introduction of benefit corporations and other social enterprise forms of entity. Admittedly, the conclusions drawn on these matters are to some extent contentious and contended in the literature. Shareholder wealth maximization norm advocates and shareholder primacy theorists, for instance, are likely to argue to the contrary.

There is ample evidence (only some of which has been presented here in light of time and space limitations) that the TFPC continues to be, at least in some states, a very flexible tool.[75] The TFPC has public benefit roots in legal doctrine, theory, and policy. It has weathered many political and economic storms.

Social enterprise entities may raise new concerns, however. Attendant benefits of social enterprise entity legislation have been identified.[76] Nevertheless, but for a limited number of judicial opinions—exemplified most recently and clearly in the Delaware Court of Chancery's opinion in the *eBay* case—there should not have been and would not be a need for legislative action to adopt new social enterprise forms of entity. The law governing TFPCs largely offers what sustainable social enterprise needs.[77] Indeed, new social enterprise entities arguably add unnecessary complexity to the choice of entity equation.[78]

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[75] *See*, *e.g.*, Khatib, *supra* note 3, at 189 (pointing out, among other advantages, that "[t]he traditional for-profit provides for greater flexibility in decision making without potentially deterring investors who fear that the statutory benefit corporation absolves directors of traditional accountability.").

[76] *See id.* ("[T]here are certain inherent advantages that benefit corporation status provides—like raising "patient" capital along with marketing and branding incentives."); Yockey, *supra* note 20, at 770 ("[I]t is . . . plausible that the benefit corporation form will fill an important market gap by helping socially oriented entrepreneurs reach a more pro-social investor class."); *id.* ("[T]he value of the benefit corporation form comes from its ability to create an important new institutional structure to govern the evolving social enterprise space.").

[77] *See* Khatib, *supra* note 3, at 188 ("The takeaway is that the existing traditional for-profit legal framework provides all of the benefits of social enterprise without introducing the slew of problems associated with the fledgling benefit corporation."); Yockey, *supra* note 20, at 770 ("[C]orporate law already provides entrepreneurs with much of what the benefit corporation form claims to offer.").

[78] *See*, *e.g.*, Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to A Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 663 (2013) ("Creating new corporate forms and other "hybrid" entities only serves to perpetuate the myth that business corporations do not have the flexibility to pursue social missions or benefit stakeholders besides shareholders."); Tu, *supra* note 66, at 167 ("Because the traditional for-profit corporation arguably provides a form that is flexible enough to accommodate the pursuit of a public benefit, the addition of the Benefit Corporation may needlessly complicate the existing legal framework."). One commentator offers a particularly harsh critique of the additional, unnecessary complexity created by social enterprise legislation (what he terms "SEL"):

> While SEL has a potentially charitable aim, I argue that contrepreneurs have advanced a deceptive maze of needless SEL using ethically-questionable marketing. In addition to this deception, contrepreneurs have attempted to

The conclusion I reach here should be of comfort to sustainable social enterprise entities formed and, in some cases, long existing as TFPCs.[79] State benefit corporation statutes generally include language indicating that the enactment and existence of the benefit corporation law should have no effect on the validity or interpretation of for-profit corporate law outside the benefit corporation context.[80] Nevertheless, managers or principals of sustainable social enterprise corporations may have believed—and continue to believe—that there is cause for alarm. The brief analysis offered here provides a path for argument that these social enterprises may continue to safely and productively operate as TFPCs. Increased public education of entrepreneurs, business promoters, and legal counsel can help correct oversimplified conceptions of TFPCs, especially those organized outside Delaware, and social enterprise entities (especially benefit corporations) that appear to be drivers of entity choice.[81]

The conclusion that corporate law doctrine, theory, and policy do not preclude sustainable social enterprises from organizing as TFPCs also is relevant to state legislatures. States that have not adopted specialized social enterprise entity statutes may find no reason to do so. States that have benefit corporation or other social enterprise entity statutes—perhaps falsely believing that they needed to have these statutes for doctrinal reasons if they wanted to support and sustain social enterprise[82]—may reconsider and (as North Carolina did with its L3C statute) repeal their social enterprise entity laws. At the least, state general assemblies should consider clarifying the availability of the TFPC form for sustainable social enterprises (and clarifying more specifically the ability of TFPCs to lawfully provide for enforceable sustainable social benefit purposes in their chartering documents).[83]

The judiciary also may find some value in the brief arguments made here. In this regard, among other things, this essay is intended to demonstrate

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> silence political and legal counter narratives, and have created self-reinforcing laws to support a cottage industry that serves their own interests, not society's. That cottage industry and SEL may allow managers to engage in value-destructive and morally hazardous behaviors that would otherwise lead to liability claims under traditional corporate law.

David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 234 (2013).

[79] *See* Khatib, *supra* note 3, at 189 (noting that "there are examples of social enterprises maintaining their traditional for-profit status even with the availability of the benefit corporation, demonstrating the suitability of the traditional for-profit for social enterprises.").

[80] *See* Heminway, *supra* note 14, at 964-65 n.77 and accompanying text.

[81] *See* Blount & Offei-Danso, *supra* note 78, at 663 ("If social entrepreneurs feel constrained within the current legal framework, the appropriate reaction is to better educate entrepreneurs about the flexibility they have within this framework to operate as a socially-minded company.").

[82] *See* Khatib, *supra* note 3, at 188 ("Many legal commentators and supporters of benefit corporation legislation have utilized fears exacerbated by the holdings in *Revlon* and *eBay* to help propel the benefit corporation into the mainstream.").

[83] *See* Yosifon, *supra* note 52, at 507 (stating that the Delaware legislature "would be prudent" to make a clarification of this kind).

that the *eBay* opinion may be limited in application to its jurisdiction or its facts. As such, courts should be cautious in relying on *eBay* as support in other jurisdictions or circumstances in which the fiduciary duty of directors of sustainable social enterprises organized as TFPCs may be at issue because of the corporation's social enterprise mission. The judiciary also can offer helpful clarification regarding the availability of the TFPC for sustainable social enterprise if the appropriate case presents itself.[84]

Ultimately, state legislatures and courts will determine the role that TFPCs will play over the long haul in sustainable social enterprise. In making and interpreting law, these state institutions should act with due deliberation and reflection, taking into account the current status of sustainable social enterprises incorporated in the state, the contextual salience of applicable theory, and any individualized public policy objectives of the state, in addition to existing governing doctrine. Individual states may continue to choose independent paths through their legislative and judicial decision-making.

Of course, as corporate law continues to develop, legal counsel will continue to advise business venturers on choice of entity determinations taking into account those very same factors. In all of these endeavors, thoughtful consideration and debate should reign over the application of heuristics in decision-making. The applied authority of a board of directors to manage a TFPC is not designed or intended to be simple or turnkey. It is complex (more or less so depending on the matter being deliberated) and requires at various times the identification, consideration, assessment, and balancing of multiple—and sometimes competing—interests. TFPC law uniquely positions the board of directors to serve this function. Sustainable social enterprise is just one context in which a TFPC board's complex decision-making processes may productively play themselves out. Let's not give up on TFPCs for sustainable social enterprise.

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[84] *See id.* (suggesting that "Delaware jurists would be wise" to offer this type of clarification).