Publicly Traded Public Benefit Corporations: An Empirical Investigation

Law Working Paper N° 788/2024
July 2024

Jens Dammann
University of Texas at Austin and ECGI

ECGI Working Paper Series in Law

Publicly Traded Public Benefit Corporations: An Empirical Investigation

Working Paper N° 788/2024
July 2024

Jens Dammann

For comments and suggestions, I am grateful to Dhruv Aggarwal, Albert Choi, Jill Fisch, Ann Lipton, Yaron Nili, Eric Talley, and to participants at the 2023 conference "Corporate Law at a Crossroads" at the University of Wisconsin Law School. I am also indebted to the Leibniz Institute for Financial Research SAFE in Frankfurt and in particular to Tobias Tröger. My stay as a visitor at the Leibniz Institute during the summer of 2023 has played a significant role in advancing the research on this Article. For help with pre-submission editing, I owe thanks to Marie Baldwin, Alex Friedman, and Timothy Shyu.

Abstract

Many corporations seek to persuade their investors, customers, and employees that they care not only about profits but also about corporate constituencies such as workers, communities, and the environment. So-called public benefit corporations ("PBCs") are at the forefront of this movement. The law requires the directors of PBCs to balance the goal of profit maximization with the public benefit specified in the corporation's charter and the interests of other stakeholders. In theory, therefore, PBCs are truly and effectively committed to their declared public benefit. In practice, however, the statutory defaults governing PBCs have significant limitations that undermine their commitment value. Overcoming these limitations requires PBCs to modify the statutory defaults in their charters. But do PBC charters actually contain provisions that modify the default rules in such a way as to strengthen PBCs' legal commitment to their stated public benefits? To answer this question, I have hand-collected and hand-coded a novel dataset of 359 corporate charters. The dataset includes all non-SPAC PBCs that are or used to be publicly traded—nineteen in total—and matches each PBC with twenty general business corporations of similar size that are incorporated in the same state and have been publicly traded for the same number of years. I then compare the PBC charters with the corresponding general business corporation charters. I also examine PBCs' use of potential signaling mechanisms outside corporate law, such as the composition of corporate boards and certification by the non-profit organization B Lab. The picture that emerges from this analysis is complex and shows substantial heterogeneity across different PBCs. Whereas some PBC charters contain multiple provisions seeking to reinforce the companies' commitments to social or environmental causes, others forego such provisions entirely, and most fall somewhere between these two extremes. Similarly, the use of non-legal signaling mechanisms varies across corporations. Furthermore, I find that PBCs advised by law firms with more relevant experience were more likely to utilize charter provisions strengthening their commitment. Overall, my results suggest that the governance practices of publicly traded PBCs are still evolving and that the low levels of commitment observed in some PBCs' charters may be due to limited experience on the part of law firms. My findings have important legal policy implications. Numerous scholars have proposed reforms that would tighten the statutory restrictions on publicly traded PBCs. However, the fact that publicly traded PBCs still appear to be at an early stage of evolution suggests that regulators would be wise to exercise restraint.

Keywords: Benefit corporations, public benefit corporations, shareholder primacy, empirical, corporate governance

Jens Dammann
Ben H. and Kitty King Powell Chair in Business and Commercial Law
University of Texas at Austin School of Law
727 East Dean Keeton St.
Austin, TX 78705, United States
phone: +1 512 232 6022
e-mail: jdammann@law.utexas.edu

Publicly Traded Public Benefit Corporations: An Empirical Investigation

Jens Dammann[*]

Many corporations seek to persuade their investors, customers, and employees that they care not only about profits but also about corporate constituencies such as workers, communities, and the environment. So-called public benefit corporations ("PBCs") are at the forefront of this movement. The law requires the directors of PBCs to balance the goal of profit maximization with the public benefit specified in the corporation's charter and the interests of other stakeholders. In theory, therefore, PBCs are truly and effectively committed to their declared public benefit.

In practice, however, the statutory defaults governing PBCs have significant limitations that undermine their commitment value. Overcoming these limitations requires PBCs to modify the statutory defaults in their charters. But do PBC charters actually contain provisions that modify the default rules in such a way as to strengthen PBCs' legal commitment to their stated public benefits?

To answer this question, I have hand-collected and hand-coded a novel dataset of 359 corporate charters. The dataset includes all non-SPAC PBCs that are or used to be publicly traded—nineteen in total—and matches each PBC with twenty general business corporations of similar size that are that are incorporated in the same state and have been publicly traded for the same number of years. I

[*] Ben H. and Kitty King Powell Chair in Business and Commercial Law, The University of Texas School of Law. For comments and suggestions, I am grateful to Dhruv Aggarwal, Albert Choi, Jill Fisch, Ann Lipton, Yaron Nili, Eric Talley, and to participants at the 2023 conference "Corporate Law at a Crossroads" at the University of Wisconsin Law School. I am also indebted to the Leibniz Institute for Financial Research SAFE in Frankfurt and in particular to Tobias Tröger. My stay as a visitor at the Leibniz Institute during the summer of 2023 has played a significant role in advancing the research on this Article. For help with pre-submission editing, I owe thanks to Marie Baldwin, Alex Friedman, and Timothy Shyu.

then compare the PBC charters with the corresponding general business corporation charters. I also examine PBCs' use of potential signaling mechanisms outside corporate law such as the composition of corporate boards and certification by the non-profit organization B Lab.

The picture that emerges from this analysis is complex and shows substantial heterogeneity across different PBCs. Whereas some PBC charters contain multiple provisions seeking to reinforce the companies' commitments to social or environmental causes, others forego such provisions entirely, and most fall somewhere between these two extremes. Similarly, the use of non-legal signaling mechanisms varies across corporations. Furthermore, I find that PBCs advised by law firms with more relevant experience were more likely to utilize charter provisions strengthening their commitment. Overall, my results suggest that the governance practices of publicly traded PBCs are still evolving and that the low levels of commitment observed in some PBCs' charters may be due to limited experience on the part of law firms.

My findings have important legal policy implications. Numerous scholars have proposed reforms that would tighten the statutory restrictions on publicly traded PBCs. However, the fact that publicly traded PBCs still appear to be at an early stage of evolution suggests that regulators would be wise to exercise restraint.

Contents

INTRODUCTION

Many CEOs emphasize that they care about more than just shareholder wealth maximization. They stress their commitment to other constituencies such as workers, communities, and the environment.

Of course, CEOs claiming to have the interests of non-shareholder constituencies at heart are hardly a new phenomenon. In the early nineteenth century, Henry Ford famously declared that his ambition was "to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[1] In recent years, though, CEOs' public endorsements of stakeholder values are reaching new heights. For example, in 2019, the Business Roundtable published its Statement on the Purpose of a Corporation ("Roundtable Statement" or "Statement"). The Statement proclaimed that a corporation's purpose is to serve not only shareholders but also other constituencies such as workers, communities, and the environment.[2] Originally signed by 181 CEOs of large companies,[3] the Business Roundtable Statement had garnered 265 signatures by the end of 2022.[4]

There are good reasons for corporations' public emphasis on social responsibility. Many retail customers prefer green or ethically-produced products.[5] Job applicants often care deeply about

---

[1] Dodge v. Ford Motor Co., 170 N.W. 668, 671 (Mich. 1919). For a brief history of the corporate social responsibility movement in the 20th century see Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 68–16 (2001).

[2] Bus. Roundtable, *Statement on the Purpose of a Corporation* (August 19, 2019), https://s3.amazonaws.com/brt.org/BRT-StatementonthePurposeofaCorporationwithSignaturesOctober2022.pdf.

[3] Claudine Gartenberg & George Serafeim, *181 Top CEOs Have Realized Companies Need a Purpose Beyond Profit*, HARV. BUS. REV. (Aug. 20, 2019), https://hbr.org/2019/08/181-top-ceos-have-realized-companies-need-a-purpose-beyond-profit. I am using the term CEO in a broad manner since not all signatories are corporate CEOs in the technical sense.

[4] Jens Dammann & Daniel Lawrence, *CEOs' Endorsements of Stakeholder Values: Cheap Talk or Meaningful Signal*, J. CORP. L. (forthcoming 2024).

[5] *See*, *e.g.*, FirstInsight, *The State of Consumer Spending: Gen Z Shoppers Demand Sustainable Retail* (2020) (reporting that "73% [of gen Z shoppers] are willing to pay more for sustainable products"), *available at* https://www.firstinsight.com/white-papers-posts/gen-z-shoppers-demand-sustainability; Karl Haller et al., *Consumers Want It All: Hybrid Shopping, Sustainability, and Purpose-driven Brands*, 9 fig. 4 (2023) (presenting survey evidence according to which 50% of consumers are willing to pay more for sustainable brands and according to which 31% claimed that "sustainable or environmentally friendly" goods accounted for

whether their employer has an ethical as well as a financial mission.[6] And, last but not least, a large and increasing number of investors take so-called ESG values into account when making financial decisions.[7] ESG stands for "Environmental, Social, and Governance,"[8] and, as the name implies, ESG-conscious investors consider how firms treat key corporate constituents, such as their workers, the communities in which they operate, and the environment.[9] In the last few years, ESG-investing has increased dramatically.[10] One recent study estimates that ESG investing will grow

---

"most or all of their last purchase"). Regarding possible reasons behind consumers' willingness to buy green products, see, for example, Sofia Gomes et al., *Willingness to Pay More for Green Products: A Critical Challenge for Gen Z*, J. CLEANER PRODUCTION 390 (2023) (conducting a survey of 927 Portuguese consumers born between 1997 and 2012 to ascertain the determinants of the willingness to pay for sustainable products). Note that not every consumer who claims to be willing to buy sustainable products at a premium may live up to their words. *Cf.* Katherine White et al., *The Elusive Green Consumer*, HARV. BUS. REV. 124, 127 (2019) (citing survey evidence according to which 65% of respondents assert an intention to buy sustainable products whereas only 26% claim to implement that intention in practice).

[6] *See, e.g.*, David A. Jones et al., *Why Are Job Seekers Attracted by Corporate Social Performance? Experimental and Field Tests of Three Signal-Based Mechanisms*, 57 ACADEMY OF MGMT. J. 383 (2014); Katarzyna Klimkiewicz & Victor Oltra, *Does CSR Enhance Employer Attractiveness? The Role of Millennial Job Seekers' Attitudes*, 24 CORP. SOC'L RESPONSIBILITY & ENVIRONMENTAL MANAGEMENT 449 (2017); Young Ran Yoo et al., *A Moderated Mediation Model of CSR and Organizational Attractiveness Among Job Applicants: Roles of Perceived Overall Justice and Attributed Motives*, 54 MANAGEMENT DECISION 1269 (2016).

[7] *Infra* text accompanying notes 8–12.

[8] *E.g.*, Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021); Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 388 (2020).

[9] *See, e.g.*, Susan S. Kuo & Benjamin Means, *Climate Change Compliance*, 107 IOWA L. REV. 2135, 2153 (2022) (pointing out that ESG requires corporations to make decisions that take into account there interests of stakeholders other than shareholders, "such as consumers, workers, communities, and the environment").

[10] *See, e.g.*, Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1191 (2022) (noting that ESG is a label for stakeholderism); Quinn Curtis et al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 395 (2021) (noting the dramatic growth in ESG investing); Jonathan R. Macey, *ESG Investing: Why Here? Why Now?,* 19 BERKELEY BUS. L.J. 258, 261 (2022) (noting that over the last few years, ESG investing and governance has "move[d] from the wings to center stage.").

from $4.5 trillion in 2021 to $10.5 trillion in 2026.[11] Other estimates are even higher.[12] Moreover, surveys suggest that about a quarter of investment professionals prefer companies that are committed to ESG values.[13]

While companies declaring their commitment to non-shareholder constituencies are part of a broad trend, one group of corporations is spearheading this movement: public benefit corporations, also known as "PBCs." While PBCs are formed under states' business corporation laws, a few key features distinguish them from regular business corporations. In particular, a PBC's charter must name a specific public benefit, such as protecting the environment or reducing poverty.[14] Moreover, when making business decisions, a PBC's directors must balance the goal of maximizing shareholder wealth with both the specified public benefit and with the interests of those affected by the PBC's operations.[15] In other words, the law explicitly dispenses with the principle of shareholder primacy and instead binds the PBC's directors to a more complex set of goals.

---

[11] PRICEWATERHOUSECOOPERS, Asset and Wealth Management Revolution 2022: Exponential Expectations for ESG (2022), https://www.pwc.com/gx/en/industries/financial-services/asset-management/publications/asset-and-wealth-management-revolution-2022.html?WT.mc_id=CT11-PL1000-DM2-TR2-LS4-ND1-TTA9-CN_gx-fy22-xlos-esg-awm-esg-revolution-pressrelease. In interpreting these numbers, one should keep in mind that the term ESG investing can be used very broadly, covering both investment approaches that use ESG data in an attempt to maximize shareholder wealth and investments strategies that accept lower returns in exchange for promoting socially worthy goals. Interestingly, even ESG mutual funds, defined as mutual funds with an explicit policy of adhering to ESG principles, differ with respect to this issue: some explicitly warn investors that they may accept lower profits for the sake of adhering to ESG principles, others make no such disclosures. Quinn Curtis et al., *supra* note 10, at 445–46.

[12] *See* Georg Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg (estimating ESG investing to account for $20 trillion in assets under management as of 2018); Jason Stevens, *The Rise of ESG and the Importance of ESG Data*, NASDAQ (Nov. 19, 2021), https://www.nasdaq.com/articles/the-rise-of-esg-and-the-importance-of-esg-data ("ESG funds . . . [raked] in more than $21 billion in the first quarter [of 2021] alone.").

[13] *E.g.*, MCKINSEY & COMPANY*, The ESG Premium: New Perspectives on Value and Performance* (2022) (surveying investment professionals and "C-suite leaders" and finding that "[o]ne-quarter of respondents say they would be willing to pay a premium of 20 to 50 percent [for a company with an overall positive as opposed to an overall negative record on ESG issues], and 7 percent say they would pay a premium of more than 50 percent").

[14] *E.g.*, COLO. REV. STAT. ANN. §§ 7-101-503 (1)(a) (West 2022)*;* DEL. CODE ANN. TIT. 8, §§ 362(a)(1) (West 2022); KAN. STAT. ANN. § 17-72a02(a)(1) (West 2022).

[15] *E.g.*, COLO. REV. STAT. ANN. §§ 7-101-503 (1) (West 2022)*;* DEL. CODE ANN. TIT. 8, §§ 362(a) (West 2022); KAN. STAT. ANN. § 17-72a02(a) (West 2022).

At least in theory, therefore, public benefit corporations have a clear legal commitment to non-shareholder constituencies. While regular business corporations may publicly declare that they are interested in protecting other stakeholders,[16] there is no requirement or guarantee that they will

---

[16] At least, that is true as long as they believe that doing so is in the best long-term interest of the shareholders. Delaware's law on general business corporations is widely thought to adhere to the idea of shareholder primacy, meaning that, as a general rule, directors and officers can only protect other constituencies to the extent that their actions are consistent with the goal of long-term shareholder wealth maximization. *See, e.g.*, eBay Domestic Holdings., Inc. v. Newmark*,* 16 A.3d 1, 34 (Del. Ch. 2010) (holding that directors have an obligation "to promote the value of the corporation for the benefit of its stockholders"); N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92, 101 (Del. 2007) (holding that the directors "have 'the legal responsibility to manage the business of a corporation for the benefit of its shareholder owners.'"); Unocal Corp. iv. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (recognizing "the basic principle that corporate directors have a fiduciary duty to act in the best interests of the corporation's stockholders"). *See also* Matthew T. Bodie, *The Next Iteration of Progressive Corporate Law*, 74 WASH. & LEE L. REV. 739, 762 (2017) (arguing that the Chancery Court's 2010 eBay decision has made it clear that Delaware law is committed to shareholder primacy); 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, 768 (2015) (arguing that under Delaware law, corporate directors are required to focus on shareholder welfare as their "sole end"); E. Norman Veasey, *Should Corporation Law Inform Aspirations for Good Corporate Governance Practices-or Vice Versa?,* 149 U. PA. L. REV. 2179, 2184 (2001) (asserting that Delaware law requires directors to act "in the best interests of the corporation and its stockholders"); Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 798-813 (2002) (arguing that Delaware law is more appropriately understood to embrace "director primacy" than shareholder primacy). *But see* Jill E. Fisch & Steven Davidoff Solomon, *Should Corporations Have A Purpose?*, 99 TEXAS L. REV. 1309, 1332 (2021) (arguing that that under Delaware law, shareholder primacy is limited to very specific areas); Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.,* 25 REGENT U.L. REV. 269, 274 (2013) (arguing that the cases cited in favor of shareholder primacy are "highly ambiguous"); David Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523, 526 (2011) (claiming that Delaware law does not impose shareholder primacy); David G. Yosifon, *Opting Out of Shareholder Primacy: Is the Public Benefit Corporation Trivial?*, 41 DEL. J. CORP. L. 461, 507 (2017) (arguing that under Delaware law, shareholder primacy is merely a default norm). In any case, even scholars who believe that Delaware is committed to shareholder primacy uniformly acknowledge that Delaware provides boards with broad latitude to protect non-shareholder constituencies. *Cf.* Leo E. Strine, Jr. & Nicholas Walter, *Conservative Collision Course?: The Tension Between Conservative Corporate Law Theory and Citizens United*, 100 CORNELL L. REV. 335, 390 n.38 (2015) (noting that while Delaware law requires directors to maximize shareholder wealth, it leaves corporate boards with "broad discretion" on how to do so); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest,* 80 N.Y.U.L. REV. 733, 738 (2005) (arguing that "[c]orporate managers have never had an *enforceable* legal duty to maximize corporate profits") (emphasis added). To be on the safe side, the board only needs to declare that protecting these constituencies is in the shareholders' long-term interest. *See, e.g.,* Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 670 (2020) (arguing that even "empty statements" about its commitment to shareholder value will protect the board).

live up to their promises. Accordingly, their declarations may be nothing but cheap talk.[17] PBCs, on the other hand, are legally bound to pursue the public benefits specified in their charters. This legal obligation, so the narrative goes, allows PBCs to send a credible signal to investors, customers, and employees that they are fully and truly committed to their stated public benefit.[18]

In practice, however, the statutory default rules governing PBCs have obvious limitations that thoroughly undermine their commitment value.[19] The laws of Delaware, where all publicly traded PBCs are currently incorporated, illustrates this point. Under Delaware law, a PBC can revert

[17] For example, critics of the Business Roundtable's 2019 Statement on the Purpose of a Corporation argue that the signatories of that statement engage in nothing more than cheap talk. *See, e.g.*, Anat Alon-Beck, *Times They Are A-Changin': When Tech Employees Revolt!*, 80 MD. L. REV. 120, 127 (2020) (suggesting that many of the CEOs signing the Roundtable Statement did so "for public relations purposes"); Lucian A. Bebchuk & Roberto Tallarita, *Will Corporations Deliver Value to All Stakeholders?*, 75 VAND. L. REV. 1031, 1035 (2022) (arguing "that the [Roundtable Statement] was largely for show"); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 98 (2020) (arguing the CEOs signing the Roundtable Statement did so "mostly for show" and did not expect it "to bring about significant changes").

[18] *See, e.g.*, John Armour et al., *Green Pills: Making Corporate Climate Commitments Credible*, 65 ARIZ. L. REV. 285, 319 (2023) (noting that by incorporating as a PBC, a corporation signals its willingness to "temper maximization of profits" in order to pursue public benefits); Michael B. Dorff, *Why Public Benefit Corporations?,* 42 DEL. J. CORP. L. 77, 107 (2017) (arguing that "[e]mployees and customers … should see PBC status as some signal of an intent to favor their interests and the interest of the public benefit the company has adopted, even if the signal is muddy"); David Nows & Jeff Thomas, *Delaware's Public Benefit Corporation: The Traditional VC-Backed Company's Mission-Driven Twin*, 88 UMKC L. REV. 873, 900 (2020) (arguing that their public purpose can make PBCs "more attractive to socially responsible investors" and will also "provide branding advantages" vis-à-vis consumers); Alicia E. Plerhoples, *Nonprofit Displacement and the Pursuit of Charity Through Public Benefit Corporations*, 21 LEWIS & CLARK L. REV. 525, 548–49 (2017) (noting that by incorporating as a public benefit corporation, "a start-up signals its intent to pursue social and environmental value and thereby gains immediate legitimacy in the public eye"); Joseph W. Yockey, *Using Form to Counter Corruption: The Promise of the Public Benefit Corporation*, 49 U. CAL. DAVIS L. REV. 623, 644 (2015) (arguing that "[o]rganizing as a PBC assists sends "important signals to the market").

[19] *See* Dana Brakman Reiser, *Benefit Corporations-A Sustainable Form of Organization?,* 46 WAKE FOREST L. REV. 591, 624–25 (2011) (arguing that incorporating as a public benefit corporation may not suffice as a signal); Dorff, *supra* note 18, at 106 (arguing that Delaware's PBC statute "does a fairly weak job of signaling the company's prosocial behavior to employees and customers"); Michael B. Dorff, *Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence*, 40 SEATTLE U.L. REV. 515, 517 (2017) (asserting that the PBC statutes' mechanisms to commit PBCs to their stated benefit "are, for the most part, toothless"). *See also* Miriam F. Weismann, *The Missing Metrics of Sustainability: Just How Beneficial Are Benefit Corporations?,* 42 DEL. J. CORP. L. 1, 15 (2017) (analyzing states' public benefit corporation statutes and criticizing "the demonstrable lack of accountability and transparency" inherent in such statutes).

back to being a regular business corporation through a simple charter amendment.[20] And, even without such an amendment, PBCs may de facto abandon their social goals due to investor pressure.[21]

In theory, the law gives PBCs the ability to overcome these weaknesses by including appropriate provisions in their charters.[22] The crucial issue, therefore, is whether PBCs make use of this ability. To answer this question, I have hand-collected and hand-coded a novel dataset of 357 corporate charters. The dataset includes all non-SPAC[23] public benefits corporations that were publicly traded on or before December 31, 2023,—nineteen in total—as well as 340 matching business corporations.[24] The matching process identifies business corporations that are incorporated in the same state as the PBCs (Delaware), have been publicly traded for the same number of years, and are similar in terms of their size.[25] To ascertain whether PBCs make strategic use of charter provisions to strengthen their commitment to their stated public benefit, I compare the PBC charters to those of the matched regular business corporations.

At first glance, the results of this analysis are sobering. The most obvious mechanism to protect PBCs' commitment to their public purpose is a supermajority requirement for charter amendments that would eliminate the corporation's PBC status. However, only four out of nineteen PBC

---

[20] Jill E. Fisch & Steven Davidoff Solomon, *The Value of a Public Benefit Corporation*, *in* RESEARCH HANDBOOK ON CORPORATE PURPOSE AND PERSONHOOD 68 (Elizabeth Pollman & Robert B. Thompson eds., 2021).

[21] *Id.*

[22] *Id. See also* Dorff, *supra* note 18, at 107 (arguing that "[f]ounders who find [the] signal [inherent in PBC statutes] too weak can remedy the problem to some degree with private ordering.").

[23] I exclude so-called special purpose acquisition companies (SPACs) that have not yet completed their initial acquisition because pre-acquisition SPACs follow a different corporate governance model that makes them ill-suited for comparisons with other companies. For an overview over the governance of pre-acquisition SPACs see, for example, Michael Klausner et al., *A Sober Look at SPACs*, 39 YALE J. ON REG. 228, 235–46 (2022) (explaining SPAC governance); Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs*, 37 DEL. J. CORP. L. 849, 871–79 (2013) (explaining SPAC governance).

[24] For two of the nineteen charters, financial data are not (yet) available. They are therefore disregarded for matching purposes and excluded from any comparisons between regular business corporation charters and PBC charters. However, I include the relevant two PBC charters in all analyses that focus solely on PBC charters. The total dataset of 359 charters includes the nineteen PBC charters plus the 17x20 (=340) regular business corporation charters obtained by matching those 17 PBCs for which financial data are available.

[25] The details of our matching process are explained *infra* Part III. We define a corporation's age as the number of years that the corporation has been publicly traded. *See* Appendix A. A corporation's size is given by its total assets. *See* Appendix A.

charters contain such a supermajority requirement. This omission is made even more glaring by the fact that thirteen out of the fifteen remaining PBC charters use supermajority requirements to protect other parts of their charter.

Some of my other results are consistent with this picture. In particular, none of the PBCs facilitate shareholder lawsuits as an enforcement mechanism for their stated public commitment. Quite to the contrary, PBC charters do just as much to blunt the impact of shareholder litigation as regular business corporation charters.[26] Furthermore, I find little evidence that PBCs systematically strengthen their commitment to the public benefit by insulating corporate directors against shareholder pressure. PBC charters sometimes include provisions that protect the directors, such as classifying the board.[27] However, the frequency of such provisions in PBC charters does not differ in a statistically significant way from that in general business corporation charters.

A more complex picture begins to emerge once one considers PBCs' share structure. Almost half of all PBC charters—nine out of nineteen—provide for multiple classes of common stock with different voting rights ("dual-class shares"). This type of share structure is commonly used to protect the control of the founder-controller(s).[28] In PBC charters, it promises to keep the PBC committed to its stated public benefit, though only as long as the founder-controllers support that benefit. Aggregating the findings on supermajority requirements and dual-class shares, eleven out of nineteen PBCs or approximately 58% use at least one of these two provisions.[29]

I also extend my analysis to non-legal mechanisms that PBCs can use to signal their commitment to their social stated public benefit. These include the composition of their boards, their ESG ratings, and certification by B Lab, a private non-profit organization that provides a seal of approval if a PBC's social and environmental impact meets certain standards.[30] In two of these

---

[26] *Infra* Part V.C.

[27] *Infra* Part V.D. Table 3.

[28] *See, e.g.*, Vittoria Battocletti et. al., *Dual-Class Shares in the Age of Common Ownership*, 48 J. CORP. L. 541, 544 (2023) (noting that "[d]ual-class shares are used to give disproportionate voting rights to founders and key insiders, who are thus granted control over the corporation even if they hold a minority of the firm's cash flow rights."); Emilie Aguirre, *Beyond Profit*, 54 U. CAL. DAVIS L. REV. 2077, 2130 (2021) (noting that "companies use dual-class shares as a private ordering instrument to protect founders' or early management's control").

[29] *Infra* Part V.E.

[30] *Infra* Part VI.A.

areas, board composition and ESG ratings, PBCs are essentially indistinguishable from regular business corporations.[31] However, twelve of the nineteen publicly traded PBCs are either directly certified by B Lab or run their operations through subsidiaries that are certified by B Lab.

Compared to charter provisions committing PBCs to their stated benefits, B Lab certification has a key drawback: it only attests to a PBC's record at the time it was certified and cannot ensure its future commitment to its social purpose.[32] Hence, while B Lab certification allows corporations to signal their past adherence to social and environmental values, it does not technically serve as a commitment device. Still, for short-term stakeholders, such as customers purchasing perishable goods who do not enter long-term contractual relationship with the corporation, the signal associated with B Lab certification may be sufficient. Taking into account both charter provisions and B Lab certification, approximately 84% of all publicly traded PBCs use some type of signaling mechanism.[33]

The heterogeneity characterizing PBCs' use of various legal and non-legal commitment mechanisms suggests that publicly traded PBCs may still be experimenting with different ways of signaling their commitment to social or environmental causes. This interpretation is consistent with the fact that publicly traded PBCs only date back to 2017 and are therefore a relatively recent phenomenon. To explore this matter further, I have hand-collected data on the law firms advising PBCs on their going-public transactions.[34] I find that the vast majority of such law firms have only been involved in one such transaction. Accordingly, they lacked prior experience with publicly traded PBCs.[35] This is significant because the level of experience that law firms have at the time that they advise PBCs on their going-public transaction is positively correlated, in a statistically significant way, with the use of charter provisions strengthening the PBCs' commitment to their social purpose.

[31] *Infra* Figure 1.

[32] *Infra* Part VI.A.

[33] *Infra* Part VI.B. Table 9.

[34] *Infra* Part VII.

[35] *Infra* Part VII Tables 8 & 9.

This Article's findings have important policy implications. Many scholars have proposed making the statutory rules governing PBCs more rigorous.[36] The results I present in this article suggest that such calls for reform are premature. The vast majority of publicly traded PBCs—sixteen out of nineteen, or approximately 84%,—use at least one meaningful signaling device, be it supermajority requirements protecting the company's PBC status, dual-class shares, or B Lab certification. This finding alleviates fears voiced in the literature that corporations merely use their PBC form for greenwashing.[37]

Moreover, given that PBCs still appear to be experimenting with different signaling devices, lawmakers—whether in Congress or the Delaware legislature—should allow this trend to play out before taking action. Over the coming years, both lawmakers and PBCs themselves will likely gain a better understanding of threats to the social purpose of publicly traded PBCs and how to address those threats. For now, the heterogeneity observed in PBCs' conduct should be viewed as a useful field test.

This Article is structured as follows: Part I provides some background on public benefit corporation statutes. Part II describes the dataset. Part III provides basic descriptive statistics about the firms included in the dataset. Part IV explains why Delaware's statutory defaults provide little assurance that PBCs will remain committed to their public purpose. Part V analyzes the extent to which PBC charters are designed to overcome the limitations of the legal default rules and strengthen PBCs' commitment to their social purpose. Part VI discusses non-legal signaling devices that may serve as a substitute for effective legal constraints. Part VII analyzes the role of law firms. Part VIII focuses on the potential downsides of more effective legal commitments. Part IX explains the implications of my analysis.

---

[36] *See, e.g.,* Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations,* 2017 COLUM. BUS. L. REV. 92, 190 (2017) (suggesting that benefit corporations be required to obtain certification); Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANSACTIONS: TENN. J. BUS. L. 21, 100 (2018) (arguing that "[s]tatutes should . . . . creat[e] a higher threshold to becoming a benefit corporation"); J. Haskell Murray, *An Early Report on Benefit Reports,* 118 W. VA. L. REV. 25, 47–48 (2015) (arguing that states should impose stricter reporting requirements); Joseph W. Yockey, *Does Social Enterprise Law Matter?,* 66 ALA. L. REV. 767, 821 (2015) (arguing that "states should also require an independent social audit rather than leave it to benefit corporations to provide their own assessments against a third-party standard").

[37] *See, e.g.*, Joseph W. Yockey, *Does Social Enterprise Law Matter?,* 66 ALA. L. REV. 767, 807 (2015) (noting that "one worry is that benefit corporations will use the form only as a vehicle for 'cheap talk' or greenwashing").

I. THE RISE OF PUBLIC BENEFIT CORPORATIONS

The rules governing public benefit corporations differ across states, and this regulatory heterogeneity extends to the statutes' names. Many statutes refer to the relevant entities simply as "benefit corporations."[38] Other statutes—including Delaware's—use the term "public benefit corporation."[39] For simplicity, I use the expression "public benefit corporation" throughout.

In 2010, Maryland became the first state to enact a public benefit corporation statute.[40] Other states quickly followed,[41] including Delaware, whose public benefit corporation statute went into effect on August 1, 2013.[42] As of December 31, 2023, the cutoff date for this study, forty-two states and the District of Columbia had adopted some form of public benefit corporation legislation.[43] However, without exception, all PBCs that are, or have been, publicly traded are incorporated in Delaware. Accordingly, the focus of this study is on Delaware law.

---

[38] *E.g.*, MD. CORPS. & ASS'NS CODE ANN. §§ 5-6C-01 et seq. The term "benefit corporation" is typically used in states that have based their PBC legislation on the so-called Model Benefit Corporation Act. The Model Benefit Corporation Act (MBCA) was drafted by attorney Bill Clark. *E.g.,* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 346 (2014); J. Haskell Murray, *The History and Hope of Social Enterprise Forms*, 22 TENN. J. BUS. L. 207, 213 (2021). The Model Benefit Corporation Act's text is reprinted in William H. Clark, Jr. & Larry Vranka, *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*, White Paper, Jan. 18, 2013, *available at* https://drive.google.com/file/d/1QyMrBS9_6fC9guMYotZ5DElsTxuD16K9/view. *See generally* Ryan Z. Ullman, *Making Benefit Corporations More Beneficial: Drafting Statutes to Entice Entrepreneurs and Consumers Alike*, 14 J. BUS. & TECH. L. 1, 24 (2018) (noting that "[m]any states' benefit corporation statutes closely resemble the B Lab's model legislation, but five states' statutes . . . follow a model originating in Delaware").

[39] MD. CORPS. & ASS'NS CODE ANN. §§ 5-6C-01 et seq.

[40] 2010 Maryland Laws Ch. 97 (S.B. 690). The relevant provisions are now codified in MD. CORPS. & ASS'NS CODE ANN. §§ 5-6C-01 et seq.

[41] A driving force behind the proliferation of public benefit corporation statutes is B Lab, a nonprofit organization that has been lobbying for their enactment since 2008. Michael B. Dorff, *Why Public Benefit Corporations?,* 42 DEL. J. CORP. L. 77, 82 (2017).

[42] 2013 Delaware Laws Ch. 122 (S.B. 47), approv. July 17, 2013, eff. August 1, 2013.

[43] *Infra* Part I Table 1.

Table 1: PBC Statutes by State and Year

State	Year	State	Year	State	Year	State	Year	State	Year
AK	--	HI	(2011)*	MI	--	NV	2014	UT	2014
AL	2021	IA	2022	MN	2015	NY	2012	VA	2011
AR	2013	ID	2015	MO	--	OH	2021	VT	2011
AZ	2015	IL	2013	MS	--	OK	2019	WA	(2012)**
CA	2012	IN	2016	MT	2015	OR	2014	WI	2018
CO	2014	KS	2017	NC	--	PA	2013	WV	2014
CT	2014	KY	2017	ND	--	RI	2014	WY	--
DC	2013	LA	2012	NE	2014	SC	2012		
DE	2013	MA	2012	NH	2015	SD	--		
FL	2014	MD	2010	NJ	2011	TN	2016		
GA	2021	ME	2019	NM	2020	TX	2017		

Notes: Year refer to the year in which statutes first took effect.[44] * Hawaii has enacted a so-called sustainable business corporation statute. ** Washington's date refers to a social purpose corporation statute.

[44] 2020 Alabama Laws Act 2020-73 (H.B. 202), approv. March 31, 2020, eff. Jan 1, 2021; 2013 Arkansas Laws Act 1388 (H.B. 1510), approv. April 19, 2013, eff. Aug. 16, 2013; 2013 Ariz. Legis. Serv. Ch. 165 (S.B. 1238) (West), approv. April 30, 2013, eff. December 31, 2014; 2011 Cal. Legis. Serv. Ch. 728 (A.B. 361) (West), approv., eff. January 1, 2012; 2013 Colo. Legis. Serv. Ch. 230 (H.B. 13-1138) (West), approv. May 15, 2013, eff. April 1, 2014; 2014 Conn. Legis. Serv. P.A. 14-217 (H.B. 5597) (West), approv. June 13, 2014, eff. Oct. 1, 2014; 2013 Delaware Laws Ch. 122 (S.B. 47), approv. July 17, 2013, eff. August 1, 2013; 2012 District of Columbia Laws 19-305 (Act 19-672), approv. February 8, 2013, eff. May 1, 2013; 2014 Fla. Sess. Law Serv. Ch. 2014-209 (C.S.C.S.H.B. 685) (West), appr. June 20, 2014, eff. July 1, 2014; 2020 Georgia Laws Act 487 (H.B. 230), approv. July 29, 2020, eff. Jan. 1, 2021; 2011 Hawaii Laws Act 209 (S.B. 298), approv. July 8, 2011, eff. July 8, 2011; 2021 Ia. Legis. Serv. Ch. 165 (H.F. 844) (West), approv. June 8, 2021, eff. Jan. 1, 2022; 2015 Idaho Laws Ch. 217 (S.B. 1076), approv. April 2, 2015, eff. July 1, 2015; 2012 Ill. Legis. Serv. P.A. 97-885 (S.B. 2897) (West), approv. August 2, 2012, eff. 1, 2013; 2015 Ind. Legis. Serv. P.L. 93-2015 (H.E.A. 1015) (West), approv. April 30, 2015, eff. Jan. 1, 2016; 2017 Kansas Laws Ch. 71 (H.B. 2153), approv. 15, 2017, eff. July 1, 2017; 2017 Kentucky Laws Ch. 28 (HB 35), approv. March 20, 2017, eff. June 29, 2017; 2012 La. Sess. Law Serv. Act 442 (H.B. 1178) (West), approv. May 31, 2012, eff. Aug. 1, 2012; 2012 Mass. Legis. Serv. Ch. 238 (H.B. 4352) (West), approv. Aug. 7, 2012, eff. Dec. 1, 2012; 2010 Maryland Laws Ch. 97 (S.B. 690), approv. April 13, 2010, eff. October 1, 2010; 2019 Me. Legis. Serv. Ch. 328 (S.P. 468) (L.D. 1519) (West), approv. June 17, 2019, eff. Sept. 19, 2019; 2014 Minn. Sess. Law Serv. Ch. 172 (H.F. 2582) (West), approv. April 29, 2014, eff. Jan. 1, 2015; 2015 Montana Laws Ch. 306 (H.B. 258), approv. April 27, 2015, eff. October 1, 2015; 2014 Nebraska Laws L.B. 751, approv. April 2, 2014, eff. July 18, 2014; 2013 Nevada Laws Ch. 116 (A.B. 89), approv. May 24, 2013, eff. January 1, 2014; 2014 New Hampshire Laws Ch. 216 (S.B. 215), approv. July 11, 2014, January 1, 2015; 2020 New Mexico Laws Ch. 61 (H.B. 118), approv. March 6, 2020, eff. May 20, 2020; 2011 Sess. Law News of N.Y. Ch. 599 (S. 79-A) (McKinney's), approv. Dec. 12, 2011, eff. Feb. 10, 2012; 2011 NJ Sess. Law Serv. Ch. 30 (Senate 2170) (West), approv. March 1, 2011, eff. March 2, 2011; 2020 Ohio Laws File 70 (Sub. S.B. 21), approv. Dec. 17, 2020, eff. March 24, 2021; 2019 Okla. Sess. Law Serv. Ch. 45 (H.B. 2423) (West), approv. April 15, 2019, eff. Nov. 1, 2019; 2013 Oregon Laws Ch. 269 (H.B. 2296), approv. June 4, 2013, eff. Jan. 1, 2014; 2012 Pa. Legis. Serv. Act 2012-152 (H.B. 1616) (Purdon's), approv. Oct. 24, 2012, eff. Jan 22, 2013; 2013 Rhode Island Laws Ch. 13-487 (13-S 1049), approv. July 16, 2013, eff. Jan. 1, 2014; 2012 South Carolina Laws Act 277 (H.B. 4766), approv. June 14, 2012, eff. June 14, 2012; 2015 Tennessee Laws Pub. Ch. 497 (S.B. 972), approv. May

A. The Rules Governing Public Benefit Corporations

All publicly traded PBCs that went public on or before January 31, 2024, are incorporated in Delaware. This is not particularly surprising given that Delaware is the leading state of incorporation for publicly traded corporations in general: more than half of all publicly traded corporations are incorporated there.[45]

1. How Are Delaware PBCs Formed?

Under Delaware law, a PBC is a corporation whose charter contains two special provisions: one stating that the corporation is a public benefit corporation and the other specifying the public benefit that the PBC pursues.[46] Entrepreneurs can form a public benefit corporation at the time of incorporation by including the relevant provisions in the corporate charter. Alternatively, an existing general business corporation can be converted into a public benefit corporation. Such a conversion is accomplished through a charter amendment, which must be approved both by the board and by a simple majority of the outstanding shares.[47] Crucially, converting into a PBC is

---

20, 2015, eff. January 1, 2016; 2017 Tex. Sess. Law Serv. Ch. 776 (H.B. 3488) (Vernon's), approv. June 14, 2017, eff. Sept. 1, 2017; 2014 Utah Laws Ch. 394 (S.B. 133), approv. April 1, 2014, eff. May 13, 2014; 2010 Vermont Laws No. 113 (S. 263), approv. May 19, 2010, eff. July 1, 2011; 2011 Virginia Laws Ch. 698 (H.B. 2358), approv. March 26, 2011, eff. July 1, 2014; 2012 Wash. Legis. Serv. Ch. 215 (S.H.B. 2239) (West), approv. March 30, 2012, eff. June 7, 2012; 2014 West Virginia Laws Ch. 17 (S.B. 202), approv. March 31, 2014, eff. July 1, 2014; 2017-2018 Wisc. Legis. Serv. Act 77 (2017 S.B. 298) (West), enacted Nov. 27, 2017, eff. Feb. 26, 2018.

[45] *E.g.*, Jens Dammann, *Fee-Shifting Bylaws: An Empirical Analysis*, 65 J.L. & ECONS. 1, 2 (2022); Jens Dammann, *State Competition for Corporate Headquarters and Corporate Law: An Empirical Analysis*, 80 MD. L. REV. 214, 236 (2020) [hereinafter Dammann, *State Competition*]. The percentage is even higher for firms having their initial public offering ("IPO firms"). *See, e.g.*, Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79, 87 (2011) (finding that in the years 2007 and 2008, 88% of corporations having their IPO were incorporated under Delaware law); Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571–72 (2002) (analyzing IPOs between 1978 and 2000 and finding that roughly 65% were incorporated under Delaware law).

[46] DEL. CODE ANN. TIT. 8, § 362(a) (West 2022).

[47] Delaware law originally required that 90% of the outstanding shares approve such a conversion. *See* 2013 Delaware Laws Ch. 122 (S.B. 47), approved July 17, 2013, eff. Aug. 1, 2013 (inserting a new section 363(a) according to which a 90% shareholder vote was necessary to convert a regular Delaware corporation into a PBC). However, in 2015, Delaware lowered the shareholder approval requirement to two-thirds of the outstanding shares. 2015 Delaware Laws Ch. 40 (S.B. 75), approved June 24, 2015, eff. Aug. 1, 2015 (replacing the 90% approval in section 363(a) requirement with a two-thirds approval requirement). And since 2020, converting a Delaware business corporation

not a one-way street. Just as it only takes a charter amendment to turn a regular business corporation into a PBC, a charter amendment is also all that is needed to convert a PBC into a regular business corporation.[48]

2. The Balancing Requirement

When a PBC's board of directors makes business decisions, it is legally required to balance the goal of profit maximization with the interests of those affected by the corporation's conduct and the specified public benefit(s).[49]

What happens if the board fails to satisfy this balancing requirement? It is worth noting, first, that third parties, such as communities or environmental groups, cannot enforce the public benefit provision.[50] That remains true even if the relevant third parties are the beneficiaries of the PBC's stated public benefit.[51] For example, even if a PBC's charter explicitly states that the public benefit is supporting economic development in a particular city, that city cannot resort to litigation if the public benefit corporation fails to follow through on its stated commitment.

In contrast, the PBC's stockholders can bring suit if the board fails to satisfy the balancing requirement.[52] However, any shareholder litigation aimed at enforcing the public benefit commitment is subject to several key limitations. To begin with, the plaintiff shareholders must collectively own either 2% of the corporation's outstanding shares or shares with a market value of $2 million.[53] Moreover, when balancing interests, corporate directors enjoy a level of protection

---

into a PBC requires only a charter amendment adopted according to the general rule. *See* 2020 Delaware Laws Ch. 256 (H.B. 341), approved July 16, 2020, eff. July 16, 2020 (eliminating the shareholder approval requirement in section 363). This means that the amendment must be approved by a simple majority of the outstanding shares. *See* DEL. CODE ANN. TIT. 8, § 242(b) (West) (providing that after a corporation has received payment for its stocks, a charter amendment must be approved by a majority of the outstanding shares entitled to vote).

[48] Davidoff Solomon & Fisch, *supra* note 20, at 87.

[49] *E.g.*, DEL. CODE ANN. TIT. 8, §§ 362(a) (West 2022). Other states' PBC statutes take the same approach. *See, e.g.*, COLO. REV. STAT. ANN. §§ 7-101-503 (1) (West 2022); KAN. STAT. ANN. § 17-72a02(a) (West 2022).

[50] *See* DEL. CODE ANN. TIT. 8, § 365(b) (West 2022) (providing that the directors have no duty to any person on account of that person's interests being impacted by the public benefit specified in the charter); *id.* § 367 (West 2022) (limiting enforcement actions under this section to shareholders).

[51] *See* sources cited *supra* note 50.

[52] *Id.* § 367.

[53] *Id.* § 367(1). If the corporation's shares are not listed on a national securities exchange, the $2,000,000 rule does not apply, and the plaintiffs must collectively own 2% of the corporation's outstanding stock. *Id.*

that is very similar to that granted by the business judgment rule. Under the business judgment rule, a director satisfies their fiduciary duties as long as their decision is informed, disinterested, and taken in good faith.[54] Under Delaware's law on public benefit corporations, a director's balancing decision satisfies the director's duties as long as the decision is informed, disinterested, "and not such that no person of ordinary, sound judgment would approve."[55] In other words, Delaware's PBC law replaces the business judgment rule's good faith requirement with a generously worded reasonableness test. Moreover, failing to protect the stated public benefit or interests of other stakeholders often does not cause the shareholder plaintiff to suffer any financial loss, meaning the PBC directors may not have to fear liability for damages. Exculpation clauses in the charter can provide additional protection to directors: as long as the director's decision was disinterested, a failure to balance will not cause the director to lose the protection of an exculpation clause.[56]

B. How Many Public Benefit Corporations Are There?

In their published statistics, states do not distinguish between general business corporations and PBCs.[57] That makes the number of privately held PBCs currently in existence impossible to determine.[58] This paper, however, focuses exclusively on publicly traded PBCs. Publicly traded PBCs are registered with the Securities Exchange Commission ("SEC"), which means that their SEC filings are publicly available via the SEC's EDGAR database.[59] As a result, I have been able

---

[54] *See, e.g.*, Kahn on Behalf of DeKalb Genetics Corp. v. Roberts, 679 A.2d 460, 465 (Del. 1996) (holding that "[t]he business judgment rule normally protects all lawful actions of a board of directors, provided they were taken in good faith, after a reasonable deliberative process and in the absence of conflicts of interest"); Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984), overruled by Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (holding that the business judgment rule "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").

[55] DEL. CODE ANN. TIT. 8, § 365(b) (West 2022).

[56] *Id.* § 365(c).

[57] *See*, *e.g.*, DELAWARE DIVISION OF CORPORATIONS, 2022 ANNUAL REPORT 2 (2023) (lumping all corporations into the same category).

[58] The last government data published on this issue dates to April 2015, when there were at least 2,144 PBCs. Ellen Berrey, *How Many Public Benefit Corporations Are There?,* SSRN Working Paper, https://ssrn.com/abstract=2602781.

[59] US SECURITIES AND EXCHANGE COMMISSION, EDGAR | Company Filings | Company and Person Lookup, https://www.sec.gov/edgar/searchedgar/companysearch.

to use full-text searches to identify all publicly traded PBCs that existed on or prior to December 31, 2023, the cutoff date for this study.

The first publicly traded public benefit corporation was Laureate Education, Inc, which had its initial public offering ("IPO") on February 1, 2017.[60] Since then, the number of publicly traded non-SPAC PBCs has grown to nineteen.[61] This number remains small in absolute terms. Moreover, as the total number of U.S. IPOs has collapsed, from 1035 in the year 2021 to a mere 154 in the year 2023,[62] the proliferation of PBCs has slowed as well.[63] However, given that publicly traded PBCs are still a relatively new phenomenon, their growth over just the last seven years suggests that they may account for a much greater share of publicly traded firms in the coming decades. Consistent with this prediction, recent work by Michael Dorf, James Hicks, and Steven Davidoff Solomon, demonstrates that very significant funding from mainstream, top-tier venture capital funds is flowing to privately held PBCs.[64] Sooner or later, these privately held firms may go public, adding to the number of publicly traded PBCs.

Table 2: Publicly Traded (Non-SPAC) Public Benefit Corporations by Year

Year	New Publicly Traded PBCs	Registration Termination	Running Total
2017	1	0	1
2018	0	0	1
2019	0	0	1
2020	3	0	4
2021	10	0	14
2022	5	1	18
2023	1	2	17

Note: Only one pre-acquisition SPAC was incorporated as a PBC. That entity is not included in the above numbers. By contrast, publicly-traded PBCs that have resulted from the merger of publicly traded SPAC with a privately held corporation are included.

[60] *See* US SECURITIES AND EXCHANGE COMMISSION, EDGAR | Company Filings | Company Search Results | Laureate Education, https://www.sec.gov/edgar/browse/?CIK=912766&owner=exclude.

[61] *See infra* Table 2.

[62] *See* Stock Analysis, IPO Statistics, https://stockanalysis.com/ipos/statistics/ (showing that the number of IPOs fell from 1035 in 2021 to 181 in 2022 and 154 in 2023).

[63] *See infra* Table 2.

[64] Michael B. Dorff et. al., *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 158 (2021) (relying on a hand-collected sample of 295 "Delaware-registered PBCs that received investment between 2013 and 2019" and finding that these PBCs "received investment from VC funds amounting to over $2.5 billion in the aggregate . . . not just from niche, pro-social VCs but from mainstream, top-tier investors").

II. THE DATASET

To construct the dataset for this study, I first identified all publicly traded PBCs by using a keyword search on the SEC's EDGAR database.[65] My search yielded twenty PBCs. One of these twenty PBCs is a so-called pre-acquisition SPAC. SPACs, or "Special Purpose Acquisition Companies," are publicly traded entities without an operating business of their own.[66] Their sole purpose lies in merging with a privately held company and helping the latter become publicly traded without the need for an IPO.[67] Prior to the initial acquisition, SPACs share a peculiar set of governance features, such as redemption rights for investors.[68] Their particular governance structure makes it difficult to compare pre-acquisition SPACs to other corporations, so I exclude pre-acquisition SPACs from my dataset.

The word "pre-acquisition" is key here. Once a SPAC has merged with a privately held company, thereby allowing the latter to go public without an IPO, the resulting company is just another publicly traded company with an operating business.[69]

After excluding the one pre-acquisition SPAC PBC from my set of publicly traded PBCs, nineteen PBCs remained. For each of these companies, I used the SEC's EDGAR database to identify the year that that the PBC was first publicly traded as a PBC, its unique CIK identification code, its state of incorporation, and its certificate of incorporation.[70] Notably, all publicly traded PBCs are incorporated in Delaware.

I then matched each of the PBCs with twenty regular business corporations for comparison. To do so, I proceeded as follows: first, I used the CIK code to link each PBC with firm-level data

---

[65] US SECURITIES AND EXCHANGE COMMISSION, EDGAR | Company Filings | Company and Person Lookup, https://www.sec.gov/edgar/searchedgar/companysearch.

[66] *E.g.*, Mira Ganor, *The Case for Non-Binary, Contingent, Shareholder Action*, 23 U. PA. J. BUS. L. 390, 409 (2021); Usha Rodrigues & Mike Stegemoller, *Exit, Voice, and Reputation: The Evolution of SPACs,* 37 DEL. J. CORP. L. 849, L.871 (2013); Emily Strauss, *Suing SPACs*, 96 S. CAL. L. REV. 553, 555 (2023).

[67] *E.g.*, Michael Klausner et. al., *supra* note 23, at 235; Amanda M. Rose, *SPAC Mergers, IPOs, and the PSLRA's Safe Harbor: Unpacking Claims of Regulatory Arbitrage*, 64 WM. & MARY L. REV. 1757, 1763 (2023); Strauss, *supra* note 66, at 555.

[68] *See* sources cited *supra* note 23.

[69] Therefore, companies where the SPAC has already merged do qualify for inclusion in the dataset.

[70] The CIK identification code is the identifier that the SEC assigns to companies when they originally filed with the SEC and that they are required to use for all subsequent SEC filings. In case of amendments to the certificate of incorporation, we use the most recent version in effect in the year of interest.

from CRSP Compustat Merged ("CCM").[71] Using the resulting dataset, I used propensity score matching to match each PBC with twenty regular business corporations that have been publicly traded for the same number of years, are incorporated in the same state (Delaware), and provide the closest possible match in total assets.[72] I then relied on the EDGAR database to retrieve the certificates of incorporation of all matched non-PBC corporations. Unfortunately, for two of the PBCs in my dataset, financial data are not (yet) available, preventing me from matching them with regular business corporations. The matching process yielded 340 regular business corporations. Note that the two PBCs for which financial data are not available can still be used to the extent that my analysis focuses exclusively on PBC charters. It is only for comparative analyses, which examine the differences between PBCs and their matching regular business corporations, that the two unmatched PBCs must be excluded.

Corporations may amend their certificates over time, and I was careful, with respect to both PBCs and matching corporations, to use the most recent versions that were in effect in the calendar year of interest. For the PBCs, the year of interest is the first calendar year in which the PBC was publicly traded as a PBC. For the regular business corporations, the year of interest is determined by the PBC with which they are matched. For example, if the corporation was first traded as a PBC in 2021 and if the charter amendment that turned the corporation into a PBC went into effect on November 1, 2021, I focused on the corporation's charter as amended on November 1, 2021.

Finally, I coded the combined dataset by hand to determine which types of charter provisions the various charters contain. All variable definitions are included in the Appendix.[73]

III. DESCRIPTIVE STATISTICS

Before delving into the governance arrangements of publicly traded PBCs, it is helpful to consider some basic information about the companies in the dataset.

---

[71] This dataset is available via Wharton Research Data Services [WRDS]. UNIV. OF PA., WHARTON RSCH. DATA SERVS. [WRDS], https://wrds-www.wharton.upenn.edu/.

[72] We match "with replacement," which means that the same regular business corporation can function as a match for different PBCs.

[73] *Infra* Appendix Table A.1 (defining financial variables) and Table A.2 (defining non-financial variables).

A. SUMMARY STATISTICS

Table 2 displays summary statistics about both the PBCs and the matched regular business corporations included in the dataset. Applying the conventional 5% level of statistical significance, the group differences are not statistically significant for most of the financial measures. The two exceptions are the dividends-over-assets ratio and book leverage, both of which are higher for regular business corporations than for PBCs. While any explanation of these differences necessarily remains conjectural, the observed differences are consistent with the narrative that PBCs focus less exclusively on shareholder wealth maximization than regular business corporations. Thus, one can hypothesize that PBCs tend to pay fewer dividends because they expect to spend funds on their social objectives.

Book leverage is defined as the ratio of total liabilities over total assets.[74] High book leverage means that managers have lower free cash flow, implying that managers have less leeway to pursue goals other than profit maximization.[75] Accordingly, consistent with what we observe, one would expect book leverage to be higher in regular business corporations, which are meant to focus on shareholder wealth, than in PBCs, which are intended to pursue a more complex set of goals.

Table 2: Summary Statistics

	Public Benefit Corporations		Business Corporations		Difference
	Obs.	Mean	Obs.	Mean	
Firm age	17	3.53	340	3.53	0.00
Assets	17	1.70	340	1.14	-0.56
Market equity	17	4265.59	340	2353.58	-1912.00
Employees	17	0.00	337	0.00	-0.00
Total liabilities	17	0.29	340	0.34	0.05
Tangibility	17	0.17	339	0.14	-0.03
Dividends over assets	17	0.00	339	0.01	0.01***
Bool leverage	17	0.12	340	0.24	0.12**
Fin. leverage	17	0.12	340	0.16	0.04
Return on assets	17	-0.17	339	-0.12	0.05
Return on equity	17	-0.40	339	-0.72	-0.32
Tobin's q	17	3.87	340	3.17	-0.71
Cap. exp./assets	16	0.08	340	0.03	-0.05

Notes: All variables are defined in Table A.2 in the Appendix. All variables refer to the year of interest. For the PBCs, the year of interest is the calendar year in which they were first publicly traded. For the regular business corporations, the calendar year of interest is the same as for the PBC with which they were matched. ***, **, and * indicate statistical significance at the 1%,

[74] *Infra* Appendix Table A.1.

[75] *See, e.g.*, Michael C. Jensen, *Takeovers: Their Causes and Consequences*, 2 J. ECON. PERSP. 21, 30 (1988) (pointing out that high leverage translates into lower free cash flow and can thereby reduce agency costs).

5%, and 10% levels respectively.

B. HOW DO PBCS BECOME PUBLICLY TRADED?

There are different ways in which a privately held company can go public. The traditional approach is to have an initial public offering ("IPO") in which newly issued shares are sold to the public at large with the help of one or more investment banks acting as underwriters.[76] IPOs are tightly regulated by federal securities law.[77] Of particular relevance is Section 11 of the Securities Act, which imposes strict liability for material misstatements or omissions in the company's registration statement.[78]

Alternatively, to avoid the IPO process, a privately held company can merge with another company that is already publicly traded. In particular, as previously mentioned, it can merge with a so-called SPAC.[79] In 2022, pre-acquisition SPACs going public accounted for 59% of US IPO proceeds.[80] Since then, however, disappointing returns[81] and an increasing awareness of the deeply flawed governance structure of SPACs[82] have caused investors' appetite for SPACs to decline precipitously.[83] In the year 2023, SPACs' share of IPO proceeds dropped to 15%.[84]

[76] *See, e.g.*, Brent J. Horton, *Spotify's Direct Listing: Is It A Recipe for Gatekeeper Failure?,* 72 SMU L. REV. 177, 182–85 (2019) (describing the traditional IPO process and the role that investment banks play as underwriters).

[77] For an overview over the relevant rules *see*, *e.g.*, Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 310 (2022).

[78] 15 U.S.C.A. § 77k (West).

[79] *See* text accompanying notes 66-68.

[80] SPAC Analytics, *SPAC and US IPO Activity*, https://www.spacanalytics.com/.

[81] *See* Michael Klausner et. al., *supra* note 23, at 298 (providing a critical evaluation of the economic performance of SPAC mergers); Michael Klausner & Michael Ohlrogge, *Was the SPAC Crash Predictable?*, 40 YALE J. ON REG. BULL. 101, 102 (2023) (noting that SPACs' poor performance).

[82] For an analysis of the governance problems inherent in the structure of SPACs see, for example, the sources cited *supra* note 23.

[83] *See, e.g.*, THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 3:58 (2023) (noting the role of SEC scrutiny in SPACs' decline); Emily Strauss, *Suing SPACs*, 96 S. CAL. L. REV. 553, 561 (2023) (noting that both "increased regulatory attention" and "heightened overall scrutiny" explain reduced SPAC activity).

[84] SPAC Analytics, SPAC and US IPO Activity, https://www.spacanalytics.com/. *See also* Klausner & Ohlrogge, *supra* note 81, at 102 (showing that the number of SPAC IPOs already saw a precipitous decline in the second half of 2022 and that by the end of 2022, "SPACs had lost their luster").

A third option for companies going public is a so-called direct listing. In the case of a direct listing, a company goes public without issuing new shares.[85] Thus, the shares that are traded are the shares that are already held by the corporation's existing shareholders.[86] A direct listing does not require the company to involve underwriters.[87] Moreover, Section 11 of the Securities Act does not apply.[88]

The nineteen publicly traded PBCs have chosen a variety of ways to go public.[89] Table 3 displays the relevant numbers. Three companies were already publicly traded when they converted from regular business corporations into PBCs. Nine PBCs had a traditional IPO. Five PBCs went public by merging with a SPAC, and two chose a direct listing. Note that this heterogeneity is consistent with a narrative in which PBCs are still experimenting with different legal structures.

Table 3: How Do PBCs Become Publicly Traded

IPO	9
Merger with SPAC	5
Midstream conversion into PBC	3
Direct listing	2

Note: Included under midstream conversions is a case in which a publicly traded business corporation was converted midstream into the subsidiary of a publicly traded PBC.

IV. THE CHALLENGE OF MAINTAINING THE PBC'S PUBLIC COMMITMENT

When a PBC's board of directors makes business decisions, it is legally required to balance the goal of profit maximization with the interests of those affected by the corporation's conduct, and the specified public benefit(s).[90] Yet despite this clear legal obligation, a closer examination

---

[85] *E.g.*, Horton, *supra* note 76, at 195; Neal Kapoor, *Direct Listings and the Tracing Doctrine: Why Congress or the Sec Must Intervene*, 2022 COLUM. BUS. L. REV. 1026, 1028 (2023); Tayler Tanner, *Spotify's Direct Listing and Foreign Private Issuers: Protecting Investors When Foreign Private Issuers List on A U.S. Exchange but Not on Their Home Exchange*, 2019 B.Y.U. L. REV. 573, 582 (2019).

[86] Kapoor, *supra*, at 1028.

[87] *E.g.*, Andrew F. Tuch & Joel Seligman, *The Further Erosion of Investor Protection: Expanded Exemptions, SPAC Mergers, and Direct Listings*, 108 IOWA L. REV. 303, 357 (2022); Horton, *supra* note 76, at 195.

[88] Slack Techs., LLC v. Pirani, 598 U.S. 759 (2023).

[89] *Infra* Table 3.

[90] *E.g.*, DEL. CODE ANN. TIT. 8, § 362(a) (West 2022). Other states' PBC statutes take the same approach. *See, e.g.*, COLO. REV. STAT. ANN. § 7-101-503 (1) (West 2022); KAN. STAT. ANN. § 17-72a02(a) (West 2022).

shows that Delaware's default rules ultimately offer little assurance that PBCs are and will remain committed to their public purpose.

A. The Governance Structure

The fundamental challenge to assuring that PBCs will remain committed to their public purpose lies in their governance structure, which is centered around the shareholders. The shareholders elect the directors and thereby retain ultimate control of the PBC.[91] By contrast, neither the beneficiaries of the stated public benefit nor any other non-shareholder constituencies have a say in how the PBC is run.

In practice, the goals of maximizing shareholder wealth do not necessarily conflict with the specified public benefit or with the interests of those affected by the corporation. For example, measures taken in furtherance of the specified public benefit may yield reputational benefits. These reputational benefits, in turn, may allow the corporation to charge higher prices for its products or services and may also help the corporation recruit particularly qualified and dedicated employees. However, to the extent that shareholder wealth maximization and public purpose are in unison, there is no need for public benefit corporations in the first place. The real question is whether the law can ensure PBCs' commitment to non-shareholder constituencies once the latter's interests diverge from those of shareholders. And in this scenario, it turns out that Delaware's statutory defaults provide shareholders with ample opportunity to abrogate or subvert a PBC's commitment to non-shareholder constituencies. It is this issue to which I turn next.

B. Abrogating or Subverting PBC's Social Purpose

Under the default rules governing Delaware PBCs, shareholders have different ways of eliminating or undermining the PBC's social commitment.

The most obvious step that shareholders can take is seeking a charter amendment that modifies the stated public benefit or converts the corporation into a regular business corporation.[92] A charter

---

[91] Del. Code Ann. tit. 8, § 211 (West 2022).

[92] Davidoff Solomon & Fisch, *supra* note 20, at 87 (asserting that "the prospect of such conversions raises the potential of undermining a PBC's commitment to its social purpose").

amendment requires not just shareholder approval, but also a board resolution.[93] However, given that the shareholders elect the directors[94] and also have the power to remove directors with or without cause,[95] the need for a board resolution is unlikely to prove much of an obstacle as long as Delaware's default rules remain in place.

Even in the absence of a formal charter amendment, large shareholders or groups of shareholders may pressure the board to neglect the stated public benefit and instead focus on shareholder wealth maximization. In such a scenario, civic-minded individual shareholders may seek to enforce the corporation's social purpose by way of litigation.[96] However, as previously explained, such litigation faces substantial legal obstacles.[97]

Optimists may object that shareholders who invest in a public benefit corporation may be on board with the corporation's social purpose and are therefore unlikely to take action against it. However, even assuming that a PBC's current investors are and will remain satisfied with management sacrificing profits for the sake of the PBC's social purpose, there is always the specter of a change in control. Should the PBC's management sacrifice substantial profits, the corporation becomes an obvious target for hostile acquirers. Such acquirers know that if they manage to acquire a controlling stake, they can use their control to convert the corporation back into a regular business corporation, stop sacrificing profits to non-shareholder interests, and then sell their investment at a profit.

In sum, Delaware's statutory defaults provide little assurance that a PBC will remain committed to its public purpose.

V. An Analysis of PBC Charters

In theory, private ordering can solve or at least mitigate the problem of insufficient commitment. PBC charters can be purposefully designed to strengthen the PBC's commitment to their stated public benefit.

---

[93] Del. Code Ann. tit. 8, § 211 (West 2022) (requiring both a board resolution and shareholder approval for midstream charter amendments).

[94] *Id.* § 211.

[95] *Id.* § 141(k).

[96] *Id.* § 367.

[97] *Supra* Part I.B.2.

Most obviously, a PBC charter can contain supermajority requirements that make it more difficult to change the specified benefit or convert the corporation back into a regular business corporation.[98] Moreover, a PBC charter can provide for dual-class shares, which allow the founders to retain a majority of the votes even after selling the greater part of the PBC's equity.[99] Dual-class shares can keep the PBC committed to its public purpose as long as its founders share that commitment. Even in the absence of supermajority requirements and dual-class shares, the charter itself can strengthen the PBC's legal commitment to its social purpose. The charter can facilitate shareholder litigation aimed at enforcing the relevant public benefit.[100] And, finally, the charter can include provisions, such as classified boards, that insulate the directors against shareholder pressure, at least in the short run.[101]

In sum, PBCs can rely on a rich menu of charter provisions to reinforce their commitment to their stated public benefit. The question, though, is whether PBCs actually make use of such provisions. It is this issue to which I turn now.

A. CHARTER AMENDMENTS

Let us begin by focusing on the most obvious problem, namely that public benefit corporations can amend their charter to change the specified benefit or even terminate their PBC status entirely.

In Delaware, such a charter amendment requires a board resolution and approval by a simple majority of the outstanding shares entitled to vote.[102] Steve Davidoff Solomon and Jill Fisch rightly point out that PBCs' ability to shed their PBC status via charter amendment constitutes a key factor limiting the PBC form's commitment value.[103] Why should customers, investors, or

[98] DEL. CODE ANN. TIT. 8, § 102(b)(4) (West 2022) (providing that the corporation's certificate of incorporation may include provisions that impose supermajority voting requirements). For an in-depth discussion see *infra* Part V.A.

[99] DEL. CODE ANN. TIT. 8, § 212(a) (West 2022) (providing that each share has one vote "[u]nless otherwise provided in the certificate of incorporation). For a discussion of dual-class shares see *infra* Part V.B.

[100] *Infra* Part V.C.

[101] *Infra* Part V.D. *Cf.* DEL. CODE ANN. TIT. 8, § 141(d) (West 2022) (allowing charter provisions that divide the board into a maximum of three classes).

[102] *See* DEL. CODE ANN. TIT. 8, § 242(b) (West) (providing that after a corporation has received payment for its stocks, a charter amendment must be approved by a majority of the outstanding shares entitled to vote).

[103] Davidoff Solomon & Fisch, *supra* note 20, at 87 (asserting that "the prospect of such conversions raises the potential of undermining a PBC's commitment to its social purpose").

employees put their faith in a corporation's PBC status if that status can be terminated with relative ease at the next annual or special shareholder meeting?

PBC charters can include a supermajority requirement to make it more difficult to amend the corporation's PBC status and stated public benefit. But do PBC charters contain such supermajority requirements in practice? The answer is "mostly no." Of the nineteen PBC charters in my dataset, only four include a provision requiring a supermajority for amendments that would change the corporation's PBC status or its stated public benefit. This omission is even more glaring because thirteen of the remaining sixteen PBC charters contain supermajority requirements protecting other parts of the charter.

B. DUAL-CLASS SHARES

A corporation's charter may utilize dual-class shares, meaning the corporation is authorized to issue two or more shares of common stock and that these different classes of stock have different voting rights.[104] Dual-class stocks are a popular mechanism by which founders can cement their control over their company despite parting with a majority of the equity.[105] Accordingly, PBCs can use dual-class shares to strengthen their commitment to their stated public benefit: as long as the founders themselves remain committed to that public benefit, dual-class shares securing the founders' control guarantee that the PBC remains committed as well.

Of the nineteen PBCs in our dataset, nine, or almost half, use dual-class shares. Moreover, comparing the PBCs with their matched regular business corporations, I find that that PBCs make more frequent use of dual-class shares than regular corporations, though that finding is only statistically significant at the 10% level and hence does not satisfy the conventional 5% threshold of significance.

---

[104] DEL. CODE ANN. TIT. 8, § 212(a) (West 2022) (providing that each share has one vote "[u]nless otherwise provided in the certificate of incorporation). Of course, a corporation's certificate of incorporation can also authorize different classes of shares that have the same voting rights. *Cf.* DEL. CODE ANN. TIT. 8, § 102(a)(4) (West) (providing for the possibility of different classes of shares). However, for the purpose of this Article, I use the term "dual-class shares" solely for those cases, in which the different classes of shares have different voting rights. *See* Table A.2 in the Appendix (defining the term dual-class shares as used in this Article).

[105] See the sources cited *supra* note 28.

Table 4: Dual-Class Shares

	Public Benefit Corps.		Regular Business Corps.		Difference
	Obs.	Mean	Obs.	Mean	
Dual-class shares	17	0.94	340	0.81	-0.13*

Notes: All variables are defined in Table A.2 in the Appendix. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

Given that dual-class shares are, in fact, more frequently used by the PBCs in our sample, it is worth asking how charter provisions imposing supermajority requirements interact with dual-class share provisions. Recall that four of the nineteen PBCs charters in the sample impose a supermajority requirement for charter amendments that covers the public benefit provision. How does the use of such supermajority requirements overlap with dual-class share provisions? Of the nineteen PBC charters in the dataset, eleven or approximately 58% contain a least one of the two provisions.

C. Shareholder Litigation

Delaware allows individual shareholders to initiate litigation if the directors fail to satisfy the law's balancing requirement. Thus, even if a majority of the shareholders pressure the board to return to shareholder wealth-maximization, a civic-minded minority can bring a shareholder lawsuit to enforce the PBC's public commitment.

However, as previously noted, such litigation faces substantial obstacles.[106] For example, the plaintiff shareholders must collectively own at least 2% of the corporation's outstanding shares or shares with a market value of $2 million.[107] Moreover, when balancing interests, corporate directors enjoy a level of protection that is very similar to that granted by the business judgment rule.[108]

In theory, PBC charters could take measures to facilitate litigation aimed at protecting the PBC's public interest commitment. For example, the charter could promise to reimburse the legal

[106] *Infra* text accompanying notes 53–56.

[107] Del. Code Ann. tit. 8, § 367(1) (West 2022). If the corporation's shares are not listed on a national securities exchange, the $2,000,000 rule does not apply, and the plaintiffs must collectively own 2% of the corporation's outstanding stock. *Id.*

[108] *Cf.* Del. Code Ann. tit. 8, § 365(b) (West 2022) (providing that a director's balancing decision satisfies the director's duties as long as the decision is informed, disinterested, "and not such that no person of ordinary, sound judgment would approve").

expenses of shareholder plaintiffs seeking to enforce the PBC's commitment to its stated public benefit(s).[109] However, none of the nineteen PBC charters contain any provisions facilitating shareholder litigation.

Even if PBC charters do not actively facilitate shareholder litigation aimed at enforcing the corporation's commitment to the stated public benefit, they may at least abstain from creating further obstacles for such litigation. Corporate charters may include various provisions that make shareholder litigation more difficult or protect directors against the effects of such litigation. For example, charters can include liability waivers or change the legal defaults on indemnification in the directors' favor. Hereinafter, I refer to these and similar provisions as anti-litigation provisions. In this Part, I investigate whether PBC charters are less likely to rely on anti-litigation provisions than regular business corporation charters.

1. The Different Types of Anti-Litigation Provisions

The PBC and regular business corporation charters in our dataset include five types of charter provisions that may reduce the effectiveness of shareholder litigation.

(1) *Liability waivers*. Charters can protect directors against the consequences of litigation by including a liability waiver.[110] Under Delaware law, such a waiver will protect the directors even if they fail to balance the public interest against the goal of profit maximization as long as the directors were reasonably informed, disinterested, and not entirely unreasonable.[111]

(2) *Mandatory indemnification*. If a current or former director is sued in their official capacity but succeeds in their defense, either on the merits or otherwise, the director has a right to be

---

[109] *See* DEL. CODE ANN. TIT. 8, § 102(f) (West) (prohibiting charter provisions that require the plaintiff shareholder to reimburse the corporation's expenses in incurred in connection with an internal corporate claim). From this provision, it follows—*e contrario*—that charter provisions requiring the corporation to reimburse shareholder plaintiffs are not per se illegal. The idea that it can be in the corporation's best interest to reimburse the expenses of stockholders challenging the board also finds an expression in Delaware's law on bylaws. The Delaware General Corporation Law explicitly allows for bylaws that require the board to reimburse insurgent shareholders for their expenses in waging a proxy contest against the corporation in connection with the election of directors. DEL. CODE ANN. TIT. 8, § 113 (West). This provision authorizes bylaws imposing a duty to reimburse insurgent shareholders who failed to win the proxy contest. Yucaipa Am. All. Fund II, L.P. v. Riggio, 1 A.3d 310, 356 n. 244 (Del. Ch. 2010), aff'd, 15 A.3d 218 (Del. 2011).

[110] DEL. CODE ANN. TIT. 8, 102(b)(7) (West).

[111] *Id.*

indemnified.[112] In all other cases, where indemnification is not prohibited outright, Delaware's default rules give the corporation a choice on whether or not to indemnify the director.[113] However, when the corporation has the power to indemnify the director, the charter may turn that power into a duty.[114] Such provisions are known as mandatory indemnification provisions.[115]

(3) *Advancement of expenses*. The charter can also go beyond the legal default rules on indemnification by requiring the corporation to advance the director's expenses when the director is entitled to indemnification.[116]

(4) *Duty to purchase insurance*. The charter can create an additional layer of protection for directors by requiring the corporation to purchase liability insurance for the director.[117]

(5) *Exclusive forum provisions*. Delaware law allows corporations to specify the Delaware chancery court as the exclusive forum for all shareholder lawsuits brought under Delaware law.[118] Such an exclusive forum provision can be included either in the corporation's charter or in its bylaws.[119] However, the charter is more difficult to amend than the bylaws. In particular, unlike a bylaw amendment, a charter amendment requires a board resolution.[120]

---

[112] *Id.* § 145(c).

[113] *Id.* § 145(a) & (b).

[114] Waltuch v. Conticommodity Services, Inc., 88 F.3d 87, 94 (2d Cir. 1996) (noting that the corporation can grant a right to mandatory indemnification as long as it has the power to indemnify); Blankenship v. Alpha Appalachia Holdings, Inc., No. CV 10610-CB, 2015 WL 3408255, at *14 (Del. Ch. May 28, 2015), judgment entered sub nom. Blankenship v. Alpha Appalachia Holdings, Inc. (Del. Ch. 2015) (enforcing a charter provision granting a right to indemnification and advancement of expenses). *See also* Samuel T. Hirzel & Dawn Kurtz Crompton, *Finding (and Funding) the Cost of Freedom: Indemnification and Advancement for Alternative Business Entities*, 15 DEL. L. REV. 83, 87 (2015) (noting that "[m]any corporations include stock language in their charters or bylaws that includes mandatory indemnification and advancement "to the fullest extent permitted by Delaware law").

[115] *E.g.*, Stockman v. Heartland Indus. Partners, L.P., No. CIV.A. 4227-VCS, 2009 WL 2096213, at *13 (Del. Ch. July 14, 2009).

[116] *E.g.*, Gentile v. SinglePoint Fin., Inc., 787 A.2d 102, 106 (Del. Ch. 2001), aff'd, 788 A.2d 111 (Del. 2001); Re Day v. Diligence, Inc., No. CV 2020-0076-SG, 2020 WL 2510416, at *2 (Del. Ch. May 15, 2020).

[117] *Cf.* DEL. CODE ANN. TIT. 8, § 145(g) (West) (providing that corporations shall have power to purchase D&O insurance).

[118] *Id.* § 115.

[119] *Id.*

[120] *Id.* § 242(b).

2. Empirical Analysis

I examine the frequencies with which the PBC charters and regular business corporation charters employ the various types of anti-litigation provisions. I also create a composite variable named *Anti-Litigation Index*, which captures the overall level of protection that the corporation affords its directors against litigation: the variable *Anti-Litigation Index* takes on values between zero and five, depending on how many of the five types of anti-litigation provisions a charter includes.

The results are displayed in Table 5 below. Instead of facilitating shareholder litigation and thereby strengthening their social purpose, PBCs rely even more heavily on anti-litigation provisions than regular corporations, though once again, the difference is not statistically significant. In sum, PBCs show no propensity to strengthen litigation as an enforcement mechanism for their social commitment.

Table 5: Charter Provisions Protecting Directors Against Litigations

	Public Benefit Corps.		Regular Business Corps.		Difference
	Obs.	Mean	Obs.	Mean	
Components					
Liability waiver	17	1.00	340	1.00	0.00
Indemnification	17	0.35	340	0.45	0.09
Advancement of expenses	17	0.35	340	0.36	0.00
Insurance	17	0.00	340	0.00	0.00
Exclusive forum	17	0.82	340	0.69	-0.13
Composite Variable					
Anti-litigation index	17	2.53	340	2.50	-0.03

Notes: All variables are defined in Table A.2 in the Appendix. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

D. INSULATING PBC BOARDS AGAINST SHAREHOLDER PRESSURE

Even without a formal charter amendment, a PBC's shareholders can pressure the board to focus on shareholder wealth maximization, thereby causing the board to abandon its public benefit de facto, if not de jure.[121] To mitigate this problem, the charter can strengthen the board's independence vis-à-vis the corporation's shareholders.

1. The Different Types of Insulating Provisions

The various PBC charters and regular business corporation charters in our dataset include six types of charter provisions that can help insulate the board against shareholder pressure. The following explanation provides an overview; more technical definitions are provided in the Appendix.[122]

(1) *Classified boards*: By providing for a classified board, the charter can reduce the frequency with which directors are up for reelection, thereby preventing shareholders from removing directors without cause.[123]

(2) *Number of directors*: Even if a corporation has a classified board, shareholders can gain control of the board by adding additional directors ("packing the board").[124] To prevent this practice, the charter can fix the number of directors or entrust the board with determining the number of directors.

(3) *Supermajority requirements for removal of directors*: In the absence of a classified board, shareholders can remove directors without cause.[125] Even if the board is classified, removal is still possible, albeit only with cause.[126] Either way, charters sometimes impose a supermajority requirement for a shareholder resolution removing one or more corporate directors.

---

[121] *Cf.* Davidoff Solomon & Fisch, *supra* note 20, at 74–76 (explaining that while PBCs are meant to balance profit maximization against their stated public benefit, the governance structure remains centered around the shareholders).

[122] *See* Appendix Table A.2 (defining the various governance variables).

[123] *See* DEL. CODE ANN. TIT. 8, § 141(d) (West) (allowing the board to be divided into up to three classes, with only one class being up for reelection each year); *id.* § 141(k) (providing that in case of a classified board, directors can only be removed for cause).

[124] *See, e.g.*, John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1399–400 (2001) (pointing out that shareholders can gain control of the board by creating additional board seats and filling the newly vacant seats with candidates of their choosing); Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 686 n.29 (2003) (noting that shareholders' ability to determine the number of directors allows them to pack the board).

[125] DEL. CODE ANN. TIT. 8, §141(k) (West). An exception applies if the directors were elected via cumulative voting. *Id.*

[126] *Id.*

(4) *Authorizing the board to adopt bylaws:* By default, the bylaws of a Delaware corporation can only be adopted or amended by the shareholders.[127] In practice, however, public corporation charters typically authorize the board to adopt or amend the bylaws.[128]

(5) *Supermajority requirements for shareholder bylaws*: Even if a corporation's charter authorizes the board to adopt bylaws, shareholders retain concurrent power to adopt or amend the bylaws.[129] To further shift the balance of power to the board, charters sometimes require shareholders to satisfy a supermajority requirement when amending the bylaws.

(6) *Banning action by written consent.* By default, any action that shareholders can take at the annual meeting can also be taken via written consent.[130] Some charters, however, explicitly, bar shareholder action by written consent either in whole or in party, thereby limiting shareholder action to annual or special meetings.

2. Empirical Results

We examine the frequencies with which PBC charters and regular business corporation charters employ various charter provisions insulating the board against shareholder pressure. We also define a composite variable *Insulation Index* that captures the total level of protection that the charter affords the board. For purposes of calculating the Insulation Index, each type of insulating provision is worth one point. So, depending on how many of the six insulating provisions a charter includes, the variable *Insulation Index* ranges between zero and six.

The results for both the six individual variables and the composite variable are displayed in Table 6. PBC charters do, indeed, contain a number of provisions that protect the board against shareholder pressure. For example, 69% of PBC charters provide for a classified board, and all PBC charters authorize the board to adopt bylaws. However, I find no statistically significant evidence that PBC charters make heavier use of insulating charter provisions than regular business corporation charters. And even discounting the question of statistical significance, the mean value

[127] *Id.* § 109(a) (West). An exception applies if the corporation has not yet received payment for its stock. In that case, the "original or other bylaws … may be adopted, amended or repealed by the incorporators, by the initial directors of a corporation…, or, … by its board of directors." *Id.*

[128] *E.g.*, Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1370 (2013) (noting that charters "typically" "authorize the board to amend [the company's] bylaws").

[129] DEL. CODE ANN. TIT. 8, § 109(a) (West).

[130] *Id.* § 228(a).

of the *Insulation Index* variable is virtually the same for regular business corporations (5.00) as for PBCs (5.06). In other words, there is no evidence that PBCs make strategic use of insulating charter provisions to strengthen their commitment to their stated public benefit.

Table 6: Charter Provisions Insulating the Board Against Shareholder Pressure

	Public Benefit Corps		Regular Business Corps.		Difference
	Obs.	Mean	Obs.	Mean	
Individual Variables					
Classified board	17	0.76	340	0.77	0.00
Board size	17	0.88	340	0.87	-0.01
Supermajority needed for director removal	17	0.82	340	0.82	-0.01
Board can adopt bylaws	17	1.00	340	1.00	0.00
Supermajority needed for s'holder bylaws	17	0.71	340	0.67	-0.04
Ban on action by written consent	17	0.88	340	0.87	-0.01
Composite Variable					
Insulation Index	17	5.06	340	5.00	-0.06

Notes: All variables are defined in Table A.2 in the Appendix. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

E. Summary

The picture emerging from my analysis of corporate charters is mixed. On the one hand, PBCs do not make use of charter provision to facilitate shareholder legislation. Moreover, while some PBC charters contain provisions that strengthen the board's independence vis-à-vis the shareholders, PBC charters are essentially indistinguishable from regular business corporations on this dimension. On the other hand, a majority (58%) of PBCs subject changes to their PBC status to supermajority voting requirements or rely on a dual-class share structure.

VI. Alternative Signals

Charter provisions are not the only way for PBCs to signal that they are serious about protecting their stated public benefit(s). Other mechanisms may serve the same purpose. Against this background, this Part focuses on three non-legal instruments that PBCs can employ to demonstrate that they take their social mission seriously. These instruments include the selection of corporate directors, ESG ratings, and certification by B Lab, a non-profit corporation.

A. PBC DIRECTORS

At least in theory, PBCs may signal that they are serious about a particular social cause by choosing directors who are known to be devoted to that cause. There is no simple way of quantifying directors' reputations. Still, if PBC directors were systematically different from directors of general business corporations, one might expect that difference to be reflected in their demographic characteristics.

I therefore use demographic data from BoardEx to compare the directors of PBCs to those of the general business corporations in our sample.[131] The results are shown in Table 7. By and large, PBC directors are remarkably similar to directors of other corporations. PBCs have, on average, a slightly higher percentage of female directors, but this difference is not statistically significant at the conventional 5% level.

Table 7: Board Characteristics

	Public Benefit Corp.		Business Corporations		Difference
	Obs.	Mean	Obs.	Mean	
Board Size	17	9.76	331	9.30	-0.46
Mean director age	17	60.22	330	59.72	-0.49
Mean director network size	17	2336.80	331	2065.74	-271.06
	17	0.29	331	0.26	-0.03
Diversity					
Percentage of female directors	17	0.91	295	0.85	-0.06*
Percentage of U.S. directors	17	0.12	331	0.17	0.04
Education					
Percentage of directors with MBA	17	0.03	331	0.02	-0.01
Percentage of directors with PhD	17	0.07	331	0.03	-0.04

Notes: The variables mean director age, mean director network size, percentage of female directors, percentage of U.S. directors, percentage of directors with MBA, and percentage of directors with PhD are calculated separately for each corporate board. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

[131] BoardEx is available via Wharton Research Data Services [WRDS]. UNIV. OF PA., WHARTON RSCH. DATA SERVS. [WRDS], https://wrds-www.wharton.upenn.edu/.

B. ESG Ratings

To the extent that PBCs seek to signal their past—rather than their future—commitment to certain causes such as the environment or the well-being of their workers, they may also rely on ESG ratings. Of course, ESG ratings are controversial.[132] Many scholars believe that such ratings are easy to manipulate or that they do not capture anything particularly meaningful.[133] Still, despite this criticism, investors continue to use ESG ratings.[134] We therefore need to consider the possibility that PBCs rely on ESG ratings to signal their commitment to social causes. In other words, PBCs may forego legal commitment devices because they can simply publish their ESG ratings to convince investors, employees, and customers that they are devoted to social or environmental causes.

To explore this possibility, I examine whether PBCs outperform other corporations in terms of ESG ratings. Specifically, I use Refinitiv's ESG ratings.[135] Refinitiv's ESG ratings are more

---

[132] *See, e.g.*, Alexander Coley, *ESG Ratings: A Blind Spot for U.S. Securities Regulation*, 43 NW. J. INTL. L. & BUS. 1, 22 (2022) (noting that "ESG ratings are the product of unregulated third-parties whose methodologies are criticized as opaque, inconsistent, and unreliable"); Andrew W. Winden, *Jumpstarting Sustainability Disclosures*, 76 BUS. LAW. 1215, 1228 (2021) (noting that "[t]he subjectivity of ESG ratings and some ESG metrics makes them . . . controversial"). *See also* Florian Berg et al., *Aggregate Confusion: The Divergence of ESG Ratings*, 26 REV. FINANCE 1315–1344 (2022) (discussing the divergence of different ESG ratings and investigating the causes of that divergence); Aneesh Raghunandan & Shiva Rajgopal, *Do ESG Funds Make Stakeholder-Friendly Investments?*, 27 REV. ACCOUNTING STUD. 822, 822–63 (2022) (providing that ESG scores are not correlated with firms' carbon emissions levels or compliance records).

[133] *See, e.g.*, Ebbe Rogge & Lara Ohnesorge, *The Role of ESG Rating Agencies and Market Efficiency in Europe's Climate Policy*, 28 HASTINGS ENVT'L L.J. 113, 138 (2022) (noting that ESG ratings disadvantage firms that lack the resources to disclose pertinent information).

[134] *See, e.g.*, Rochelle Toplensky, *Why ESG Ratings Are All Over the Map: Requiring All Companies to Disclose a Uniform Set of ESG Data Would Make It Easier for Investors to Compare Funds and Companies*, WALL ST. J. Online, Aug. 17, 2023, https://plus.lexis.com/api/permalink/de9e7623-78fb-4de4-97c5-8ec5303d6532/?context=1530671 (noting that "[m]any investors look to ESG scores as an easy way to compare firms based on their environmental, social and governance practices").

[135] This dataset is available via Wharton Research Data Services [WRDS]. UNIV. OF PA., WHARTON RSCH. DATA SERVS. [WRDS], https://wrds-www.wharton.upenn.edu/ [https://perma.cc/7Y8A-N9GS].

highly regarded than many of its competitors,[136] and are widely used in financial literature.[137] The results are displayed in Table 8.

Table 8: ESG Scores

	Public Benefit Corporations		Business Corporations		Difference
	Obs.	Mean	Obs.	Mean	
Combined ESG score	9	0.30	145	0.34	0.04
Environment score	9	0.17	145	0.17	0.00
Resource use	9	0.16	145	0.21	0.05
Emissions	9	0.21	145	0.18	-0.03
Innovation	9	0.08	145	0.09	0.02
Social score	9	0.38	145	0.40	0.02
Workforce	9	0.38	145	0.38	0.01
Human rights	9	0.11	145	0.20	0.09
Community	9	0.54	145	0.57	0.03
Product responsibility	9	0.38	145	0.37	-0.01
Governance score	9	0.32	145	0.39	0.08
Management	9	0.34	145	0.41	0.07
Shareholders	9	0.30	145	0.45	0.15
Strategy	9	0.22	145	0.19	-0.03
ESG controversies	9	0.80	145	0.94	0.14

Notes: Scores are based on Refinitiv's ESG Scores. For each PBC and the matched general business corporations, the ESG scores refer to the year in which the PBC was first publicly traded as a PBC. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

[136] *See, e.g.*, Seth C. Oranburg, *The Unintended Consequences of Mandatory ESG Disclosures*, 77 BUS. LAW. 697, 709 (2022) (arguing that "[t]he Bloomberg ESG Score is essentially a word count of ESG-related terms in public disclosures" whereas the "Asset4 ESG Score," the former name of Refinitiv's ESG score, "attempts to measure ESG activity, as opposed to mere verbiage").

[137] *See, e.g.*, Elizabeth Dehmers et al., *ESG Did Not Immunize Stocks During the COVID-19 Crisis, But Investments in Intangible Assets Did*, 48 J. BUS. FIN. & ACCT. 433, 434 (2021) (using Refinitiv's ESG ratings to analyze the relationship between ESG ratings and stock prices); Elisa Menicucci & Guido Paolucci, *ESG Dimensions and Bank Performance: An Empirical Investigation in Italy*, 23 CORP. GOV. 563 (2023) (using Refinitiv's ESG ratings to analyze the relationship between ESG scores and bank performance). *See also* Szliárd Erhart*, Take It with a Pinch of Salt—ESG Rating of Stocks and Stock Indices*, 2022 INT. REV. FIN. ANALYSIS. 83, 83 (2022) (noting that Refinitiv's ESG scores "have been becoming an integral part of financial, business and consumption decisions"); Özge Sahin et al., *Environmental, Social, Governance Scores and the Missing Pillar—Why Does Missing Information Matter?*, 29 CORP. SOC. RESP. & ENV'L MGMT. 1782 (2022) (noting that "many scholars and investors" use Refinitiv's ESG scores).

It is worth noting, first, that ESG scores were unavailable for a large percentage of firms. In particular, Refinitiv only contained ESG scores for 9 out of the 17 matched PBCs in our sample. It follows that the results in Table 8 should be interpreted with caution. Still, they provide no support for the hypothesis that PBCs rely on ESG ratings to signal their social values. The mean value of the variable *Combined ESG Score*, which aggregates the different category ratings, is actually higher for regular corporations than for PBCs, though that difference is not statistically significant. On the majority of category scores, regular corporations also outperform PBCs, though again, none of the differences are statistically significant.

C. CERTIFICATION BY B LAB

B Lab is a non-profit corporation that is very much at the heart of the public benefit corporation movement.[138] Founded in 2006, B Lab has long pursued the goal of shifting corporations' activities from a shareholder-centric to a stakeholder-oriented approach. To this end, B Lab has pursued two main paths.

First, B Lab has been a key player in lobbying states to adopt public benefit corporation legislation.[139] This effort to promote PBC legislation has been largely successful. Most U.S. states have adopted some such legislation,[140] and in many cases, the relevant legislation closely follows the Model Benefit Corporation Act (MBCA) championed by B Lab.[141]

Second, since it was formed in 2006, B Lab has offered a certification process, allowing corporations to be certified as so-called "B Corporations" or, for short, "B Corps" if they meet certain criteria related to B Lab's values.[142] In B Lab's own words, the certification process seeks

---

[138] *E.g.*, Joseph Pileri, *Democratizing the Fourth Sector: B Corps and Beneficiary Participation*, 72 S.C. L. REV. 83, 84 (2020).

[139] *See, e.g.*, J. Haskell Murray, *The History and Hope of Social Enterprise Forms*, 22 TENN. J. BUS. L. 207, 212 (2021) (noting that "B Lab . . . has been spearheading the passage of benefit corporation legislation")

[140] *See supra* Table 1.

[141] Richard R. Caputo, Jr., *Benefit Corporations: The End of Shareholder Primacy in the Takeover Context?*, 45 DEL. J. CORP. L. 279, 284 (2021). *Cf.* J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 346 (2014) (noting that "[a]fter eighteen months of lobbying and negotiating, B Lab even convinced Delaware . . . to amend its corporate statute").

[142] B Lab, *About B Corp Certification: Measuring a Company's Entire Social and Environmental Impact*, https://www.bcorporation.net/en-us/certification/ (last visited January 27, 2024).

to measure a corporation's "entire social and environmental impact."[143] Recertification is due every three years.[144] To qualify as a B Corporation, a company must "[d]emonstrate high social and environmental performance" by obtaining a score of 80 or more on B Lab's "impact assessment" and passing B Lab's risk review.[145] Moreover, in states that have adopted public benefit corporation legislation, such as Delaware, the corporation must be organized as a public benefit corporation.[146] And third, the corporation must "exhibit transparency" by making the result of their assessment "publicly available . . . on B Lab's website."[147] Certification as a B Corporation is widely thought to yield substantial marketing benefits.[148]

To determine the extent to which publicly traded PBCs in our sample rely on certification by B Lab, I used B Lab's website which allows interested users to look up the certification status of individual corporations.[149] Unfortunately, B Lab's website does not provide information on firms that were previously certified as B Corporations but have lost that status since. Therefore, I have only collected information on those PBCs that were publicly traded as of December 31, 2023, seventeen in total. Of those seventeen PBCs, nine were certified as B Corporations as of December 31, 2023, and of the remaining eight PBCs, three conduct operations through subsidiaries that were certified B Corporations. In sum, twelve out of seventeen PBCs, or approximately 71%, relied, directly or indirectly, on B Lab's seal of approval.[150]

---

[143] *Id.*

[144] *See* B Lab, *Guide to B Corp Recertification*, https://usca.bcorporation.net/recertification/ (last visited Feb. 14, 2024).

[145] B Lab, *supra* note 142.

[146] *Id.*

[147] *Id.*

[148] *See, e.g.*, Michael B. Dorff, *Assessing the Assessment: B Lab's Effort to Measure Companies' Benevolence*, 40 SEATTLE U.L. REV. 515, 518 (2017) (calling B Lab certification "incredibly important and influential in the benefit corporation community"); Christopher Marquis, *The B Corp Movement Goes Big*, 18 STANFORD SOCIAL INNOVATION REVIEW 22, 26 (2020) (asserting that certification as a B Corp allowed Laureate, a corporation operating educational institutions, "to credibly demonstrate that it was focused on student needs" and thereby set itself apart from numerous for-profit education corporations with poor reputations); Joseph Pileri, *Democratizing the Fourth Sector: B Corps and Beneficiary Participation*, 72 S.C. L. REV. 83, 85 (2020) (noting that "B Corp status is widely recognized and highly valued" and emphasizing that corporations use B Lab certification to "signal their commitment" to social or environmental sustainability).

[149] *See* B Lab, Find a B Corp, https://www.bcorporation.net/en-us/find-a-b-corp/.

[150] *Infra* Figure 1.

Two caveats are in order at this point. First, scholars disagree on how meaningful B Lab's vetting process really is.[151] Second and more importantly, B Lab's certification has an important limitation: it only attests to a company's environmental and social impact at the time the company is certified. Accordingly, it cannot guarantee a corporation's future adherence to social or environmental values. Certified B Corporations can abandon B Lab's values at a moment's notice, even if it previously used that certification to draw in investors, customers, or employees. Admittedly, it may not be costless for PBCs to abandon their B Corporation certification. Doing so may generate negative publicity, and this effect may be particularly burdensome for corporations that have staked their reputations on being socially responsible. Still, once they are established in the market, companies may decide that accepting the reputational costs of losing their B Corp status is worth it.

Etsy Inc. ("Etsy"), a company known for operating an e-commerce marketplace for handmade and vintage goods,[152] may serve to illustrate this problem. In 2015, Etsy went public as a certified B Corporation.[153] However, after going public, Etsy began to face pressure from investors concerned about slowing growth and high expenses.[154] Only two years later, in 2017, Etsy fired Chad Dickerson, its CEO of six years, eliminated the business team that it had charged with monitoring the corporation's environmental and social endeavors, and allowed its B Corporation status to lapse.[155] When the news of Etsy's change of direction broke, employees were in tears,

---

[151] *Contrast* Dorff, *supra* note 20, at 553 (analyzing B Lab's impact assessment process and concluding that it "is a deeply considered and eminently reasonable third-party assessment tool for benefit corporations") with David Groshoff, *Contrepreneurship? Examining Social Enterprise Legislation's Feel-Good Governance Giveaways*, 16 U. PA. J. BUS. L. 233, 269 (2013) (noting that "[w]hile B Lab offers what it contends is an independent certification, in reality, companies are simply paying to license B Lab's mark of certification.").

[152] *See* Etsy Inc., Keep Commerce Human, https://www.etsy.com/about (last visited on Jan. 28, 2024).

[153] *See* Etsy Inc., Form S-1/A, filed with the SEC on April 14, 2015, *available at* https://www.sec.gov/Archives/edgar/data/1370637/000119312515129455/d806992ds1a.htm ("We are a Certified B Corporation.").

[154] Khadeeja Safdar, *Etsy Confronts and Identity Crisis—Online Retailer Under Pressure to Stop Spending Like a Tech Startup; "Trying to Find the Right Balance,"* Wall St. J., August 2, 2017, at B4, https://plus.lexis.com/api/permalink/5dd99fc4-f546-4856-ac4f-e636e8984834/?context=1530671.

[155] David Gelles, *Inside the Revolution at Etsy*, N.Y. TIMES, Nov. 26, 2017, at BU 1; https://plus.lexis.com/api/permalink/e4680a6b-92e0-4428-87d5-6caf7918dbd3/?context=1530671; Pileri, *supra* note 148, at 85.

but to no avail.[156] Etsy's story demonstrates the limits of B Lab certification as a signaling device. Still, while B Lab certification does not guarantee a corporation's future compliance with its declared social purpose, that may not matter to some third parties. For example, customers buying consumer goods may only care about whether the products they buy were produced in an ethical or environmentally friendly way, not about how the company that produced them will behave in the future. Therefore, B Lab certification may be an effective signaling device for some publicly traded corporations.

Aggregating the various signaling mechanisms, I find that at 16 out of 19 publicly traded PBCs, or approximately 84%, protect their PBC status by way of a supermajority voting requirement, the use of dual-class shares, or a B Lab certification.[157]

Table 9: Different Levels of Commitment

Publicly traded PBCs that use the following commitment mechanisms	No.	%
Supermajority requirement for charter amendments	4	20%
Supermajority requirement for charter amendments or dual-class shares	11	58%
Supermajority requirement for charter amendments or dual-class shares or B-lab certification	16	84%
None of the above	3	16%

Note: All governance variables are defined in Table A.2 in the Appendix.

VII. The Role of Law Firms

The heterogeneity that characterizes PBCs' levels of commitment, together with the relatively recent arrival of publicly traded PBCs, suggest that these companies may still be experimenting with different signaling mechanisms. According to that narrative, once PBCs and their advisors have gathered more experience, we may eventually see more uniformity as PBCs converge on one or more common standards.

To explore this possibility further, I focus on the law firms that advise PBCs with respect to their going public transactions. IPO firms disclose both their legal advisors and the underwriters' legal advisors in their filings. Moreover, many of the corporations that went public by merging with a SPAC or by way of a direct listing also disclosed their legal advisors in their filings.

[156] Gelles, *supra* note 156.
[157] *Infra* Table 9.

Table 10 focuses solely on firms that went public by way of a traditional IPO. Only two law firms, Latham & Watkins and Cooley provided advice on more than one PBC IPO. Of those two firms, Cooley advised two PBCs, and Latham three.

Table 10: PBC IPOs and Law Firms

PBC		Underwriters		PBC or Underwriters	
Law Firm	No.	Law Firm	No	Law Firm	No.
Latham & Watkins	3	Latham & Watkins	3	Latham & Watkins	6
Cooley	2	Davis Polk	1	Cooley	2
Gibson Dunn	1	Goodwin Procter	1	DLA Piper	1
DLA Piper	1	Simpson Thacher	1	Foley Hoag	1
Foley Hoag	1	Skadden	1	Freshfields	1
Freshfields	1	Weil, Gotshal & Manges	1	Gibson Dunn	1
Pillsbury Winthrop	1	White & Case LLP	1	Pillsbury Winthrop	1
Ropes & Gray	1	Wilson Sonsini	1	Ropes & Gray	1
				White & Case	1
				Wilson Sonsini	1
				Davis Polk	1
				Goodwin Procter	1
				Simpson Thacher	1
				Skadden	1
				Weil Gotshal	1

Notes: Law firm names are abbreviated for brevity. Note that one PBC failed to disclose its underwriters' law firm, which explains why the total number of law firms listed as advising PBCs is one greater than the total number of law firms listed as advising underwriters.

If one takes into account cases where PBCs went public by way of a direct listing or by merging with a SPAC, these numbers change slightly, as shown in Table 11. Cooley and Latham & Watkins are still the only law firms advising more than one PBC, but Cooley advised a total of three PBCs and Latham four. If one adds law firms' experience in advising underwriters, Latham's number rises further, to a total of seven transactions. Still, the fact remains that a large majority of PBCs (and their underwriters) received advice from law firms that had no prior experience with PBCs going public.

The hypothesis that law firms advising publicly traded PBCs may not have had the opportunity to gain much experience has further support if we focus on individual attorneys rather than law firms. Whereas Latham & Watkins played a role in seven going-public transactions, the two most commonly involved attorneys, Marc Jaffe and Stelios Saffos, were each involved in only three of those transactions. While this is an impressive record given the overall small number of publicly traded PBCs, it simply does not compare to the level of experience that attorneys have and can gain with regular business corporations' IPOs.

Table 11: PBCs and Law Firms

PBC Law Firm	No.	Underwriters Law Firm	No	PBC or Underwriters Law Firm	No.
Latham & Watkins	4	Latham & Watkins	3	Latham & Watkins	7
Cooley	3	Davis Polk	1	Cooley	3
Covington & Burling	1	Goodwin Procter	1	Covington & Burling	1
DLA Piper	1	Simpson Thacher	1	DLA Piper	1
Foley Hoag	1	Skadden	1	Davis Polk	1
Freshfields	1	Weil Gotshal	1	Foley Hoag	1
Gibson Dunn	1	White & Case LLP	1	Freshfields	1
Kirkland & Ellis	1	Wilson Sonsini	1	Gibson Dunn	1
Maslon	1			Goodwin Procter	1
Pillsbury Winthrop	1			Kirkland & Ellis	1
Ropes & Gray	1			Maslon	1
Sidley Austin	1			Pillsbury Winthrop	1
				Ropes & Gray	1
				Sidley Austin	1
				Simpson Thacher	1
				Skadden	1
				Weil Gotshal	1
				White & Case LLP	1
				Wilson Sonsini	1

Notes: Law firm names are abbreviated for brevity. Columns 1 & 3 includes not just IPOs, but also cases in which the PBC went public by merging with a SPAC or via a direct listing. Cases in which an already publicly traded corporation converted into a PBC are not captured in columns 1 or 3 since the relevant filings do not disclose the information on the law firms involved.

Do PBCs advised by experienced law firms use more rigorous charter provisions? To explore this question, I define a variable *legal commitment* that takes on the value one if the charter protects the PBC statute by way of a supermajority voting requirement and/or if the charter provides for a dual-class share structure. Otherwise, this variable is zero. Furthermore, I create the variable *law firm experience*, which is designed to capture the level of experience that the law firm advising the PBC in its going public transaction had at the time the PBC went public. Specifically, the variable *law firm experience* is equal to the number of prior deals in which the firm advised either a PBC or its underwriter in a going public transaction. For example, if a law firm advised one PBC on its IPO in 2020 and a second PBC on its direct listing in 2021, then at the time of the first transaction, the variable experience takes on the value zero, whereas at the time of the second transaction, it takes on the value one. I then regress the variable *legal commitment* on the variable *law firm experience* and various covariates.

The results are displayed in Table 12. The relationship between variables *law firm experience* and *legal commitment* is both positive and statistically significant at the 5% level. This finding is consistent with the idea that PBC charters are still evolving and that the lack of legal commitment devices in some charters may partially be the result of inexperienced legal advisors.

Table 12: The Role of Law Firm Experience in Predicting Legal Commitment

	Dependent variable: legal commitment: does the charter require a supermajority shareholder vote to eliminate the PBC status and/or does the charter provide for dual-class shares?			
	(1) b/se	(2) b/se	(3) b/se	(4) b/se
Law firm experience	0.094**	0.092**	0.101**	0.093**
	(0.035)	(0.035)	(0.038)	(0.035)
Calendar year		0.048		
		(0.130)		
IPO			-0.289	
			(0.218)	
B Lab certification				0.094
				(0.243)
Observations	19	19	19	19
R sq.	0.127	0.141	0.212	0.135
Adjusted R sq.	0.076	0.033	0.114	0.027

Note: Linear probability model. The variables legal commitment, law firm experience, and calendar year are defined in Table A.2 in the Appendix. All regressions use robust standard errors. ***, **, and * indicate statistical significance at the 1%, 5%, and 10% levels respectively.

VIII. The Costs of Legal Commitments and the Need for Tradeoffs

The narrative suggested in this Article, according to which publicly traded PBCs are still experimenting with different commitment mechanisms, gains additional plausibility if one takes into account the fact that the various legal commitment devices PBCs do use are not costless.

Some of the relevant costs are a necessary consequence of the very commitment sought. Once effectively committed to a particular public benefit, a PBC may find that such commitment makes it difficult or impossible to find enough investors to continue its operations. Even if a PBC's social goals enjoy great support from investors at the time the PBC goes public, that enthusiasm may fade over time. Public goals that are currently in vogue may lose their appeal over time as competing social causes take the spotlight. One generation of customers may prioritize saving specific endangered species from extinction, whereas the next may focus more on reducing carbon emissions or protecting human rights. Accordingly, customers who were willing to pay a premium for the company's products may switch to others as priorities and attention shift. Such changes are entirely understandable, yet they may prove fatal for a company that has chained itself to a now unfashionable social or environmental cause.

Even setting aside the fact that the intended commitment itself may prove disproportionately costly, most of the legal commitment devices discussed in this Article can have unsavory side effects. Charter provisions that facilitate or fail to curtail shareholder litigation may help enforce the PBC's public commitment, but they may also result in frivolous litigation.[158] Plaintiffs' lawyers may exploit such provisions to reap juicy legal fees, regardless of whether the relevant litigation ultimately benefits the company. Charter provisions that insulate the board from shareholder pressure can help the board follow through with the corporation's social commitment. However, they also increase the agency costs associated with board independence.[159] Rather than using their leeway to promote the PBC's stated benefit, directors may use their increased insulation to engage in shirking, empire-building, self-entrenchment, or other activities that benefit the directors at the shareholders' expense. Dual-class shares that allow founders to keep voting control while parting with most of the equity are similarly problematic. Some scholars have theorized that dual-class shares may benefit the other shareholders by ensuring that the founder(s)' idiosyncratic

[158] According to some scholars, shareholder litigation levels are already excessive. *See, e.g.*, Dan Awrey et. al., *Resolving the Crisis in U.S. Merger Regulation: A Transatlantic Alternative to the Perpetual Litigation Machine*, 35 YALE J. ON REG. 1, 12 (2018) (arguing that excessive levels of shareholder litigation amount to a shareholder litigation crisis"); Stephen M. Bainbridge, *Fee-Shifting: Delaware's Self-Inflicted Wound*, 40 DEL. J. CORP. L. 851, 852 (2016) (arguing that shareholder litigation levels had "reached crisis proportions."); Jessica Erickson, *Investing in Corporate Procedure*, 99 B.U. L. REV. 1367, 1373 (2019) (noting the "current crisis in shareholder litigation"); Sean J. Griffith, *Correcting Corporate Benefit: How to Fix Shareholder Litigation by Shifting the Doctrine on Fees*, 56 B.C. L. REV. 1, 1 (2015) (diagnosing "a larger crisis in shareholder litigation."). Other voices take a more sanguine view of shareholder litigation. *See, e.g.*, Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 140 (2004) (arguing that in light of the benefits that shareholder litigation yields in reducing managerial agency costs, the costs of "acquisition-oriented class actions . . . do not appear excessive"). *See also* Jens Dammann, *Fee-Shifting Bylaws: An Empirical Analysis*, 65 J.L. & ECONS. 1, 3 (2022) (finding that Delaware's temporary legalization of fee-shifting bylaws, which had the potential to reduce shareholder litigation substantially, caused stock prices to fall not rise).

[159] This downside of charter provisions increasing board independence is well known. Against this background, it is highly controversial, for example, how classified boards impact shareholder wealth. Some scholars have found that charter provisions that classify corporate boards reduce shareholder wealth. *See, e.g.*, Lucian A. Bebchuk & Alma Cohen, *The Costs of Entrenched Boards*, 78 J. FIN. ECON. 409, 430 (2005) (finding that staggered board are associated with reduced firm value). Other scholars come to different conclusions. *See* K.J. Martijn Cremers & Simone M. Sepe, *The Shareholder Value of Empowered Boards*, 68 STAN. L. REV. 67, 71 (2016) (analyzing both staggering and de-staggering decisions and finding that staggered board are associated with an increase in firm value).

vision for the corporation prevails.[160] But dual-class shares can also become an instrument for the founders to enrich themselves at the other shareholders' expense or to cling to power long after the founders have ceased to benefit the corporation.[161]

Supermajority requirements may be the least objectional commitment device in terms of their unintended side effects. But even supermajority requirements have potential for abuse: they may create a so-called hold-up problem:[162] if it ever becomes necessary to abandon the company's PBC status, some shareholders may seek to extract private benefits in exchange for giving their assent. In sum, legal commitments come at a price.

Against this background, one cannot easily assert that a particular level of commitment is optimal. Instead, there are complex tradeoffs involved. The PBC has to decide how firmly it wants to commit itself to its social goals in an ever-changing world. It has to take into account the potential costs of the various commitment mechanisms. We should not be surprised, therefore, that PBCs are experimenting with different legal and non-legal mechanisms in an attempt to find the right mix of credibility and flexibility.

---

[160] *See* Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 566 (2016) (arguing that dual-class shares provide reassurance to investors that the firm will be managed in accordance with the founder's idiosyncratic vision).

[161] *See, e.g.*, Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 630 (2017) (arguing that "potential benefits of dual-class structures can be expected to decline and the potential costs to increase" and that "controllers have perverse incentives to retain dual-class structures even when those structures become substantially inefficient"); Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1457 (2019) (arguing that "dual-class structures that enable controllers to have a lock on control . . . with only a small fraction of the company's equity capital. . . can be expected to generate considerable governance risks and costs").

[162] This is a general feature of supermajority requirements. *See, e.g.*, Lucian Arye Bebchuk, *Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law*, 105 HARV. L. REV. 1435, 1510 (1992) (noting that "a demanding supermajority requirement may . . . give [some shareholders] an undesirable hold-up power").

IX. IMPLICATIONS

The empirical findings presented in this Article have important legal policy implications. Many scholars have suggested that the statutory rules on PBCs should be made more rigorous.[163] By contrast, the findings presented in this Article show that such proposals are premature, at least when it comes to publicly traded PBCs. Four main reasons support this conclusion.

First, the evidence I have presented suggests that publicly traded PBCs still find themselves at an early stage of evolution, characterized by trial and error. Lawmakers and courts should therefore wait and see what practices emerge as dominant before intervening. If PBCs converge on a high level of legal commitment, there is no need for legislative intervention. The narrative that publicly traded PBCs are still in trial-and-error phase is based on several considerations. Publicly traded PBCs only date back to 2017, and their overall number remains small. Only nineteen non-SPAC PBCs have ever been publicly traded. Accordingly, even leading law firms have had little opportunity to acquire experience with publicly traded SPACs. Only a single firm, Latham & Watkins, has been involved in more than two such transactions, and the large majority of law firms advising PBCs going public have had no prior experience with such transactions. Furthermore, as shown in this Article, the design of PBC charters is characterized by substantial heterogeneity, as one would expect given the lack of time for prevailing practices to develop.

Second, regardless of whether PBCs converge on one or more common practice(s), there remains much to learn for both firms and regulators about which commitment mechanisms prove useful in practice. For example, we will learn whether founder-controller(s) protected by dual-class shares can be relied on to protect their PBCs' social vision, or whether, in practice, they are just as quick to scuttle it as ordinary shareholders. Similarly, it remains to be seen whether a supermajority for charter amendments proves to offer effective protection or not.

---

[163] *See, e.g.,* Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations,* 2017 COLUM. BUS. L. REV. 92, 190 (2017) (suggesting that benefit corporations be required to obtain certification); Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANSACTIONS: TENN. J. BUS. L. 21, 100 (2018) (arguing that "[s]tatutes should . . . . creat[e] a higher threshold to becoming a benefit corporation"); J. Haskell Murray, *An Early Report on Benefit Reports,* 118 W. VA. L. REV. 25, 47–48 (2015) (arguing that states should impose stricter reporting requirements); Joseph W. Yockey, *Does Social Enterprise Law Matter?,* 66 ALA. L. REV. 767, 821 (2015) (arguing that "states should also require an independent social audit rather than leave it to benefit corporations to provide their own assessments against a third-party standard").

Third, it is difficult to argue that changes to Delaware's statute are necessary to prevent greenwashing or social washing. By and large, publicly traded PBCs already demonstrate a general willingness to incur some level of commitment beyond what the law requires. A majority of publicly traded PBCs (58%) makes use of dual-class shares or protects their PBC status by way of supermajority requirements. If one also counts B Lab certification as a signaling device, that percentage increases to 84%.

Fourth, the uniformity that mandatory corporate law norms would impose is unlikely to yield optimal results. Indeed, the heterogeneity of PBC charters itself suggests that there may not be a one-size-fits-all solution that offers the perfect level of commitment for all PBCs. As previously noted, the different charter provisions that promise to strengthen PBCs' commitment to their social purpose come with a price. Therefore, finding the right balance between commitment and flexibility requires difficult tradeoffs, and the optimal mix may not be the same for all corporations. This argument becomes even more compelling if one considers the additional factors that PBCs need to take into account when choosing their level of commitment. A PBC needs to consider whether it wants to commit for the long term, or whether signaling its current dedication to a particular cause is sufficient. Moreover, a PBC must take into account the intended audience for its commitment. Sophisticated investors, such as ESG funds, may be well-positioned to evaluate PBCs' charter terms. Consumers, by contrast, are likely to find it much easier to rely on B Lab's certification. In sum, any one-size-fits-all solution is unlikely to accommodate PBCs' heterogeneous business needs.

For all these reasons, changes to Delaware's law on PBCs cannot be justified at this time. Moreover, the case for federal regulation of PBCs is even weaker. Federal legislation would foreclose regulatory experimentation.[164] Moreover, once in existence, federal law governing

---

[164] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."). *See also* ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 5 (1993) (noting that "federalism spurs innovation in public policy because of the incremental experimentation afforded by fifty laboratories of states competing for citizens and firms"); Roberta Romano, *The States As A Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 246 (2006) (examining the diffusion of corporate law rules across states and concluding that "[o]ne observes a typical pattern of initial experimental variation . . . followed by a majority of states eventually settling upon one format").

private enterprises is difficult to roll back.[165] And federal courts may not match Delaware's propensity for speedy conflict resolution.[166] In sum, both state and federal lawmakers should abstain from adding rigor to the law on public benefit corporations.

CONCLUSION

Public benefit corporations ("PBCs") are a new stage in the evolution of corporations.[167] Their directors have a legal duty to balance the goal of profit maximization against the public benefits stated in their charter and the interests of those that are materially impacted by the corporation's activities.[168] At least in theory, this legal obligation allows them to send a credible signal of their commitment to the stated public benefit. Scholars have rightly pointed out that commitment value of PBC statutes is limited: PBCs can convert into regular business corporations by way of a simple charter amendment, and even without such an amendment, shareholders can pressure directors to

---

[165] *See also* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359, 2387 (1998) (noting that "[w]ith only a national law, . . . a legislative or judicial mistake would be more difficult to reverse, as Congress moves considerably more slowly than state legislatures").

[166] *Cf.* Brett H. McDonnell, *Two Cheers for Corporate Law Federalism*, 30 J. CORP. L. 99,106 (2004) (praising the Delaware Chancery Court for being able to "move quickly"); Leo E. Strine, Jr., *"Mediation-Only" Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America's Business Courts?*, 53 DUKE L.J. 585, 588 (2003) (noting that Delaware's Chancery Court and Supreme Court "can act with the speed and expertise"); Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 441, 483 (2014) (noting that "Delaware's Chancery Court . . . is widely thought to be unparalleled in terms of quality, experience, and speed"); David A. Skeel, Jr., *Icarus and American Corporate Regulation*, 61 BUS. LAW. 155, 167 (2005) (noting that "[a]s even Delaware's critics concede, the Delaware court system is remarkably efficient.").

[167] *See, e.g.*, Michael B. Dorff, *Why Public Benefit Corporations?,* 42 DEL. J. CORP. L. 77 (2017) (calling public benefit corporations "a revolutionary new form of business organization that overturn the fundamental corporate principle of shareholder wealth maximization"); Scott J. Shackelford et al., *Unpacking the Rise of Benefit Corporations: A Transatlantic Comparative Case Study*, 60 VA. J. INTL. L. 697, 701 (2020) (noting that "benefit corporation legislation [codified] . . . [a] fundamental shift in corporate perspective"); Ryan Z. Ullman, *Making Benefit Corporations More Beneficial: Drafting Statutes to Entice Entrepreneurs and Consumers Alike*, 14 J. BUS. & TECH. L. 1, 24 (2018) (praising public benefit corporations for making "fundamental changes to the conventional shareholder primacy model"); Laura A. Farley, Note *Knowledge Is Power: How Implementing Affirmative Disclosures Under the Jobs Act Could Promote and Protect Benefit Corporations and Their Investors*, 99 MINN. L. REV. 1507, 1516 (2015) (arguing that "different accountability requirements in benefit corporation legislation establish a fundamental difference from regular corporations").

[168] *E.g.*, COLO. REV. STAT. ANN. §§ 7-101-503 (1) (West 2022); DEL. CODE ANN. TIT. 8, §§ 362(a) (West 2022); KAN. STAT. ANN. § 17-72a02(a) (West 2022).

focus on shareholder wealth maximization. However, the question is whether, in practice, PBCs rely on private ordering to overcome the weaknesses of the statutory defaults.

Using a hand-coded and hand-collected dataset of 357 corporate charters, including both PBC charters and matched business corporation charters, I have shown that the answer to this question is complex. The use of charter provisions aimed at strengthening PBCs' commitment to their stated public benefits varies substantially across PBCs. Still, a majority of PBC charters either require a supermajority for eliminating the PBC status or impose a dual-class share structure, two mechanisms that can substantially reinforce the relevant PBC's commitment to its stated public benefits. The picture changes further if one takes into account non-legal signaling devices. A substantial majority of PBCs rely on certification by B Lab, a non-profit corporation that measures companies' social and environmental impact. In aggregate, 84% of all PBCs rely on supermajority requirements, dual-class shares, or B-Lab certification.

My analysis has important policy implications. Given the weakness of the statutory defaults on PBCs, many scholars have called for reforms making PBC statutes more rigorous. Yet my findings suggest that such calls are, at best, premature. PBCs still appear to be at an early stage of their evolution. In time, we will learn more about the circumstances under which PBCs abandon their social or environmental commitment, and we will better understand the costs and benefits of the various mechanisms that PBCs use to strengthen that commitment. Until then, lawmakers should view existing publicly traded PBCs as a useful field test and let their development play out.

Appendix

Table A.1: Financial Variables

Variable	Definition	Compustat Codes
Assets	Total assets	at
Book leverage	Total debt over total assets	(dltt+dlc)/at
CapEx	Capital expenditures over total assets	capx/at
Dividends over assets	Dividends paid on common/ordinary capital/total assets	dvc/at
Employees	Employees	emp
Financial leverage	Total debt over sum of total debt and market capitalization.	(dlc+dltt)/((dlc+dltt+ (prcc_f*csho))
Market cap.	Market capitalization	prcc_f * csho
Return on assets (ROA)	Operating income before depreciation over total assets	ebitda/at
Return on equity (ROE)	Operating income before depreciation over total common/ordinary equity	oibdp/ceq
Sales	Sales (net)	sale
Tangibility	Property, plant, and equipment/total assets	ppent/at
Tobin's q	(Total assets – common equity + market cap) over total assets	(at-ceq+(prcc_f*csho))/at
Total debt	Long term debt + dent in current liabilities	dltt+dlc

Table A.2: Non-Financial Variables

Variable	Definition
Advancement of Expenses	This variable takes on the value one if the charter requires (and not merely authorizes) the corporation to advance the director's expenses in one or more of the situations covered by DGCL § 145. Otherwise, this variable takes on the value zero.
Anti-litigation Index	This variable is the sum of five other variables: (1) *liability waiver*, (2) *mandatory indemnification*, (3) *advancement of expenses*, (4) *duty to purchase insurance*, and (5) *exclusive forum*.
Board bylaw authority	This variable takes on the value one if the certificate of incorporation authorizes the board to adopt bylaws, zero otherwise.
Calendar year	The variable calendar year is equal to the calendar year in which a PBC was first publicly traded as a PBC.
Classified board	This variable takes on the value one if the certificate of incorporation contains a provision classifying the board into two or three classes, zero otherwise.
Dual-class shares	This variable takes on the value one if the charter provides for two or more classes of common stock, not all of which have an identical number of votes, zero otherwise.
Duty to purchase insurance	This variable takes on the value one if the charter requires the corporation to purchase insurance within the meaning of DGCL § 145 (g) for corporate directors, zero otherwise.
Exclusive forum	This variable takes on the value one if the charter designates an exclusive forum for some or all shareholder lawsuits, zero otherwise.
Fixed number of directors	This variable takes on the value one if the certificate of incorporation contains a provision specifying the exact or the maximum number of directors or if the charter contains a provision giving the board the exclusive power to specify the number of directors. Otherwise, this variable takes on the value zero.
Insulation-Index	This variable is the sum of six other variables: (1) *classified board*, (2) *fixed number of directors*, (3) *supermajority for director removal*, (4) *board bylaw authority*, (5) *supermajority for shareholder bylaws*, and (6) *no action by written consent.*
Law firm experience	This variable is equal to the number of prior deals in which the law firm has advised a PBC or its underwriters on a going-public transaction. Going-public transactions include IPOs, mergers of privately held PBCs with publicly traded SPACs, and direct listings.
Legal commitment	The variable legal commitment takes on the value one if a PBC charter requires a supermajority shareholder vote for eliminating the corporation's PBC status and/or if the charter provides for two or more classes of common stock, not all of which have an identical number of votes. Otherwise, this variable takes on the value zero.
Liability waiver	This variable takes on the value one if the charter eliminates or limits, in whole or in part, the liability of corporate directors for fiduciary duty violations, zero otherwise.
Mandatory Indemnification	This variable takes on the value one if the charter imposes a duty on the corporation to indemnify directors, in whole or in part, in at least some cases in which DGCL § 145 allows but does not require indemnification. Otherwise, this variable takes on the value zero.
No action by written consent.	This variable takes on the value one if the charter prevents shareholders, either generally or in specific cases, from acting by written consent even though action by written consent would be allowed under Delaware's default rules.

Supermajority for director removal	This variable takes on the value one if the certificate of incorporation imposes a supermajority requirement for removing corporate directors, zero otherwise. For the purpose of this definition, any provision requiring a higher number of votes than the one required by the default rules is a supermajority requirement.
Supermajority for shareholder bylaws	This variable takes on the value one if the certificate of incorporation requires more than a simple majority of the shares present or represented by proxy and entitled to vote on the matter for adopting shareholder bylaws, zero otherwise.

about ECGI

The European Corporate Governance Institute has been established to improve *corporate governance through fostering independent scientific research and related activities.*

The ECGI will produce and disseminate high quality research while remaining close to the concerns and interests of corporate, financial and public policy makers. It will draw on the expertise of scholars from numerous countries and bring together a critical mass of expertise and interest to bear on this important subject.

The views expressed in this working paper are those of the authors, not those of the ECGI or its members.

Electronic Access to the Working Paper Series

The full set of ECGI working papers can be accessed through the Institute's Web-site (https://ecgi.global/content/working-papers) or SSRN:

Finance Paper Series	http://www.ssrn.com/link/ECGI-Fin.html
Law Paper Series	http://www.ssrn.com/link/ECGI-Law.html