DIRECTOR PRIMACY TO THE HILT IN THE PUBLIC BENEFIT CORPORATION

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I. INTRODUCTION

Corporate law requires the directors of ordinary, for-profit corporations to manage firms in the best interests of the shareholders, forbidding directors from sacrificing corporate profits in service of any other goal. There has been a longstanding debate about whether this *ought* to be the law of corporate purpose, but today, shareholder primacy is well established as black letter corporate law. There has also been a longstanding debate, even among proponents of the shareholder primacy rule, about the appropriate balance of power between directors, management, and shareholders in the governance of the corporation as it pursues shareholder value. In the United States today, this contest has, at least for now, been resolved in favor of the dominance of the board of directors in the machinery of corporate governance. The law allows no discretion as to the *goal* of corporate governance, but nearly all formal power to pursue the prescribed purpose of profit maximization, and total discretion as to how to pursue it, is bestowed on the board of directors.

This principle of "director primacy"[1] has been prominently associated with Professor Stephen Bainbridge, the most prolific and articulate proponent

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1. The term "director primacy" should not be directly contraposed with the term "shareholder primacy." Shareholder primacy, as commonly used, refers to the prescribed or desired *goal* of corporate governance. Director primacy refers to a particular *means* of pursuing that goal. Director primacy is to be distinguished from a corporate governance system in which some party other the directors has significant control of corporate policy. One could be a critic of the goal of shareholder primacy, insisting that the corporation should pursue more varied interests, while still adhering to the means of director primacy, that is, that the board should have the dominant authority to pursue

of that view.[2] Bainbridge insists that director primacy is a more efficient, effective corporate governance structure for shareholder-primacy firms than any of the available alternatives, including giving more power to executive officers, or more power to shareholders.[3] Managers typically have non-diversified personal and professional investments in the firms that employ them. They may be more interested in building corporate empires and making money in the course of one career rather than maximizing value over appropriate time horizons for diversified, passive shareholders. Shareholders themselves are too disparate, rationally ignorant, and cacophonous to articulate or pursue coherent corporate strategies. Power also cannot be shared among these different corporate stakeholders without inviting confusion and sclerosis. "Director primacy" cuts through these difficulties by endowing nearly all corporate authority in the board of directors, thereby gaining clarity of authority and efficiency in decision-making while maintaining an organizational structure that provides for multiple perspectives, deliberation, and accountability.[4]

Director primacy is a governance "technology" designed to make the corporation powerful and effective, and it has succeeded.[5] It is precisely this successful cultivation of corporate power that has made the corporation suspect to legal and social critics. Power will always draw scrutiny in a democratic society, but powerful corporations, their undeniable productive contributions notwithstanding, have also clearly been agents of destruction, from tobacco-related carnage to climate change to social, cultural, and political corrosion.[6] The success of director primacy gives rise to suspicion

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a different corporate purpose. Or, one might prefer to alter both the purpose of corporate governance, away from shareholder wealth maximization, and the means of corporate governance, away from director primacy towards more diverse participation in firm governance. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. L. REV. 547, 563, 575 (2003) [hereinafter Bainbridge, *Means and Ends*] (defining director primacy).

2. *See generally*, STEPHEN BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE (Oxford Univ. Press ed., 2008) [hereinafter BAINBRIDGE, NEW CORPORATE] explicating and defending director primacy in corporate governance); *see also* STEPHEN BAINBRIDGE, THE PROFIT MOTIVE DEFENDING SHAREHOLDER VALUE MAXIMIZATION 68, 146-47 (Cambridge Univ. Press ed., 2023) [hereinafter BAINBRIDGE, THE PROFIT MOTIVE]. Bainbridge himself credits and draws on the pioneering organizational theory of Kenneth Arrow in developing his views. *See* KENNETH J. ARROW, THE LIMITS OF ORGANIZATION 67-68 (W.W. Norton & Co. ed., 1974).

3. BAINBRIDGE, NEW CORPORATE, *supra* note 2, at 202.

4. *Id*. at 202, 233-35.

5. Bainbridge*, Means and Ends*, *supra* note 1, at 572.

6. It must always be born in the mind that proponents of shareholder primacy promote that system with reference to its avowed *social* utility. The claim is that all of society benefits from the capital investment that shareholder primacy in corporate governance incentivizes. Apologists recognize that in the exclusive pursuit of shareholder profits, firms will try to externalize costs to other stakeholders. But they insist that their ability (rather than their motive) to do so should be

about the social value of the corporation, and this suspicion then inspires the public benefit corporation (PBC) innovation. The idea of the PBC is that individual firms should actively pursue multiple stakeholder interests, including both profits for shareholders and benefits to other interests and society generally. The success of director primacy has not, however, just produced a perceived need for the PBC. It also provided a blueprint for how a public benefit corporation could be plausibly designed. Indeed, the public benefit corporation takes the idea of director primacy *to the hilt*, expanding it beyond what is evident even in ordinary corporate governance. The power of director primacy thus both exposes the contradictions of the ordinary corporate form and paves the way, conceptually and practically, to the elaboration of a plausible alternative.

II. ADVANCED DIRECTOR PRIMACY

The public benefit corporation evinces "advanced director primacy" in multiple ways. Delaware's PBC statute[7] specifies that the public benefit corporation is "intended to produce a public benefit . . . and to operate in a responsible and sustainable manner."[8] The statute then dictates the core governance instruction: "To that end, a public benefit corporation shall be managed in a manner that *balances* the stockholders' pecuniary interests, the best interests of those materially affected by the corporation's conduct, and the public benefit . . . identified in its certificate of incorporation."[9] The

constrained by other government regulations rather than corporate governance. Critics contend that since shareholder primacy firms will work to pursue profits as much in the halls of government as in labor and consumer markets, the regulatory machinery of the state will be captured to further advance shareholder primacy, rather than contain it. The backup retort to such critique is to deny that firms have collective active advantages over other stakeholders in the competition for regulatory favor, or, as a final retreat, to insist that in any event, even without reliable regulation to curb externalization, it is still on net more socially beneficial to have shareholder primacy firms than to suffer the disincentive to investment, and inefficiency in corporate operations, that would follow from the adoption of any alternative corporate governance system. *See generally* DAVID YOSIFON, CORPORATE FRICTION: HOW CORPORATE LAW IMPEDES AMERICAN PROGRESS AND WHAT TO DO ABOUT IT 9, 21-22 (Cambridge Univ. Press ed., 2018) (critiquing shareholder primacy theory).

7. My technical treatment here will reference the Delaware Public Benefit Corporation, because of Delaware's prominence both in corporate law generally and in the new market for benefit corporation charters. There are important differences between the Delaware statute and the Model Benefit Corporation Act. *See generally* MICHAEL B. DORFF, BECOMING A PUBLIC BENEFIT CORPORATION: EXPRESS YOUR VALUES, ENERGIZE STAKEHOLDERS, MAKE THE WORLD A BETTER PLACE 52-67 (Eric Nee & Johanna Mair eds., 2024). But those differences are not crucial to the conceptual point I am developing here. Director primacy dominates in both the Delaware PBC and in the Model Act.

8. DEL. CODE ANN. tit. 8, § 362(a) (2015).

9. *Id.* (emphasis added).

statute clarifies that the "public benefit" to be identified in the charter, "means a positive effect . . . on 1 or more categories of persons, entities, communities or interests (other than stockholders in their capacities as stockholders) including, but not limited to, effects of an artistic, charitable, cultural, economic, educational, environmental, literary, medical, religious, scientific or technological nature."[10]

The PBC is thus established to make profits, to advance the interests of those materially affected by firm operations, and to serve the public benefit specified in the charter. Directors are to manage the firm to serve that end. Specifically, they are charged with governing the corporation in such a way as to "balance" those interests. Even as it establishes this stakeholder-oriented governance, however, the PBC statute follows immediately with a specification that non-shareholders with a stake in these corporate purposes will have *no power* to challenge the directors' management of the firm.[11] People who are meant to benefit from a PBC's operations thus have even less ability to enforce directorial duties than do shareholders in an ordinary corporation. The legal and conceptual result is to broaden the prescribed goal of corporate activity from that which is seen in ordinary corporations while expanding to a maximum degree the latitude directors enjoy to pursue that goal without interference.

Although the statute requires the PBC charter to specify a particular benefit to be served by the firm, the "balancing" instruction deepens the directors' discretion to determine the *substance* of a PBC's purpose far beyond what directors have in the ordinary firm. The "balance" instruction in the statute has not been interpreted by any court[12]—an absence of judicial treatment which itself must be read as deepening director authority and discretion. But it would certainly be a mistake to read the term "balance" as imposing on directors anything like a mechanically applicable obligation to set all stakeholder interests out evenly, as if they were instructed to do math. In fact, they are instructed to do ethics. The Oxford English Dictionary emphasizes that the verb "balance" is "chiefly figurative" and references most crucially the act of weighing things so as to evaluate their relative merit and importance, rather than putting them in an even equilibrium.[13]

10. DEL. CODE ANN. tit. 8, § 365(b) (2020).

11. *See id.* ("A director of a public benefit corporation shall not, by virtue of the public benefit provisions or §362(a) of this title, have any duty to any person on account of any interest of such person in the public benefit or public benefits identified in the certificate of incorporation or on account of any interest materially affected by the corporation's conduct").

12. Dorff makes the "no reported cases" observation repeatedly, for nearly every important interpretive question concerning PBC. *See*, *e.g.*, DORFF, *supra* note 7 at 81, 83, 107, 137.

13. *Balance*, DICTIONARY.COM, https://www.oed.com/dictionary/balance_v (last visited Nov. 1, 2024).

"Balancing" references deliberate assessment and pondering, a determination of the relative rank of value among varied things or values.[14] The PBC statute does not pretend that there exists a monistic concept of "the public good" or "social responsibility," and it does not pretend that all stakeholder interests are aligned or that all gains can be Pareto superior.[15] Instead, the statute recognizes that there are *distinct* interests: shareholder interests, the interests of those materially affected by corporate operations, and the specific interest identified in the charter.[16] The anti-monist conception in the statute should make salient the reality that these stakeholder interests *are*, or often will be, in tension. Higher wages for workers at some margins mean higher prices for consumers; greater environmental protections sometimes mean both lower wages and higher prices.[17] The present must sacrifice for the future, or vice versa, sometimes. Directors are instructed to use their own judgment in determining the relative weight to give to these interests at any particular time and, over all times, in the course of corporate operations. This deepens director primacy beyond the realm of discretion as to means and gives directors expansive discretion even as to purpose.

The PBC statute does give *some* shareholders the power to enforce the board's governance obligations, but this power is significantly more restricted than what shareholders enjoy under ordinary corporate law.[18] For the standard shareholder primacy firm, *any* shareholder can bring a derivative suit for a fiduciary breach so long as they were a stockholder at the time of the alleged directorial misconduct.[19] No minimum stock ownership is necessary. Under the Delaware PBC statute, a shareholder must hold two percent of the firm's outstanding equity, or $2 million worth of stock, in order to bring suit.[20] That is a lot of money, and it is a significant restriction on shareholder prerogatives.[21] This is precisely the kind of restriction that

14. *See id.* ("To weigh (a matter); to estimate the two aspects or sides of anything; to ponder"; "To weigh two things, considerations, etc., against each other, so as to ascertain which preponderates."); Dorff examined the SEC filings of multiple publicly traded PBCs and he found that "not one of these companies provided meaningful details about how its board intended to balance the company's public purpose against its profitability." DORFF, *supra* note 7, at 172.

15. DEL. CODE ANN. tit. 8, § 361-368 (2013-2020).

16. *Id.*

17. NICHOLAS G. MANKIW, PRINCIPLES OF ECONOMICS 5 (Jane Tufts ed., 7th ed. 2015).

18. Eric S. Klinger-Wilensky et al., *Public Benefit Corporations (DE)* (Aug. 25, 2020), https://www.morrisnichols.com/insights-delaware-public-benefit-corporation-guides (after accessing the webpage, click the hyperlink reading "Delaware Public Benefit Corporation Practice Note" at "1.").

19. DEL. CODE ANN. tit. 8, § 327 (1998).

20. DEL. CODE ANN. tit. 8, § 367 (2020).

21. *Id.* The statute specifies these restrictions for any shareholder seeking to "enforce the balancing requirement of § 365(a)." *Id.* But it should not be thought that shareholders are entitled

director-primacists, or anti-shareholder activists, have sought to adopt in the ordinary corporate context, but have been unable to obtain.

If a shareholder does manage to bring a suit alleging a duty of care violation in connection with the "balancing requirement," the statute indicates that such claims will enjoy the highly deferential "business judgment rule" standard that has been developed through case-law for duty of care claims in ordinary corporate litigation.[22] But the PBC statute then goes much further than this and insulates PBC directors even from liability for *good faith and loyalty* violations relating to the core balancing function, so long as the claim does not involve a conflict of interest.[23] Such protections are certainly not given in the ordinary corporate context. The PBC statute states that: "In the absence of a conflict of interest, no failure to satisfy [the] balancing requirement shall . . . constitute an act or omission not in good faith, or a breach of the duty of loyalty."[24] In recent decades, because of expansive protections for duty of care claims, most of the real action in shareholder derivative suits in ordinary corporations has shifted to the duty of loyalty and, in particular, to the obligation of "good faith."[25] Among the most important and *developing* areas of "good faith" liability today relates to directors' "oversight" obligations.[26] Directors have a good faith duty to establish, monitor, and respond to board-level reporting systems relating to core firm operations.[27] Failure to do so is a breach of the duty of good faith, which is a loyalty violation that does not necessarily involve conflicts of interest.[28] It would seem then that PBC directors, unlike their ordinary corporate director colleagues, are not liable for bad faith oversight failures, at least to the extent that oversight relates to the "balancing" requirement, which, again, is *the* core corporate governance obligation in the PBC.

With such extreme insulation for PBC directors, it should perhaps come as no surprise, although it nevertheless remains shocking, that in the fourteen years since public benefit corporations have been on the scene, with

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to any other kind of derivative action, since it is § 365(a) that specifies what directors are supposed to be doing in corporate governance.

22. DEL. CODE ANN. tit. 8, § 365(b) (2020) ("with respect to a decision implicating the balance requirement . . . [directors] will be deemed to satisfy such [their] fiduciary duties to stockholders and the corporation if such director's decision is both informed and disinterested and not such that no person of ordinary, sound judgment would approve.").

23. DEL. CODE ANN. tit. 8, § 365(c) (2020).

24. *Id.*

25. Melvin A. Eisenberg*, The Duty of Good Faith in Corporate Law*, 31 DEL. J. CORP. L. 1, 10-14 (2005).

26. *See Marchand v. Barnhill*, 212 A.3d. 805, 821 (2019) (reviewing cases and extending the doctrine of oversight liability).

27. *In re* Caremark Int'l Inc., 698 A.2d 959, 969-70 (1996).

28. Stone *ex rel.* AmSouth Bancorporation v. Ritter, 911 A.2d 362, 369-71 (2006).

thousands of them in operation all over the country, and large amounts of capital invested in them, there has not been a single published judicial opinion interpreting PBC director duties.[29] Of course, the doctrines of ordinary corporate law usually protect directors against liability in a number of ways anyway—e.g., the business judgment rule, statutory exculpation, and safe harbor provisions.[30] But shareholder derivative suits are a constant source of worry and distraction anyway because directors are individually risk-averse, and any litigation can bring costly and time-consuming legal proceedings, as well as bad press. And derivative suits can succeed. They are, therefore, a not-insignificant limitation of director primacy. In contrast, the absence of judicial decisions must stand for diminished litigation, reduced opportunity cost, and greater confidence in the advanced director-primacy PBC boardroom.

Having here elucidated the nature of "advanced director primacy" in the public benefit corporation, I now want to draw two (very different) implications for PBC analysis: the first concerns a theoretical observation regarding PBC governance in general, and the second concerns an interpretation of the widespread involvement of for-profit corporations with the PBC form.

III. PRACTICAL AND THEORETICAL IMPLICATIONS

The advanced director primacy that we see in the structure of the public benefit corporation should shape our expectations of what kind of governance will emerge in PBCs. The PBC statute charges the board with formulating and pursuing broad and varied corporate purposes, and then insulates the board to pursue its vision without interference or pause from corporate stakeholders who take issue with them. A consequence of this expansive discretion and insulation of the board is to encourage bold, creative, risk-taking that might defy the common sense of corporate stakeholders materially affected by the firm, or otherwise interested in the public benefits set out in the charter. Encouraging bold risk-taking is, in fact, one of the intended results of director primacy in ordinary corporate operations, and it is a result that can be expected to deepen under the advanced director primacy of the PBC. To illustrate, the board of a PBC engaged in the development of artificial intelligence, and formed in part to

29. Michael B. Dorff et al., *The Future or Fancy? An Empirical Study of Public Benefit Corporations* 6 (Harv. Bus. L. Rev. Working Paper, Paper No. 495, 2020), https://ssrn.com/abstract=3433772.

30. Lisa Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV.1163, 1210 (2022).

advance environmental protection, might decide that the speedy development of AI, and its consequent positive impact on environmental issues, is worth the sudden, rapacious, even calamitous local environmental devastation that will be necessary to produce the enormous up-front energy needed to "train" the AI to begin with.[31] Stakeholders empowered even with the thin-tools of opposition available to shareholders in an ordinary corporation might challenge, stall, or at least have a platform to embarrass the board to impede or delay such corporate policy, especially if it was hastily undertaken.[32] Not so under the full-bore director primacy of the PBC.

Director primacy enables the robust, bold exercise of power. Advanced director primacy does so to the hilt. We must, therefore, resist the tendency to anticipate that the public benefit corporation will evince a kinder, gentler, more tempered form of corporate power. It might, in fact, be more extreme. Not atypically of commentators, Dorff sometimes writes as if we can expect the PBC to be more reserved than ordinary corporations (e.g.: "One way to think about this is that in a sense, all PBCs . . . are required at a minimum to adopt a public benefit purpose of attempting to avoid unreasonable negative externalities."[33]). But there is no reason to expect a reasonableness requirement to be imposed on PBC boards, or to expect ordinarily prudent behavior from them. Director primacy encourages ordinary corporate boards to be iconoclastic, risk-preferring institutions.[34] Advanced director primacy can be expected to deepen that orientation in the PBC.

Properly understood, the Public Benefit Corporation should not be regarded as promoting a more socially beneficial form of corporate governance than does the shareholder primacy firm. To do so would be to presume a particular conception of social benefit and then to assume that the public benefit corporation will promote it. Rather, the PBC should be regarded as an institution that promotes pluralism, creativity, and dynamism in the conception and pursuit of social benefit. There is no political or ideological orientation to the public benefit corporation design. But the PBC does institutionalize moral agency, if we regard morality as the establishment of a hierarchy with respect to independently estimable, but ultimately irreconcilable, values. The *essence* of the Public Benefit Corporation is its

31. *See* Lauren Leffer, *The AI Boom Could Use a Shocking Amount of Electricity*, SCI. AM. (Oct. 13, 2023), https://www.scientificamerican.com/article/the-ai-boom-could-use-a-shocking-amount-of-electricity (discussing energy demands of AI systems).

32. Lucian Bebchuk & Roberto Tallarita, *The Illusory Promise of "Stakeholderism": Why Embracing Stakeholder Governance Would Fail Stakeholders*, PROMARKET (Sept. 8, 2020), https://www.promarket.org/2020/09/08/the-illusory-promise-of-stakeholderism-why-embracing-stakeholder-governance-would-fail-stakeholders/.

33. *See* DORFF, *supra* note 7, at 86.

34. Bainbridge, *Means and Ends*, *supra* note 1, at 580.

empowering of the board to decide what is socially desirable and how to pursue it. Director primacy in the ordinary primacy catalyzes production and consumption. Advanced director primacy in the public benefit corporation catalyzes morally inflected action.

The foregoing discussion of "advanced director primacy" in the PBC also suggests a possible solution to three related puzzles concerning investments in and chartering of public benefit corporations. The related puzzles are as these: First, some shareholder-primacy investment firms are investing in public benefit corporations.[35] How can they do so in a way that is consistent with their own obligations to maximize returns to shareholders? Second, some ordinary corporations are organizing subsidiaries as public benefit corporations. How is that consistent with the parent's ordinary fiduciary obligations to their shareholders, which forbid profit sacrifice? Third, the PBC statute authorizes ordinary corporations to transform into public benefit corporations and makes it rather easy for them to do so. When the statute was first adopted, such transformation required director approval and an affirmative vote of 90 percent of the stockholders; however, the stockholder approval threshold was quickly reduced by statutory amendment to just a majority of outstanding shares.[36] But how could directors of an ordinary firm, consistent with their shareholder primacy obligations, pursue a corporate restructuring that would reduce the shareholder's interest from maximum to "balance" in the first place?

The existing literature suggests an analysis that is partially responsive to these puzzles. My "advanced director primacy" analysis adds a solution that is complimentary to them. Most generally, shareholder primacy firms might invest in a PBC or even become one because a PBC can credibly commit to serving multiple stakeholder interests in the boardroom, thus attracting consumers, workers, and other factors more cheaply than can shareholder primacy firms.[37] This can result in greater profits for shareholders (or the same profits), even after the "balancing" profit-sacrifice, as would be available under shareholder primacy operations.[38] My analysis provides an

35. One of Dorff's most interesting findings from his own surveys and interviews is that venture capital firms have invested substantial capital in PBCs, and that "the bulk of the investment came from sources that sought profit alone rather than from impact investors." DORFF, *supra* note 7, at 142.

36. DEL. CODE ANN. tit. 8, § 363 (2020).

37. Jens Dammann, *Publicly Traded Public Benefit Corporations: An Empirical Investigation*, 29 STAN. J.L. BUS. & FIN. 265, 270-71 (2024) (discussing how the legal obligation of PBCs signals its credibility).

38. A second, partial solution for these puzzles discussed by Dorff is the notion of "investment scarcity." *See* DORFF, *supra* note 7, at 154-61. If net-positive investments are scarce, then capital may simply have no alternative to dealing with founders, workers, and consumers who insist on doing business with public benefit corporations. A third, less promising explanation suggested by

additional explanation for this kind of behavior by shareholder primacy boards. It is conceivable that the value to shareholders from fund or parent investments in public benefit corporations, or to actually becoming a public benefit corporation, stems from the advanced director primacy provided by the governance law of such firms. More fully liberated from shareholder scrutiny and the constant threat and burden of derivative lawsuits, PBC directors can exercise their discretion more freely and profitably, just as basic director primacy theory promises. Even after the "balancing" obligation is undertaken in good faith, there may be more profits for shareholders than merely basic director primacy can provide. I do not suggest that this purpose is within the conscious awareness of ordinary corporate directors investing in or seeking to become a PBC (not until this is published, anyway). Still it does provide what would be a theoretically legitimate explanation for such conduct, and it may serve as a plausible characterization of the "revealed preferences" of directors who do engage in this conduct.[39]

Dorff for profit-oriented investment in PBCs is "universal ownership." *See id.* Investment funds might be so diversified that a portfolio cannot benefit from any one firm externalizing costs, because such costs will inevitably be borne by another firm. A coal mining company may wish to increase profits by externalizing costs by polluting the environment, but the consequent climate change will diminish the profits of, say, the agricultural operations in the same investment portfolio. This explanation seems implausible. The issue is net profit. A universal owner might benefit substantially from one highly profitable sector imposing externalities on another less-profitable one. Further, a universal owner may be invested in all *firms*, but they are not invested in all time-horizons.

39. An inverse question could be posed concerning the possibility of a Public Benefit Corporation adopting charter amendments to become an ordinary for-profit corporation. The statute does not explicitly discuss the mechanics of such a transformation, but since the statute does say that the rest of ordinary corporate law applies to PBCs unless stated otherwise, then it must be assumed that PBC's can adopt charter amendments disposing of their PBV status. *See* DEL. CODE ANN. tit. 8, § 361 (2013) ("a public benefit corporation under this subchapter . . . shall be subject in all respects to the provisions of this chapter, except to the extent this subchapter imposes additional or different requirements, in which case such requirements shall apply"). But how could a board consistent with its "balancing" obligations do so? I do not pursue a solution to that puzzle here, but I note again in the context of such a question that only shareholders, anyway, are authorized to bring suit for violation of the "balancing" requirement. So only shareholders could sue to stop a board from violating its balancing obligations by pursuing charter amendments that would allow them to focus exclusively on serving the shareholders.