

U.S. Trade Unionism and Social Enterprise

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I. INTRODUCTION

The collective U.S. conception of American corporate law, governance, and purpose is one marked by fundamental ambiguity.¹ Indeed, many “legal” questions concerning the function and nature of a corporation—or a director’s fiduciary responsibility—are only legal insofar as “legal institutions will be required at certain points to formulate or assume answers to them.”² That is, legal matters arising from these questions are often unanswered by the application of traditional legal doctrine and “analytical rule manipulation,”³ but rather are answered by applying ever-evolving, and largely arbitrary, conceptions of corporations.⁴

Modern questions of this sort primarily concern the tension between shareholder primacy and stakeholder welfare.⁵ The ubiquity of economic analysis of corporate law has undoubtedly led to shareholder primacy as the predominant paradigm of corporate

1. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992).

2. *Id.* at 281.

3. *Id.*

4. *Id.* at 264.

5. Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 535–36 (2006).

governance.⁶ And the overwhelming acceptance of shareholder primacy has perhaps marked the end of history for corporate law.⁷ Notwithstanding, the negative social externalities of virtually all shareholder primacy regimes have also given many scholars and courts pause.⁸ Apprehension about workers' rights and welfare, as well as more general public interest concerns, have generated a significant amount of doubt as to the moral and normative value of shareholder primacy.⁹

Addressing this basic tension, the social enterprise movement was born, creating a new corporate governance regime that gives employees/stakeholders and a particular social or environmental goal equal fiduciary standing to that of shareholders. That is, the very basis for the so-called social enterprise movement is founded on a fundamental distinction between it and prevailing corporations operating under shareholder primacy. The social enterprise movement, however, is still in its nascency and has only been recognized by 38 states.¹⁰ Moreover, among those states which have adopted social enterprise legislation, no substantial enforcement mechanisms exist to ensure newly formed social enterprises and their directors adhere to their duties of loyalty to stakeholders and social impact goals.¹¹ It is, then, unquestionably crucial for social enterprises to effectively demonstrate not only their fiduciary commitment to stakeholders and social goals, but also, and perhaps more importantly, their distinction from the standard U.S. corporate governance system of shareholder primacy to ensure their viability in the U.S. market.

The economic status quo under shareholder primacy has undeniably been marked by a high-profit economy, but it has also seen the ruination of stakeholder interests,¹² specifically those of employees. Indeed, "consumer debt [has turned] workers into indentured servants of the capitalist class."¹³ As it is, in order to manifest a bona fide distinction from shareholder primacy (and the attendant social ills), social enterprises would perhaps do well to give special deference to workers and labor unions. If it is their stated intention to establish a form of accountable capitalism and secure worker welfare,¹⁴ social enterprises are in effect bound to the cause of workplace justice and dignity through collective bargaining to ensure their very market viability.

This Note, then, will analyze the current state of social enterprise governance and its relationship to employees as a primary stakeholder and the right to organize/collectively

6. *Id.* at 535.

7. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001).

8. Lee, *supra* note 5, at 535.

9. *Id.*

10. Alice Thai et al., *Mapping the State of Social Enterprise and the Law*, GRUNIN CTR. FOR L. & SOC. ENTREPRENEURSHIP 9 (2017–18), https://www.law.nyu.edu/sites/default/files/upload_documents/Tepper%20Report%20State%20of%20Social%20Enterprise%20and%20the%20Law%20-%202017-2018.pdf [<https://perma.cc/8699-9LGR>].

11. See Joseph W. Yockey, *The Compliance Case for Social Enterprise*, 4 MICH. BUS. ENTREPRENEURIAL L. REV. 1, 10 (2014) (surveying the lack of enforcement mechanisms).

12. See Lenore Palladino & Kristina Karlsson, *Towards Accountable Capitalism: Remaking Corporate Law Through Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), <https://corpgov.law.harvard.edu/2019/02/11/towards-accountable-capitalism-remaking-corporate-law-through-stakeholder-governance/> [<https://perma.cc/HGN8-EULN>].

13. E. PAUL DURRENBERGER, *UNCERTAIN TIMES: ANTHROPOLOGICAL APPROACHES TO LABOR IN A NEOLIBERAL WORLD* 4 (2017).

14. Michael B. Dorff, *Why Public Benefit Corporations?*, 42 DEL. J. CORP. L. 77, 112 (2017).

bargain. Part II will discuss the background and historical development of corporate conceptions and relevant theoretical contributions of corporate law scholars that ultimately gave rise to social enterprise. Part III will analyze the competing theories and criticisms surrounding the social enterprise movement and their respective merits and shortcomings. Specifically, it will look to the lack of enforcement mechanisms in social enterprise governance as well as the importance of employee welfare and collective bargaining under an analysis of the longevity and sustainability of the social enterprise movement generally. Part IV will recommend that all social enterprises should incorporate with a mandatory contract with a sectoral bargaining unit which represents all employees employed by a social enterprise certified under B Lab.

II. BACKGROUND

A. The Social Enterprise Movement

In January 1953, the Senate Armed Services Committee held confirmation hearings for Charles Wilson, then the president of General Motors, upon his nomination to be Secretary of Defense by President Eisenhower.¹⁵ Concerned about Wilson's potential lack of objectivity, Senator Hendrickson of New Jersey asked of him: "[I]f a situation [arose] where you had to make a decision which was extremely adverse to the interests of your stock and General Motors . . . in the interests of the United States Government, could you make that decision?"¹⁶ Wilson replied that he could not even conceive of such a conflict of interest arising, stating, "*I thought what was good for our country was good for General Motors, and vice versa.*"¹⁷

Today, such a sentiment "may sound like standard C-suite spin,"¹⁸ publicly projecting an illusory alignment of community and corporate interests, yet in practice maintaining short-term maximization of shareholder returns. Nevertheless, Wilson's conception of mutual interests may have actually reflected the overriding perception of corporations at the time. Indeed, the U.S. conception of corporations has undergone several appreciable shifts since the 19th century.

The prevailing conception from the mid-19th century to the 20th century, known as the Property Conception, portrayed corporations as a mere collection of individual shareholders "in a special form" who enjoy *absolute* loyalty from directors.¹⁹ A leading case expressing the Property Conception was the 1919 Michigan Supreme Court case *Dodge v. Ford Motor Co.* where the court held:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end,

15. Ellen Terrell, *When a Quote Is Not (Exactly) a Quote: General Motors*, LIBR. OF CONG. (Apr. 22, 2016), https://blogs.loc.gov/inside_adams/2016/04/when-a-quote-is-not-exactly-a-quote-general-motors/ [<https://perma.cc/V364-ZAR3>].

16. *Id.*

17. *Id.* (emphasis added).

18. Robert D. Atkinson & Michael Lind, *Is Big Business Really That Bad?*, ATL. MONTHLY (Apr. 2018), <https://www.theatlantic.com/magazine/archive/2018/04/learning-to-love-big-business/554096/> [<https://perma.cc/RDK7-K76C>].

19. Allen, *supra* note 1, at 267.

and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.²⁰

Under the Property Conception, “[t]he rights of creditors, employees and others are strictly limited to statutory, contractual, and common law rights” and directors’ duties only extend insofar as these rights are observed.²¹ Beyond this, the maximization of returns for shareholders is the only duty of loyalty that must be considered.

In the 20th century, the idea of a corporation shifted away from the Property Conception to something altogether new: The Entity Conception. In recognition that corporations no longer simply represent the respective property interests of individual shareholders, the Entity Conception lent greater standing to various stakeholders. This established “an obligation to labor, to customers, and lastly to the public”²² Whereas returns for shareholders would always be prioritized, “the corporation [had] other purposes of perhaps equal dignity,”²³ such as ensuring the welfare of employees.

The turn of the 21st century, however, heralded an era of renewed ambiguity surrounding corporate law and governance. The nearly ubiquitous use of economic analysis of corporate law gave rise to a modern form of the Property Conception, marked by fundamental shareholder primacy.²⁴ It momentarily seemed that the doctrinal bases of *Dodge v. Ford Motor Co.* once more enjoyed categorical support from corporate law scholars across the United States.²⁵ Such perhaps would have spelled the end of history for corporate law²⁶ but for the growing unease among a vocal faction of academics²⁷ and courts²⁸ concerning the normative and moral consensus around shareholder primacy.²⁹ To be sure, many scholars have long noted that the model of shareholder primacy insidiously contributes to a myriad of social ills, spoiling workplace dignity/democracy³⁰ and intergenerational environmental justice.³¹ That is, a nationwide shareholder primacy regime may generally contribute to a high-profit economy, but it also “comes at the expense of investments in workers” and the public interest more generally.³² While corporate productivity has increased exponentially in recent decades and prices of consumer goods have drastically decreased, the relevant cost is predominantly exploited labor and the

20. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

21. Allen, *supra* note 1, at 268.

22. *Id.* at 271.

23. *Id.*

24. See Lee, *supra* note 5, at 533–35.

25. *Id.*

26. Hansmann & Kraakman, *supra* note 7, at 439.

27. See generally Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003 (2013) (discussing shareholder primacy including shareholder primacy’s negative consequences).

28. Lee, *supra* note 5, at 536.

29. See *id.* at 533–35 (arguing that neither of the mentioned attacks on shareholder primacy are successful).

30. Palladino & Karlsson, *supra* note 12.

31. See Gail Henderson, *A Fiduciary Duty to Minimize the Corporation’s Environmental Impacts*, UNIV. OSLO (Sep. 22, 2011), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1932032 [<https://perma.cc/9E2U-4TEH>] (arguing that corporate directors should consider the environment when making corporate decisions).

32. See Palladino & Karlsson, *supra* note 12 (discussing the importance of replacing shareholder primacy with stakeholder corporate governance).

subjugation of the working poor.³³

While a purely economic analysis of corporate law would indeed likely support the idea of shareholder primacy, critics would quickly point out that corporations do not exist in a vacuum, but under a fundamental obligation to labor, consumers, and the public. A system of corporate governance which, by design,³⁴ serves to suppress wages and undermine worker welfare ignores the negative correlation of rising income inequality and declining living standards with long-term economic viability,³⁵ whereas one which embraces “stakeholderism” and the cause of workplace dignity buttresses a sound, abiding economy.³⁶

Here lies the basic tension between modern conceptions of corporate law, governance, and purpose under which a new subgroup of corporations began to arise in 2008, known as the social enterprise movement.

Certainly, the 66 years following Wilson’s confirmation hearing have seen large-scale corporate scandals,³⁷ the establishment of absolute shareholder primacy,³⁸ the rapid rise of American-based multinational corporations as the result of economic globalization,³⁹ and the 2008 financial crisis. It’s no wonder, then, why even the first words of Peter Georgescu’s latest book read: “For the past four decades, capitalism has been slowly committing suicide.”⁴⁰ Born predominantly out of the 2008 financial crisis⁴¹ and the absolutist nature of contemporary shareholder primacy,⁴² the general perception of the

33. See Daniel Costa, *The True Cost of Low Prices Is Exploited Workers*, ECON. POL’Y INST.: WORKING ECON. BLOG (June 16, 2015, 2:30 PM), <https://www.epi.org/blog/true-cost-of-low-prices-is-exploited-workers/> [<https://perma.cc/Q222-WBAX>] (discussing corporate lobbying efforts to “water down collective bargaining rights and weaken unions” and utilize “guestworker” programs to hire immigrant workers).

34. See Sharon Smith, *Marxism, Unions, and Class Struggle*, INT’L SOCIALIST REV. (July 2011), <https://isreview.org/issue/78/marxism-unions-and-class-struggle> [<https://perma.cc/86K4-3W5N>] (discussing the “continuous struggle” between capital and labor in a capitalist system, and the current neoliberalist system that “is actually a system of corporate welfare”).

35. See James Manyika et al., *The U.S. Economy Is Suffering from Low Demand. Higher Wages Would Help*, HARV. BUS. REV. (Feb. 22, 2018), <https://hbr.org/2018/02/the-u-s-economy-is-suffering-from-low-demand-higher-wages-would-help> [<https://perma.cc/4UKW-ZWHE>] (discussing the issue of low demand and low wages, and how productivity growth is “the key to increasing living standards”).

36. See Ben Zipperer, *Gradually Raising the Minimum Wage to \$15 Would Be Good for Workers, Good for Businesses, and Good for the Economy*, ECON. POL’Y INST. (Feb. 7, 2019), <https://www.epi.org/publication/minimum-wage-testimony-feb-2019/> [<https://perma.cc/FE3S-R8Z9>] (reprinting testimony before Congress discussing the stagnant minimum wage and the importance of the proposed Raise the Wage Act of 2019, which would increase the national minimum wage to \$15 by 2024).

37. See Atkinson & Lind, *supra* note 18 (noting “Enron’s accounting [fraud], Goldman Sachs’s manipulation of derivative markets,” etc.).

38. See *id.* (commenting that the “rise of the shareholder-value movement” does not tolerate any “mission other than producing profits, preferably in the near term”).

39. See *id.* (noting that such multinationals have “interests that do sometimes run counter to those of their home country”).

40. PETER GEORGESCU & DAVID DORSEY, *CAPITALISTS ARISE!: END ECONOMIC INEQUALITY, GROW THE MIDDLE CLASS, HEAL THE NATION 1* (2017).

41. See Bourree Lam, *Quantifying Americans’ Distrust of Corporations*, ATL. MONTHLY (Sept. 25, 2014), <https://www.theatlantic.com/business/archive/2014/09/quantifying-americans-distrust-of-corporations/380713/> [<https://perma.cc/3MTD-W8VT>] (noting also that the Occupy Wall Street movement was predicated on a fundamental objection to the power and influence of American corporations).

42. See, e.g., GEORGESCU & DORSEY, *supra* note 40, at 3 (noting short-term maximization of shareholder value has become a “cancerous” system of corporate governance which kills corporations and hurts the country).

standard C-corp governance regime has undergone a marked shift, favoring smaller, more socially and environmentally conscious companies.⁴³

In an effort to mirror the “social movements in the aftermath of the 2008 financial crisis” and reflect the corresponding shift in public opinion regarding “prevalent corporate governance theory, from current share-holder centric corporate governance to collaborative corporate governance,” legislatures in thirty-five states have enacted an alternate corporate governance regime—namely: social enterprise legislation.⁴⁴

B. Social Enterprise Legislation: Adoption and Form

There is currently no consensus definition of “social enterprise” among scholars or so-called social entrepreneurs. Many of the relevant theoretical conceptions of social enterprise are often “ill-defined, fragmented, and incoherent”⁴⁵ However, a social enterprise should generally be understood as “an organization that utilizes an earned income strategy to accomplish a primary organizational mission of creating value for one or more stakeholders besides the organizations’ shareholders or owners.”⁴⁶ That is, social enterprises utilize “market-based strategies to advance social and environmental change[.]”⁴⁷ rather than focus solely on increasing shareholder returns.

Social enterprise legislation was originally established by a group called B Lab,⁴⁸ a nonprofit organization created in 2006 by various entities who endorsed not only stakeholder welfare, but also corporate social responsibility.⁴⁹ B Lab’s novel contribution to modern corporate governance law “created a robust third party certification system that allow[ed] entities to earn designation as a ‘Certified B-Corporation’ (aka B-Corp),”⁵⁰ that, while having “no impact on the legal status of the entity,” signified certain constraints on shareholder primacy.⁵¹ Ultimately, however, “B-Lab proceeded to create model legislation for states to establish a new corporate form with different fiduciary duties.”⁵²

By 2008, B Lab had effectively lobbied numerous states to pass social enterprise legislation⁵³ which yielded rapid results with 11 states joining by 2012—“including major commercial states like California, New York, and Illinois.”⁵⁴ Although the exact form of a state’s particular social enterprise legislation may vary, they generally contain the following elements which: “(1) require that a benefit corporation consider general public welfare before acting, (2) permit that more specific interests be considered as well, and (3) require that the firm’s compliance be measured against a standard imposed by an

43. See Atkinson & Lind, *supra* note 18 (discussing the events leading to a shift from big corporations being admired to scorned).

44. Anat Alon-Beck, *The Law of Social Entrepreneurship—Creating Shared Value Through the Lens of Sandra Day O’Connor’s iCivics*, 20 U. PA. J. BUS. L. 520, 520 (2018).

45. *Id.* at 521.

46. Justin Blount & Patricia Nunley, *What Is a “Social” Business and Why Does the Answer Matter?*, 8 BROOK. J. CORP. FIN. & COM. L. 278, 303–04 (2014).

47. Alina S. Ball, *Social Enterprise Governance*, 18 U. PA. J. BUS. L. 919, 919 (2016).

48. Dorff, *supra* note 14, at 82.

49. Kelsey J. Nunez, *Enforcing the “Benefit” Part of Benefit Corporations*, ADVOCATE, Aug. 2019, at 27.

50. *Id.*

51. *Id.*

52. *Id.*

53. Dorff, *supra* note 14, at 82.

54. *Id.* at 83.

independent third party.”⁵⁵ Additionally, the “more specific interests” element generally takes the form of (and is referred to in this Note as) a *social (impact) goal* focused on, inter alia, “reduced inequality, lower levels of poverty, a healthier environment, stronger communities, and the creation of more high-quality jobs with dignity and purpose.”⁵⁶

Significantly, by 2013, the social enterprise movement had such considerable momentum (with more than a dozen states adopting some form of B Lab’s public benefit corporation statute)⁵⁷ that Delaware opted to enact its own public benefit corporation statute.⁵⁸ To be sure, as Delaware maintains the uncontested position as the U.S. leader in corporate law, “had it chosen to reject the new form, the benefit corporation movement might well have withered and died.”⁵⁹

C. Why Social Enterprise?

Perhaps more important than Delaware’s adoption of the new form, however, is Delaware’s *rationale* for doing so. Upon its consideration and drafting of the 2013 Delaware public benefit corporation statute the Corporation Law Council of the Corporation Law Section⁶⁰ and its former chairman, Frederick Alexander, concluded:

I remain convinced that the for-profit corporation remains the best vehicle for raising and allocating capital . . . However, given the challenges that our planet and society face, I also believe we must look for a way to allow that vehicle to operate with a recognition of the interdependence of our complex globe, and the responsibility that follows. *The benefit corporation provides such a path.*⁶¹

Remarkably, this partly reflects the well-established position of many advocates for “stakeholder primacy” under traditional C-corp governance,⁶² who contend that an “allegiance to” and “an imperative to strengthen” stakeholders, such as employees and consumers, leads to a thriving economic system.⁶³ Georgescu similarly remarked: “What we desperately need now is not to abandon free-market capitalism, but to correct its vision—to restore its broader sense of responsibility to multiple stakeholders, to our society as a whole.”⁶⁴ And, as it happens, on August 19, 2019, a large swath of American corporations seemed to have adopted an identical ethos.⁶⁵ The Business Roundtable

55. Corporate Laws Committee, ABA Business Law Section, *Benefit Corporation White Paper*, 68 BUS. LAW. 1083, 1087 (2013).

56. *About B Corps*, CERTIFIED B CORPORATION, <https://bcorporation.net/about-b-corps> [<https://perma.cc/6VSS-YWWK>].

57. For the purposes of this Note, “public benefit corporation” and “public benefit legislation” mean the same as “social enterprise” and “social enterprise legislation,” respectively.

58. DEL. CODE ANN. tit. 8, §§ 361–68 (2020).

59. Dorff, *supra* note 14, at 83.

60. This is a committee under the Delaware State Bar Association, which drafts many of Delaware’s corporate statutes (differing from most legislation, which originates in the state legislature). *Id.*

61. *Id.* at 89 (emphasis added).

62. See GEORGESCU & DORSEY, *supra* note 40, at 3 (stating that many scholars advocate for stakeholder primacy).

63. See *id.* (stating that some successful companies felt an allegiance to stakeholders at one time).

64. *Id.*

65. See *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans>

released a new Statement of the Purpose of a Corporation signed by 181 CEOs representing some of America's largest corporations.⁶⁶ The signed Statement redefined the ultimate purpose of corporations, from the maximization of shareholder returns to the promotion of stakeholder welfare and benefits.⁶⁷

The Roundtable's seemingly revolutionary new stance on the purpose of a corporation—which momentarily seemed to herald a new era marked by stakeholder advancement and influence—ironically served only to lay bare the inimical relationship between stakeholder welfare and shareholder primacy. Indeed, many of the CEOs who signed the Roundtable statement indicated they had *already* been running their companies “with customers, employees, suppliers and communities in mind,” and that a shareholder-centric model does not end up “short-changing” American employees or communities.⁶⁸

However, recent decades under the shareholder primacy model have seen labor's share of income precipitously decrease,⁶⁹ torpid wages,⁷⁰ increased wage theft,⁷¹ gaping wealth inequality,⁷² and a striking apathy toward climate change.⁷³ A normative judgment as to the merits of shareholder primacy based solely on economic analysis may well bear out the CEOs' claims, but is belied by one which even slightly considers corporate morality or workplace dignity.⁷⁴ Indeed, U.S. workers' real wages, for example, “have been flat for . . . four decades, while productivity has increased by 80 percent,”⁷⁵ showing that investment in employees has been overwhelmed by profit and capital interests. Whether this can be explained by structural inability or fundamental unwillingness, it nonetheless seems clear that corporations bound by shareholder primacy do not adequately serve the interests of stakeholders—especially employees. Social enterprises, on the other hand, seem considerably more capable of doing so, particularly if the fundamental purpose of social enterprise is to secure worker welfare⁷⁶ and cure various social ills, among other things.⁷⁷

This explains, in part, the rapid ascendancy of the social enterprise movement. Many

[<https://perma.cc/MLQ9-7B9Y>] (describing the release of a new Statement on the Purpose of a Corporation signed by 181 CEOs stating that their respective companies will be run for the benefit of all stakeholders).

66. *Id.*

67. *Id.*

68. Anders Melin, *The New Capitalism Is Looking a Lot Like the Old Capitalism*, BLOOMBERG (Sept. 20, 2019), <https://www.bloomberg.com/news/articles/2019-09-20/the-new-capitalism-is-looking-a-lot-like-the-old-capitalism> [<https://perma.cc/QZC6-QSMF>].

69. Richard Reeves, *Capitalism Is Failing. People Want a Job with a Decent Wage—Why Is That So Hard?*, GUARDIAN (Apr. 24, 2019), <https://www.theguardian.com/commentisfree/2019/apr/24/capitalism-is-failing-workers-people-want-a-job-with-a-decent-wage-why-is-that-so-hard> [<https://perma.cc/4757-WUD4>].

70. *Id.*

71. David Cooper & Teresa Kroeger, *Employers Steal Billions from Workers' Paychecks Each Year*, ECON. POL'Y INST. (May 10, 2017), <https://www.epi.org/publication/employers-steal-billions-from-workers-paychecks-each-year/> [<https://perma.cc/8AH2-GEZ3>].

72. Melin, *supra* note 68.

73. *Id.*

74. *Id.*

75. Peter Georgescu, *Capitalists, Arise: We Need to Deal with Income Inequality*, N.Y. TIMES (Aug. 7, 2015), <https://www.nytimes.com/2015/08/09/opinion/sunday/capitalists-arise-we-need-to-deal-with-income-inequality.html> [<https://perma.cc/7CK7-WWNL>].

76. See generally Dorff, *supra* note 14 (stating why social enterprises better serve the interests of stakeholders—especially employees—than does shareholder primacy).

77. *Id.* at 89.

states, like Delaware, expressly adopted social enterprise legislation “to harness the power of capitalism to remedy social ills that government has so far failed to fix”⁷⁸ without forfeiting the ability to raise and allocate capital through a for-profit apparatus.

D. Labor, Employee Welfare, and Social Enterprise

Unsurprisingly, the Roundtable’s redefined purpose of a corporation largely amounted to a mere reactionary public relations tactic catering to the shifting public perception of American corporations. After all, “[n]early 60% of American households are technically insolvent and adding to their debt loads each year.”⁷⁹ And the “share of national income going to business profits has climbed to its highest level since World War II, while workers’ share of income (employee compensation, including benefits) has slid to its lowest level since the 1940s.”⁸⁰ Although national economic productivity has increased 80% since the 1970s, wages have remained flat.⁸¹ This same period also saw a rapid decline in union membership.⁸² Significantly, this decline of workers under a collective bargaining contract perfectly reflects a “mirror image of the rise of incomes of the top 10 percent.”⁸³ Such trends have not occurred by happenstance—they are the fundamental *intent* of shareholder primacy regimes and overarching neoliberal policies,⁸⁴ affirming that wage levels can only be “settled by the continuous struggle between capital and labor, the capitalist constantly tending to reduce wages to their physical minimum, and to extend the working day to its physical maximum, while the working man [sic] constantly presses in the opposite direction.”⁸⁵ Labor unions are the foremost instrument for this struggle under modern day capitalism and their erosion, at a minimum, strips workers of “a voice at work and the power to shape their working lives[.]”⁸⁶ thereby empowering corporate exploitation.

Indeed, as collective bargaining power has become increasingly absent in the American workplace, corporations have adopted practices marked by acute exploitation and insidious discrimination, such as requiring 60 or 70-hour work weeks, engaging in systematic wage theft and status discrimination,⁸⁷ employing unpaid interns en masse, or

78. *Id.* at 77.

79. Theodore Kinni, *Is Capitalism Killing America?*, STAN. GRADUATE SCH. BUS. INSIGHTS (Sept. 18, 2017), <https://www.gsb.stanford.edu/insights/capitalism-killing-america> [<https://perma.cc/4WTP-4XEJ>].

80. STEVEN GREENHOUSE, *BEATEN DOWN, WORKED UP: THE PAST, PRESENT, AND FUTURE OF AMERICAN LABOR* 6 (2019).

81. Georgescu, *supra* note 75.

82. See GREENHOUSE, *supra* note 80, at 9.

83. Lawrence Mishel et al., *Wage Stagnation in Nine Charts*, ECON. POL’Y INST. (Jan. 6, 2015), <https://www.epi.org/publication/charting-wage-stagnation/> [<https://perma.cc/G7Q6-6RXU>].

84. Smith, *supra* note 34.

85. KARL MARX, *VALUE, PRICE AND PROFIT* (1865), reprinted in KARL MARX & FRIEDERICH ENGELS, *COLLECTED WORKS* 146 (1985).

86. Josh Bivens et al., *How Today’s Unions Help Working People*, ECON. POL’Y INST. (Aug. 24, 2017), <https://www.epi.org/publication/how-todays-unions-help-working-people-giving-workers-the-power-to-improve-their-jobs-and-unrig-the-economy/> [<https://perma.cc/5LXX-YFCQ>].

87. Chandra Bhatnagar, *Human Rights Abuses in Plain Sight: Migrant Workers in the U.S.*, ACLU (Dec. 18, 2009, 11:57 AM), <https://www.aclu.org/blog/national-security/human-rights-abuse-plain-sight-migrant-workers-us> [<https://perma.cc/6LR5-8D4R>].

“illegally treating many workers as independent contractors rather than as employees.”⁸⁸
The decline in union membership, to be sure, is not a natural phenomenon:

[M]ajor American corporations—among them Amazon and Walmart—have grown more expert and aggressive in beating back unionization drives. Many companies illegally fire pro-union workers to derail these efforts because these companies see that the penalties for such lawbreaking are puny. Walmart even went so far as to close the first Walmart store to unionize in North America⁸⁹

Where U.S. politics, law, and economy upholds and encourages systems of monopsony⁹⁰ and anti-union animus, there is a very basic need for organizational vehicles aimed against class stratification, wage inequality, and workplace injustice. As it is, structural sociopolitical and economic reform is beyond the ambit of this Note; rather, its humble focus is on the relationship between novel corporate governance regimes and workers’ rights—namely, of course, social enterprise and trade unionism. Social enterprise is of particular interest in this respect because unlike its C-corp counterparts, it incorporates with a basic commitment to worker welfare.

But while the social enterprise ethos is indeed amenable to seriously promoting the interests and welfare of employees, there is a structural tension between the respective goals of social enterprises and labor unions. Traditionally, the “chief goal of unions is to organize workers for collective action in support of their interests to redress the power imbalance between those who provide labor and those who control the conditions of its use through their ownership or management of productive resources.”⁹¹ In other words, unions’ basic function is to temper the power of corporate management through collective bargaining to promote worker welfare. However, in the case of social enterprises, such bargaining could result in the dilution of a social enterprise’s ability to achieve its own (purportedly) benevolent social goals, let alone produce adequate returns for shareholders.

That notwithstanding, if the fundamental purpose of social enterprise is to secure worker welfare,⁹² social enterprises should take concrete steps to meet that purpose in practice, namely through promoting collective bargaining in their corporate structure. If a social enterprise abdicates its commitment to employee interests,⁹³ it will certainly frustrate its own purpose and threaten the market viability of the social enterprise movement altogether.⁹⁴ To be sure, “[t]he reality that corporate decision-making is largely a function of corporate choice rather than corporate law is no less true for the new benefit corporation. The B Corp legal regime no more guarantees that those companies will make ‘socially

88. GREENHOUSE, *supra* note 80, at 8.

89. *Id.* at 14.

90. Monopsony here is defined as when the excessive power of a few consolidated employers holds down wages. *Id.* at 8.

91. DURRENBERGER, *supra* note 13, at 11.

92. See Dorff, *supra* note 14, at 112–13 (stating the purpose of a social enterprise).

93. This seems quite likely seeing as how there exist very few enforcement mechanisms in state social enterprise governance regimes. For further discussion, see Part III.

94. See Dana Brakman Reiser, *Benefit Corporations—A Sustainable Form of Organization?*, 46 WAKE FOREST L. REV. 591, 593 (2011) (stating that if B Corps lack robust mechanisms to enforce their dual mission, it will undermine the B Corp system as a whole).

responsible' decisions than existing law prevents directors from doing so."⁹⁵

Promoting collective bargaining with labor unions in social enterprises' corporate structure would not only ensure all third-party standards were met, but it would incorporate third-party standards into its very "DNA," thereby staying "true to the implicit promise to successfully execute a dual business and social mission."⁹⁶

However, the potential dilution of a social enterprise's ability to achieve its own benevolent, social goals while simultaneously producing adequate returns for shareholders remains a strong countervailing concern when considering the exact role of labor unions in social enterprises. The following section will analyze this issue carefully.

III. ANALYSIS

A. Enforcement and Identity

The fundamental tension of the nascent social enterprise movement between benefit identity and profit-seeking structure necessitates certain questions regarding enforcement. While most social enterprise statutes contain a "benefit enforcement proceeding,"⁹⁷ there currently exists no judicial guidance explaining how these provisions ought to be interpreted.⁹⁸ In fact, there has only been one lawsuit brought under a social enterprise enforcement provision. The case, *Pirron v. Impact Makers*, concerned "a founder and former CEO of a Virginia benefit corporation" who "sued the board of directors to (among other things) reverse a sale of shares that threatened the philanthropic mission of the company."⁹⁹ The parties quickly settled, but the lawsuit demonstrated the largely undefinable nature of benefit enforcement claims. Unlike traditional C-corp governance—where only returns for shareholders are analyzed—social enterprises must also consider largely intangible factors, such as social and environmental benefits.¹⁰⁰ While "[c]reating and improving metrics to measure returns on investment in social and environmental benefits is a rapidly evolving industry,"¹⁰¹ it still remains particularly difficult to determine whether a social enterprise is adequately meeting or making efforts to meet its stated goal.

Even in cases where a social enterprise clearly intends to protect the interests of employees, there is a marked absence of enforcement mechanisms available to ensure social enterprises are acting in accordance with their stated purpose.¹⁰² There are neither adequate statutory enforcement provisions nor existing case law to draw upon in order to enforce a social enterprise's purported social benefit.¹⁰³ Moreover, there is neither an

95. Mark A. Underberg, *Benefit Corporations vs. "Regular" Corporations: A Harmful Dichotomy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 13, 2012), <https://corpgov.law.harvard.edu/2012/05/13/benefit-corporations-vs-regular-corporations-a-harmful-dichotomy/> [<https://perma.cc/JW3R-PBF8>].

96. Norman D. Bishara, *Hybrid Entities and the Psychological Contract with Employee-Stakeholders*, 22 U. PA. J. BUS. L. 303, 344 (2020).

97. See Nunez, *supra* note 49, at 27–28 (examining the Idaho Benefit Corporation Act, which establishes a benefit enforcement proceeding system typical of social enterprise statutes).

98. *Id.*

99. *Id.* at 28.

100. *Id.* at 27.

101. *Id.* at 28.

102. See Brian Galle, *Social Enterprise: Who Needs It?*, 54 B.C. L. REV. 2025, 2025 (2013) (arguing social enterprise firms are often privately wasteful).

103. Nunez, *supra* note 49, at 27.

existing law nor a judicial precedent in any of the 35 states which prevents a board of directors from actively disregarding the interests of stakeholders in favor of “pure profit-seeking.”¹⁰⁴ To be sure, judicial and theoretical ambiguity surrounds *all* corporate law, including social enterprise legislation; so, social enterprises are equally liable—if not more so—to abdicating from their fiduciary duties to employees and the public interest.¹⁰⁵ While it is true that social enterprises are uniquely positioned to self-enforce their social/environmental benefit goals (after all, most social enterprise founders are truly passionate about their stated goals),¹⁰⁶ there is no guarantee they will dedicate sufficient resources to social benefits. It is quite possible (if not probable) that founders will seek to leverage their socially beneficial “brand” in order to raise capital and heighten their status,¹⁰⁷ while only investing marginally in tangible benefits. It is also possible that directors and officers may join a social enterprise long after its inception and “may not be as committed [to its stated social goal] as the early managers.”¹⁰⁸

But in all cases where a social enterprise does not list employees as one of the social beneficiaries in its statement of purpose, workers may be considered subordinate to the overarching social goal and exploited to meet that goal,¹⁰⁹ thereby turning the very ethos of social enterprises on its head. And, perhaps ironically, it can be even more problematic in cases where employees are listed as the sole social beneficiaries. This arises in “Work Integration Social Enterprises” which provide “[l]ow-income individuals and other disadvantaged groups”¹¹⁰ training and other opportunities to enter the workforce. Because the benefits these disadvantaged workers receive are considered to be benevolent, advantageous, and, thus, sufficient, it is often ignored that these workers may need more than simple training and accommodation programs or they might also need health care benefits, wage and employment security guarantees, etc.—things which are not enforced by existing social enterprise governance regimes even when employees are the sole beneficiaries. Rather, such things are secured for workers by labor unions.

But if a social enterprise abdicates its commitment to employee interests, it “will ultimately undermine its ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.”¹¹¹ The viability of the social enterprise model is directly contingent on a real dedication to social benefits.¹¹² If, then, the fundamental purpose of social enterprises is to, among other things, secure worker welfare,¹¹³ it seems economically advisable to ensure that employees are well-protected. The promotion of collective bargaining in a social enterprise’s corporate structure would not only ensure that all third-party standards were met, but it would incorporate third-party standards into its very “DNA,” thereby staying “true to the implicit promise to successfully

104. Galle, *supra* note 102, at 2025.

105. Underberg, *supra* note 95.

106. Dorff, *supra* note 14, at 91.

107. *Id.* at 102.

108. Nunez, *supra* note 49, at 28.

109. See Dorff, *supra* note 14, at 92–93.

110. Ofer Eldar, *The Role of Social Enterprise and Hybrid Organizations*, 2017 COLUM. BUS. L. REV. 92, 143 (2017).

111. Reiser, *supra* note 94, at 593.

112. See *id.* (describing the relationship between social benefits and the social enterprise model).

113. See Dorff, *supra* note 14, at 106 (describing the automatic inclusion of employee welfare).

execute a dual business and social mission.”¹¹⁴

B. Labor Unions and “Benefit” Efficiency

As noted above, while the social enterprise ethos is indeed amenable to seriously promoting the interests and welfare of employees, as a general matter, there is a structural tension between the respective goals of social enterprises and labor unions. Generally, “[l]abor unions equip workers with the bargaining power they need to negotiate significant improvements to their working conditions.”¹¹⁵ But in the case of social enterprises, such bargaining could result in the dilution of a social enterprise’s ability to achieve its own benevolent, social goal(s).

One of the principal effects of unionization is the limitation of managerial and operational flexibility.¹¹⁶ As social enterprises are still in their nascency and are largely experimental endeavors,¹¹⁷ an imposition of inflexibility may be particularly problematic for social enterprises to contend with. After all, social entrepreneurs often experiment with different approaches to social enterprises¹¹⁸ but labor unions limit what management can do concerning the size of the workforce, wages, and hours for employees, etc.¹¹⁹ This could hamper social enterprises’ attempts to fully commit to their stated social goal as well as returning profits to their shareholders. Conversely, the limitation of managerial and operational flexibility has been shown to increase the costs of equity.¹²⁰ So while having a unionized workforce under a social enterprise will likely frustrate attempts by directors and officers to take experimental approaches to their particular social enterprise, the stability offered by a union will ultimately raise costs of equity and provide for greater institutional strength and viability to invest in their social goal.¹²¹

Further, attempts to unionize could very well be considered fundamentally irrelevant in the context of social enterprises. After all, social enterprises have largely been created “to harness the power of capitalism to remedy social ills that government has so far failed to fix.”¹²² Their stated benefits vary greatly, from particular socioeconomic goals to general environmental goals.¹²³ Perhaps social enterprises should be exempt from expectations of workers and labor unions because they are providing a specific social benefit and the imposition of negotiating with a labor union will ultimately detract from their ability to deliver their stated benefits.¹²⁴ In fact, many workers specifically work for a social enterprise and take substantially less pay and benefits solely because they believe

114. Bishara, *supra* note 96, at 344.

115. JEANETTE WICKS-LIM, CREATING DECENT JOBS IN THE UNITED STATES: THE ROLE OF LABOR UNIONS AND COLLECTIVE BARGAINING 5 (Pol. Econ. Rsch. Inst., 2009).

116. *See generally* Huafeng Chen et al., *Labor Unions, Operating Flexibility, and the Cost of Equity*, 46 J. FIN. & QUANTITATIVE ANALYSIS 25 (2011) (studying whether the constraints on firms’ operations imposed by labor unions affect firms’ costs of equity).

117. *See* Dorff, *supra* note 14, at 82 (describing the benefits of Public Benefit Corporations).

118. *Id.*

119. *See* Chen et al., *supra* note 116, at 26 (describing the role of unions in firms’ operations).

120. *Id.*

121. *See id.* (showing that firms in more unionized industries have higher costs of equity).

122. Dorff, *supra* note 14, at 77.

123. *See id.* (exploring why Delaware chose to adopt PBCs).

124. *See id.* (presenting ideas of why the Public Benefit Corporation statute is not a good enforcement tool).

in the stated mission of that social enterprise.¹²⁵

Moreover, between social enterprises and labor unions, there are many “conflicting tendencies.”¹²⁶ Where social enterprises rely on nimble and flexible structures to use “an earned income strategy” to provide returns for shareholders and a social goal,¹²⁷ labor unions seek to temper the power and flexibility of managers to ensure the needs of workers are met.¹²⁸ Indeed, labor unions see the welfare of their workers as their single concern, while social enterprises have a wide variety of concerns. Social enterprises are, after all, legally bound to not only their shareholders but also to their stated social benefit, in contrast to standard C-corp firms.¹²⁹ Thus, oftentimes the social enterprise considers the interests of its workers as subordinate to their stated social benefit which is fundamentally inapposite to the function and goals of labor unions.

These differences in priorities may appear to be intractable and suggest that labor unions should play no role in the social enterprise movement. However, such a conclusion is paradoxical. The social enterprise movement is based on the goal to “soften capitalism’s ill effects on workers, communities, and the environment.”¹³⁰ Likewise, labor unions exist to protect workers from capital primacy and exploitation. This “mutuality of interests”¹³¹ indeed suggests that while there may be some conflicting tendencies, ultimately labor unions and social enterprises are fundamentally compatible and will benefit each other. In the context of social enterprises, the argument for unionization is therefore simple: “[B]etter treatment means more stability and higher morale, the benefits of which inure to the [social enterprise beneficiaries].”¹³² Thus, where there are conflicts in the respective institutional roles of both labor unions and social enterprises, they are fully reconcilable because the mutuality of interests ultimately creates cyclical and complementary benefits to each other.

In sum, not only are labor unions compatible with social enterprises’ “benefit” efficiency, but also the viability of social enterprises’ “benefit identity” is highly dependent on labor unions. There is a mutuality of interests between labor unions and social enterprises, therefore their respective roles will ultimately benefit and complement each other. Where collective bargaining might decrease social enterprises’ investment into their social goal, their contractual commitment to workers’ rights will ultimately yield a net positive total combined investment in both stakeholders *and* social goals. Moreover, labor unions would allow social enterprises to “create a strong brand for social enterprise as sustainable organizations”¹³³ because it would show a reliable commitment to positive social and economic change, thereby bolstering their market viability as bona fide public benefit firms, distinct in identity from standard C-corps.

125. *Id.* at 102.

126. Eduardo R.C. Capulong, *Which Side Are You on? Unionization in Social Service Nonprofits*, 9 N.Y.C. L. REV. 373, 375 (2006).

127. Blount & Nunley, *supra* note 46, at 201.

128. DURRENBERGER, *supra* note 13.

129. *But see* Part III (discussing the absence of effective enforcement mechanisms).

130. Dorff, *supra* note 14, at 112.

131. Capulong, *supra* note 126, at 374.

132. *Id.* at 396.

133. Reiser, *supra* note 94, at 593.

C. The Effect of Unionization on Profit and Economic Viability

The very structure of a social enterprise, especially an “early-stage” social enterprise, is necessarily low-profit.¹³⁴ After all, social enterprises must “balance the complex and often competing interests within these unique business entities”—i.e. favorable returns for shareholders and the stated social impact goal—all while navigating the unfamiliar challenges that nascent social enterprise governance regimes often face.¹³⁵

Once a firm unionizes, profits that would otherwise be enjoyed by owners shift to workers in the form of “higher wages and benefits and better working conditions. . . .”¹³⁶ This is no less true in the social enterprise context, except that in addition to the competing pecuniary interests of owners, a social enterprise must also consider its level of investment in its stated social impact goal as well as the naturally volatile environment of the nascent social enterprise movement. It would seem reasonable then for a newly-established social enterprise to be reluctant to contend with a unionized workforce. But a categorical opposition to a unionized workforce is fundamentally inapposite to the very legal as well as moral purpose of a social enterprise.

The social enterprise ethos of conducting business fundamentally alters the ways in which a company should be governed because it compels directors and officers to make corporate decisions that account for the *divergent interests of the company’s stakeholders and to consider the decisions’ broader impact on society.*¹³⁷

The “longevity and growth of social enterprises will be determined by their ability” to effectively balance the attendant, and competing, interests of not only their shareholders and social impact goals, but also their stakeholders—i.e. employees.¹³⁸ Indeed, if social enterprises decline, or otherwise fail, to serve the needs of their employees, “[they] will ultimately undermine [their] ability to expand funding streams and create a strong brand for social enterprise as sustainable organizations.”¹³⁹ As previously noted, unions act as a third-party which mediates between labor and management and ensures the welfare of employees. A unionized workforce thereby provides for a situation wherein employee welfare is incorporated into the very structure of a social enterprise which reinforces its ability to stay “true to the implicit promise to successfully execute a dual business and social mission.”¹⁴⁰

While social enterprise management may attempt to artificially “raise productivity to offset the higher cost of labor” in a unionized firm, such attempts will likely yield few or

134. Ball, *supra* note 47, at 921.

135. *See id.* at 919 (stating that social enterprises focus on advancing social or environmental change).

136. Richard B. Freeman & Kelsey Hilbrich, *Do Labor Unions Have a Future in the United States?*, HARV. LIB. 7 (Nov. 9, 2019), <https://dash.harvard.edu/bitstream/handle/1/10488702/15855239.pdf?sequence=2> [<https://perma.cc/8R6R-QYLF>].

137. Ball, *supra* note 47, at 921 (emphasis added) (footnote omitted).

138. *Id.* at 919.

139. Reiser, *supra* note 94, at 593.

140. Bishara, *supra* note 96, at 344.

no results.¹⁴¹ But “higher wages and benefits, [better working conditions,] and . . . union-initiated grievance system[s]” may ultimately “[reduce] labor costs”¹⁴² in the long run. In the context of social enterprises, where profit-maximization is not an established objective, “[u]nion wage pressure may precipitate a *shock effect* that is favorable to productivity.”¹⁴³ That is, when a social enterprise is compelled to negotiate with a union and the consequent demands for higher wages and better conditions, it may be favorable for it to simply acquiesce, yet maintain profitability by adopting “better personnel and production methods.”¹⁴⁴ Moreover, heightened wages and benefits may also “accelerate the substitution of capital for labor and hasten the search for cost-reducing (productivity-increasing) technologies.”¹⁴⁵

Additionally, social enterprises should not see the limitations put on managerial discretion and flexibility by most collective bargaining agreements as a net-negative result of unionization. To be sure, as mentioned above, the limitation of managerial and operational flexibility has proved to actually increase costs of equity,¹⁴⁶ enabling higher levels of investment in stakeholders and shareholders alike (in addition to a social goal).

It is nevertheless clear that social enterprises, in their infancy, have fewer means and less flexibility in the allocation of resources to engage in a traditional negotiation with an established labor union. This, however, should not be interpreted as an absolute bar to industry-wide unionization in the social enterprise sector.

IV. RECOMMENDATION

Notwithstanding the abovementioned “benefit” and pecuniary incentives for social enterprise management to encourage unionism, the traditional method of “enterprise bargaining” poses a fundamental disincentive. Whereupon a collective bargaining agreement is entered into by a single social enterprise and its workers, the social enterprise is immediately placed at a decided disadvantage relative to all other nonunion firms in the same market.¹⁴⁷ While, indeed, this Note recommends for industry-wide unionization, it does so in the context of sectoral bargaining,¹⁴⁸ where “an entire field or industry agrees on basics, such as safety standards or minimum wages, rather than each company bargaining with its own workers.”¹⁴⁹ This circumvents the principle problem with enterprise bargaining and the disadvantageous nature of operating a union firm. Sectoral bargaining, on the other hand, carries out negotiations primarily “between employer

141. Freeman & Hilbrich, *supra* note 136, at 6.

142. *Id.*

143. *Chapter 11: The Economic Impact of Unions*, IND. ST. U. (Nov. 9, 2019), <http://isu.indstate.edu/conant/ecn351/ch11/chapter11.htm> [<https://perma.cc/C764-CKH4>].

144. *Id.*

145. *Id.*

146. Chen et al., *supra* note 116, at 25.

147. Laura Rosbrow-Telem, *Warren Supports ‘Sectoral Bargaining.’ Here’s What That Means*, PUB. NEWS SERV. (Oct. 9, 2019), <https://www.publicnewsservice.org/2019-10-09/livable-wages-working-families/warren-supports-sectoral-bargaining-heres-what-that-means/a68019-1> [<https://perma.cc/R7LK-BF96>].

148. It should, however, be noted here that the economic and “benefit” advantages of a unionized firm discussed in Part III would nonetheless apply and, indeed, outweigh the particular “disadvantages” in enterprise bargaining.

149. Rosbrow-Telem, *supra* note 147.

federations and unions of workers in an entire sector”¹⁵⁰ The benefit of sectoral bargaining is also that “[s]ince every firm pays essentially the same negotiated wages and benefits, management has little incentive to campaign against workers joining a union. Managements compete on the basis of better productivity, innovations, or service—not on the basis of lower labor costs.”¹⁵¹

Certainly, the imposition of a sectoral bargaining system on social enterprises may seem fundamentally misguided at first blush. After all, the social enterprise movement represents a particular corporate governance regime, not an individual market. Social enterprises exist on a wide spectrum of distinct markets.¹⁵² Nevertheless, social enterprises are uniquely positioned to adopt a sectoral bargaining system. Not only do they all adhere to novel and specialized public benefit corporate governance regimes, they nearly all are registered, verified, and certified by an external third-party—B Lab. Sectoral bargaining could be imposed on social enterprises by establishing B Lab as a de facto “federation” of social enterprises. B Lab already fields labor complaints filed by union advocates on behalf of employees under certified social enterprises, monitors violations of workers’ rights among its member businesses, and has publicly recognized collective bargaining as a basic human right.¹⁵³ Further, B Lab’s Standards Advisory Council has stated that anti-union animus on the part of a social enterprise may result in ineligibility for B Corp Certification.¹⁵⁴ The transition, thus, to a de facto federation of social enterprises would not run afoul of either B Lab’s structural role in social enterprise or its stance toward workplace dignity and unionization, but rather, such a transition would authenticate them.

Upon the creation of a social enterprise-sector union, both the federation and the union would enter into an industry-wide, established contract. “The agreement [would] become[] legally binding on all firms and workers in the sector, whether they are members of the federation . . . or of the union or nonunion.”¹⁵⁵

Both states with existing social enterprise laws, and states yet to adopt such governance regimes, should accordingly adopt similar policies into their social enterprise legislation which would mandate the registration and adherence to the federation of social enterprises and its collective bargaining agreement with the sector-wide union.

V. CONCLUSION

The primary function of a social enterprise is to provide for an alternative corporate governance regime which substantially provides for workers, the reduction of inequality, high quality jobs with dignity and purpose, and a stated social impact goal. There are, however, remarkably few enforcement mechanisms. Thus, to ensure the viability and sustainability of the social enterprise model, future and existing social enterprises ought to incorporate with a sectoral collective bargaining agreement with employees and a third-

150. Freeman & Hilbrich, *supra* note 136, at 6.

151. *Id.*

152. See *About B Corps*, *supra* note 56 (showing that social enterprises represent industries from retail to banking, from engineering firms to breweries, etc.).

153. *B Lab Controversial Issues Statement—Unionization Efforts by Employees*, B LAB (Apr. 2018), <https://blab-mktg-bcorporation-production.s3.amazonaws.com/Union%20Controversial%20Issues.pdf> [https://perma.cc/6979-KLJC].

154. *Id.*

155. Freeman & Hilbrich, *supra* note 136, at 6.

party federation. That is, the commitment to the welfare of employees is inextricably linked to the foundational purpose of social enterprises and the establishment of sectoral bargaining in social enterprises as an entire industry will best secure the welfare and benefits of employees. Therefore, sectoral bargaining in social enterprises ought to be realized through state statutes and through a third-party federation, such as B Lab, to implement industry-wide unionization in social enterprise.