The Accountable Capitalism Act in Context and Its Implications for Legal Ethics

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INTRODUCTION

In 2018, Senator Warren proposed the Accountable Capitalism Act ("ACA"), a bill designed to reshape American capitalism.[1] The bill would federalize the corporate charter system to shift corporate priorities from a singular focus on maximizing shareholder value to a broader balancing of disparate stakeholders' interests, all in an effort to reduce wealth inequality and give stakeholders such as employees and consumers greater control over the corporations that affect their lives.[2] Such a change would in turn impact the landscape of legal ethics in organizational representation.

This Note will explore the ACA's relationship with the past century of American corporate governance and, where necessary, foreign corporate legal structures. The bill's proponents assert it would be a triumphant realization of past attempts to achieve corporate social responsibility. Part I of this paper will briefly sketch the history of corporate governance and social responsibility in the United States. Part II will lay out the major provisions of the ACA and its public reception. Part III will examine the degree to which each of the bill's provisions has historical precedent in the United States or abroad. Finally, Part IV will explore the ACA's implications for the field of legal ethics, specifically the role a corporate lawyer would play for a corporation with new obligations and constituents.

I. CORPORATE GOVERNANCE IN AMERICAN HISTORY

A. POST-WAR ERA – CORPORATE SOCIAL RESPONSIBILITY

In the development of American corporate law, Adolf Berle, perhaps "one of the most influential public policy intellectuals of the Twentieth Century,"[3] looms large. A veteran of World War I, graduate of Harvard Law, and Columbia Law professor, Berle is best known for his seminal 1932 book, *The Modern*

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1. Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

2. *See* Accountable Capitalism Act One-Pager, OFFICE OF SENATOR ELIZABETH WARREN (2018), https://www.warren.senate.gov/imo/media/doc/Accountable%20Capitalism%20Act%20One-Pager.pdf [https://perma.cc/SC4J-7APR].

3. Robert B. Thompson, *Adolf Berle During the New Deal: The Brain Truster as an Intellectual Jobber*, 42 U. SEATTLE L. REV. 663, 663 n.1 (2019) (citing 4 LETTERS OF LOUIS D. BRANDEIS 36–37 (Melvin I. Urofsky and David W. Levy eds., 1975)).

Corporation and Private Property, which laid the foundation for modern corporate law.[4] His work has informed corporate law for the last century.[5]

In 1963, Berle wrote a book describing the post-war corporation and its sociopolitical environment.[6] He argued that since the New Deal, private corporations and the government had come to occupy a stable equilibrium: corporations were motivated by profit but policed their own behavior to avoid drastic intervention by the powerful post-New Deal government.[7] Corporate self-restraint allowed government to regulate via limitations on corporate power rather than more intrusive, potentially controversial mandates of positive action.[8] Government's undisputed supremacy in economic management and the broad political interest in full employment and stable, equitable distribution of economic benefits brought managers to heel as "quasi-public servants."[9] For example, while other countries were creating national health insurance and pension systems, American corporations shouldered that burden themselves, exemplified by an agreement between General Motors ("GM") and the Union of Automobile Workers in 1950.[10] In those years, shareholders were seen as passive dividend collectors and philanthropists, playing little role in corporate management.[11]

B. THE ROARING '80S – SHAREHOLDER VALUE MAXIMIZATION

Cracks in the equilibrium began to emerge in the 1970s.[12] The economy was roiled by recession, stock market collapse, oil crises, and increased international competition in manufacturing.[13] The progressive political coalition which had implemented the New Deal fell apart, and the regulatory state failed to keep pace with new avenues of corporate risk-taking and externalization.[14] Good-faith managerial cooperation with existing regulations devolved into minimum legal compliance as fears of government intervention abated.[15] A new conception of the corporation's role in society began to emerge, which Milton Friedman neatly

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4. *See id.* at 663–65 (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (Harcourt, Brace & World ed., 1968) (1932)).
5. *Id.* at 663–64.
6. *See* William W. Bratton, *The Separation of Corporate Law and Social Welfare*, 74 WASH. & LEE L. REV. 767, 768 (2017) (citing ADOLF A. BERLE, JR., THE AMERICAN ECONOMIC REPUBLIC (1963)).
7. *See id.* at 768–71.
8. *See id.* at 769.
9. *See id.* at 771.
10. *Id. See generally* Erik de Gier, Paradise Lost Revisited: GM and the UAW in Historical Perspective 12–13 (2010) (unpublished working paper), *available at* https://digitalcommons.ilr.cornell.edu/intlvf/30 [https://perma.cc/R9S9-QD6M]. This agreement was just the latest in a long line of corporate welfare programs instituted to encourage employee loyalty through stock subscriptions, regular wage increases, pensions, etc. *See* KATHY STONE, *The Labor System of the Industrial Era*, *in* FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE 27, 43–44 (2004).
11. Bratton, *supra* note 6, at 771–72.
12. *See id.* at 773.
13. *Id.* at 773–74.
14. *Id.* at 774.
15. *Id.*

summarized in the title of his influential article "The Social Responsibility of Business is to Increase its Profits."[16]

Out of the alarm over the reprise of management risk-taking and profit-seeking arose the corporate governance and social responsibility movement. One proposal, set forth by Melvin Eisenberg and embraced by progressives, was that the board of directors could monitor management performance rather than take a leadership role in managing the corporation itself.[17] However, this would require directors who would not be solely invested in the corporation's financial success. Some suggested requiring corporations to select their directors from an approved list[18] or federalizing corporate law.[19] One group tried to use the proxy system to nominate directors chosen by employees and customers at GM in 1970.[20] For a time, even the business community was on board with the idea of independent directors,[21] although this cooperation did not last.[22]

A flurry of hostile takeovers in the 1980s impressed upon managers the importance of maximizing their shareholders' returns, lest the corporation face buyouts and radical "restructuring" (often a euphemism for cost-cutting layoffs).[23] Thus maximization of shareholder value solidified into the ultimate corporate objective, to which self-serving managers were seen as impediments.[24] The same business community which endorsed independent directors in 1978 declared in the first sentence of its 1997 Statement on Corporate Governance that "the principal objective of a business enterprise is to generate economic returns to its owners."[25]

C. PRESENT SITUATION – STUCK IN THE '80S (FOR NOW)

This singular focus on stock price has had deleterious effects for constituents. Corporations have decreased domestic employment while increasing outsourcing.[26]

16. Steven Hill, *Co-determination Takes the Spotlight in the US*, STEVEN HILL (Feb. 12, 2019), https://www.steven-hill.com/co-determination-takes-the-spotlight-in-the-us/ [https://perma.cc/HZ8E-N45C]; *see* Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES MAG., Sept. 13, 1970).

17. *See* Bratton, *supra* note 6, at 774–75 (citing MELVIN A. EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976)).

18. *Id.* at 775–76 (citing Elliott J. Weiss, *Social Regulation of Business Activity, Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 UCLA L. REV. 343, 426–32 (1980)).

19. *Id.* at 776 (citing NADER ET AL., TAMING THE GIANT CORPORATION 16 (1976) and Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 548–49 (1984)).

20. *See* Donald E. Schwartz, *Proxy Power and Social Goals: How Campaign GM Succeeded*, 45 ST. JOHN'S L. REV. 764 (2012).

21. *See* Bratton, *supra* note 6, at 777 (citing Bus. Roundtable, *The Role and Composition of the Board of Directors of the Large Publicly Owned Corporations*, 33 BUS. LAW. 2083, 2085, 2089, 2093 (1978)) ("proposing reforms to encourage more independent directors").

22. *See id.* (citing Victor Brudney, *The Role of the Board of Directors: The ALI and Its Critics*, 37 U. MIAMI L. REV. 223, 228 (1983)) ("opposing increased government regulation of board structure").

23. *See* Bratton, *supra* note 6, at 778–79.

24. *Id.* at 779–80.

25. BUS. ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE 1 (1997).

26. Bratton, *supra* note 6, at 781.

As careers are reduced to jobs and gigs (short-term, out-sourced work contracts), workers lose regulatory protection and job security.[27] Pensions and medical benefits are being phased out.[28] Inequality is widening as labor's opportunities and stability decrease while management compensation balloons, due in part to equity arrangements which tie executive earnings to the stock price.[29] "It is now clear that the market side really won the battle of the 1980s, succeeding in entering a wedge between corporate law and social welfare."[30]

There has been significant social and political backlash in response to these developments. The Occupy Wall Street protest at the heart of New York City's financial district in 2011 represented a wave of popular sentiment against corporate greed and income inequality.[31] In his 2016 presidential campaign, political underdog and democratic socialist Bernie Sanders rode this wave to receive over forty-five percent of the pledged delegates in the Democratic primary, ushering progressive ideas on income inequality, universal healthcare, and free public college into the political mainstream.[32] Recently, in the 2020 Democratic primary, many other candidates espoused similar views, including Massachusetts Senator Elizabeth Warren, a "leading progressive voice[], fighting for big structural change that would transform our economy and rebuild the middle class."[33]

II. ACCOUNTABLE CAPITALISM ACT

A. THE BILL

To effect her structural change, Senator Warren has proposed a bill that would change the fundamental nature of the corporation and the world of corporate law. In short, the bill would make large corporations: (i) obtain federal charters mandating that the corporations seek to create a "general public benefit" and bringing them under the direct supervision of a new federal agency; (ii) have some employee-elected directors; (iii) receive shareholder and board approval for political expenditures; and (iv) be subject to charter revocation.[34] These provisions are laid out in more detail below:

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27. *Id.* at 782; *see* Stephen F. Befort, *The Declining Fortunes of American Workers*, 70 FLA. L. REV. 189, 191–96 (2018) (discussing decreased workforce attachment).

28. Bratton, *supra* note 6, at 782.

29. *Id.* at 783.

30. *Id.* at 768.

31. Heather Gautney, *What is Occupy Wall Street? The History of Leaderless Movements*, WASH. POST (Oct. 10, 2011), https://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story.html [https://perma.cc/CF42-TPA6].

32. Nicole Gaudiano, *Bernie Sanders Defied Expectations with Long-shot Presidential Campaign*, USA TODAY (Jul. 11, 2016), https://www.usatoday.com/story/news/politics/elections/2016/07/11/bernie-sanders-defied-expectations-presidential-campaign/85694576/ [https://perma.cc/XFU5-Z6R8].

33. *About Elizabeth Warren*, OFFICE OF SEN. ELIZABETH WARREN (Sept. 5, 2013), https://www.warren.senate.gov/about/about-elizabeth [https://perma.cc/LDC7-D7F5].

34. Accountable Capitalism Act, S. 3348, 115th Cong. (2018).

i. An American corporation with annual revenue exceeding $1 billion must obtain a federal charter as a "United States corporation" under the new Office of United States Corporations.[35] A U.S. corporation will "have the purpose of creating a general public benefit,"[36] meaning "a material positive impact on society resulting from [its] business and operations."[37] Its directors must seek to create such a benefit and "consider the effects of any action or inaction on" the interests of all corporate stakeholders, including employees, customers, shareholders, the communities in which the company operates, and the environment.[38] This provision mirrors benefit corporation laws present in most states.[39] The only parties with standing to sue for enforcement of this provision are the corporation itself, shareholders of the corporation who own at least two percent of its shares, or shareholders of the corporation's parent company who own at least five percent of the parent company's outstanding equity.[40] Importantly, U.S. corporations will not be liable for monetary damages for failing "to pursue or create a general public benefit," only injunctive relief;[41]

ii. At least forty percent of the corporation's directors must be selected by the employees;[42]

iii. A corporation must receive the approval of at least seventy-five percent of its shareholders and seventy-five percent of its directors before engaging in political expenditures;[43] and

iv. The federal government may revoke a corporation's charter for repeated egregious illegal conduct and failing to take meaningful steps to address it.[44]

B. PUBLIC RECEPTION

In light of the Senator's accelerating presidential campaign, this bill and the ideas underlying it have garnered significant attention.[45] The political media have split predictably along partisan lines in their responses,[46] although without public

35. *Id.* § 4(a)(1).
36. *Id.* § 5(b)(2).
37. *Id.* § (b)(2).
38. *Id.* § 5(c)(1).
39. One-Pager, *supra* note 2.
40. S. 3348 § 5(d)(2).
41. *Id.* § 5(d)(1).
42. *Id.* § 6(b)(1).
43. *Id.* § 8(b).
44. *Id.* §§ 9(a)–(c)(2).
45. As of this Note's writing, Sen. Warren had not yet exited the 2020 presidential race.
46. *Compare* Matthew Yglesias, *Elizabeth Warren has a Plan to Save Capitalism*, VOX (Aug. 15, 2018), https://www.vox.com/2018/8/15/17683022/elizabeth-warren-accountable-capitalism-corporations [https://perma.cc/SRC9-4WYS], *with* Milton Ezrati, *Senator Warren's Accountable Capitalism Bill has Big Problems*,

polling data it might be imprudent to assume broader public opinion tracks similarly. More interestingly, the fermenting opposition to shareholder primacy and looming threat of government intervention[47] have created waves in the business community. In its August Statement on the Purpose of a Corporation, the Business Roundtable disavowed its stance on shareholder primacy which had reigned since 1997.[48] In its place, the group pledged "a fundamental commitment to all of our stakeholders," including customers, employees, suppliers, local communities, and the environment.[49]

III. THE ACA'S RELATIONSHIP TO EARLIER IDEAS ON AMERICAN CORPORATE LAW AND ETHICS

A. FEDERALIZING THE CORPORATE CHARTER

In our current system, a corporation is formed by filing articles of incorporation (i.e., the charter) with a state office, with state law governing the charter.[50] The leading provision of the ACA would give this power over the issuance and supervision of corporate charters and entities to the federal government.[51] The ACA's proponents attempt to cast the bill as the natural culmination of decades or even centuries of support.[52] Senator Warren has said: "For much of U.S. history, the answers were clear. Corporations sought to succeed in the marketplace, but they also recognized their obligations to employees, customers and the community."[53] This much seems to be accurate.[54]

However, the bill's prescribed solution of wresting control of corporate charters from the states and placing it in federal hands has never enjoyed widespread support in this country, and to bring it to fruition would be unprecedented. In endorsing and mandating this arrangement, the ACA aligns itself with a more radical, minority position.

FORBES (Feb. 5, 2019), https://www.forbes.com/sites/miltonezrati/2019/02/05/senator-warrens-accountable-capitalism-bill-has-big-problems/ [https://perma.cc/MD5T-5UA4].

47. *See supra* Part I.C.

48. *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 [https://perma.cc/LK2W-9XR3].

49. *Statement on the Purpose of a Corporation*, BUS. ROUNDTABLE (Aug. 19, 2019), https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf [https://perma.cc/MH33-DC7S].

50. *See* Will Kenton, *Corporation*, INVESTOPEDIA, https://www.investopedia.com/terms/c/corporation.asp [https://perma.cc/CKZ2-YQV2] (last updated Dec. 11, 2019).

51. *See* Accountable Capitalism Act, S. 3348, 115th Cong. § 4 (2018).

52. *See* Elizabeth Warren, *Companies Shouldn't Be Accountable Only to Shareholders*, WALL ST. J., https://www.wsj.com/articles/companies-shouldnt-be-accountable-only-to-shareholders-1534287687 [https://perma.cc/MZ2P-CPSE] (Aug. 14, 2018).

53. *Id.*

54. *See infra* Part I.

The notion of federalizing the corporate charter has existed since this nation's founding but has never been enacted.[55] At the Constitutional Convention in Philadelphia, James Madison's suggestion for a "national law of corporations" was rejected, entrusting regulatory control to the states.[56] In the late 19th and early 20th centuries, the federal government moved to regulate the business world and promote competition by passing the Sherman Antitrust Act, the Federal Trade Commission Act, and the Clayton Act,[57] as well as to create the Department of Commerce and Labor and the Antitrust Division at the Department of Justice.[58] Presidents Theodore Roosevelt and William Howard Taft both made proposals to federalize corporate law, but neither passed.[59] In the wake of the Great Depression in the late 1930s, senators proposed several bills for federal incorporation and President Franklin Delano Roosevelt created a committee which floated the same idea.[60] Again, none of these measures came to much, in part due to the outbreak of World War II soon after.[61]

Calls for corporate reform again resurfaced in the 1970s in response to negative, antisocial externalities resulting from business activity, including "environmental burdens, unsafe products, [and] discrimination."[62] One such prominent reformer in the 1970s was political activist and attorney Ralph Nader, an early champion of consumer advocacy and increased tort liability against corporations.[63] In his book *Taming the Giant Corporation*, Nader and his coauthors argued that state law was unable to restrain corporate excesses and abuses and proposed that the federal government charter and control corporations instead.[64]

However, as a modern supporter of corporate federalization writes, "[n]one of this came to much."[65] Most proposals at that time focused on reforming corporate

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55. *See* Schwartz, *supra* note 19, at 547.

56. *Id.* at 551 (citing JAMES MADISON, NOTES OF DEBATES OF THE FEDERAL CONVENTION 638 (W. Norton & Co. ed. 1966)).

57. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3RVT-AM9Q] (last visited Dec. 19, 2019).

58. Jonathan Grossman, *The Origin of the U.S. Department of Labor*, U.S. DEP'T LABOR, https://www.dol.gov/general/aboutdol/history/dolorigabridge [https://perma.cc/Q56H-T5GZ] (last visited Dec. 19, 2019); *History of the Antitrust Division*, U.S. DEP'T JUST., https://www.justice.gov/atr/history-antitrust-division [https://perma.cc/2UQY-7JHL] (last updated Dec. 13, 2019).

59. Schwartz, *supra* note 19, at 547 (citing Taft-Wickersham Federal Incorporation Bills, H.R. 20142 & S. 6186, 61st Cong., 2d Sess. (1910) and FEDERAL TRADE COMMISSION REPORT, COMPILATION OF PROPOSALS AND VIEWS FOR AND AGAINST FEDERAL INCORPORATION ON LICENSING OF CORPORATIONS AND COMPILATION OF STATE CONSTITUTIONAL, STATUTORY AND CASE LAW CONCERNING CORPORATIONS, WITH PARTICULAR ATTENTION TO PUBLIC UTILITY HOLDING AND OPERATING COMPANIES, S. Doc. No. 92, Part 69-A, 70th Cong., 1st Sess. (1934)).

60. *See* Schwartz, *supra* note 19, at 547 n.17.

61. *Id.* at 547.

62. *See id.* at 548–49.

63. *See* Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS UNIV. L. REV. 9, 11–12 (2000) (citing RALPH NADER, UNSAFE AT ANY SPEED (1965)).

64. *See* Schwartz, *supra* note 19, at 548 (citing R. NADER ET AL., *supra* note 19).

65. Bratton, *supra* note 6, at 776.

governance to promote accountability for managers, rather than substantive, sweeping legal changes to the corporate system.[66] Reformers like Nader who found the central corporate ethos of profit maximization antithetical to social welfare and in need of federal intervention were in the distinct minority.[67] On the other hand, "[t]he mainstream of corporate reform accept[ed] the corporation as a necessary and desirable vehicle for achieving economic goals. The reformers' quarrel [was] with managers, not the corporation."[68]

Writing in 1984, corporate social responsibility advocate and corporate law professor Donald E. Schwartz again advocated federally chartering corporations.[69] He claimed that making federal law the exclusive law governing large corporations would modernize and standardize outdated state laws, a nigh-impossible task for states themselves to carry out given their perverse incentive to attract corporations by having lax regulatory frameworks.[70] However, even Schwartz himself was doubtful about a mired Congress's ability to pass such major, controversial legislation and was concerned about the uncertainty that would reign if two centuries of state law precedent were swept aside.[71]

In arguing for federalization of the corporate charter, ACA proponents firmly align themselves with two unpopular core principles underlying the reformists' goals. The first principle is that profit maximization and social welfare are fundamentally misaligned, if not diametrically opposed. From Senator Warren: "[T]he obsession with maximizing shareholder returns effectively means America's biggest companies have dedicated themselves to making the rich even richer,"[72] rather than benefitting society as a whole.

The second principle, which follows from the first, is that neither voluntary compliance nor state law are able to ameliorate corporate disregard for social welfare. Companies believe self-regulation for social good provides little shareholder value benefit, and since there is no formal penalty for failing to promote social good, they simply will not assign much weight to consequences for public welfare in their decision-making beyond maintaining their reputation. As for state law, "[m]ost states don't want to demand more of companies, lest they incorporate elsewhere."[73] In fact, legislators offer companies benefits such as tax breaks to attract investment to their own states rather than the next state over.[74] "Corporate charters . . . are an obvious tool for addressing these skewed

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66. *See* Schwartz, *supra* note 19, at 549–50.
67. *See id.* at 550.
68. *Id.*
69. *See generally id.*
70. *See id.* at 586 ("In many respects, this is an ideal solution because it wipes the state clean of all barnacles of outmoded notions of governance and the substcsantive content of corporation law.").
71. *See id.* at 586–87.
72. Warren, *supra* note 52.
73. *Id.*
74. Norton Francis, *State Tax Incentives for Economic Development*, URBAN INST. (Feb. 29, 2016), https://www.urban.org/research/publication/state-tax-incentives-economic-development [https://perma.cc/3XXS-Z453].

incentives."[75] A federal charter can require companies to do unpopular things, like provide a public benefit, that a state charter could not for fear of mass relocation of businesses to other, more business-friendly states.

As shown above, neither principle has enjoyed broad-based historical support because they run contrary to tenets of American capitalism and federalism. Capitalism itself is premised on the ideas that entities operating for profit provide great social benefits, like jobs, productivity, and higher standards of living, and that competition, both among companies and among states for investment, is an impetus for experimentation and improvement, not a race to the bottom. Therefore, while they have tapped into an enduring anti-corporate sentiment, the ACA's proponents cannot claim nationalizing the federal charter to be merely the culmination of a popular endeavor. Instead, such legislation would depart from this country's capitalist and federalist ideals in favor of homogeneous, unelected intrusion into every business decision made by every director of every large company, a scenario surely leading to bureaucratic bloat and inefficiency.

B. BENEFIT CORPORATIONS

Contrary to the One-Pager's comparison, the success of benefit corporations does not translate to the ACA because the ACA's mandatory nature nullifies the advantages conferred by benefit corporation status.

The ACA's first provision includes a key feature of the new federal charter: it "obligates company directors to consider the interests of all corporate stakeholders – including employees, customers, shareholders, and the communities in which the company operates."[76] According to the bill's One-Pager, this requirement is modeled after the benefit corporation model which has been adopted by the majority of states and implemented by several prominent companies.[77] A benefit corporation model is an alternative type of corporate charter authorized by state legislation.[78] Its two primary requirements include (1) requiring the company's directors to consider constituents other than shareholders to promote the public benefit when making decisions[79] and (2) creating a benefit report each year assessing the company's overall social and environmental performance against a third-party standard, which every state except Delaware mandates be made

75. *Id.*

76. One-Pager, *supra* note 2.

77. *Id.*

78. *See What is a Benefit Corporation?*, B LAB, https://benefitcorp.net/what-is-a-benefit-corporation [https://perma.cc/T9NK-FDC9] (last visited Apr. 22, 2020).

79. *A Corporate Paradigm Shift: Public Benefit Corporations*, GIBSON DUNN (Aug. 9 2016), https://www.gibsondunn.com/a-corporate-paradigm-shift-public-benefit-corporations/ [https://perma.cc/SA53-D4VD [hereinafter *A Corporate Paradigm Shift*].

public.[80] Thirty-six states, including Washington, D.C., have passed such legislation thus far.[81]

While it is true that the provision's conditions mirror those of the benefit corporation, the ACA would be a significant departure from that model. It would mandate that all qualifying corporations comply with its rules rather than merely offering the charter as an alternative, permissive model, uniformly the states' current approach.[82] This shift would significantly neutralize the three chief advantages of becoming a benefit corporation in the first place, making it disingenuous for ACA proponents to invoke the benefit corporation as a successful prototype for their plan.

First, public benefit corporations offer directors greater discretion. Under the current corporate law framework, directors who consider constituents that may be affected by their decisions other than shareholders, such as the company's employees or the environment, risk exposing themselves to liability for breaching their fiduciary duty to maximize shareholder returns.[83] The benefit form provides protection for, and in fact encourages, directors to incorporate such externalities into their decision-making without risking legal liability.[84] However, if the public benefit model shifts from opt-in to mandatory, it could become a ball-and-chain for directors and companies not well-situated and disposed to address such interests.

Second, registering as a public benefit corporation provides a takeover defense. For example, without approval from two-thirds of the outstanding voting shares, a Delaware-chartered public benefit corporation may not merge or consolidate with other entities unless it retains its public benefit provisions.[85] The benefit corporation's board must consider interests other than potential short-term gains when evaluating a hostile bid, giving them more ammunition for rejecting it.[86] Moreover, mandated consideration of interests beyond shareholder returns in all decision-making may deter activists and hedge fund investors who desire relatively simple projects and short-term yields from seeking to buy benefit corporations at all.[87] However, if every large corporation follows this model, activists and hedge funds seeking large deals will have no choice but to target benefit corporations in spite of their disadvantages. Thus, while having benefit corporation

80. *See generally Benefit Corporation Reporting Requirements*, B LAB, https://benefitcorp.net/businesses/benefit-corporation-reporting-requirements [https://perma.cc/44L9-77YQ] (last visited Dec. 19, 2019). This website also provides helpful examples of benefit reports.

81. *State by State Status of Legislation*, B LAB, https://benefitcorp.net/policymakers/state-by-state-status?state=washington-dc [https://perma.cc/6G6U-ZZ2R] (last visited Dec. 19, 2019).

82. *How to Become a Benefit Corporation*, B LAB, https://benefitcorp.net/businesses/how-become-benefit-corporation [https://perma.cc/SQ88-E88F] (last visited Feb. 22, 2020).

83. *Cf. A Corporate Paradigm Shift*, *supra* note 79.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

features could still help tilt the negotiating table toward the target corporation in terms of retaining its public benefit interests, the deterrent effect toward hostile takeovers would be reduced.

Third, registering as a benefit corporation is an honest, inimitable signal to potential investors and employees of a company's self-imposed commitment to social responsibility. The CEO of Danone, parent company of the largest benefit corporation in the world, Danone North America, stated that becoming a benefit corporation "received tremendous employee support and won over skeptical investors."[88] The CEO of Patagonia, another well-known benefit corporation, argued that conventional companies face greater challenges in securing quality candidates and capital than benefit corporations because potential employees and investors increasingly want to work with companies who espouse and practice socially beneficial business.[89] But if every corporation were obligated to convince the federal government it was seeking to provide a public benefit, it would be harder to determine which companies were genuinely committed to such goals versus which companies were just avoiding lawsuits and charter revocation. The inimitable signal would become indistinguishable from a hollow recitation.

As a final point, although the ACA's proponents invoke the benefit corporation model to establish some precedent for such legislation, the truth is that the model itself is legally untested. No shareholder in a benefit corporation has ever sued over its management, meaning there is no legal guidance for navigating the fiduciary duty complications inherent in balancing various constituents' interests.[90] For lawyers representing such companies, this also means there are no cases elucidating their ethical obligations in the inevitable conflicts-of-interest among feuding stakeholders. Compliance has not been a problem thus far because corporations which would voluntarily bind themselves to such higher standards already tout social welfare objectives as part of their business model.[91] Therefore, the benefit corporation model and its handful of adherents offer few clues as to how the new Office of U.S. Corporations and the courts will interpret the ACA's requirement to "create a general public benefit" or what standard companies will be measured against when one of them has been accused of failing to comply. Requiring corporations not typically known for such objectives to "create a general public benefit" under penalty of injunction could have immediate negative repercussions far greater than the bill's proponents might envision, such as

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88. Richard Feloni, *Food Giant Danone is Aiming to Win B-Corp Status – and Committing Itself to Benefitting Both Shareholders and Society is Already Boosting the Bottom Line*, BUS. INSIDER (Oct. 8, 2018), https://www.businessinsider.com/danone-planning-to-be-worlds-largest-benefit-corporation-2018-10 [https://perma.cc/FY5Y-WQN2].

89. YALE CTR. FOR BUS. AND THE ENV'T, PATAGONIA, AND CAPROCK, JUST GOOD BUSINESS: AN INVESTOR'S GUIDE TO B CORPS 1, *available at* https://cbey.yale.edu/sites/default/files/2019-09/Just_Good_Business_An_Investors_Guide_to_B_Corps_March_2018_0.pdf [https://perma.cc/8LDM-B637] (last visited Dec. 19, 2019).

90. *A Corporate Paradigm Shift*, *supra* note 79.

91. *E.g.*, Patagonia; *see* AN INVESTOR'S GUIDE TO B CORPS, *supra* note 89.

crippling some of the country's biggest employers or entire industries like energy or manufacturing if they are not deemed to be creating a general public benefit (and presumably the ACA's supporters believe at least some companies or industries are not, since they are pushing the requirement in the first place). A bill with such unknown, potentially disastrous consequences should not be supported without more information beyond a comparison to the benefit corporation model.

C. EMPLOYEE-ELECTED DIRECTORS

The second provision of the ACA requires that at least forty percent of a United States corporation's directors are selected by its employees.[92] In contrast with the bill's first provision, this requirement—which allows employees to have some control over their employer and elect representatives to the board of directors, called "codetermination"—would be a major change for the United States,[93] and attempting to implement a German codetermination scheme here as Warren's One-Pager suggests would face obstacles from several corners.[94]

1. DOMESTIC CODETERMINATION

While discussing Senator Warren's plan, one prominent political writer seeking to allay uncertainty referred to codetermination "as American as apple pie," and other recent scholars have agreed.[95] It is not quite as American as that, but the few domestic instances which approached full codetermination, including early work councils, proxy contests by shareholders, and even a union president serving on a major automotive board, warrant further consideration.

a. Work Councils

Probably the earliest example of codetermination in America is also considered one of the most successful: that of Filene and Co., a department store in Boston with approximately 3000 employees.[96] Beginning in 1898, committees of employees began assisting in the administration of insurance and medical benefits, education, and entertainment.[97] The committee system gradually expanded to include an arbitration board, a legislative body, and, in 1920, the Filene Cooperative Association ("FCA") was born.[98] All employees were members of

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92. One-Pager, *supra* note 2.

93. *See* Kent Greenfield, THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES 158 n.38 (appears on 265) (2010) ("[Codetermination] would represent a profound shift in the relations between capital and labor in the United States.").

94. Detlev. F. Vagts, *Reforming the Modern Corporation: Perspectives from the Germans*, 80 HARV. L. REV. 23, 76 (1966) ("[B]oth American management and organized labor would oppose the move.").

95. Hill, *supra* note 16; *see* Ewan McGaughey, *Democracy in America at Work: The History of Labor's Vote in Corporate Governance*, 42 SEATTLE U. L. REV. 697 (2019).

96. EARL J. MILLER, WORKMEN'S REPRESENTATION IN INDUSTRIAL GOVERNMENT 38 (1924).

97. *Id.* at 38.

98. *Id.* at 38–39.

the FCA, which elected officers and operated under a charter, constitution, and by-laws.[99] Employees elected twelve of their own to the FCA arbitration board to handle employee-related disputes within the store.[100] The FCA could initiate new store rules and modify or cancel existing rules on any matter except business policies by a five-sixths vote of the FCA council or a two-thirds vote of the entire membership, subject only to an overridable management veto.[101] Finally, the employees could nominate six members, of which the shareholders chose four, for the eleven-member management board.[102]

In Massachusetts, evidently a vanguard state for codetermination, the legislature passed a law allowing manufacturing corporations to have employees elect some of the directors.[103] The statute still exists today,[104] making it "the world's oldest codetermination law continuously in force."[105] However, there is disagreement regarding how prevalent this practice actually was.[106]

Similar work councils cropped up throughout the early 20th century, some organic and others ordered by the short-lived National War Labor Board, an agency created to resolve labor disputes during World War I.[107] For instance, plants at Standard Oil, Cambria Steel, Proctor & Gamble, and General Electric all had some form of work councils around that time.[108] Perhaps puzzlingly at first glance, the work council movement was directly sponsored by employers.[109] They sought to foster goodwill among their employees to quell labor unrest and, importantly, head off unionism.[110] Despite their relative scarcity and lack of directorial influence, the proliferation of work councils was seen as evidence "of a larger evolutionary movement toward democratic industrial management."[111]

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99. *Id.* at 39.

100. *Id.*

101. *Id.* at 39–40.

102. *Id.* at 40.

103. An Act to Enable Manufacturing Corporations to Provide for the Representation of Their Employees on the Board of Directors, 1919 Mass. Acts 45.

104. MASS. GEN. LAWS ch. 156, § 23 ("A manufacturing corporation may provide by by-law for the nomination and election by its employees of one or more of them as members of its board of directors.").

105. McGaughey, *supra* note 95, at 718.

106. *See* Clyde W. Summers, *Codetermination in the United States: A Projection of Problems and Potentials*, 4 U. PA. J. INT'L L. 155 (1982) ("The United States has had no experience with employee representation on corporate boards . . . ."). *But see* McGaughey, *supra* note 95, at 719 ("[I]t is clear that Clyde Summers' opinion that the United States had 'no experience with employee representation on corporate boards' went too far.").

107. *See* MILLER, *supra* note 96, at 40–71.

108. *Id.* at 54–55, 59.

109. 109. *Id.* at 71.

110. *Id.* at 68, 71.

111. *Id.* at 68.

b. The Rise of Unions and Demise of Work Councils

With the passage of the National Labor Relations Act of 1935 ("NLRA") guaranteeing private-sector employees the rights to unionize, collectively bargain, and strike,[112] union membership and strength expanded.[113] Four years later, the Supreme Court declared a company work council unlawful because it required management approval to implement its decisions and amend its plan, violating an NLRA prohibition on management interference with or support of labor organizations.[114] Because this ruling left unions without guidance for forming lawful work councils, the councils' role in labor progress waned as union power waxed.[115]

c. Unions Friendless

In the 1970s, efforts began anew to broaden representation in the boardroom.[116] In 1970, a movement called *Campaign to Make General Motors Responsible*, or Campaign GM, advanced proxy proposals at the annual meeting to place three additional directors on GM's board who would advocate for the public benefit beyond shareholders, including employees.[117] Their proposals garnered less than three percent of the votes.[118] Similar efforts faced similar resistance.[119] Despite union support for employee board representation, the AFL-CIO was against it,[120] as were business leaders.[121] There have been a few exceptions: Pan American Airways, with union leaders from the United Auto Workers on the board (the scheme was cancelled by the board in 1991 but revived in 1998 during Pan Am's merger with German corporation Daimler-Benz); Chrysler, which in 1979 acceded to union representation demands in the face of serious financial distress; and a brief six-year stint for the United Steel Workers on the boards of five other companies.[122]

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112. McGaughey, *supra* note 95, at 720–21 (citing National Labor Relations Act of 1935 §§ 7–8, 29 U.S.C. §§ 157–158 (2012)).

113. 113. *See id.* at 721.

114. *Id.* at 721 (citing N.L.R.B. v. Newport News Shipbuilding & Dry Dock Co. 308 U.S. 241, 241, 250 (1939)).

115. *See id.* at 721, 724–25, 728.

116. *Id.* at 729.

117. Schwartz, *supra* note 20, at 764.

118. *Id.* at 765.

119. For example, attempts at employee board representation at Ford, Jewel, United Airlines, AT&T, General Tire and Rubber Company, and Anheuser-Busch were unsuccessful, although Providence and Worcester Railroad employees managed it. *See* McGaughey, *supra* note 95, at 729–30.

120. As the future President of the AFL-CIO said, "American unions have won equality at the bargaining table, we have not sought it in corporate boardrooms." *Id.* at 730–31.

121. *See id.* at 735 (citing Bus. Roundtable, *supra* note 21, at 2107 (noting that employee representation on boards would be "inconsistent with U.S. traditions and style of management-labor relationships at arm's length")).

122. *See id.* at 736–37.

d. Codetermination Today

Employee representation on corporate boards remains as marginal as ever, but there has been renewed interest in the idea from progressive Democrats. Several bills to cement the proposition in federal law have been proposed, including the Accountable Capitalism Act and the Reward Work Act.[123] The ACA does indeed draw from a venerable line of thought for its employee representation provision, but this concept has never enjoyed broad support, and instead only pushback from the government, business, and the upper stratum of organized labor. Historical backing of work councils and more recent research indicate desire for voice and democracy at the individual plant level,[124] but because of their limited scope and unattractiveness to both management and unions, support for them is a poor proxy for further support of employee election of directors. Nevertheless, such councils seem to be a flexible, inclusive method of dispute resolution at the individual plant level, particularly if recognized as such by the unions.

2. COMPARISON WITH GERMANY

Senator Warren has explained that the codetermination provision is borrowed from "the successful approach in Germany and other developed economies . . ."[125] However, American idiosyncrasies in areas like directorial boards and collective bargaining impede straightforward comparisons with and wholesale adoption of the German or other European models. According to Clyde W. Summers, an American lawyer renowned for his expertise in labor and union democracy law,[126] "[c]odetermination in the United States must of necessity be unique because the U.S. system of industrial relations is unique."[127]

In the United States, boards of directors are one-tier, meaning they "delegate day-to-day business tasks to the CEO, management team, or executive committee, and is [sic] composed of both executive and non-executive members."[128] By contrast, corporations in Germany and several other European countries have a

123. *Id.* at 698 (citing Reward Work Act, S. 2605, 115th Cong. § 3(c)(2) (2018); H.R. 6096, 115th Cong. § 3(c)(2) (2018) (requiring that a third of the board seats for listed companies be elected by employees)).

124. The majority of both union and nonunion employees "wanted some kind of elected workplace committee to consult regularly with management, perhaps with third-party arbitration of disputes, and welcomed [them] to aid in workplace regulation in areas like occupational safety and health." RICHARD B. FREEMAN & JOEL ROGERS, WHAT WORKERS WANT 2 (2d ed. 2006).

125. One-Pager, *supra* note 2.

126. Michael J. Goldberg, *Present at the Creation: Clyde W. Summers and the Field of Union Democracy Law*, 14 EMP. RTS. & EMP. POL'Y J. 121, 121–22 (2010) (claiming that among mid-twentieth century union democracy scholars, Clyde Summers "was without doubt the most prolific and the most influential.").

127. Summers, *supra* note 106, at 183.

128. Victor Ghazal, *Co-determination in Germany: A Model for the U.S.?*, MICH. BUS. & ENTREPRENEURIAL L. REV. (Feb. 13, 2018), http://mbelr.org/2378-2/ [https://perma.cc/8QG3-676Q] (citing Who's Running the Company?, INT'L CTR. FOR JOURNALISTS (2012), https://www.icfj.org/resources/who%E2%80%99s-running-company-guide-reporting-corporate-governance/types-boards-directors [https://perma.cc/XPP4-MZEU]).

two-tier board, in which a supervisory board oversees and appoints directors to a management board handling day-to-day business.[129] Under the German Codetermination Act of 1976, employees have anywhere from equal to one-third representation on the supervisory boards of corporations, but not on the management board.[130] Legislation placing employee-elected representatives on American boards of directors, charged with more granular management than the German supervisory board, would therefore go beyond even Germany in shifting decision-making power from shareholders, who traditionally appoint the board, to employees.

A further point of difference between German and American boardrooms is that the German managers owe no formal obligations to their shareholders.[131] Directors elected by employees in the United States would nevertheless bear such an obligation to shareholders,[132] an obligation seemingly incompatible with their mission of advocating for the interests of the employees rather than shareholders.

The American collective bargaining system also differs from Germany's, complicating the election of directors by employees. In Germany, codetermination involves election of employee representatives to firm supervisory councils—as well as management councils in large coal and steel firms—by workers acting through their individual plant councils and national unions.[133] By contrast, in the United States, the principle of exclusivity in union representation is codified by federal law, which mandates that "[w]hen there is a majority union, the employer must bargain solely with that union," not any other union or individual employee, and that their agreements bind all employees regardless of union membership.[134] Thus, "[f]or both practical and political reasons, any structure of codetermination must incorporate and accommodate the system of collective bargaining."[135] However, American union membership is far from complete: in 2019, just 6.2 percent of workers in the private-sector were members of a union, although this percentage was greater in the public sector and varied among industries.[136] Thus, the vast majority of employees have "no organizational structure upon which to build a system of representation,"[137] which is ruinous because "[w]ithout any organizational structure, candidates will be self-nominated unknowns who are

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129. *Id.* (citing Frank Woolridge, *The Composition and Functions of German Supervisory Boards*, 32 CO. LAW. 190–91 (2011)).

130. *Id.* (citing Florian Schwarz, *The German Codetermination System: A Model for Introducing Corporate Social Responsibility Requirements into Australian Law? Part 2*, 23 J. INT'L BANKING L. REG. 190, 191 (2008)).

131. *See id.* (citing Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6, 1965, BGBL I at 1089, last amended by Gesetz, May 10, 2016, BGBL I at 1142 art. 5, § 93(1)-(2) (F.R.G.)).

132. *Id.*

133. Vagts, *supra* note 94, at 66–67.

134. Summers, *supra* note 106, at 158 (citing 29 U.S.C. § 159(a) (1976)).

135. *Id.*

136. *News Release: Union Members – 2019*, BUREAU OF LAB. STAT., U.S. DEP'T LABOR, (Jan. 22, 2020).

137. Summers, *supra* note 106, at 162.

willing and able to finance a campaign . . . [or] seek membership on the board in order to advance themselves rather than [] represent their fellow employees."[138]

For the workers employed in majority union workplaces, unions could in theory help facilitate representative elections and communication. But unions are as against the idea as management is.[139] As Lane Kirkland, former President of the AFL-CIO, stated: "[The American worker] is smart enough to know, in his bones, that salvation lies – not in reshuffling the chairs in the board room or the executive suite – but in the growing strength and bargaining power of his own autonomous organizations."[140] There is an incongruence between codetermination and collective bargaining in the United States: collective bargaining is legally and culturally regarded as an antagonistic system, whereas codetermination "presupposes a mutuality of interest between the employer and his employees, and seeks to solve problems by a process of integration rather than confrontation."[141]

In short, differences on both the top floor and the factory floor would make it difficult to neatly superimpose the German codetermination system over the current American system, contrary to Warren's assertions.[142]

D. POLITICAL EXPENDITURES

The third major ACA provision requires United States corporations to "receive the approval of at least 75% of their shareholders and 75% of their directors before engaging in political expenditures."[143] While there is some support for requiring shareholder and director approval for political expenditures, there is no state or federal precedent for it in the United States. With federal law against independent corporate political expenditures on the books since 1947, shareholder approval of such action was a moot point until a decade ago.[144] But in 2010, the Supreme Court in *Citizens United v. FEC* held that the First Amendment protected unlimited corporate independent expenditures in federal and state elections.[145] In response to this decision, the idea of soliciting or even requiring shareholder approval has attracted attention and support.[146] As a Maryland state

138. *Id.*
139. *Id.* at 155.
140. *Id.* (quoting Ellenberger, *The Realities of Codetermination*, AFL-CIO AM. FED. 10, 15 (Oct. 1977)).
141. *Id.* at 163–64.
142. One-Pager, *supra* note 2.
143. *Id.*
144. *See* Citizens United v. FEC, 558 U.S. 310, 343 (2010) (citing 2 U.S.C. § 251 (1946 ed., Supp. I)).
145. *Id.* at 365–66.
146. *See, e.g.*, Ciara Torres-Spelliscy, *Corporate Campaign Spending: Giving Shareholders a Voice*, BRENNAN CTR., 22 (Feb. 3, 2010), https://www.brennancenter.org/sites/default/files/legacy/publications/shareholdersvoice2_5_10.pdf [https://perma.cc/4TPA-7FP9].

Furthermore, the state legislatures of Maine, Maryland, New York, and New Jersey have introduced such bills. Liz Essley Whyte, *States Consider Requiring Shareholder Approval for Political Gifts*, CTR. FOR PUB. INTEGRITY (Feb. 17, 2015), https://publicintegrity.org/federal-politics/state-politics/states-consider-requiring-shareholder-approval-for-political-gifts/ [https://perma.cc/3LEA-Y7BW]. According to the sponsor of Maine's

legislator said, "The whole thesis of *Citizens United* is that the companies are just speaking for the shareholders," but laws requiring shareholder approval are needed "[i]f this is going to be anything more than a cynical fiction."[147] In the current landscape, however, independent political expenditures by corporations are allowed, and there are no federal or state laws or regulations requiring shareholders to approve them.[148]

One scholar has pointed to a British model as an example of required shareholder approval for corporate political expenditures in action,[149] but their model differs from the state and federal laws proposed in the United States in a vital way that almost precludes comparison. British law requires shareholder consent via vote for a company to spend over €5,000 on political expenditures.[150] However, British shareholders vote only on whether or not to spend the balance of the political spending budget, not how or for whom the money will be spent.[151] The political spending resolutions are almost always approved, but managers have chosen to spend less on political expenditures since the measure was enacted.[152] By contrast, in the United States, the state bills and the ACA would require shareholder approval of the expenditure recipients.[153] This difference is crucial: while the British shareholders seem overwhelmingly amendable to their companies spending money on politics generally, the process would surely become more fractious if they had to vote on the recipients. Comparison with the British model is therefore mostly inadequate for supporting the ACA provision or predicting how it would work in practice. In sum, the ACA's political expenditures provision is unprecedented in both the American and British law. However, the British model of voting on general political spending suggests the ACA would disincentivize corporate political spending via pre-spending hurdles, a positive outcome.

E. CHARTER REVOCATION

The fourth major provision of the ACA authorizes State Attorneys General to petition the Office of United States Corporations to revoke a U.S. corporation's charter.[154] Charter revocation is colloquially referred to as the "death penalty," as

bill, Rep. Deane Rykerson, "[t]his is not really a total rejection of *Citizens United*, but it's a step on the way, temporarily anyway." *Id*.

147. Whyte, *supra* note 146.

148. Torres-Spelliscy, *supra* note 146, at 6.

149. *See id*. at 16.

150. *Id*. at 17 (citing Companies Act c. 46, §§ 369, 374 (2006), http://www.opsi.gov.uk/acts/acts2006/pdf/ukpga_20060046_en.pdf).

151. *Id*.

152. *Id*. at 18.

153. ACA § 8(b)(1); Whyte, *supra* note 146 ("[The Maryland bill] would require shareholder approval for an annual political budget and a slate of candidates or committees the money would support.").

154. One-Pager, *supra* note 2.

it ends the legal entity's existence.[155] Under the ACA, the Office's Director may grant the petition if he finds the corporation engaged in "egregious and repeated illegal conduct" with no meaningful steps toward rectification.[156] The charter would then be revoked in a year, giving the company time to informally appeal to Congress.[157]

Unlike some other parts of the ACA, similar charter revocation statutes are already present in state and federal law. For example, Delaware Chancery Courts may revoke a corporate charter "for abuse, misuse, or nonuse of its corporate powers, privileges, or franchises,"[158] and New York courts may revoke the charter of a company that has "conducted or transacted its business in a persistently fraudulent or illegal manner."[159] All fifty states have charter revocation laws on the books, although they are very rarely used.[160] Charter revocation can also be found in federal law, albeit exclusively for national banks.[161] In addition, the U.S. sentencing guidelines allow courts to set a fine "sufficient to divest the organization of all its net assets" for organizations with a criminal primary purpose, but this penalty is rarely enforced.[162] Recent legal scholarship has advocated for a federal statute authorizing charter revocation for all corporations because "[t]he current system of deterring criminal punishment is systematically impotent at both the state and federal levels."[163] Far from breaking new ground, the ACA's corporate charter revocation provision seems to be an obvious and necessary facsimile from the states' charter-granting framework.

IV. LEGAL ETHICS IMPLICATIONS

The passage of the ACA would change the fundamental nature of the corporation, sending shockwaves through various fields, including legal ethics. There is friction between potential new obligations imposed by the ACA and the ethical guidelines regarding the legal representation of organizations as provided in the *ABA Model Rules of Professional Conduct*.[164]

If the ACA were passed, eligible corporations would "have the purpose of creating a general public benefit,"[165] which is defined as "a material positive impact

155. Drew Isler Grossman, *Would a Corporate "Death Penalty" Be Cruel and Unusual Punishment?*, 25 CORNELL J. L. & PUB. POL'Y 697 (2016).

156. One-Pager, *supra* note 2.

157. *Id.*

158. DEL. CODE ANN. tit. 8, § 284 (West, 2019).

159. N.Y. BUS. CORP. LAW § 1101(a)(2).

160. Kyle Noonan, Note, *The Case for a Federal Corporate Charter Revocation Penalty*, 80 GEO. WASH. L. REV. 602, 610 (2012).

161. 12 U.S.C. § 93(a) (2012).

162. Noonan, *supra* note 160, at 613 (citing U.S. SENTENCING GUIDELINES § 8C1.1).

163. *See id.* at 614 (citing Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933 (2005)).

164. *See generally* MODEL RULES OF PROF'L CONDUCT (2018) [hereinafter MODEL RULES].

165. ACA § 5(b)(2).

on society resulting from [its] business and operations . . . ."[166] In managing such corporations, directors would be required to "seek[] to create a general public benefit . . . and balance[] the pecuniary interests of the shareholders . . . with the best interests of persons that are materially affected by the conduct" of the corporation, such as its employees, customers, the local community, and the environment.[167]

The question then arises: What would be the nature of the corporate lawyer's relationship with the "materially affected" persons, given that they are owed legal obligations by the corporation and its directors? After all, these groups are to be considered stakeholders in the corporation just like shareholders.[168]

Model Rule 1.13 seems to provide part of the answer.[169] Rule 1.13(a) provides that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[170] As the comment to the rule explains, the corporate managers, employees, or shareholders are merely constituents of the organizational client.[171] In practice, however, the abstract corporation necessarily functions through intermediaries, with whom the lawyer must work but whose interests do not always align with those of the corporation, making it difficult for the lawyer to know his duties.[172]

The company is the in-house counsel's client and thus attorney-client privilege may not apply to the attorney's communications with directors or employees, making it good practice to warn individuals of this fact prior to their potential disclosure of sensitive information.[173] This rule would seem to apply equally to the other stakeholders created by the bill, meaning they would be constituents as well, but they would not be the lawyer's clients any more than a shareholder or director. An amendment of the rule to redefine the constituents of the corporate organization client to include the new parties might be required, a change which could affect many of the *Rules*' nuances, such as protection of constituent communication under Rule 1.6.[174]

While shareholders, directors, and the employees with whom corporate lawyers mostly interact often have many shared goals and interests, the new constituents theoretically will not, creating wrinkles in following the rules regarding explanation of client identity[175] and dual representation[176] due to inherent

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166. *Id.* § 5(a)(1).
167. *Id.* § 5(c)(1)(A).
168. *See* One-Pager, *supra* note 2 ("all corporate stakeholders – including employees, customers, shareholders, and the communities in which the company operates").
169. *See* MODEL RULES R. 1.13.
170. MODEL RULES R. 1.13.
171. MODEL RULES R. 1.13 cmt. 1.
172. *See* MODEL RULES R. 1.13 cmt. 1.
173. Doug Gallagher & Manasi Raveendran, *Attorney-Client Privilege for In-House Counsel*, A.B.A. (2017).
174. *See* MODEL RULES R. 1.13(a) cmt. 2.
175. *See* MODEL RULES R. 1.13(f).
176. *See* MODEL RULES R. 1.13(g); MODEL RULES R. 1.7.

conflicts of interest. Whether it is local communities fighting offshoring to keep their jobs, environmental groups demanding lower emissions, customers demanding more supply chain transparency, or even blue-collar employees wanting higher wages or better benefits, most of these groups' goals will inevitably conflict with directors' and shareholders' interest in bolstering the bottom-line. In fact, the entire purpose of elevating materially affected persons to stakeholder status is to set them opposite the incumbent powers and counterbalance the corporation's primary goal— shareholder value maximization.[177]

Rule 1.13(f) provides that in dealing with an organization's constituents, "a lawyer shall explain the identity of the client [is the organization] when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[178] Given the inherent opposition of the new constituents' interests to the organization's institutional stakeholders, the directors and shareholders, lawyers dealing with the new constituents might be wise to make the baseline assumption that a warning of client identity is required as indicated in Comment 10 to Rule 1.13, absent circumstances indicating otherwise.[179]

Rule 1.13(g) sanctions dual representation of the organization and any of its constituents, subject to Rule 1.7's conflict of interest strictures.[180] Despite the focus of Comment 12 to Rule 1.13 on principal officers or major shareholders, paragraph (g) would theoretically seem to apply to the new constituents.[181] However, Rule 1.7 may often get in the way. Rule 1.7(a) tentatively prohibits dual representation that involves a concurrent conflict of interest, which exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[182]

However, Rule 1.7(b) allows for dual representation despite a concurrent conflict of interest if (1) the lawyer "reasonably believes" he can provide adequate representation to all parties, (2) representation is legal, (3) the clients are not against each other in the same proceeding, and (4) each affected client gives informed, written consent.[183]

Dual representation of new constituents would likely be infrequent and problematic. It seems unlikely that the new constituents, being "outsiders," would

177. *See* One-Pager, *supra* note 2.
178. MODEL RULES R. 1.13(f).
179. *See* MODEL RULES R. 1.13 cmt. 10.
180. MODEL RULES R. 1.13(g).
181. MODEL RULES R. 1.13 cmt. 12.
182. MODEL RULES R. 1.7(a).
183. MODEL RULES R. 1.7(b).

seek representation from the corporate lawyer—particularly in-house counsel—in any matters, especially involving conflict with the company, given his perceived and potentially genuine loyalty to the company's institutional stakeholders. If a new constituent did seek the corporate lawyer's representation, even in a matter unrelated to the company, the lawyer should be aware that the relationship would be viewed with a greater degree of skepticism and is more likely to lead to forced withdrawal and "additional cost, embarrassment, and recrimination . . . [because] if the relationship between the parties has already assumed antagonism, the possibility that the clients' interests can be adequately served by common representation is not very good."[184]

A more realistic dual representation problem might arise for the institutional stakeholders whom the lawyer frequently appears to represent. Under the present corporate charter system, executives' and shareholders' interests frequently align with the company's interests, making dual representation not only possible, but often efficient.[185] However, the aim and the effect of the ACA would be to decouple the organization's interests from those of the institutional stakeholders, making dual representation of both parties less feasible. For example, a general counsel may currently attend a meeting of the company's directors to discuss long-term strategy without fear of privilege issues because no lawsuit will arise from the matters being discussed unless of course criminal conduct were being discussed. Under the ACA regime, however, if directors are discussing how to minimally comply with the public welfare creation requirement of their charter, which according to the Act must figure into every consideration of action or inaction, the general counsel must be wary of attending for fear of a shareholder suit later being brought accusing the company of not fulfilling this responsibility. If that happens, the lawyer will be aligned against those directors in favor of the company, and those statements would likely not be privileged, much to the directors' chagrin. The unfavorable result of this might be that in-house lawyers are necessarily excluded from directorial strategy discussions altogether to avoid privilege issues, making it more difficult for the earnest company to assess the legality of their strategies. The entire conception of representing an organization, already a complex ethical field, may need to be re-evaluated as the organization's interests cease to align with any single group of its constituents and its lawyers are presumptively conflicted with all of its intermediaries.

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184. MODEL RULES R. 1.7 cmt. 29.

185. Derivative suits are a notable exception, although even in these instances, dual representation is not categorically prohibited. *See Restatement (Third) of the Law Governing Lawyers* § 131 cmt. g (2000) ("If [] the disinterested directors conclude that no basis exists for the claim that the defending officers and directors have acted against the interests of the organization, the lawyer may, with the effective consent of all clients, represent both the organization and the officers and directors in defending the suit.").

CONCLUSION

The ACA is a bold response to the shareholder value maximization paradigm. The provision federalizing the corporate charter is a position that, while venerable in its legacy, has only ever commanded a fraction of wide support and runs counter to American values of capitalism and federalism. The comparison to a benefit corporation is misplaced; the ACA's mandatory nature would lessen the benefit corporation's advantages which stem from its voluntariness. Election of directors by employees, or codetermination, has a few historical analogous but would be a major change in American corporate governance. Implementing the German system in the United States would likely receive little support from unions or management but could be a boon for employees. The idea of requiring shareholder approval for political expenditures is more recent and seems to command more support than some of the other ACA provisions, as it would likely reduce corporate political expenditures, a worthwhile goal. However, there is no state or federal precedent for it, and comparisons to the British system ignore a key distinction to the comparisons' detriment. On the whole, the ACA owes debts to earlier thinking and support, but it cannot be characterized as a return to any particular regime or era in this country and instead runs counter to bedrock values. Some of its more minor provisions could be beneficial for workers and the political economy, but unilaterally changing the nature of the profit-driven corporation and placing its every move under government supervision is unwise.

The ACA's impact on our conception of the corporation also has important implications for the field of legal ethics which should be considered. Current rules and scholarship can help begin to address the issues arising from the creation of new corporate obligations and constituents, but the framework for organizational client representation may need to be re-evaluated to fully resolve such questions.