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Twenty-Ninth Annual Corporate Law Center Symposium: Corporate Social Responsibility and the Modern Enterprise: Foreword

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FOREWORD

*Felix B. Chang**

In December 2015, Facebook founder Mark Zuckerberg and his wife, Priscilla Chan, publicly pledged to give ninety-nine percent of their Facebook shares, then worth over \$45 billion, to charitable purposes.¹ As the receptacle for their philanthropy, the couple created a limited liability company.² This touched off a flurry of commentary over the merits of limited liability companies (LLCs) versus nonprofit organizations and for-profit social enterprises such as benefit corporations.³ Anticipating the debates to follow, the Corporate Law Center at the University of Cincinnati College of Law (UC) held its 29th Annual Symposium (the Symposium) on corporate social responsibility and the modern enterprise.⁴

The Symposium engaged with the debate over how new forms of enterprise organizations serve social purposes,⁵ as well as the discourse on sourcing dilemmas and corporate social responsibility (CSR) in our globalized world. Several lines of scholarly work converge here—the pushback against shareholder wealth maximization,⁶ the theories governing choice-of-entity

* Associate Professor, University of Cincinnati College of Law. I thank Sean Mangan and Lori Strait for their hard work in organizing the Symposium. Thanks, too, to all the Symposium participants, the editors of the *University of Cincinnati Law Review*, and the fellows of the Corporate Law Center.

1. Vindu Goel & Nick Wingfield, *Mark Zuckerberg Vows to Donate 99% of His Facebook Shares for Charity*, N.Y. TIMES (Dec. 1, 2015), https://www.nytimes.com/2015/12/02/technology/mark-zuckerberg-facebook-charity.html?_r=0.

2. See *Division of Corporations General Information Name Search*, DEL. DEP'T ST., <https://icis.corp.delaware.gov/Ecorp/EntitySearch/NameSearch.aspx> (search under the entity name of “Chan Zuckerberg Initiative, LLC”).

3. See, e.g., Natasha Singer & Mike Isaac, *Mark Zuckerberg's Philanthropy Uses L.L.C. for More Control*, N.Y. TIMES (Dec. 2, 2015), <https://www.nytimes.com/2015/12/03/technology/zuckerbergs-philanthropy-uses-llc-for-more-control.html>; Celia Taylor, *The Chan/Zuckerberg Initiative: Why Not a Benefit Corporation? Because We Don't Need Them To Do Good*, THE RACETOTHEBOTTOM.ORG (Dec. 11, 2015), <http://www.theracetothetbottom.org/home/the-chanzuckerberg-initiative-why-not-a-benefit-corporation.html>.

4. For the full agenda, see *The 29th Annual Corporate Law Center Symposium*, U. CINCINNATI C.L. (Mar. 18, 2015), <http://law.uc.edu/corporate-law-center/2016-symposium>.

5. I use “social purpose” as shorthand for benefits to society, the environment, and the general public.

6. This includes, for instance, the team production theory, see Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999), corporate constituency statutes, see Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992), and the communitarian vision of corporate law, see David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

considerations,⁷ and the view of companies as social partners with citizens.⁸ The contributions to this Symposium issue of the *Cincinnati Law Review* reflect this diversity. They range from analyses of model laws at the forefront of social enterprises, to a new unifying theory of the corporation and its implications for socially responsible behavior, to sourcing considerations in the manufacturing behemoth of China.

The articles by Professor Loewenstein and Professor Murray examine recent developments in benefit corporation and benefit LLC law. I read as a common thread in their articles the critique that if a legislative initiative is too closely associated with one constituent, the endeavor can be derailed. In both *Benefit Corporation Law* by Professor Loewenstein⁹ and *Beneficial Benefit LLCs?* by Professor Murray,¹⁰ B Lab Company (B Lab) plays a central role in driving model legislation. B Lab, which certifies for-profit companies as “B corps,”¹¹ enjoys something of a first-mover status in the social enterprise certification market, with spillover effects elsewhere. B Lab support can spell either the success of social enterprise legislation¹² or its failure.¹³ B Lab appears to guard its primacy vigorously, which creates an indelible association of benefit corporations with certified B corps. To that effect, Professor Loewenstein notes that B Lab opposed the work of a Colorado Bar Association committee on benefit corporation legislation.¹⁴ Such input might have cured ambiguities in the Model Benefit Corporation Legislation.¹⁵

7. See, e.g., LARRY E. RIBSTEIN, *THE RISE OF THE UNCORPORATION* 4–9 (2010).

8. This is more commonly known as corporate social responsibility. For a primer on CSR, as well as how it overlaps with business and human rights, see Anita Ramasastry, *Corporate Social Responsibility Versus Business and Human Rights: Bridging the Gap Between Responsibility and Accountability*, 14 J. HUM. RTS. 237 (2015).

9. 85 U. CIN. L. REV. 381 (2017).

10. 85 U. CIN. L. REV. 437 (2017) [hereinafter Murray, *Beneficial Benefit LLCs?*]

11. On B corps, which is *not* the same as benefit corporations, see *What are B Corps?*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps> (last visited Apr. 14, 2017). On B Lab, see *About B Lab*, B CORPORATION, <https://www.bcorporation.net/what-are-b-corps/about-b-lab> (last visited Apr. 14, 2017).

12. E.g., the widespread adoption of model laws on benefit corporations. See Loewenstein, *supra* note 9, at 382; J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 575–78 (2016).

13. E.g., the limited adoption of model laws on benefit LLCs and low-profit limited liability companies. See Murray, *Beneficial Benefit LLCs?*, *supra* note 10, at 444.

14. See Loewenstein, *supra* note 9, at 382 n.7.

15. *Id.* at 382. This is not to disparage William Clark, of course, who drafted the legislation and who participated in the Symposium. See Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 23 n.101 (2012) [hereinafter Murray, *Choose Your Own Master*]; *The 29th Annual Corporate Law Center Symposium*, *supra* note 4.

Among the worthy points raised in Professor Loewenstein and Professor Murray's articles, I will linger on the influence that a powerful constituent can have upon the law reform process. In my own forays into law reform,¹⁶ I have seen the following scenario unfold: A committee of lawyers, having labored through all the nuances and contingencies, assembles a draft bill for the legislature to consider, only to be preempted by a well-funded interest group lobbying for its version—which lawmakers promptly adopt instead. Whether or not Professors Loewenstein and Murray agree, I see protectionist behavior by such an interest group as commandeering the more thoughtful and deliberative process of law reform by collaboration (i.e., by committee).

We are therefore at an interesting juncture. Well-drafted social enterprise legislation that receives broad acceptance could render the debate over shareholder primacy moot. Businesses would migrate to these enterprise forms because of the strong signal of social commitment that they send to consumers and investors. In fact, Professor Murray observes that more social entrepreneurs are foregoing the flexibility and tax advantages of the LLC and opting for benefit corporations precisely because of the form's signaling function.¹⁷ Of course, business interests have a way of co-opting altruism, and social enterprises can become laundromats for green-washing the pursuit of profits.¹⁸ Over time, then, the authenticity of their signaling will depend on the accountability mechanisms built into both model laws and third-party certification processes.

More fundamentally, the success of new forms of social enterprises might be determined not by the flexibility that those forms accord¹⁹ but by whether corporations are conceived in a way that enables socially beneficial activity. In *The Origins of Corporate Social Responsibility*,²⁰ Professor Chaffee extends his wholly original theory of the corporation, the *collaboration theory*, which “views the corporation as a collaborative effort among a state government and those individuals organizing, operating, and owning the business

These ambiguities could be the result of other forces, such as the inability of the law-reform process to play out.

16. At UC, I teach trusts and estates, and following the missive of a beloved teacher in this field, I have participated in several law-reform initiatives through the Estate Planning Section of the Ohio State Bar Association. See Lawrence W. Waggoner, *Why I Do Law Reform*, 45 U. MICH. J.L. REFORM 727 (2012).

17. Murray, *Beneficial Benefit LLCs?*, *supra* note 10, at 447–48.

18. Leo E. Strine, Jr., *Making It Easier for Directors to “Do the Right Thing”?*, 4 HARV. BUS. L. REV. 235, 249–50 (2014); Murray, *Choose Your Own Master*, *supra* note 15, at 33–34.

19. For this and other choice-of-entity considerations, see RIBSTEIN, *supra* note 7.

20. 85 U. CIN. L. REV. 353 (2017) [hereinafter Chaffee, *Origins of CSR*].

entity.”²¹ Professor Chaffee offers the collaboration theory as a superior alternative to the three prevailing essentialist theories of corporations because it more fully explains the metaphysics of corporations, as well as why government should wield the power to regulate them distinctively.²² The article’s greatest contribution—which, in my view, also marks the theory’s most significant development since its first articulation²³—is how collaboration theory applies to CSR. As an illustration, Professor Chaffee creates a decision tree comprised of four scenarios: where a corporation considers whether to engage in socially responsible activity whose impact to the company is (1) financially beneficial, (2) financially harmful, (3) financially neutral, and (4) financially uncertain.²⁴ In doing so, he infuses managerial decisions, which might otherwise rest upon intuition, with more analytical rigor.

As with other theories, the durability of collaboration theory will be measured by how it overcomes challenges to its premises. In our era of widening income inequality, will management and labor be able to maintain focus on their “common effort”?²⁵ Professor Chaffee acknowledges that the interests of corporations and governments sometimes diverge, though there is still nexus between them. Surely the same divergence holds for intra-firm constituencies, who are more likely to become unglued. I look forward to Professor Chaffee’s work as he tinkers with this theory further.

Beyond intra-firm income inequality, another type of inequality lies at the heart of CSR: inequality among countries.²⁶ For multinational companies, inequality among countries drives sourcing decisions. In *Beyond Wrecking Chinese Drywall*, Professor Hu traces how low-cost labor and cheap raw materials propelled China to become the world’s most formidable supplier, as well as how the Chinese government created additional incentives through tax treaties.²⁷ Equally important, Professor Hu also examines how recent anticorruption campaigns in China have attempted to counteract the abuses that disparity breeds.²⁸

Efforts such as China’s anticorruption campaigns can complement

21. *Id.* at 371.

22. *See id.* at 370–74.

23. *See* Eric C. Chaffee, *Collaboration Theory: A Theory of the Charitable Tax-Exempt Nonprofit Corporation*, 49 U.C. DAVIS L. REV. 1719 (2016).

24. Chaffee, *Origins of CSR*, *supra* note 20, at 376–78.

25. *Id.* at 371.

26. *See* BRANKO MILANOVIC, *WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY* (2005).

27. 85 U. CIN. L. REV. 395 (2017).

28. *Id.* at 426–34.

the CSR initiatives of global businesses.²⁹ A recurring theme of the Symposium was how to bring non-corporate stakeholders such as governments and consumers into the fold.³⁰ These conversations will be ongoing; for our part, UC was glad to have played a role in facilitating them.

29. The test, of course, lies in how China and other governments actually pursue these reforms.

30. For example, Professor Anita Ramasastry presented on the World Economic Forum's "shared responsibility" paradigm for supply chains. *See* GLOBAL AGENDA COUNCIL, WORLD ECONOMIC FORUM, SHARED RESPONSIBILITY: A NEW PARADIGM FOR SUPPLY CHAINS (2015), http://www3.weforum.org/docs/WEF_GAC_Supply_Chains_%20A_New_Paradigm_2015.pdf.

