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Hobby Lobby and Social Justice: How the Supreme Court Opened the Door for Socially Conscious Investors

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HOBBY LOBBY AND SOCIAL JUSTICE: HOW THE SUPREME COURT OPENED THE DOOR FOR SOCIALLY CONSCIOUS INVESTORS

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"[T]o the shareholder who is concerned about social questions, his stock ownership is not entirely a dollar symbol."[1]

ABSTRACT

In Burwell v. Hobby Lobby,[2] *the Supreme Court upended the traditional foundations of corporate law. By allowing corporations to exercise legally recognized religious rights,*[3] *the Court changed the very nature of a corporate entity. Moreover, the Court defied the conventional doctrine providing that the purpose of a corporation is to make profit for its shareholders.*[4] *The case is being both praised and denounced by observers,*[5] *but no one has yet fully analyzed how the Court's reasoning paved the way for social impact investors to use the corporate form as a vehicle to achieve their objectives.*

This Article is the first to connect the Hobby Lobby *case to shareholder activism for social justice causes. The Article considers the existing methods by which advocates can use shareholder activism to create meaningful social change. The Article next examines how the Court's expansion of the rights of corporate "persons" in* Hobby Lobby *created new legal arguments for corporate social responsibility advocates. For example, after* Hobby Lobby, *corporations can be considered moral "persons" who do not need to consider shareholder wealth maximization as the highest priority.*[6] *This reasoning presents an exciting opportunity for investors trying to influence corporations to act in socially or environmentally beneficial*

* Professor of Law, Golden Gate University School of Law. The author is grateful to Professor Eric Christiansen, Professor Eleanor Lumsden, and Professor William Gallagher for their feedback on earlier drafts, as well as research assistants Kristen Head and Casey Crittenden. This article is dedicated to Ella Neitz.

1. Donald E. Schwartz, The Public-Interest Proxy Context: Reflections on Campaign GM, 69 Mich. L. Rev. 421, 476 (1971).

2. Burwell v. Hobby Lobby. Stores Inc., 134 S. Ct. 2751 (2014).

3. *See id.* at 2771.

4. *See id.* at 2770.

5. See Binyamin Applebaum, What the Hobby Lobby Ruling Means for America, N.Y. TIMES (July 7, 2014), http://www.nytimes.com/2014/7Y27/magazine/what-the-hobb-lobby-ruling-means-for-america.html.

6. *See* Hobby Lobby, 134 S. Ct. at 2770-71.

ways. Accordingly, the Article will propose two ways social investors can act now to take advantage of Hobby Lobby*'s extraordinary impact on corporate law doctrines: (1) creating an innovative classification of stock to expand the voting rights of socially conscious investors, and (2) shifting investments away from benefit corporations to larger and more influential companies. In the wake of* Hobby Lobby*, this Article forecasts the emergence of a new legal chapter in corporate social responsibility: Corporations as tools for generosity, not greed.*

I. INTRODUCTION

SISTER Patricia Daly is an unusual shareholder. She is not a passive investor who chooses a 401(k) plan and then allows others to monitor the performance of companies in her plan. Nor is she a wealthy active investor, advising boards of directors about corporate governance issues and earning millions for her own profit.

Sister Patricia Daly, a Catholic nun, is an active socially conscious investor.[7] She is the Executive Director of the Tri-State Coalition for Responsible Investment, an alliance of Roman Catholic institutional investors, and a member of the Interfaith Center on Corporate Responsibility.[8] Sister Daly and her religious order own shares through their retirement funds, enabling them to attend corporate shareholder meetings and use their voting power to "hold corporations accountable" on social and environmental issues.[9] These faith-based investors are often at the negotiating table with the directors and officers of some of America's largest companies.[10] When negotiation fails, Sister Daly and her colleagues use the shareholder proposal process to put their issues to a vote of all of the company's shareholders.[11]

Sister Daly prefers to think of herself as an "engaged" shareholder, rather than an activist.[12] But she is only one of a rising number of socially conscious investors using their shareholder power to create social change through corporations.[13] The U.S. Supreme Court's groundbreaking 2014 opinion in *Burwell v. Hobby Lobby*, in which the Court held that the

7. *See Board and Staff*, TRI-STATE COALITION FOR RESPONSIBLE INVESTMENT, http://www.tricri.org/about-us/board-and-staff (last visited July 11, 2014).

8. *Id.*

9. *About Us*, TRI-STATE COALITION FOR RESPONSIBLE INVESTMENT, http://www.tricri.org/about-us (last visited July 11, 2014).

10. For example, Sister Patricia Daly has negotiated with executives from Ford, Exxon Mobil, and Archer Daniels Midland. Sister Patricia Daly, Exec. Dir., Tri-State Coalition for Responsible Investment in San Francisco, Cal. (July 7, 2014) (hereinafter "Daly Interview"); *see also* Dashka Slater, *Resolved: Public Corporations Shall Take Us Seriously*, N.Y. TIMES (Aug. 12, 2007), *available at* http://www.nytimes.com/2007/08/12/magazine/12exxon-t.html?pagewanted=all&_r=0; Kristen Hannum, *Sister Patricia Battles The Board: How Women Religious Are Protecting Consumers*, 76 U.S. CATHOLIC 12, 18-22 (Dec. 2011), http://www.uscatholic.org/culture/social-justice/2011/10/sister-pat-battles-board.

11. *See* Slater, *supra* note 10.

12. Daly Interview, *supra* note 10, at 1.

13. *See* Hannum, *supra* note 10.

Affordable Care Act's contraceptive mandate violated corporations' religious beliefs, may have made Sister Daly's job much easier.[14]

This Article has two general goals. First, the Article will consider the methods by which social justice activists, including Sister Daly, can use the corporate form as a vehicle to achieve their objectives. Second, the Article will analyze how the Court's expansion of the rights of corporate "persons" in *Hobby Lobby* has created new legal arguments for corporate social responsibility advocates. Although the *Hobby Lobby* decision will have significant ramifications in a variety of legal areas, including religious freedom and reproductive rights, the analysis of this Article will focus on the decision's extraordinary effects on corporate law.

Part II considers the traditional view of the purpose of a corporation: To make profit for its shareholders. This "shareholder wealth maximization" view has been subject to some debate, but it was generally held as the prevailing corporate law doctrine until the *Hobby Lobby* decision.[15] As a result, active shareholders seeking to create social change through corporations have historically been obliged to explain how their recommendations will increase corporate profitability.

Part III will examine shareholder activism, including the history of this distinctive form of shareholder involvement. This section will explain how the shareholder proposal mechanism operates to give a voice to shareholder activists seeking corporate change, and will also address the barriers preventing average citizens from becoming shareholder activists.

Part IV reveals how the Supreme Court's *Hobby Lobby* decision changed the legal landscape for social impact investors and activists. The *Hobby Lobby* majority opinion introduced uncertainty into the realm of corporate law, changing norms that were once unquestioned. Specifically, the Court redefined the legal view of a corporate "person" by holding that corporations can have legally recognized religious beliefs.[16] The Court also weakened the shareholder wealth maximization model and left open several unsettled questions, including the applicability of the case to publicly traded corporations.[17]

Although Justice Alito's opinion in *Hobby Lobby* purports to be a narrow holding focused on religious rights under a particular statute, the case can be seen as a critical piece of the Court's broader expansion of corporate rights.[18] In fact, the Court's analysis leads to a logical—but revolutionary—conclusion: if corporations are "persons" with beliefs under *Hobby Lobby*, and at least some corporations may have morals derived

14. *See* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

15. *See* Hobby Lobby, 134 S. Ct. at 2768; Duane Windsor, *Shareholder Wealth Maximization*, *in* FINANCE ETHICS: CRITICAL ISSUES IN THEORY AND PRACTICE 437 (John R. Boatright ed. 2010).

16. *See* Hobby Lobby, 134 S. Ct. at 2768.

17. *See id.* at 2785.

18. *See generally*, Citizens United vs. Fed. Election Comm'n, 558 U.S. 310 (2010); *see also* Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1630 (2012).

from strongly held personal convictions that do not take the traditional and recognized form of religion, then a corporation should be able to express beliefs that are not rooted in organized religion. In fact, a corporate "person" may be an atheist, whose shareholders do not believe in a specific unified religion but hold strong moral beliefs related to social justice. In this way, a corporation may embrace social justice or community responsibility as its most prioritized "belief" and conduct its operations accordingly.

Hence, the *Hobby Lobby* case could permit a corporation to pursue social justice causes in association with its beliefs at the expense of profits. The reasoning in the *Hobby Lobby* decision has far-reaching implications for active socially conscious investors, who should take advantage of the Court's willingness to redefine settled corporate law doctrine.

Part V will propose two ways for shareholders to do so. First, this section will introduce an innovative "Social Investor" classification of stock. The Social Investor class of stock would have the same economic rights and most of the same voting rights as common shares, but would hold two votes for every share in the area of social impact shareholder proposals. These shares would improve the access and influence of socially conscious investors, while providing a straightforward way for corporations to include the perspectives of these investors. Second, this section will recommend that social investors shift away from benefit corporations toward investments in larger and more influential companies.

II. THE PURPOSE OF A CORPORATION

The modern view is that the purpose of a corporation is to make profit for its shareholders.[19] This perspective is grounded in the 1919 case *Dodge v. Ford Motor Company*, in which the Supreme Court of Michigan directed Henry Ford to distribute a large surplus to shareholders as dividends.[20] Ford sought to use the surplus to increase production and lower the price of cars, and he famously declared that his ambition was "to employ still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[21] The court ordered Ford to issue a dividend instead, noting, "A business corporation is organized and carried on primarily for the profit of the stockholders."[22]

By the end of the 20th century, most scholars, business leaders, and regulators had accepted this "shareholder wealth maximization" or "shareholder primacy" model.[23] However, an interesting debate over the

19. *See* The Purpose of the Corporation, The Aspen Institute, http://www.aspeninstitute.org/policy-work/business-society/purpose-of-corporation (last visited Nov.10, 2014.

20. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 685 (Mich. 1919).

21. *See Id.* at 671.

22. *Id.* at 684.

23. *See* LYNN STOUT THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC 21 (2012). This theory is also known as the "property model" or "contract model" of the corporation. *See* Aaron A.

true purpose of a corporation has been brewing for some time, with some scholars arguing that a corporation could consider the welfare of other stakeholders, including employees and customers.[24] These opponents of the shareholder wealth maximization model reason that corporations in most states can be incorporated for "any lawful purpose," and no corporate state statute requires a corporation to maximize shareholder profit.[25] Internal corporate bylaws also do not address the matter.[26] Even the language related to corporate purpose in *Dodge v. Ford Motor Company* was dicta and not binding precedent.[27]

Despite this ongoing debate among academics, the shareholder wealth maximization issue was deemed settled in Delaware, the undeniable leader in corporate law.[28] This subject came before the Delaware Court of Chancery in *eBay Domestic Holdings, Inc. v. Newmark*.[29] In 2004, the company eBay purchased 28.4% of the stock in craigslist, an online classified ad service.[30] The two other shareholders were the founders of craigslist.[31] eBay desired craigslist to monetize the company's website, while the craigslist founders "largely operate[d] its business as a community service."[32] eBay began to utilize nonpublic information from craigslist to support the development of a competing company.[33] When the dispute reached a boiling point, the founders tried to convince eBay to sell its shares.[34] When that failed, the founders created a staggered board, a poison pill, and a right of first refusal to limit eBay's influence as a minority shareholder.[35]

The dispute landed in the Delaware courts in 2008, when eBay filed

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Dhir, *Realigning the Corporate Building Blocks: Shareholder Proposals as a Vehicle for Achieving Corporate Social and Human Rights Accountability*, 43 AM. BUS. L.J. 365, 369-70 (2006).

24. *See* STOUT *supra* note 23, at 28 (providing strong arguments refuting the traditional shareholder primacy model). This theory is also known as the "social entity" model. *See* Dhir, *supra* note 23, at 369-374. For a thorough summary of the shareholder wealth maximization debate, *see* J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 5-8 (2012).

25. *See* STOUT *supra* note 23, at 28; Lyman Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405, 432 (2013). Indeed, some states specifically allow corporate directors to consider "alternative constituents" besides shareholders. *See* Iowa Code Ann. § 491.101B (West 1999); Ind. Code Ann. § 23-1-35-1 (West 2011).

26. *See* STOUT *supra* note 23, at 28.

27. *See* Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919); *see also* Johnson, *supra* note 25, at 432 n.203 (2013) (*Dodge* stated this premise "in dictum and without recitation of authority. . .."); David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 188 (2014) (*Dodge* has never been cited in Delaware courts on the issue of corporate purpose, and the case "is not a great doctrinal citation.").

28. *See* ROBERT W. HAMILTON ET AL., CASES AND MATERIALS ON CORPORATIONS INCLUDING PARTNERSHIP AND LIMITED LIABILITY COMPANIES, 142 (11th ed. 2010).

29. *See generally*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010).

30. *See id.*at 11. The company name "craigslist" is not capitalized. *See id.* at 6.

31. *See id.* at 11.

32. *See id.* at 8-9.

33. *Id.* at 17.

34. *See id.* at 19-20.

35. *See id.* at 20, 23-24.

suit to challenge the founders' attempts to limit eBay's power.[36] eBay argued that the founders, as directors, breached fiduciary duties to eBay, a minority shareholder.[37] The case went to trial in December 2009. The Delaware Court of Chancery upheld the staggered board plan, but ordered rescission of the poison pill and the right of first refusal.[38]

The Delaware Court of Chancery determined that the poison pill was not adopted in response to a reasonably perceived threat.[39] More importantly for purposes of this Article, the court also held the founders had "failed to prove at trial that they acted in the good faith pursuit of a proper *corporate* purpose" in creating the poison pill.[40] The court declared that the corporate form is not the "appropriate vehicle for purely philanthropic ends" because shareholders can expect to receive investment returns.[41] Thus, the court held that "a corporate policy that specifically, clearly and admittedly seeks *not* to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders" was invalid.[42]

Since Delaware is the most influential state in the field of corporate law, the *eBay* case can be interpreted as the codification of the shareholder wealth maximization theory.[43] In fact, this traditional view of corporate purpose has limited corporations and their owners from investing time, effort, or resources into any activity that would not ultimately improve long-term shareholder profit. Investors and activists seeking to encourage corporations to embrace social justice issues have long been constrained by this wealth maximization argument.[44] But the Supreme Court's repudiation of this view in *Hobby Lobby*, discussed in Part IV below, arrives at the same time that shareholders are increasingly harnessing their power to influence corporations to act in socially responsible ways.

III. THE RISE OF SHAREHOLDER ACTIVISM

A. WHO ARE SHAREHOLDER ACTIVISTS?

"Shareholder activism" is a term describing the attempt by shareholders to use the voting power of their shares to influence the behavior of

36. *See id.* at 25.
37. *Id.* at 7.
38. *Id.*
39. *Id.* at 32.
40. *Id.* at 34.
41. *Id.*
42. *Id.*
43. David G. Yosifon, *The Law of Corporate Purpose*, 10 BERKELEY BUS. L.J. 181, 224 (2014) (*eBay* is a case "where Delaware does enforce the shareholder primacy obligation"). For expanded discussion of *eBay Domestic Holdings, Inc. v. Newmark* and its analysis of shareholder wealth maximization, *see* Johnson, *supra* note 25, at 439-50.
44. *See infra* Part III (C).

corporate managers.[45] Shareholders can use their voting powers to advocate for changes related to corporate governance and management, as well as social or political change causes.[46] In contrast to the stereotypical passive shareholder who invests in companies and then takes a *laissez-faire* approach, trusting corporate directors and officers to run the business, active shareholders monitor, negotiate, and sometimes engage in all-out proxy battles to create corporate change.[47] While increased shareholder engagement can be a headache for corporate management, some studies have found that shareholder activism can improve corporate performance and enhance shareholder value.[48]

Two brothers formed the first shareholder activist group in the U.S. in the 1930s.[49] In an annual meeting of Consolidated Gas in 1932, the board chairman failed to acknowledge shareholders who raised their hands.[50] Apparently "appalled" by management's unwillingness to communicate with shareholders, Lewis Gilbert and his brother John used investor activism to impact corporate governance issues.[51] Their focus included promoting management accountability, limiting executive compensation, and creating more discussion between management and shareholders at annual meetings.[52] The brothers also urged corporations to engage in social objectives, including "charity, good labor relations," and "racial and gender equality," for both long-term economic and social responsibility reasons.[53]

Nearly fifteen years later, in 1948, a member of the Congress for Racial Equality named James Peck bought one share of stock in Greyhound.[54] Mr. Peck used his stock ownership to attend an annual shareholders meeting and raise the issue of integrated bus seating in the American South.[55] Although this "first militant social issue shareholder activist" was unsuccessful in persuading Greyhound management to integrate buses, Mr. Peck made the argument that segregation was an economic issue for the company.[56]

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45. James R. Copland et al., *Proxy Monitor 2012: A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR (Fall 2012), http://www.proxymonitor.org/forms/pmr_04.aspx.

46. *See id.*

47. *See id.*; LISA M. FAIRFAX SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION, 39 (2011).

48. *See* FAIRFAX, *supra* note at 47; *see also* Copland, et al. *supra* note 45.

49. Anastasia O'Rourke, *A New Politics of Engagement: Shareholder Activism for Corporate Social Responsibility*, BUSINESS STRATEGY AND THE ENVIRONMENT, 11 (July 11, 2003), https://gin.confex.com/gin/archives/2002/papers/010243ORourke.pdf.

50. Stuart L. Gillan & Laura T. Starks, *The Evolution of Shareholder Activism in the United States*, SOC. SCI. RESEARCH NETWORK n.9 (2007), 7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=959670.

51. *Id.*

52. O'Rourke, *supra* note 49, at 11.

53. JAY EISENHOFER & MICHAEL BARRY, THE HISTORY OF SHAREHOLDER ACTIVISM, 3-4 (Supp. 2007).

54. *Id.* 3-5.

55. *Id.*

56. *Id.* (citing Richard Marens, *Inventing Corporate Governance: The Mid-Century Emergence of Shareholder Activism*, 8(4) J. BUS. & MGMT. 371, 371 (2002)).

Shareholder activism flourished as a vehicle for social justice protests in the 1960s and 1970s. Shareholders challenged companies on civil rights employment issues (Eastman Kodak); anti-Vietnam war protests (Dow Chemical for the production of napalm); and weapons production (Honeywell).[57] Ralph Nader, in conjunction with the "Project on Corporate Responsibility," used shareholder proxy votes in the 1970s to pressure General Motors on social responsibility issues, including consumer safety and environmental and employment discrimination.[58]

The landscape of shareholder activism has changed significantly in the modern era with the rise of institutional investors.[59] The percentage of stock owned by institutional investors in the United States rose from 7.2% in 1950 to 61.2% of outstanding securities in 2005.[60] These organizations, including pension funds, mutual funds, and labor unions, have become much more prominent and active shareholders.[61]

Institutional investors tend to hold large portions of stock for longer periods of time than individuals.[62] As a result, when institutional investors are unhappy with corporate performance, they are incentivized to try to change companies from within rather than exercise the "Wall Street Rule" and sell their stock.[63] These organizations also have more expertise and resources for activism than an ordinary investor.[64]

Some investors are more active than others. Hedge funds, which are investment vehicles using "a variety of techniques to 'hedge' against fluctuations in the market,"[65] have succeeded in numerous high profile activist campaigns recently.[66] Faith-based investors, such as Sister Patricia Daly and the Interfaith Center on Corporate Responsibility, are active in environmental, anti-military, and human rights issues.[67] Socially Responsible Investment ("SRI") funds, which screen investee companies based on environmental or social performance, are creating and supporting shareholder proposals on these issues.[68] In addition, proxy advisory firms offer services to shareholders including vote recommendations and actual

57. O'Rourke, *supra* note 49, at 12.

58. *Id.*

59. An "institutional investor" professionally manages money on behalf of someone else. EISENHOFER & BARRY *supra* note 53, at 3-6.

60. *Id.* at 3-7; *see also* FAIRFAX, *supra* note 47, at 47 (institutional investors owned 73% of stock at the 1,000 largest U.S. companies in 2009).

61. EISENHOFER & BARRY, *supra* note 53, at 3-6.

62. *Id.* at 3-7 – 3-8.

63. FAIRFAX, *supra* note 47, at 30-31.

64. *Id.* at 47.

65. Hedge funds are "notoriously difficult to define." Goldstein v. Sec. & Exch. Comm'n, 451 F.3d 873, 874-75 (D.C. Cir 2006). Common characteristics of hedge funds include "(a) increased risks/returns to investors; (b) high management fees, and (c) lack of regulatory oversight." EISENHOFER & BARRY, *supra* note 53, at 3-76; *see also* FAIRFAX, *supra* note 47, at 46.

66. FAIRFAX, *supra* note 47, at 53-56 (noting "hedge funds have experienced success or partial success in nearly two-thirds of their campaigns").

67. O'Rourke, *supra* note 49, at 12.

68. *Id.* at 7. In 2010, 12% of all professionally managed assets were under the management of SRIs. *See also* STOUT, *supra* note 23, at 98.

voting of proxy cards.[69] While not technically shareholders, these firms are quite influential on shareholder voting and can significantly shape the outcomes of activist campaigns.[70]

The rise of institutional investors translates into a smaller percentage of stock being held by individuals. Individuals owned approximately 90% of stock in 1950.[71] By 2009, individuals owned only 36% of shares in the U.S.[72] A small number of individuals involved in shareholder activism (whether through their own holdings or as leaders of institutions) have become Wall Street celebrities, including Warren Buffet, Carl Icahn, and T. Boone Pickens.[73]

Notably missing from most discussions of shareholder activism are average individual investors. This is partly due to the complicated legal mechanism for shareholder action.[74] Some individual activists are working to empower other individual shareholders to become more active. For example, Carl Icahn established United Shareholders of America to encourage individual investors to join corporate governance campaigns.[75]

Cost is also a concern. Even individuals who own large blocks of shares may be unable to pay for a shareholder activist campaign.[76] Since activists "incur *all* the costs associated with such activism (while the benefits accrue to all shareholders), only shareholders with large positions are likely to obtain a large enough return on their investment to justify the costs."[77] The fiscal playing field for stock ownership and shareholder activism should be leveled in order to allow the concerns of ordinary investors to be heard by corporate leaders.

B. Goals of Traditional Shareholder Activists

Shareholder activists have a broad array of objectives for their activism. Long-term shareholders, such as pension funds or mutual funds, are focused on "steady, long-run returns" on their investments.[78] As a result, most institutional investors focus on corporate governance issues, including removal of management-friendly devices such as poison pills, classified boards, and anti-takeover provisions.[79]

Short-term investors, such as hedge fund activists, also seek gains related to corporate governance, including replacing management by winning seats on boards of directors, forcing buyouts or sales of part or all of a company, or enacting dividends or share repurchases to boost cash dis-

69. Fairfax, *supra* note 47, at 60.
70. *Id.* at 61.
71. *See id.* at 46.
72. *Id.*
73. *Id.* at 58-59.
74. *See infra* Part III(D).
75. *Id.* at 59.
76. *See* Gillian & Starks, *supra* note 35, at 35.
77. *Id.*
78. Stout, *supra* note 23, at 66.
79. Gillan & Starks, *supra* note 35, at 15.

tributions to shareholders.[80] In the 2000s, as corporate scandals rocked shareholder faith in boards of directors, shareholder activists increased attention on executive compensation and board independence.[81]

C. Goals of Corporate Social Responsibility Activists

Socially conscious investors have a different focus for their activism: encouraging companies to be more "socially and environmentally responsible."[82] These investors intend to spark discussion about human rights, global warming, employment discrimination and labor practices, tobacco, and other policy issues.[83] For example, in 2005, investors in publicly traded corporations filed thirty resolutions related to global warming.[84] Some companies, such as ChevronTexaco, Ford Motor Company, and Unocal, responded in a friendly manner, engaging activists in negotiation and agreeing to improve disclosures and actions related to climate change.[85] Others, such as ExxonMobil, unsuccessfully sought permission from the SEC to exclude proposals asking the company to reduce emissions linked to global warming.[86] Ultimately, the ExxonMobil climate change resolutions won only 30% support from shareholders.[87] Although the precatory shareholder proposals did not earn majority shareholder support, environmental activists succeeded in putting ExxonMobil on the defensive and bringing undesirable publicity to the company's energy practices.[88]

Religious investment groups were early and energetic socially minded shareholder activists. These investors often create coalitions with SRIs and other social justice organizations to support social policy proposals.[89] For example, the Interfaith Center on Corporate Responsibility ("ICCR") referenced in the Introduction has been a leader in the corporate social responsibility movement for over thirty years.[90] The ICCR "is a coalition of faith and values-driven organizations who view the management of their investments as a powerful catalyst for social change."[91] Through a combination of dialogue and the use of shareholder proposals, the ICCR and its members, including Sister Patricia Daly's Tri-State Coalition for Responsible Investment, are focused on creating corporate action related to social and environmental issues.[92]

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80. *Id.* at 30; *see also* Eisenhofer & Barry, *supra* note 53, at 3-85.
81. Gillian & Starks, *supra* note 35, at 15, tbl. 1 at 43.
82. Eisenhofer & Barry, *supra* note 53, at 3-12 (citing *Homepage*, Interfaith Center on Corporate Responsibility, http://www.iccr.org/ (last visited July 21, 2014)).
83. *Id.* at 3-12, 3-13.
84. *Id.* at 3-18.
85. *Id.* at 3-19.
86. *Id.* at 3-19, 3-20.
87. *Id.* at 3-20.
88. *See id.*
89. Dhir, *supra* note 23, at 384-85.
90. Eisenhofer & Barry *supra* note 53, at 3-12.
91. *About ICCR*, Interfaith Center On Corporate Responsibility, http://www.iccr.org/about-iccr (last visited July 20, 2014).
92. *See id.*

Although research suggests that the "vast majority" of people would be willing to make sacrifices, including shareholder profits, in order to follow their conscience,[93] shareholder activists historically have had to contend with the shareholder wealth maximization theory. Many social activism campaigns are designed to benefit both society and the long-term financial interests of the company's shareholders. For example, the Teachers Insurance and Annuity Association—College Retirement Equities Fund ("TIAA—CREF"), one of the world's largest and most active institutional investors, acts in accordance with its belief that "a record of social responsibility may enhance a company's reputation and its long-term economic performance."[94] One TIAA-CREF official clarified, "Some of the issues people would call social issues have long-range implications for the company's profits. If a company has poor policies on labor or diversity and it leads to fines, it changes from a social issue to a financial issue in a hurry."[95]

In the wake of the *Hobby Lobby* decision abrogating the shareholder wealth maximization theory, shareholder activists with social justice objectives may be freed from being forced to explain how their suggestions would increase shareholder profit. Furthermore, social justice advocates who have not traditionally seen corporations as vehicles for social reform stand to benefit from learning the process for shareholder activism. As more people become shareholder activists, and as activists gain more leverage with corporate boards, corporations could increasingly become positive actors in social change movements.

D. Mechanism for Shareholder Action: The Shareholder Proposal

Shareholder activists cannot simply walk into a CEO's office and demand reform. Instead, shareholders who wish to influence corporate management primarily use the shareholder proposal process to advocate for change.[96]

Shareholder proposals are recommendations for corporate action drafted by shareholders.[97] The proposals are included with the corporate proxy statement (at the company's expense) and submitted to all share-

93. Stout, *supra* note 23, at 97.

94. Eisenhofer & Barry, *supra* note 53, at 3-12.

95. *Id.* (citing David Nicklaus, *Mutual Fund Ballots Are No Longer Secret with New Disclosures*, St. Louis Post Dispatch (Sept. 1, 2004), http://nl.newsbank.com/nl-search/we/Archives?p_product=SL&p_theme=sl&p_action=search&p_maxdocs=200&s_dispstring=%22Mutual%20Fund%20Ballots%20Are%20No%20Longer%20Secret%20with%20New%20Disclosures%22&p_field_date-0=YMD_date&p_params_date-0=date:B,E&p_text_date-0=2000%20-%202008—2011%20-%202012—1998%20-%202000—2000—2000&p_field_advanced-0=& p_text_advanced-0(%22Mutual%20Fund%20Ballots%20Are%20No%20Longer%20Secret%22%20with%20%22New%20Disclosures%22)&xcal_numdocs=20&p_perpage=10&p_sort=YMD_date:D&xcal_useweights=no (last visited July 21, 2014).

96. Fairfax, *supra* note 47, at 64.

97. 17 C.F.R. § 240.14a-8 (2014).

holders for a vote at a shareholder meeting.[98] This mechanism is a "potentially important part of corporate democracy," since it gives an individual shareholder with a relatively small number of shares the ability to raise issues with her fellow shareholders "through the corporation's proxy statement."[99] As the SEC explained in a Legal Bulletin, this process is "popular because it provides an avenue for communication between shareholders and companies, as well as among shareholders themselves."[100]

The shareholder proposal mechanism as we know it today began in 1942, with the SEC's adoption of a rule mandating disclosure of shareholder proposals.[101] This rule, requiring companies to include shareholder resolutions in proxy statements mailed to shareholders at the company's expense, was intended to enable shareholders to gather support for their resolutions without incurring large costs.[102] The SEC demanded that resolutions were "of concern to all shareholders" and related to the "ordinary conduct of business."[103] The process has developed over time, and SEC Rule 14a-8 now governs the shareholder proposal mechanism.[104]

The SEC drafted Rule 14a-8 in a question and answer format to make the process more accessible to individual shareholders.[105] Corporate management may exclude a shareholder proposal from the corporate proxy statement for procedural or substantive reasons.[106] If a corporation succeeds in excluding a proposal, the shareholder must decide whether to mount a proxy campaign on her own—a costly and often ineffective proposition.[107]

Procedurally, in order to submit a proposal, a shareholder must hold at least $2,000 in market value or 1% of the company's stock for at least one year.[108] This requirement ensures that "only shareholders with long-term interest in the corporation" are allowed to present proposals to their fellow shareholders.[109] However, this threshold also prevents middle-income investors and social justice advocates from accessing the

98. *Id.*

99. HAMILTON ET AL., *supra* note 28, at 621. The Obama administration attempted to mandate proxy access for shareholders of all public corporations in 2010 through the SEC's adoption of Rule 14a-11, granting shareholders access to the corporate proxy statement to nominate director candidates. *See Bus. Roundtable v. S.E.C.*, 647 F.3d 1144, 1152 (D.C. Cir. 2011) However, the D.C. Circuit court struck down the rule. *See id.*

100. EISENHOFER, *supra* note 53, at 3-9 (citing SEC *Division of Corporate Finance, Staff Legal Bulletin No. 14* (July 13, 2001), *available at* www.sec.gov/interps/legal.)

101. FAIRFAX, *supra* note 47, at 65.

102. O'Rourke, *supra* note 49, at 12.

103. *Id.*

104. *Id.*

105. FAIRFAX, *supra* note 47, at 65.

106. *Id.*

107. *Id.*

108. 17 C.F.R. § 240.14a-8(b) (2014).

109. FAIRFAX, *supra* note 47, at 65.

shareholder proposal process.[110] Some corporate advocates are pressuring the SEC to raise the threshold ownership amount for shareholder proposals to $20,000.[111] This would effectively preclude most individual shareholders from accessing the shareholder proposal mechanism.

A shareholder may only submit one proposal per shareholder's meeting.[112] The proposal itself cannot exceed 500 words,[113] and the company must receive it no less than 120 days before the date the company released the prior year's proxy statement to shareholders.[114] The shareholder or her representative must personally appear at the shareholder meeting to present the proposal for a shareholder vote.[115]

If an eligible shareholder and her proposal pass the procedural hurdles, the proposal must still overcome the substantive bases for exclusion from the proxy statement.[116] Rule 14a-8 identifies thirteen reasons a company may exclude a proposal.[117] These restrictions represent the SEC's "pragmatic effort" to limit the amount of shareholder proposals and ensure the proxy statement is only used for issues of "general importance to shareholders."[118]

E. The Submission of Social Policy Proposals

Proposals related to corporate social responsibility are most commonly excluded from proxy statements via two particular exclusions: (7) management functions ("if a proposal deals with a matter relating to the company's ordinary business operations"), and (10) substantially implemented ("if the company has already substantially implemented the

110. The national average wage index for 2012 was $44,321.67. *National Average Wage Index*, Social Security Administration, http://www.ssa.gov/oact/cola/AWI.html (last visited July 21, 2014).

111. Daly Interview, *supra* note 10. The SEC Commissioner recommended raising the threshold to "$200,000, or even better, $2 million," before suggesting dropping the flat dollar test entirely in favor of a percentage test. Daniel M. Gallagher, Remarks at the 26th Annual Corporate Law Institute, Tulane University Law School: Federal Preemption of State Corporate Governance (Mar. 27, 2014), http://www.sec.gov/News/Speech/Detail/Speech/1370541315952#.U9qMLlYwjwJ. The ICCR and other shareholder groups wrote letters in opposition. Email from Mary Beth Gallagher, Associate Director, Tri-State Coalition for Responsible Investment, (July 7, 2014) (on file with author).

112. 17 C.F.R. § 240.14a-8(c).

113. *Id.* at § 240.14a-8(d).

114. *Id.* at § 240.14a-8(e)(2).

115. *Id.* at § 240.14a-8 (h)(1); *see also id.* at § 240.14a-8(h)(3) (permitting the corporation to exclude all of that shareholder's proposals from its proxy materials for any meetings held in the following two calendar years for failure of the soliciting shareholder to appear and present the proposal, without good cause).

116. *Id.* at § 240.14a-8(i) (1)-(13).

117. *Id.* These reasons are: (1) Improper Under State Law; (2) Violation of Law; (3) Violation of proxy rules; (4) Personal grievance; special interest; (5) Relevance; (6) Absence of Power/Authority; (7) Management functions; (8) Relates to election; (9) Conflicts with company's proposal; (10) Substantially implemented; (11) Duplication; (12) Resubmissions; (13) Specific Amount of Dividends.

118. Hamilton et al. *supra* note 28, at 622 (citing Jill E. Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 Vand. L Rev. 1129, 1143-48 (1993) (discussing whether there is a federal or state law foundation for Rule 14a-8's bases for exclusion).

proposal.")[119] Shareholder activists, recognizing this, craft the actual wording of proposals carefully to avoid exclusion.[120] For example, shareholder proposals are often non-binding recommendations or requests instead of demands, and are drafted to relate only to future corporate conduct.[121]

Moreover, "the SEC's interpretation of these rules for exclusion are . . . shifting," and topics once excluded from proxy statements may ultimately be permitted.[122] This is the case for proposals related to executive compensation; once considered "mundane" and excluded as related to management functions, these proposals are now "fair game for resolutions."[123]

If a corporation wishes to exclude a proposal for procedural or substantive reasons, the burden is on the corporation to prove that exclusion from the proxy statement is valid.[124] A corporation seeking to exclude a proposal from its proxy statement must notify the SEC and the submitting shareholder no later than eighty days before the filing of the proxy statement.[125] The corporation may choose to make a no action request, asking the SEC's Division of Corporate Finance staff to *not* recommend that the SEC take enforcement action against the company for excluding a proposal.[126] A so-called "no action letter" assures a corporation "that it can exclude a shareholder proposal without repercussions."[127] No action letters are publicly available to serve as guidance for both shareholders and corporations.[128]

Historically, the SEC allowed proposals related to social responsibility issues to be excluded by corporations.[129] The SEC announced in a 1945 release that the shareholder proposal rule was not designed to "permit stockholders to obtain the consensus of other stockholders with respect to matters that are of a general political, social or economic nature."[130] The shareholder proposal mechanism became more friendly for social policy proposals in 1976, when the SEC narrowed the ordinary business exclusion to encompass only proposals that "involve business matters that are mundane in nature and do not involve any substantial policy or other

119. O'Rourke, *supra* note 49, at 19.
120. *Id.*
121. FAIRFAX, *supra* note 47, at 71; *see also* HAMILTON ET AL., *supra* note 28, at 630.
122. O'Rourke, *supra* note 49, at 19.
123. *Id.* Beginning in 2004, executive compensation has been the "number one issue addressed by shareholder proposals." FAIRFAX, *supra* note 47, at 78. Under the Dodd-Frank Act's "say on pay" provision, shareholders in public companies will regularly vote on executive compensation. *Id.* at 79.
124. 17 C.F.R. §240.14a-8(g) (2014); *see also* FAIRFAX, *supra* note 47, at 65.
125. 17 C.F.R. §240.14a-8(j) (1).
126. FAIRFAX, *supra* note 47, at 68.
127. *Id.*
128. *Id.*
129. HAMILTON ET AL., *supra* note 28, at 621.
130. H. Rodgin Cohen & Glen T. Schleyer, *Shareholder vs. Director Control Over Social Policy Matters: Conflicting Trends in Corporate Governance*, 26 NOTRE DAME J.L. ETHICS & PUB. POL'Y 81, 117 (2012).

considerations."[131] With this change, the SEC essentially sanctioned shareholder proposals related to policy or economic implications.[132]

Predictably, the SEC struggled to determine on a case-by-case basis what constituted a "substantial policy consideration" allowing exclusion.[133] During this time, the SEC mandated inclusion of numerous proposals related to corporate equal opportunity or affirmative action policies.[134] In 1992, the SEC changed its position to create an exception for proposals related to employment matters.[135] Cracker Barrel shareholders brought a proposal requiring the company to establish a policy of non-discrimination against homosexuals.[136] In a no action letter issued in response to Cracker Barrel's request to exclude the proposal, the SEC determined that "the fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue" was no longer a reason to require inclusion of the proposal on a corporate proxy statement.[137] These proposals would instead be deemed excludable as related to ordinary business operations.[138]

The controversy surrounding the Cracker Barrel no-action letter was significant and resulted in litigation on the part of shareholder advocates, questioning the SEC's authority to issue such a change, and corporations seeking to broaden the exclusion.[139] In 1996, the U.S. Congress became involved, directing the SEC to study shareholder proposals relating to social policy.[140] The pressure led the SEC to reverse its position in 1998, returning to its pre-Cracker Barrel interpretation allowing a case-by-case analysis for social policy proposals.[141] This approach, which remains in place today, has been criticized for increasing the workload of the SEC and promoting unpredictability for shareholders and corporations.[142]

In recent years, the SEC has made it tougher for companies to exclude social policy proposals from corporate proxy statements.[143] Before 2009, the SEC permitted exclusion of social policy proposals "if the focus of the proposals was on the company's internal assessment and management of the risks and liabilities presented by the issue, rather than the broader social effects of the company's operations."[144] In a 2009 Staff Legal Bul-

131. *See* Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976); *see also* Cohen & Schleyer, *supra* note 130, at 119.
132. *See* Cohen & Schleyer, *supra* note 130, at 119.
133. *See id.*, at 119-120.
134. HAMILTON ET AL., *supra* note 28, at 624.
135. *Id.*
136. *Id.*
137. *See* Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992) [hereinafter Cracker Barrel No-Action Letter]; *see also* HAMILTON ET AL., *supra* note 28, at 624; Cohen & Schleyer, *supra* note 130, at 119-20 (discussing the Cracker Barrel case).
138. Cracker Barrel No-Action Letter, *supra* note 137.
139. Cohen & Schleyer, *supra* note 130, at 120.
140. *Id.*
141. *Id.* at 121.
142. *Id.* at 122.
143. *Id.*
144. *Id.*

letin, the SEC announced that it would not permit exclusion of social policy proposals "if the risk at issue arises from a significant policy matter," whether or not the proposal concentrates on "the risk to the company or the broader social impact."[145]

Since then, the SEC has maintained its inclusionary approach to social policy proposals.[146] For example, in 2011, the SEC allowed a proposal focused on climate change, despite the fact that the proposal did not address the impact of the company's operations on climate change.[147] The SEC's broader view of social policy proposals led some corporate attorneys to lament that shareholders may now be "permitted to use issuer proxy statements as a forum for general social policy discussions."[148] However, in the best-case scenario, this development can be viewed positively as creating dialogue among powerful corporate executives about difficult subjects, eventually resulting in corporate changes and creating benefits for society at large.[149]

F. The Impact of Social Policy Proposals

If shareholder proposals are now legally appropriate venues for corporate social responsibility debates, the tide has shifted for shareholder activism and social justice. Social policy shareholder proposals are an increasingly important part of corporate democracy; between 2006 and 2012, 38% of shareholder proposals submitted to Fortune 200 companies were related to social policy—the same percentage as those related to corporate governance.[150] For Fortune 100 companies, social policy issues were the topic of 51% of shareholder proposals in 2011.[151] The most common topic for social policy proposals was environmental sustainability, followed by corporate political participation, animal rights, employment issues, and other human rights.[152] Sister Patricia Daly reports that the Tri-State Coalition for Responsible Investment has a 98% success rate when its shareholder proposals are reviewed by the SEC.[153]

Support for social policy proposals is growing among shareholders. Historically, social policy proposals rarely received support of more than 20% of shareholder votes. However, the shareholder approval for these proposals is now up to 30% or higher.[154] As a comparison, in 2008 only

145. *Id.* (discussing SEC Staff Legal Bulletin No. 14E, 2009 WL 4363205 (Oct. 27, 2009)).
146. *Id.* at 123-24.
147. *Id.* at 123.
148. *Id.* at 123-24.
149. For an example of this "best-case scenario," *see* discussion of ICCR's negotiation with Archer Daniels Midland, *infra* Part III(F).
150. Copland et al., *supra* note 45.
151. Cohen & Schleyer, *supra* note 130, at 123-24 (citing Manhattan Institute Proxy Monitor Finding 7, *2011 Proxy Season Review, Database Reveals Decline in Successful Shareholder Proposals*, Proxy Monitor (2011), http:// www.proxymonitor.org/Forms/Finding7.aspx.
152. Copland et al., *supra* note 45.
153. Daly Interview, *supra* note 10.
154. Fairfax, *supra* note 47, at 82.

7% of social policy proposals received 30% shareholder support.[155] In 2011, 14% of social policy proposals were approved by 30% of shareholders.[156] A 2011 Chevron shareholder resolution calling for a report on "fracking" was supported by 40.5% of shareholders' votes.[157] The statistics show "an increasing possibility that social policy proposals will be approved by a majority of votes cast."[158]

Some may argue that less-than-majority support for precatory shareholder proposals lacks any power or meaning. After all, boards of directors are not required to accede to shareholder requests through the proposal mechanism; directors can simply ignore a shareholder's nonbinding proposal.

This argument fails to recognize the escalating impact of the shareholder proposal process. A social policy proposal garnering 20% to 30% of shareholder support is actually a red flag to directors demonstrating that it is time to engage in a dialogue with shareholders about that particular topic.[159] In effect, "[e]ven non-binding proposals can significantly influence the direction of a company, as management and boards that ignore shareholders are much more likely to face negative recommendations from the proxy advisory services and stronger opposition from shareholders at the next meeting."[160]

In addition, shareholder activists can measure success by the number of proposals that are withdrawn, since withdrawn proposals are an indication that corporate directors are addressing shareholder concerns without the need for a formal vote.[161] For example, the ICCR recently engaged with Archer Daniels Midland ("ADM").[162] The shareholders brought a shareholder resolution requesting a "comprehensive sustainable agriculture policy," including environmental and human rights protection. [163] The company responded by negotiating with the shareholder group to develop and adopt a "Respect For Human Rights Statement," including "policies for fair wages, safe working conditions, freedom of association, and ethical recruitment standards that expressly prohibit workers paying recruitment fees."[164] In light of the company's response, the shareholders

155. *See New Database Reveals Shareholder Proposal Trends*, PROXY MONITOR (Winter 2011), http://proxymonitor.org/forms/Reparts.aspx.

156. Cohen & Schleyer, *supra* note 130, at 123-24 (citing *New Database Reveals Shareholder Proposal Trends*, PROXY MONITOR (Winter 2011), http://proxymonitor.org/forms/Reports.aspx.

157. Hannum, *supra* note 10, at 18-22.

158. Cohen & Schleyer, *supra* note 130, at 125.

159. FAIRFAX, *supra* note 47, at 82.

160. Shulte, Roth & Zabel, LLP, *Shareholder Activism Insight* 9 (2012), http://www.srz.com/files/News/7cd7d880-c430-4c04-bb31-f12637ae313e/Presentation/NewsAttachment/3c06638e-5702-4720-a1b6-f4bdd41a46ef/SRZ_2012_Shareholder_Activism_Insight.pdf.

161. FAIRFAX, *supra* note 47, at 82.

162. Press Release, Interfaith Center On Corporate Responsibility, Shareholders Commend ADM for Adopting Human Rights Statement (May 1, 2014) http://www.iccr.org/sites/default/files/blog_attachments/ADM%20PR%205-1-14FINAL.docx.

163. *Id.*

164. *Id.*

withdrew their resolution and viewed this case as a success.[165]

Hence, the rising power of shareholder activists, coupled with the Supreme Court's *Hobby Lobby* decision empowering shareholders as explained below, present an exciting opportunity for social justice advocates who are interested in corporate social responsibility. If these advocates are able to invest in publicly traded companies and subsequently create social policy shareholder proposals, there is growing potential that corporate directors would need to listen and act. The corresponding publicity may inspire other activists (and other corporations) to do the same. As more investors become engaged in activism, "[t]he broadening out of the types of investors involved in shareholder activism has significant implications for corporate policy. . . [because] companies must take notice when investor groups that have been less active previously become vocal with their views and dissatisfaction."[166] The next section will explain how the Supreme Court's *Hobby Lobby* decision expanded the legal arguments available to social investors.

IV. HOW THE *HOBBY LOBBY* DECISION SUPPORTS CORPORATE SOCIAL RESPONSIBILITY ACTIVISTS

A. THE *BURWELL V. HOBBY LOBBY* OPINION

The plaintiffs in *Hobby Lobby* were the owners of three closely held corporations, Hobby Lobby, Conestoga Wood Specialties, and Mardel. The owners believed in accordance with their religious faith that life begins at conception.[167] Accordingly, the owners argued that it would violate their Christian beliefs and right to freedom of religion to comply with aspects of the Affordable Care Act, which requires employers to provide health care coverage, including contraception, to employees.[168]

The owners of Conestoga, the Hahn family, are devout Mennonites.[169] They sued the Department of Health and Human Services ("HHS") and other federal agencies to enjoin application of the contraceptive mandate to their corporations under the Religious Freedom Restoration Act of 1993 ("RFRA") and the Free Exercise Clause of the First Amendment.[170] The Eastern District of Pennsylvania court denied a preliminary injunction.[171] The Third Circuit affirmed the denial, holding that "for-profit, secular corporations cannot engage in religious exercise" under the RFRA and First Amendment,[172] and the mandate does not impose any personal requirements on the corporate owners.[173]

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165. *Id.*; Daly Interview, *supra* note 10. The ICCR must have "some type of a commitment" from a company before it will withdraw a shareholder proposal. *Id.*
166. Shulte et al., *supra* note 160, at 9.
167. *Id.* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2755 (2014).
168. *Id.*
169. *Id.* at 2764.
170. *Id.* at 2765.
171. *Id.*
172. *Id.*
173. *Id.* at 389.

The Green family members are Christians who own Hobby Lobby and Mardel.[174] Hobby Lobby is a nationwide chain, with more than 13,000 employees and 500 stores.[175] Mardel is a Christian bookstore with nearly 400 employees and 35 stores.[176] They also sued under RFRA and the Free Exercise Clause to enjoin application of the contraceptive mandate to their businesses, and the Western District of Oklahoma court denied a preliminary injunction.[177] Unlike the Third Circuit, however, the Tenth Circuit held that the Hobby Lobby and Mardel were "persons" as defined under RFRA, and therefore had a viable claim.[178] Analyzing this claim, the Tenth Circuit held that the corporations had established a likelihood of success under RFRA because "the contraceptive mandate substantially burdened the exercise of religion."[179] Moreover, the Tenth Circuit held that HHS had failed to prove that the mandate was the "least restrictive means" of furthering a government interest.[180] Finding that the corporations had "demonstrated irreparable harm," the Tenth Circuit reversed and remanded the case to the district court.[181] The Supreme Court granted certiorari in 2013.[182]

In a divided five to four opinion, the Supreme Court accepted the corporate owners' argument that their for-profit corporation should be considered a "person" under the Religious Freedom Restoration Act.[183] RFRA was enacted in 1993 to provide "very broad protection for religious liberty."[184] The Court decided that the HHS regulations violated RFRA, holding that a closely held corporation could claim a religious exemption to the contraceptive mandate of the Affordable Care Act.[185] Significantly, the *Hobby Lobby* Court held for the first time that a for-profit corporation could have legally recognized religious beliefs.[186]

The *Hobby Lobby* opinion was a landmark decision for corporate law in several ways. First, as every law student learns in an introductory Business Associations class, corporations differ from partnerships because they are "separate legal entit[ies]," legally viewed as distinct from direc-

174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 2766.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 2767.
183. *Id.* at 2768-69.
184. *Id.* at 2755. RFRA was originally designed to apply to both the federal Government and the states. When the Supreme Court struck down the application of RFRA to the states in *City of Boerne v. Flores,* 521 U.S. 507, 533-34 (1997), Congress responded by passing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"). RLUIPA defined "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S. C. §2000cc-5(7)(A) (2012).
185. Burwell v. Hobby Lobby Stores, Inc., 134 Ct. 2751, 2785 (2014).
186. *See id.* Justice Ginsberg noted in dissent that "until today, religious exemptions had never been extended" to commercial entities. *Id.* at 2795 (Ginsberg, J., dissenting).

tors, officers, and shareholders.[187] In *Hobby Lobby*, the Supreme Court undermined this separate entity theory by defining a corporation as "simply a form of organization used by humans to achieve desired ends."[188] Indeed, the Court focused on the persons behind the entity rather than the entity itself, noting that corporations are unable to do anything without the people who "own, run and are employed by them."[189]

The Court's opinion in *Citizens United vs. Federal Election Commission* foreshadowed this result.[190] In *Citizens United*, a conservative lobbying corporation wanted to distribute a documentary about Hillary Clinton within thirty days of the 2008 primary election.[191] The Court held the corporation's political financial expenditures were a form of protected free speech under the First Amendment of the Constitution.[192] Notably for this Article, the *Citizens United* Court described corporations as "associations of individuals" for purposes of First Amendment rights.[193]

In addition to altering the view of a corporation as a separate entity, the *Hobby Lobby* court strikingly rejected the shareholder wealth maximization perspective.[194] The Court maintained that the argument that corporations exist solely to make money "flies in the face of modern corporate law."[195] The Court recognized that corporations could be created for "any lawful purpose" under state corporate law, and noted that "modern corporate law does not require for-profit corporations to pursue profit at the expense of everything else, and many do not do so."[196] The Court noted favorably that "[f]or-profit corporations, with ownership approval, support a wide variety of charitable causes."[197] The Court illustrated this proposition with examples of environmentally responsible activities and fair labor conditions, stating that just as these "worthy objectives" may be pursued by corporations at the expense of profits, religious objectives may be pursued as well.[198] The Court's reasoning undermined decades of corporate focus on profits and shareholder wealth, providing a unique opportunity for corporate social responsibility activists and investors.[199]

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187. HAMILTON ET AL., *supra* note 28, at 3.

188. *Id.* at 2768.

189. *Id.* at.

190. Citizens United vs. Fed. Election Comm'n, 558 U.S. 310 (2010).

191. *Id.* at 321.

192. Id. at 393.

193. *Id.*

194. Hobby Lobby, 134 S. Ct. at 2770-71.

195. *Id.* at 2770.

196. *Id.* at 2771 (emphasis omitted).

197. *Id.*

198. *Id.*

199. *See* Kent Greenfield, Hobby Lobby Symposium: Hobby Lobby, "unconstitutional conditions," and corporate law mistakes, SCOTUSBLOG (June 30, 2014, 9:07 AM), http://www.scotusblog.com/2014/06/hobby-lobby-symposium-hobby-lobby-unconstitutional-conditions-and-corporate-law-mistakes/.

B. The Implications of *Hobby Lobby* for Social Investors

Hobby Lobby reframed critical aspects of American corporate law. By allowing corporations to exercise religious liberty, the Supreme Court has enabled investors to argue that corporations must also be able to prioritize social responsibility. The most relevant portions of the *Hobby Lobby* case for this Article relate to the corporate entity theory, shareholder wealth maximization, and the opinion's implications for publicly traded corporations.

1. Hobby Lobby*'s Impact on the Corporate Entity Theory*

The *Hobby Lobby* Court essentially broke down the wall between shareholders and a corporation.[200] No longer a separate entity, a corporation may now be viewed as a "nexus of humans."[201] This reasoning represents a startling departure from the established norms underpinning corporate law. In fact, the separation of investors from the corporate entity is traditionally a major reason for incorporation.[202] Before the *Hobby Lobby* decision, this separation worked as a two-way street: the fact that shareholders could not be identified with the company meant their opinions and beliefs were separate from the entity itself, but in turn shareholders could not be liable for corporate debts.[203]

The *Hobby Lobby* case blurred this line. According to the Court, protecting the rights of corporations is actually protecting the rights of persons within the business: "When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights" of the people affiliated with the corporation: shareholders, officers, and employees.[204]

By eliminating the separation between a corporate entity and its owners, the *Hobby Lobby* Court has "changed, definitionally, what it means to be a corporation."[205] Corporate law experts are still debating how this new approach to corporate entity doctrine will play out in the courts.[206] But it is clear that this shift will have major repercussions on future corporate law decisions. For example, the Court's reasoning conflicts with the logic underlying the doctrine of piercing the corporate veil. If a corporation is an association of persons whose beliefs are carried out by the corporation, there is no "veil" between corporate creditors and share-

200. *Id.*

201. Usha Rodrigues, *The Supreme Court's View of the Corporation in* Burwell v. Hobby *Lobby*, The Conglomerate (July 2, 2014), http://www.theconglomerate.org/2014/07/the-supreme-courts-view-of-the-corporation-in-burwell-v-hobby-lobby.html.

202. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners at 4, Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751 (2014) (Nos. 13-354, 13-356), 2014 WL 333889, at *4.

203. *Id.* at *14.

204. Burwell v. Hobby Lobby Stores, Inc. 134 S. Ct. 2751, 2768 (2014).

205. Greenfield, *supra* note 199.

206. *See*, *e.g.*, *Hobby Lobby Symposium*, The Conglomerate (July 19, 2014), http://www.theconglomerate.org/hobby-lobby/.

holders.[207] As Justice Ginsberg pointed out in her dissenting opinion in *Hobby Lobby*, "[o]ne might ask why the separation should hold only when it serves the interest of those who control the corporation."[208]

This decisive change in how a corporation is viewed also empowers shareholders, who now have more influence in directing corporate policies. Rather than separating their personal interests from the purpose of a corporate entity, shareholders can now use the corporate form to claim their own rights and accomplish their personal objectives. Indeed, that is exactly what the Hahn and Green families successfully accomplished in this case.

The *Hobby Lobby* Court's analysis was admittedly intended to be narrowly applied to corporate owners' religious beliefs under RFRA.[209] However, the Court's analysis is framed in a way that will inevitably lead to an expansion of its holding.[210] Moreover, Justice Kennedy's concurring opinion asserted that our constitutional tradition includes the right "to establish one's religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community."[211] Read broadly, Justice Kennedy's inclusion of "nonreligious" identity suggests that the nonreligious beliefs of a corporation—which really means those of its owners—are also constitutionally important.

Thus, although the Court's analysis was grounded in RFRA, the Court offers no rationale to prevent the expansion of its reasoning to encompass moral beliefs. For example, the Hobby Lobby, Mardel, and Conestoga shareholders were members of organized religions.[212] But what about a corporate "atheist"—a corporation whose shareholders do not believe in God but hold strong moral beliefs that they should (for example) give

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207. Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners *supra* note 202, at *7-8.

208. Hobby Lobby 134 S. Ct. at 2797 (Ginsberg, J., dissenting). A group of corporate law professors submitted an amicus brief to the Supreme Court in connection with the *Hobby Lobby* case explaining this dilemma. *See* Amicus Curiae Brief of Corporate and Criminal Law Professors in Support of Petitioners *supra* note 202, at 13-14. The brief was apparently not persuasive to the Court. *See* Hobby Lobby, 134 S. Ct. at 2779-80.

209. *See* Hobby Lobby, 134 S. Ct. at 2782.

210. For example, soon after the decision corporations sought *Hobby Lobby*-style religious exemptions related to LGBT employment discrimination, far beyond the realm of health care. Molly Ball, Hobby Lobby *Is Already Creating New Religious Demands on Obama*, THE ATLANTIC, (July 28, 2014), *available at* http://www.theatlantic.com/politics/archive/2014/07/hobby-lobby-is-already-creating-new-religious-demands-on-obama/373853/. In addition, in September 2014, a federal judge cited *Burwell v. Hobby Lobby* to support a ruling that a member of a Fundamentalist Mormon sect was not required to testify in a child labor investigation. Perez v. Paragon Contractors, No. 2:13CV 00281-DS 2014 WL 4628572, at *4 (D. Utah Sept. 11, 2014). The District Court held that forcing such testimony would place a substantial burden on the Mormon sect member's religious beliefs. *See id.* Dean Irwin Chemerinsky noted that this is "just the start of cases of people claiming religious exemptions from general laws" in the wake of the *Hobby Lobby* decision. Shadee Ashtari, *Judge Cites Hobby Lobby to Excuse Fundamentalist Mormon from Child Labor Testimony*, HUFFINGTON POST (Sept. 18, 2014), http://www.huffingtonpost.com/2014/09/18/hobby-lobby-testimony-mormon-child-labor_n_5844696.html/.

211. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2785 (2014).

212. *Id.* at 2755.

more than 50% of the corporation's profits to charity instead of distributing such profit as dividends? Certainly some nonreligious shareholders hold strong moral convictions related to social justice. Even shareholders belonging to different religions may agree on some aspects of morality. What would happen if shareholders used their corporation to perform an action they deem to be "moral," such as a socially beneficial act or program, that conflicted with the corporation's pursuit of profit?

2. The Expanding Purpose of a Corporation After Hobby Lobby

The answer lies in the Court's newly expanded definition of corporate purpose. Unlike the traditional view of corporate purpose expecting corporations to prioritize shareholder wealth over all else, the Supreme Court declared in *Hobby Lobby* that a corporation's purpose can be closely aligned with the rights and interests—profit or otherwise—of its shareholders.[213]

The Supreme Court's apparent repudiation of the shareholder wealth maximization theory has significant implications for corporate social responsibility activists. Traditionally, corporations have implemented socially or environmentally beneficial activities with the understanding that, in addition to the benefits conferred on the community by such programs, long-term profit maximization can also result from these actions.[214] For example, the world's largest tobacco company, Philip Morris, has donated millions of dollars over several decades to support charities and the arts.[215] In 2001, the company donated $115 million to charity, including gifts to the "favorite philanthropies" of legislators.[216] The company then spent $150 million on advertisements extolling its charitable donations for public relations purposes.[217] Philip Morris's charitable gifts were clearly designed to improve the company's image and increase profitability.

But *Hobby Lobby* raises the intriguing notion that courts may accept corporate social responsibility programs in alignment with shareholders' morality that do not provide even long-term financial advantages to the corporation and its shareholders. After all, the Court noted that the closely held Hobby Lobby corporation closes on Sundays to comply with the owners' religious beliefs, even though this action causes the owners to lose millions of dollars in sales per year.[218] In this way, the *Hobby Lobby* reasoning may be viewed as endorsing actions that do not maximize shareholder profit. This endorsement might signal the dawn of a new age for corporate social responsibility, as corporations may have moral beliefs outweighing their interests in profit. If profit no longer needs to be the

213. *Id.* at 2768.
214. Norm Orstein, *Corporations: Still Not People*, THE ATLANTIC (July 3, 2014), http://www.theatlantic.com/business/archive/2014/07/corporations-still-not-people/373889/.
215. Dan Harris, *Corporate Goodwill or Tainted Money*, ABC NEWS (Feb. 8, 2002), http://abcnews.go.com/WNT/story?id=131249.
216. *Id.*
217. *Id.*
218. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2766 (2014).

first concern of corporate managers, corporations now have room to perform a vast array of socially or environmentally beneficial actions.

c. Hobby Lobby*'s Applicability to Publicly Traded Companies*

Should the Court's analysis differ for publicly traded companies? Perhaps not. Although Justice Alito's majority opinion sought to narrowly apply the holding in *Hobby Lobby* to closely held corporations, the Court did not define the term "closely held corporation."[219] There are several available definitions.

One approach would be to consider state corporate statutes for clarification. As Professor Stephen Bainbridge explained shortly after the decision, courts will likely look to the law of the state of incorporation to determine whether a corporation is closely held, and states have different definitions for this term.[220] However, courts could also take a federal definition into account; the Internal Revenue Service defines a "closely held corporation" as one with "more than 50% of the value of its outstanding stock owned (directly or indirectly) by five or fewer individuals at any time during the last half of the tax year; and is not a personal service corporation."[221] Thus, a corporation could be publicly traded with the majority of its stock held by a few individuals. "S" corporations, which may not have more than 100 shareholders, would also qualify as "closely held."[222] For instance, Hobby Lobby is an "S" corporation with a small number of shareholders but thousands of employees.[223] As Justice Ginsberg noted in the *Hobby Lobby* dissent, "'[c]losely held' is not synonymous with 'small.'"[224]

The Court's failure to define the term "closely held" is especially notable because the Court did not specifically state that its reasoning would

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219. Hobby Lobby, 134 S. Ct. at 2785.

220. Stephen Bainbridge, *What is a "close corporation" for purposes of the new* Hobby Lobby *rule*, PROFESSORBAINBRIDGE.COM (July 1, 2014), http://www.professorbainbridge.com/professorbainbridgecom/2014/07/what-is-a-close-corporation-for-purposes-of-the-new-hobby-lobby-rule.html. The typical statute defines a closely held corporation as having no more than thirty-five shareholders. The IRS requires that no more than five shareholders may own 50% of a closely held corporation's shares. *See* 26 U.S.C. § 542 (2012).

221. *Help & Resources*, IRS, http://www.irs.gov/Help-&-Resources/Tools-&-FAQs/FAQs-for-Individuals/Frequently-Asked-Tax-Questions-&-Answers/Small-Business,-Self-Employed,-Other-Business/Entities/Entities-5 (last visited July 15, 2014). In August 2014, the federal government solicited public comments about the definition of a closely held corporation as part of its proposed regulations related to the ACA—a telling sign that the definition is not clear-cut. *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 79 Fed. Reg. 51092 (proposed Aug. 27, 2014) *available at* https://www.federalregister.gov/articles/2014/08/27/2014-20254/coverage-of-certain-preventive-services-under-the-affordable-care-act#h-10.

222. Drew Desilver, *What is a "Closely Held Corporation" Anyway, and How Many Are There?*, PEW RESEARCH CENTER (July 7, 2014), http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/.

223. Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2765 (2014); *see also* Desilver, *supra* note 222.

224. Hobby Lobby Stores, Inc., 134 S. Ct. at 2797 n.19 (Ginsberg, J., dissenting).

not apply to publicly traded companies.[225] Instead, the Court's majority opinion stated that would be "unlikely" that publicly traded corporations would assert religious beliefs under RFRA, since it is "improbable" that unrelated shareholders, including institutional investors, "would agree to run a corporation under the same religious beliefs."[226] Justice Ginsberg noted in dissent that the Court's "logic extends to corporations of any size, publicly or private."[227]

Thus, the *Hobby Lobby* decision would not preclude a publicly traded company from seeking the same type of religious exemption benefits conferred on the Hobby Lobby corporation. It would only require a controlling shareholder (or a block of shareholders pooling their votes to constitute a majority) choosing to determine the religious beliefs of the corporation. For example, under the IRS definition, Wal-Mart is a closely held but publicly traded company, with the majority of its stock owned by the Walton family.[228] As Professor Kent Greenfield explained, if the Walton family agreed that its religious beliefs dictated that LGBT employees should not be hired by Wal-Mart, "nothing in the logic of the [*Hobby Lobby*] opinion would limit the company's ability to claim a *Hobby Lobby* waiver" from state laws preventing employment discrimination against LGBT employees.[229]

How would this relate to corporate social or environmental responsibility? Read together, the holdings of *Citizens United* and *Hobby Lobby* could be expanded to include corporate social responsibility initiatives in publicly traded companies. Under *Citizens United*, corporations may constitutionally hold political beliefs in alignment with their shareholders' interests.[230] Under *Hobby Lobby*, corporations may hold the same religious beliefs as their shareholders.[231] Why then, can't corporations also hold the social justice beliefs and morality of their shareholders? Indeed, if a corporation is simply an "association of individuals" under *Citizens United*,[232] and the rights conferred on a corporation are simply designed to "protect the rights of these people" under *Hobby Lobby*,[233] then the people behind the corporate entity should be legally allowed to choose the corporation's priorities (political, religious, or otherwise). This would include "worthy objectives,"[234] such as the craigslist founders' de-

225. *Id.* at 2774 ("we have no occasion in these cases to consider RFRA's applicability to [publicly traded] companies.")

226. *Id.*

227. *Id.* at 2797 (Ginsberg, J. dissenting); *see also id.* at 2797 n.19 (Ginsburg, J., dissenting)

228. Jay Hancock, *Court Ruling Geared to 'Closely Held' Firms, but What is That?*, KAISER HEALTH NEWS (June 30, 2014), http://www.Kaiserhealthnews.org/news/companies-workers-hobby-lobby-decision/.

229. Greenfield, *supra* note 199. Professor Greenfield's prediction proved to be correct. *See* Ball, *supra* note 210.

230. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370-71 (2010).

231. Burwell v. Hobby Lobby Stores, Inc., 134 S. ct. 2751, 2770-71 (2014).

232. Citizens United v. Fed. Election Comm'n, 558 at 392.

233. Hobby Lobby, 134 S. Ct. at 2768.

234. *Id.* at 2771.

sire to operate their business as a "community service,"[235] that do not enhance shareholder wealth.

At first glance, the idea that publicly traded shareholders would agree to support corporate social responsibility initiatives without long-term corporate profit might appear naïve or disingenuous. But recent examples demonstrate that corporations are increasingly choosing to do "the right thing" despite the resulting negative or neutral effect on profitability. For example, the largest pharmacy chain in the United States, CVS, voluntarily stopped selling all tobacco products in its stores in 2014 in an effort to create a store environment supportive of public health.[236] The move will cost CVS an expected $2 billion in revenue.[237] Some fast-food chains, such as In-N-Out Burger and Shake Shack, pay their workers well above the minimum wage.[238] While the founders of these companies hope the higher wage will reduce employee turnover, they decided to pay these wages "partly because they wanted to do the right thing."[239]

Remarkably, corporate directors, officers, and shareholders desiring to "do the right thing" now have a legal basis to create socially responsible programs benefiting stakeholders other than shareholders. The Supreme Court's decision in *Hobby Lobby* opens the door for shareholder activists to advocate for socially beneficial programs, regardless of those programs' impacts on shareholder profit maximization. Shareholders are in the driver's seat, and their personal beliefs can dictate corporate policy. Accordingly, more socially conscious investors may become activists, arguing that their corporations should adopt their views and enact socially or environmentally beneficial programs.

V. RECOMMENDATIONS: WHERE DO WE GO FROM HERE?

Hobby Lobby created a new era for social investors and corporate social responsibility advocates. Although the long-term consequences of the case have yet to be realized, shareholder activists can use the reasoning of the case to increase their power as owners of corporations. This section will suggest two ways social investors can act now to take advantage of *Hobby Lobby*'s extraordinary impact on corporate law doctrines: creating a new classification of stock to expand the voting rights of socially conscious investors, and shifting investments away from benefit corporations to larger and more influential companies.

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235. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 8 (Del. Ch. 2010).

236. Matthew Herper, *Kicking the Habit: CVS to Stop Selling Tobacco, Sacrificing $2 Billion in Sales for Public Health and Future Growth*, FORBES (Feb. 5, 2014), http://www.forbes.com/sites/matthewherper/2014/02/05/cvs-to-stop-selling-tobacco-sacrificing-2-billion-in-sales-for-public-health-and-future-growth/.

237. *Id.*

238. Steven Greenhouse & Stephanie Strom, *Paying Employees to Stay, Not Go*, N.Y. TIMES (July, 4, 2015), http://www.nytimes.com/2014/07/05/business/economy/boloco-and-shake-shack-offer-above-average-pay.html?_r=0.

239. *Id.*

A. New "Social Investor" Classification of Stock

The Model Business Corporation Act ("MBCA") offers great flexibility to incorporators devising stock classifications. A corporation's articles of incorporation may authorize shares with special, conditional, or limited voting rights, or no voting rights.[240] Distributions, including dividends, may be calculated in any manner.[241] Terms of shares may vary,[242] and the Act takes care to note that its description of possible "preferences, rights, and limitations of classes or series of shares" is not an exhaustive list.[243]

The MBCA is the model for most corporate state statutes, and its trend toward a flexible stock structure mirrors the modern trend of flexibility throughout modern corporate law.[244] Corporations and their lawyers can design the stock structure that works best for that company's needs, as long as the classes of stock are properly described in the articles of incorporation.[245] Thus, corporations could legally create a new class of stock designed to enhance the company's dialogue about socially conscious issues.

To accomplish this goal, corporations could create "Social Investor shares" ("SI shares"). These shares would hold equivalent economic rights to distributions as other classifications of stock. However, they would retain two votes for every share on the particular issue of social impact shareholder proposals.

This stock differs from dual-class structures found in some publicly traded companies, such as Google and Facebook, in which the founders of the company retain control through a separate class of super-voting stock.[246] Here, Social Investor shareholders only hold "super-voting" shares in the narrow area of nonbinding shareholder proposals. They do not have more control in the company than other shares, since they cannot influence director elections or any traditional governance issues other than socially conscious shareholder proposals. To alleviate concerns about the dilutive impact of a new classification of stock on the rights of existing shareholders, the creation of Social Investor shares could be limited to the incorporation or reincorporation stage of a company's life cycle.

This new classification of stock has numerous advantages. For the average investor who cares about social justice issues, SI shares offer a chance

240. Model Bus. Corp. Act. § 6.01(c)(1) (2006).
241. *Id.* at § 6.01(c)(3).
242. *Id.* at § 6.01(e).
243. *Id.* at § 6.01(f).
244. This trend is most notably visible with the extraordinary popularity of Limited Liability Companies (LLC), a type of unincorporated entity emphasizing flexibility in structure and governance.
245. *Id.* at § 6.01(f).
246. Dual-class structures are rising in popularity as founders of companies desire to retain control after the company's Initial Public Offering of shares. For example, when Facebook went public, its founder Mark Zuckerberg owned 18% of the company but controlled 57% of the stock. James Surowiecki, *Unequal Shares*, The New Yorker (May 28, 2012), http://www.newyorker.com/talk/financial/2012/05/28/120528ta_talk_surowiecki.

to gain ownership into corporations and influence corporate decisions related to social responsibility. For other shareholders, SI shares represent a chance to open shareholder proposals to a wider variety of shareholder audiences.

Corporations adopting SI classifications of stock would also benefit. First, this classification would encourage additional investment on the part of impact investors who wish to invest in socially conscious corporations. Socially conscious investors seeking to invest in corporations would likely gravitate to companies with this type of stock. In addition, corporations with SI stock classifications would immediately achieve a public relations advantage. Much like CVS and the fast-food chains referenced above, these corporations would be applauded for "doing the right thing."[247] In this way, the existence of SI shares might also help to quell public anger toward corporations.

There are disadvantages to the creation of a Social Investor classification of stock. Presumably, social investor shares with expanded voting rights would cost more than common shares of stock, which would limit this stock to those who can afford the investment. SI shares could also be used in a negative way, with opponents of social responsibility programs using these shares to vote heavily against socially conscious shareholder proposals.

One point likely to be raised by corporate managers is the fact that SI shares give a larger megaphone and audience to shareholder activists. Although the existence of these shares may benefit the corporation in the long run by expanding the investment pool to attract more impact investors, it is true that corporate directors would have to deal with a more engaged shareholder group. Whether this is an advantage or disadvantage depends on one's perspective. Either way, with both economic rights and voting power, SI shareholders would be real investors with a stake in the corporation, not outsiders seeking only publicity.

The purpose of this section is to simply introduce the concept of Social Investor shares, but this new idea raises a host of questions for consideration in future articles. For example, the term "socially conscious shareholder proposal" would need to be carefully defined in a corporation's articles of incorporation. Additionally, the ways in which this special classification would fit within existing stock exchange rules could be examined. Ultimately, the use of SI shares would likely raise the level of debate within corporations about social justice issues and increase the relevance of corporate social responsibility programs.

B. The Shift Away From Benefit Corporations

Some observers would argue that the use of benefit corporations is a more appropriate way to combine profit and social justice objectives. Benefit corporations are a hybrid corporate entity requiring pursuit of a

247. *See supra* Part III.C.

"general public benefit" in addition to profit.[248] Over twenty-five states have passed statutes allowing benefit corporations.[249] These statutes "expressly require the consideration of various non-shareholder stakeholders," unlike traditional corporation statutes simply allowing consideration of other stakeholders.[250]

There are certainly advantages to the use of benefit corporations. Investors may choose benefit corporations over other types of entities to ensure their funds are used in alignment with their social justice values.[251] Directors are legally protected when using corporate funds to achieve socially responsible goals.[252] Additionally, there has been a great deal of public attention given to this new type of corporate entity.[253]

However, benefit corporations are not necessarily the best route for corporate social responsibility advocates. First, benefit corporations are new legal entities, and much of the law related to these hybrid businesses is uncertain.[254] Also, their existence may give traditional corporations an "out" when dealing with social justice advocates: "If you want to invest for social change, go find a benefit corporation." Moreover, there are very few benefit corporations nationally,[255] and they tend to be smaller and less stable companies.[256] In Delaware, for example, 74% of public benefit corporations created from August-October 2013 were new businesses, raising "questions about the likelihood of their long term performance and success."[257]

Following *Hobby Lobby*, owners of traditional corporations are allowed to consider other stakeholders and other issues beyond shareholder profits.[258] Indeed, "[t]here is no necessary reason why a corporation cannot usefully advance a public benefit without also requiring the board to consider a range of individual stakeholders."[259] Since corporations no longer need to prioritize shareholder wealth, the social responsibility debate should move away from specialized hybrid corporations and into the boardrooms of larger and more influential corporations.

Large corporations, especially publicly traded corporations, have enor-

248. Murray, *supra* note 24, at 23.

249. *State by State Legislative Status*, BENEFIT CORPORATION INFORMATION CENTER, http://www.benefitcorp.net/state-by-state-legislative-status (last visited July 10, 2014).

250. Murray, *supra* note 24, at 22.

251. Doug Bend & Alex King, *Why Consider a Benefit Corporation?*, FORBES (May 30, 2014), http://www.forbes.com/sites/theyec/2014/05/30/why-consider-a-benefit-corporation/.

252. *Id.*

253. Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.* 25 REGENT U.L. REV. 269, 269 (2013).

254. *Id.*

255. Alicia E. Plerhoples, *Delaware Public Benefit Corporations 90 Days Out: Who's Opting In?*, 14 U.C. DAVIS BUS. L.J. 2, 3 (2014).

256. *Id.* at 15.

257. *Id.* at 15-16.

258. *See supra* Part III, A-B.

259. Johnson, *supra* note 253, at 291.

mous political clout in the U.S. and in foreign countries.[260] Indeed, "large global corporations . . . have their own nationality and can create their own . . . policy."[261] Shareholders seeking to create real social change can have major impacts if they convince large traditional corporations to embrace reform. ICCR's success with ADM is an example of shareholders able to do exactly that.[262] Advocating for change in larger corporations, rather than investing in narrower benefit corporations, would be a more effective way for social justice advocates to have a practical impact.

VI. CONCLUSION

As active shareholders are increasingly successful in influencing corporate action, the socially conscious investor movement is gaining momentum. Sister Patricia Daly and her colleagues exemplify the type of socially conscious investor now using the corporate form to advocate for change. The Supreme Court's decision in *Hobby Lobby* paved the way for investors to argue that their moral beliefs related to social justice should be passed through to their corporations. After *Hobby Lobby,* corporations can be considered moral "persons" who do not need to consider shareholder wealth maximization as the highest priority. The creation of Social Investor classifications of stock and the shift away from benefit corporations represent two ways for social investors to be effective advocates for change in the post-*Hobby Lobby* era. We are witnessing the potential emergence of a new legal chapter in corporate social responsibility: Corporations as tools for good, not evil, and generosity, not greed.

260. HAMILTON, *supra* note 28, at 504.

261. Frank René López, *Corporate Social Responsibility in a Global Economy After September 11: Profits, Freedom, and Human Rights*", 55 MERCER L. REV. 739, 753-54 (2004).

262. *See supra* Part III.D.