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ARTICLES

SHAREHOLDER PROPOSALS AND SOCIAL POLICY

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Social policy's role in shareholder proposals is the focal point of this Article. The SEC sets standards for the social policy issues allowed to be submitted to a shareholder vote but will not define social policy or describe the agency's methods. The SEC determines whether a proposal appears on a range of environmental and social matters, such as climate change, human rights, and corporate political activities. Generally, shareholder proposals related to a company's ordinary business operations are matters reserved for the board of directors. However, when these same matters trigger SEC-determined social policy questions, they must often be put to a shareholder vote. Legally non-binding SEC no-action letters govern most decisions about whether a shareholder proposal appears; there is little social policy case law and a scarcity of formal administrative rulings. Index funds and proxy advisors amplify the social policy drama now playing out. Index funds seeking to address "systemic" risk and proxy advisors that sway votes without capital at risk heighten the consequences. By analyzing how it applies in actual cases and current-day hypotheticals, this Article concludes that social policy places the SEC in untenable situations, interferes with the proper functioning of boards, frustrates disclosure regimes, and affords undue power to activists with singular and idiosyncratic goals. These harms, sometimes justified in the name of shareholder democracy, outweigh any benefits to social policy as an instrument of shareholder rights. After exploring the options to repair the problems, this Article recommends the SEC act through formal rulemaking to eliminate social policy as a consideration in shareholder proposals that involve a company's ordinary business operations.

CONVERSION TO A BENEFIT COMPANY AND DISSENTERS' RIGHTS

Paolo Butturini..... 271

The conversion of an ordinary corporation or a limited liability company (LLC) to a benefit company and the termination of the benefit status may trigger dissenters' rights (also known as appraisal rights) under certain state statutes. However, this consequence does not occur under other statutes, and some states follow ordinarily applicable rules. Three distinct interests are connected to this issue, including minority shareholder protection, benefit companies' diffusion, and legal certainty. Across the United States, state statutes address these interests in varying ways. Granting shareholders dissenters' rights serves to safeguard minority shareholders and clarify the consequences of conversion, but it may hinder the spread of benefit companies. Conversely, excluding such rights tends to facilitate companies' acquisition of benefit status, potentially neglecting minority protection and, in the long term, prompting dissatisfaction among members or shareholders regarding the company's new objectives. In the latter scenario, adherence to standard dissenters' rights regulations may affect legal certainty, particularly when dissenters' rights cases are irrelevant or not utilized in the matter at hand and may not necessarily offer sufficient protection to minorities or promote the proliferation of benefit entities.

Statutes pertaining to Benefit LLCs, Low-Profit LLCs, and regular LLCs may address the withdrawal rights of members, with some explicitly outlining these rights while others remain silent. An operating agreement can establish events that lead to a member’s dissociation. The different approaches to withdrawal rights in case of conversion to a benefit entity or amendment of the LLC purpose to provide a benefit goal will consequently depend on the choices made in each LLC operating agreement.

Through an analysis of the evolution of dissenters’ rights and the potential impact of the conversion to a benefit company, this Article aims to verify how to balance the heterogeneous interests related to the issue and propose a solution. The adoption of a benefit goal—even if a specific one—does not necessarily profoundly affect the company’s purpose or the risk run by shareholders or members. The proposed approach of this Article distinguishes between consequential and inconsequential outcomes of converting to a benefit company. Consequently, it advocates for minority protection through dissenters’ rights only in cases where the impact of the conversion is substantial.

NOTES

PIC-WRAP: A PICTURE IS WORTH A THOUSAND TERMS IN ONLINE CONTRACTING

Emily Smoot 303

Modern online contracts—often categorized as click-wrap, scroll-wrap, and browse-wrap agreements—are rarely read by users. Even if users attempt to read them, the use of long paragraphs and complex language creates a barrier for the average user to understand what they are agreeing to. Issues surrounding online contract formation have sparked litigation in recent years to determine the enforceability of these agreements. The current standard used by courts to determine the enforceability of online contract terms is whether the design of the interface would put the reasonably prudent user on inquiry notice of their existence. The standard of adequate notice has fundamentally replaced the concept of mutual assent, as a user can be bound by a contract they had no intention of entering as long as the agreement is reasonably conspicuous. This Note offers an innovative suggestion to apply the visual elements of adequate notice to make agreements more enforceable by providing illustrated explanations of contract provisions. The inclusion of explanatory pictures alongside the terms of an agreement would create more engaging and accessible online contracts while increasing notice by design.

ACCESS DENIED: AN IMMEDIATE DISCRIMINATORY IMPACT ON WOMEN WITH CHRONIC ILLNESS AFTER *DOBBS v. JACKSON WOMEN’S HEALTH ORGANIZATION*

Mallory Maag 329

In the wake of the United States Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization* overruling *Roe v. Wade*, medical professionals were left confused, and the denial of prescription medication burdened women with chronic illnesses. Medical professionals either refused to prescribe or refill the medication to women with chronic illnesses or changed prescriptions for women who had used methotrexate and misoprostol for the management of their chronic illnesses. The *Dobbs* Court failed to take into account the reliance interest that women with chronic illnesses possess to access their medication for their treatment plans. Additionally, the Court failed to consider medical professionals in its decision. This Note argues that the confusion created in the wake of *Dobbs* has burdened women with chronic illnesses

disproportionately to their male counterparts. This Note provides specific examples of cases where this denial of prescription medication occurred. It also examines the statutes and case law that may create a device to obtain legal relief and argues that the disproportionate effect on women with chronic illnesses is unlawful. The Note further considers the policy considerations which call for physician shielding laws that will reduce confusion and decrease this disproportionate effect on women with chronic illnesses. Finally, this Note proposes a model “shield” law to protect medical professionals from any liability—criminal or civil—when lawfully providing women with chronic illnesses their prescriptions. The solution aims to decrease the disproportionate impact on women with chronic illnesses by decreasing physician and pharmacist fear around providing access to the medication at issue.

SHAREHOLDER PROPOSALS AND SOCIAL POLICY

Creighton R. Meland, Jr.*

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I. INTRODUCTION

Public company shareholders enjoy the right to propose resolutions to be voted on at the corporate annual meeting.¹ Federal securities laws govern this right and are subject to modest ownership requirements and content limitations; putting a shareholder resolution to a vote is relatively easy to accomplish.² Rule 14a-8³ of the United States Securities and Exchange Commission (SEC)⁴ and related authorities govern the making of shareholder

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¹ See generally 17 C.F.R. § 240.14a-8 (2013).

² See generally *id.*

³ See generally *id.*

⁴ See *id.* for an explanation of the differences between the “Staff” and the “Commission.” Where necessary to analyze, this article makes reference to the Staff and the Commission; otherwise, this article simply refers to the SEC.

proposals for public companies.⁵ This Article explores how social policy⁶ affects whether a shareholder proposal appears for a vote.

Shareholder proposals appear in the corporate proxy statement.⁷ Proposals are commonplace and take the form of various requests made to boards of directors and senior management.⁸ These sometimes address environmental and social policy (E&S)⁹ concerns.¹⁰ According to data compiled by the SEC, between 2017 and 2021, shareholders submitted 3,560 proposals.¹¹ Of these, 54% related to corporate governance, 31% to social issues, and 11% to environmental matters.¹² Index funds vote large blocks of shares and comprise among the largest holders in publicly traded companies.¹³ An index fund's principal investment responsibility is to cause its shares to track the relevant index.¹⁴ Because of their considerable voting power, index funds such as Vanguard,¹⁵ BlackRock,¹⁶ and State Street¹⁷ play a meaningful role in determining the direction and impact of shareholder

⁵ See generally *id.*

⁶ The term “social policy” is ascribed to the meaning in relevant SEC Releases and other publications and authorities. Earlier authorities used the term “substantial policy” in this context. See Amendments To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240).

⁷ For a discussion of the proxy voting process, see Marcel Kahan & Edward B. Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227 (2008).

⁸ See *id.*

⁹ The acronym “ESG” (environmental, social and governance) may be more familiar to the reader. This Article does not discuss governance, hence the use of the term E&S.

¹⁰ See Kahan & Rock, *supra* note 7.

¹¹ Substantial Implementation, Duplication, and Resubmission of Shareholder Proposals Under Exchange Act Rule 14a-8, Exchange Act Release No. 34-95267, IC-34647, 87 Fed. Reg. 45052, 45064 (July 27, 2022) [hereinafter 2022 Proposed Rule], available at <https://www.govinfo.gov/content/pkg/FR-2022-07-27/pdf/2022-15348.pdf>.

¹² *Id.*

¹³ *Id.*

¹⁴ S&P Dow Jones Indices, *S&P 500*, S&P DOW JONES INDICES, <https://www.spglobal.com/spdji/en/indices/equity/sp-500/#overview> (last visited Jan. 27, 2024) (explaining that the Standard and Poor's 500 is an example of one such index. “The S&P 500 is widely regarded as the best single gauge of large-cap U.S. equities. . . . [A]n estimated USD 15.6 trillion is indexed or benchmarked to the index. . . .”).

¹⁵ See VANGUARD, 2022 INVESTMENT STEWARDSHIP SEMIANNUAL REPORT 8 (2022) (explaining that in its 2022 Semiannual Report, Vanguard reports equity assets under management of \$2.2 trillion).

¹⁶ As of March 2023, BlackRock had \$9.1 trillion of assets under management and equities comprised slightly over 50% of these. *BlackRock Inc.*, ADV RATINGS, <https://www.advratings.com/company/blackrock> (last visited Jan. 27, 2024).

¹⁷ State Street's 2022 Annual Report shows \$3.1 trillion of assets under management (the annual report does not specify the equity segment). State Street undertakes a variety of governance initiatives. Under State Street's Fearless Girl Initiative, the bank pressures issuers to appoint women directors to boards. STATE STREET, ANNUAL REPORT 2022 (2022), available at https://investors.statestreet.com/files/doc_financials/2022/ar/SSC_AR_2022_Final_Web.pdf.

proposals.¹⁸ Persuading any large shareholder to support a proposal will attract the attention of the board of directors and senior management.¹⁹

In tandem with index funds, proxy advisors, such as Institutional Shareholder Services and Glass Lewis, develop benchmark corporate governance policies that support the funds' voting decisions.²⁰ One study in 2020 found 114 institutional investors managing over \$5 trillion voted in lockstep with proxy advisors' recommendations.²¹ Proxy advisors effectively control these votes without capital at risk.²² Index funds and proxy advisors have been accused of using their influence to attain an array of E&S goals,²³ sometimes to the detriment of shareholders.²⁴

Regulators and securities exchanges may also foster E&S concerns.²⁵ For example, issuers that trade on the Nasdaq exchange must publicly disclose board-level diversity data and report the race, sex, and sexual orientation of their boards of directors.²⁶ Index funds and proxy advisors deny their efforts relate to anything other than long-term shareholder welfare, characterizing their activities as “investment stewardship,”²⁷ “custom-made policies that are tailored to specific unique circumstances,”²⁸ and setting benchmark policies that demonstrate “a nexus to shareholder value.”²⁹ Regardless of whether the critique of institutional actors such as index funds, proxy advisors, and Nasdaq has merit, it is undisputed that these actors often

¹⁸ See VANGUARD, *supra* note 15, at 8 (explaining in its 2022 Semiannual Report, Vanguard reports equity assets under management of \$2.2 trillion); see also BlackRock Inc, ADV RATINGS, <https://www.advratings.com/company/blackrock> (last visited Jan. 27, 2024); see also STATE STREET, *supra* note 17.

¹⁹ See, e.g., *id.*

²⁰ See generally PAUL ROSE, PROXY ADVISOR AND MARKET POWER: A REVIEW OF INSTITUTIONAL INVESTOR ROBOVOTING (MANHATTAN INST. 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3851233.

²¹ See generally *id.* at 4.

²² See generally Marlo Oaks & Todd Russ, *A Historic Breach of Fiduciary Duty*, THE WALL ST. J. (May 15, 2023), https://www.wsj.com/articles/a-historic-breach-of-fiduciary-duty-shareholder-proposals-proxy-advicory-climate-43baa5ba?adobe_mc=MCMID%3D28358085983983583794070087200115694352%7CMCORGID%3DCB68E4BA55144CAA0A4C98A5%2540AdobeOrg%7CTS%3D1686256682.

²³ See generally *id.*

²⁴ See generally *id.*

²⁵ See generally *id.*

²⁶ Rule 5605(f), Nasdaq Rulebook, 5600. Corporate Governance Requirements, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series>.

²⁷ See VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at <https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf>.

²⁸ Letter from Gary Retelny, President & CEO, Institutional Shareholder Services to Editorial Board of The Wall Street Journal (June 13, 2023) (submitted to Wall St. J.), available at <https://insights.issgovernance.com/posts/commentary-our-proxy-advice-is-apolitical/>.

²⁹ Letter from Nichol Garzon, Glass Lewis, to Glass Lewis State Treasurers and Chief Financial Officers (July 3, 2023), available at <https://www.glasslewis.com/state-treasurers-glass-lewis-response-letter/>.

determine whether a shareholder proposal has consequences for the enterprise.³⁰ The SEC oversees the shareholder proposal process, and while the agency has established mechanisms to serve as a referee, it has failed to communicate what comprises social policy in this context.³¹

Issuers³² commonly resist shareholder proposals and have considerable influence over the process because they prepare and disseminate proxy statements and tabulate votes.³³ Once a shareholder proponent has met certain ownership criteria, an issuer may successfully resist a proposal if one or more of Rule 14a-8's thirteen exclusions apply.³⁴ This Article concentrates on one exclusion: an issuer need not submit to shareholders a proposal that addresses the issuer's ordinary business operations.³⁵ To do this requires one to critique SEC approaches to shareholder proposals generally, and this Article shows that the process as a whole suffers from a lack of meaningful judicial review and is plagued by an SEC internal structure that hinders the development of authoritative law. Despite the abundance of SEC pronouncements and secondary materials, the system lacks the workable authority needed to interpret Rule 14a-8.³⁶ As a result, public guidance suffers. Among the most problematic are SEC determinations of social policy as they affect shareholder proposals that apply to ordinary business operations.³⁷ The SEC's review of these proposals too often lacks transparency and applies arbitrarily.³⁸ Social policy in these matters will be the centerpiece of this Article's analysis.

As noted, under Rule 14a-8, issuers may reject proposals that relate to their ordinary business operations.³⁹ However, the ordinary business exclusion may be unavailable if the proposal involves significant social

³⁰ See, e.g., Rule 5605(f), Nasdaq Rulebook, 5600. Corporate Governance Requirements, available at <https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/Nasdaq%205600%20Series>; see also VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at <https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf>.

³¹ See Shaun J. Mathew, *How Companies Should Approach Shareholder Proposals This Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 3, 2023), <https://corpgov.law.harvard.edu/2023/01/03/how-companies-should-approach-shareholder-proposals-this-proxy-season/>.

³² References in this article to an "issuer" are publicly traded companies whose shares are registered under the Securities Act of 1933 and are typically the object of a shareholder proposal. Unless otherwise specified, reference to a "company," "registrant," or "corporation" should mean and be a reference to an issuer.

³³ See Reilly S. Steel, *The Underground Rulification of the Ordinary Business Operations Exclusion*, 116 COLUM. L. REV. 1547, 1570 (2016).

³⁴ 17 C.F.R. § 240.14a-8 (i)(1-13) (2013).

³⁵ *Id.*

³⁶ See generally *id.* at § 240.14a-8.

³⁷ *Cf. id.* at § 240.14a-8 (i)(7).

³⁸ See Steel, *supra* note 33, at 1570.

³⁹ *Cf.* 17 C.F.R. § 240.14a-8 (i)(7) (2013).

policy matters.⁴⁰ There is a history of unresolved disagreement and confusion over what a social policy issue is.⁴¹ What comprises social policy matters is not fixed and is at the core of many of the problems with the SEC's handling of the ordinary business exclusion.⁴² One commentator showed SEC determinations (which largely control whether a proposal will appear) vary based on non-public staff-imposed subject matter categories.⁴³ The SEC will not explain why it favors or disfavors any specific social policy subject matter.⁴⁴ This has left the SEC open to accusations of bias in its application of the difficult-to-discern social policy exception to the ordinary business exclusion.⁴⁵

The SEC also considers not just the subject matter of the proposal but how it is to be implemented.⁴⁶ Even proposals involving approved⁴⁷ social policy concerns may nonetheless fail if they seek to “micromanage” the business.⁴⁸ Micromanagement generally occurs when a proposal imposes detailed requirements and specific timelines on the board or management.⁴⁹ A prohibition on micromanagement means proponents must fashion their requests in broad generalities, often recommending only study and not precise action.⁵⁰ Index funds have developed a code phrase for proposals that micromanage—they are considered “overly prescriptive.”⁵¹

When a shareholder submits a proposal, what is the process to determine whether it will appear? Issuers turn to the SEC's no-action letter process to resist proposals.⁵² No-action letters are nonbinding, informal Staff opinions recommending the SEC take no enforcement action when an issuer declines to publish a proposal.⁵³ Ordinarily, these are not judicially reviewable and are not binding as precedent on the SEC.⁵⁴ However, no-action letters generally have a controlling influence over whether a proposal

⁴⁰ See Steel, *supra* note 33, at 1570.

⁴¹ See *id.* at 1549.

⁴² See generally *id.*

⁴³ *Id.* at 1568 (explaining that staff will not exclude proposals related to climate change, fundamental business strategy, human rights, political activity and senior executive compensation).

⁴⁴ *Id.* at 1570 (explaining that staff will not exclude proposals related to climate change, fundamental business strategy, human rights, political activity and senior executive compensation).

⁴⁵ See, e.g., Petition for Review from an Order, Nat'l Ctr. for Pub. Pol'y Rsch. v. SEC, No. 23-60230 (5th Cir. 2023).

⁴⁶ See Steel, *supra* note 33, at 1570.

⁴⁷ As will be discussed, the SEC does not publish what social policies it approves or describe how it decides which ones to recognize.

⁴⁸ See Steel, *supra* note 33, at 1570.

⁴⁹ See *id.*

⁵⁰ See *id.*

⁵¹ See VANGUARD, *supra* note 15; BLACKROCK, IT'S ALL ABOUT CHOICE EMPOWERING INVESTORS THROUGH BLACKROCK VOTING CHOICE (2022), available at <https://www.blackrock.com/corporate/literature/publication/its-all-about-choice.pdf>.

⁵² See Steel, *supra* note 33, at 1570.

⁵³ See *id.*

⁵⁴ See *id.*

will appear.⁵⁵ When an issuer requests and obtains a no-action letter, the proposal will not appear.⁵⁶ In that case, while a spurned proponent can, in theory, bring a declaratory judgment action to force the submission of a proposal, this happens with extreme rarity.⁵⁷

Those proposals that are presented to shareholders trigger a variety of results.⁵⁸ Some of these are non-events; others may prompt changes, both real and cosmetic.⁵⁹ Proposals subjected to a vote can have an impact even if rejected by a majority.⁶⁰ But even shareholder proposals embraced by a majority are usually merely precatory—they do not require the board of directors and managers to do anything.⁶¹ Still, boards pay attention in order to avert disruption (such as proxy contests and “withhold vote” recommendations) and avoid public opprobrium.⁶² At times, “the threat of a proposal often motivates companies to engage with investors in good faith.”⁶³ Proxy advisors also increase the likelihood that directors will face automatic “withhold vote” recommendations if they fail to implement proposals approved by shareholders.⁶⁴ The election of a director will fail if they do not receive a majority of votes cast.⁶⁵ Proxy advisors also increase scrutiny of a

⁵⁵ *Id.* at 1553-54 n.44.

⁵⁶ *Id.* at 1552-53.

⁵⁷ *Id.* at 1553.

⁵⁸ See generally Steel, *supra* note 33.

⁵⁹ See *Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), <https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx>; *Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT’L (Apr. 28, 2022), <https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology>; *Moderna investors reject proposal to transfer vaccine tech*, FIN. TIMES (Apr. 27, 2022), <https://www.ft.com/content/731ae6a6-fa0d-4781-a6e3-0725e68ce060>; Julie Wokaty, *Worker Justice Rises to the Top of Investors’ Agenda at 2023 Annual Meetings*, INTERFAITH CTR. ON CORP. RESP. (Apr. 27, 2023), <https://www.iccr.org/worker-justice-rises-top-investors-agenda-2023-annual-meetings/>; 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, 128-29 (2012). Cf. John C. Coffee, *The Coming Shift in Shareholder Activism: From “Firm Specific” to “Systematic Risk” Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 54 (2021) (describing proxy contest—not a proposal—but instruct of the range of outcomes).

⁶⁰ See Steel, *supra* note 33, at 1591.

⁶¹ See *id.* at 1552 n.33.

⁶² See *id.*

⁶³ Letter from Interfaith Center on Corporate Responsibility to Secretary, Vanessa A. Countryman, SEC (Sept. 9, 2022), available at <https://www.sec.gov/comments/s7-20-22/s72022-20138864-308567.pdf> (commenting on 2022 Proposed Rule).

⁶⁴ 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, 84 (2012).

⁶⁵ *Id.*

board's handling of a shareholder proposal that garners substantial minority support.⁶⁶

This Article argues that the SEC should discard social policy as a consideration in shareholder proposals. This Article discusses Rule 14a-8's ordinary business operations exclusion (as affected by social policy) in six Parts. Following this Introduction, Part II supplies background and addresses when a shareholder proposal concerns ordinary business. Part III analyzes the ordinary business exclusion. The critique contained in Part IV explains inconsistencies and deficiencies in SEC guidance. Part V contains this Article's recommendations, and Part VI concludes.

II. BACKGROUND

As noted, SEC Rule 14a-8 governs shareholder proposals.⁶⁷ A shareholder proposal is a shareholder's "recommendation or requirement that the company and/or its board of directors take action."⁶⁸ The proposals are presented at a shareholder meeting.⁶⁹ Under current Rule 14a-8, to submit a shareholder proposal, a shareholder must continuously hold a minimum market value of the issuer's securities over specified minimum time periods.⁷⁰ The shareholder must hold (a) securities with a market value of at least \$2,000 for at least three years,⁷¹ (b) securities with a market value of at least \$15,000 for at least two years,⁷² or (c) securities with a market value of at least \$25,000 for at least one year.⁷³ Generally,⁷⁴ "the proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement released to shareholders in connection with the previous year's annual meeting."⁷⁵

The requirement that the minimum market value be continuously held for the required holding period creates problems.⁷⁶ Brokers and banks may be unwilling or unable to verify whether the holder has continuously satisfied the minimum market value over time because brokers and banks do not issue

⁶⁶ See generally Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy*, 119 COLUM. L. REV. 2029 (2019).

⁶⁷ See generally 17 C.F.R. § 240.14a-8 (2013).

⁶⁸ *Id.* at § 240.14a-8 (a).

⁶⁹ *Id.*

⁷⁰ *Id.* at § 240.14a-8 (b)(3).

⁷¹ *Id.* at § 240.14a-8 (b)(i)(A).

⁷² *Id.* at § 240.14a-8 (b)(i)(B).

⁷³ 17 C.F.R. § 240.14a-8 (b)(i)(C) (2013).

⁷⁴ *Id.* at § 240.14a-8 (e)(2) (2013) ("However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.").

⁷⁵ *Id.*

⁷⁶ *Id.* at § 240.14a-8 (b)(1)(i).

daily statements.⁷⁷ Share values could momentarily dip below the minimum during an interim, unmeasured period.⁷⁸ This has led to hypertechnical objections to valuations submitted by proponents.⁷⁹ In these situations, the proponent will be at the mercy of the recordkeeping systems of the brokers and banks.⁸⁰ Hypertechnical objections by issuers have been used to suppress unwanted shareholder proposals irrespective of the proposal's merit under Rule 14a-8.⁸¹

Share ownership is measured solely by reference to the proposing shareholder and may not be aggregated with other persons.⁸² The Rule makes no mention of how holders under common control by the proponent or pension holdings would be treated for purposes of measuring share ownership.⁸³ Given the lack of guidance, applying the Rule's literal terms, treating each nominal shareholder as a discrete owner for purposes of the Rule, appears to be a plausible interpretation.⁸⁴

In addition to required ownership values and holding periods, Rule 14a-8 requires the shareholder to prove ownership.⁸⁵ This can be accomplished in one of two ways. First, the shareholder can be a "registered holder" of the relevant securities, which requires the shareholder's name to appear in the company records as a shareholder.⁸⁶ Most shareholders, who hold through intermediaries such as banks and brokers in "street name," will not qualify for this status.⁸⁷ For these shareholders, the issuer will not know of the

⁷⁷ See, e.g., *How often will I receive my account statements?*, CHARLES SCHWAB, <https://www.schwab.com/help/account-statements#:~:text=How%20often%20will%20I%20receive,expect%20a%20statement%20each%20month> (last visited Jan. 27, 2024) ("If you opt to receive paperless statements, you can expect a statement each month.")

⁷⁸ Cf. 17 C.F.R. § 240.14a-8 (b)(1)(i) (2013).

⁷⁹ See Letter from Latham & Watkins LLP to SumOfUs (September 3, 2021).

⁸⁰ See *id.*

⁸¹ See, e.g., *id.* (discussing objections submitted by Latham & Watkins to Jane M. Saks, as proponent, which noted such deficiencies as incorrect company name, no evidence of bank/broker's DTC membership (likely attributable to name confusion), failure of bank/broker to certify continuously value thresholds during required holding period).

⁸² 17 C.F.R. § 240.14a-8 (b)(1)(vi) (2013).

⁸³ See generally *id.* at § 240.14a-8.

⁸⁴ See generally *id.*

⁸⁵ *Id.* at § 240.14a-8 (2)(ii)(A)(B) (2013).

⁸⁶ *Id.* at § 240.14a-8 (b)(2)(i) (2013). In the leading judicial ruling involving a hypertechnical objection, *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 728 (S.D. Tex. 2010), the issuer, Apache Corporation, incorrectly argued the law required proponent Chevedden to obtain a letter from Depository Trust Company ("DTC"), the record holder of the Apache shares. DTC cannot and will not submit statements supporting share ownership. DTC only knows the interests of its direct participants (banks and brokers) and not their customers or their customers' customers. Apache's legal approach, if embraced, would have effectively ended the ability of shareholders to make proposals, save for those willing to reduce ownership to physical, paper certificates registered with the issuer's transfer agent. Such registration would present a number of obstacles to trading and lending that would have adverse consequences for securities servicing and the capital markets. Chevedden nevertheless lost the case on the grounds of untimely submissions. *Id.*

⁸⁷ *Apache Corp.*, 696 F. Supp. 2d at 734.

existence of the shareholder, nor will it know the number of shares held.⁸⁸ These shareholders must prove their ownership through a “written statement from the ‘record’ holder of [the] securities (usually a broker or bank),” verifying required ownership, required market value, and required holding periods necessary to establish eligibility.⁸⁹ The shareholder must also furnish a written statement that they intend to continue to hold the requisite shares through the date of the shareholders’ meeting for which the proposal is submitted.⁹⁰ Proposals are subject to a 500-word limit,⁹¹ and each shareholder may submit only one proposal per meeting.⁹² Once the shareholder has proved requisite ownership and holding period, the shareholder or a representative under state law must attend the meeting to present the proposal,⁹³ either in person or by electronic media if the meeting is conducted in that manner.⁹⁴

When the proponent timely submitting a proposal has satisfied requirements to demonstrate ownership in sufficient amounts for requisite time periods, the issuer must include, at its expense, the proposal in its proxy materials unless it can demonstrate the proposal is properly excludable under Rule 14a-8.⁹⁵ The issuer must file its reasons for the exclusion with the SEC within eighty calendar days before it files its proxy statement and form of proxy.⁹⁶ The placement of the burden on the issuer explains the abundance of no-action letters and no-action requests from issuers seeking to resist shareholder proposals. Even if desired, judicial review may be unavailable to an issuer desirous of resisting a proposal.⁹⁷

Using the ordinary business exclusion as the locus of analysis, this Article searches for any discernable principles that can be derived from the SEC (principally, no-action letters) to determine if a proposal involving ordinary business operations, which also carries colorable social policy issues, must appear in the proxy statement.⁹⁸ To understand these issues, one must first understand Rule 14a-8’s thirteen proposal exclusions.⁹⁹ Among these exclusions are proposals that are not in compliance with state corporate

⁸⁸ See, e.g., Daniel Liberto, *Street Name: Meaning, Overview, Advantages and Disadvantages*, INVESTOPEDIA (May 12, 2023), <https://www.investopedia.com/ask/answers/185.asp>.

⁸⁹ 17 C.F.R. § 240.14a-8 (b)(2)(ii)(A) (2013).

⁹⁰ *Id.*

⁹¹ *Id.* at § 240.14a-8 (d).

⁹² *Id.* at § 240.14a-8.

⁹³ *Id.* at § 240.14a-8 (h).

⁹⁴ *Id.* at § 240.14a-8 (h)(2).

⁹⁵ 17 C.F.R. § 240.14a-8 (g) (2013).

⁹⁶ *Id.* at § 240.14a-8 (j).

⁹⁷ Steel, *supra* note 33, at 1553 n.44.

⁹⁸ 17 C.F.R. § 240.14a-8 (i)(7) (2013).

⁹⁹ *Id.* at § 240.14a-8 (i)(1-13).

law,¹⁰⁰ that violate law,¹⁰¹ that violate proxy rules,¹⁰² that air personal grievances,¹⁰³ that do not relate to a relevant business segment,¹⁰⁴ that concern problems that the company has no power or authority to resolve,¹⁰⁵ that concern election of directors,¹⁰⁶ that conflict with a proposal made by the issuer,¹⁰⁷ that have already been substantially implemented,¹⁰⁸ that duplicate another proposal previously submitted and put to a vote,¹⁰⁹ that amount to a resubmission as defined by the Rule,¹¹⁰ and that relate to a specific amount of dividends.¹¹¹ This Article will concentrate its analysis on matters related to ordinary business operations.¹¹²

III. ANALYZING THE ORDINARY BUSINESS EXCLUSION

This Part analyzes Rule 14a-8's ordinary business exclusion, which has been the source of continuing disagreement between issuers and proponents.¹¹³ It begins with the origins and history of the exclusion, then discusses the seminal Cracker Barrel no-action letter that upended years of SEC policy, followed by the reaction to Cracker Barrel, and the confusion created much later by short-lived Staff Legal Bulletins, and completes the analysis with problems with the current SEC approach. These various SEC machinations provide some evidence that the social policy exception has been controversial and unsettled.¹¹⁴ Before the analysis, a brief juxtaposition of recent SEC reforms to Rule 14a-8 unrelated to the ordinary business exclusion is in order.¹¹⁵ Recall that there are thirteen possible exclusions, one of which this Article explores in depth.¹¹⁶ This does not mean other exclusions have not been the source of turmoil, and on occasion, the SEC

¹⁰⁰ *Id.* at § 240.14a-8 (i)(1).

¹⁰¹ *Id.* at § 240.14a-8 (i)(2).

¹⁰² *Id.* at § 240.14a-8 (i)(3) (This includes proposals containing false and misleading statements).

¹⁰³ *Id.* at § 240.14a-8 (i)(4).

¹⁰⁴ 17 C.F.R. § 240.14a-8 (i)(5) (2013) (The Rule places this under the heading of "Relevance." "If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business.").

¹⁰⁵ *Id.* at § 240.14a-8 (i)(6).

¹⁰⁶ *Id.* at § 240.14a-8 (i)(8).

¹⁰⁷ *Id.* at § 240.14a-8 (i)(9).

¹⁰⁸ *Id.* at § 240.14a-8 (i)(10).

¹⁰⁹ *Id.* at § 240.14a-8 (i)(11).

¹¹⁰ 17 C.F.R. § 240.14a-8 (i)(12) (2013).

¹¹¹ *Id.* at § 240.14a-8 (i)(13).

¹¹² *Id.* at § 240.14a-8 (i)(7).

¹¹³ *Id.* at § 240.14a-8 (i)(7).

¹¹⁴ *See Steel, supra* note 33.

¹¹⁵ 17 C.F.R. § 240.14a-8 (i)(1-13) (2013).

¹¹⁶ *Id.*

acts to resolve these problems.¹¹⁷ For example, in 2022, the SEC proposed to amend Rule 14a-8 to revise provisions that address duplicative proposals,¹¹⁸ resubmissions,¹¹⁹ and already implemented proposals.¹²⁰ At the time of this writing, the Commission has not acted on these changes to Rule 14a-8.¹²¹ While change in these areas may have been warranted,¹²² problems with the ordinary business exclusion remain unresolved.¹²³

A. Origins and History of Ordinary Business Exclusion

Rule 14a-8(h)(7) excludes proposals that deal with a company's ordinary business operations.¹²⁴ Ordinary business operations involve

¹¹⁷ 2022 Proposed Rule, *supra* note 11, at 45064.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* The amendment will change the text of Rule 14a-8(i)(10) to exclude proposals where the issuer “has already implemented the essential elements of the proposal,” which previously required the issuer to have “substantially implemented” the proposal. Without expressing an opinion on whether the reforms are curative, there are examples of how the previous standard worked unfairly to issuers. The SEC denied Apple’s no-action letter request in connection with a proposal concerning forced labor policies by the company and its supply chain. Apple, 2021 WL 4963232 (Dec. 20, 2021). After failing to exclude the proposal on proof of ownership issues, Apple contended in its no-action letter request that it had substantially implemented the measures described in the forced labor proposal. *See* Letter from Sam Whittington, Assistant Secretary of Apple to Office of Chief Counsel, Division of Corporate Finance, Securities and Exchange Commission (October 18, 2021), available at <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/saksapple122021-14a8.pdf>. In support, the company communicated that it had performed over 1,100 audits and interviewed more than 57,000 workers to uphold its strict standards. *See id.* The SEC’s denial of Apple’s request for a no-action letter stated: “based on the information you have presented it does not appear that either the Company’s public disclosures or the level of the board engagement compare favorably with the requests in the Proposal.” *See id.* In short, in the eyes of the SEC, Apple failed to demonstrate that it had already addressed the issue. The SEC also rejected Costco Wholesale Corporation’s request for a no-action letter in response to a shareholder proposal related to food equity. In Costco, a group of shareholders led by American Baptist Home Mission Societies proposed that Costco’s board of directors “prepare a report, at reasonable cost and omitting proprietary information, describing if, and how, Costco applies its Sustainability Commitment to its core food business to address the links between structural racism, nutrition insecurity, and health disparities.” Costco Wholesale Corporation, 2021 WL 5323617 (Oct. 15, 2021). Costco contended the proposal should be excluded because it had already implemented what was being proposed and cited its September 2021 Report on Food Security to support its case. This report discussed the Costco value proposition versus competition as well as its offering of fresh and organic foods. *Id.* at Exhibit B, p. 1. Costco raised a number of reasons to show it had substantially implemented the proposal. It began with an attempt to clarify that Costco’s philanthropic efforts are relevant to the proposal, contending these are part of its core business goal of increasing access to food. Costco also disputed the contention that it offered less healthy food options in communities of color. It also contended the proposal “confused a desire for substantive action which the proposal does not request) and the delivery of a report that states the facts.” *Id.* The SEC rejected Costco’s no-action letter request without explanation. *Id.*

¹²¹ 17 C.F.R. § 240.14a-8 (h)(7) (2013).

¹²² 2022 Proposed Rule, *supra* note 11, at 45064.

¹²³ *See id.*; *cf.* 17 C.F.R. § 240.14a-8 (h)(7) (2013).

¹²⁴ 17 C.F.R. § 240.14a-8 (h)(7) (2013).

functions “so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.”¹²⁵ This includes matters such as management of the workforce, production, and suppliers.¹²⁶ Since 1954, proposals that affect “ordinary business operations”¹²⁷ could be excluded.¹²⁸ SEC interpretations of the Rule have varied over time.¹²⁹ As the discussion to follow will show, rather than amend the Rule, SEC interpretations have materially changed the Rule’s scope and effects over time.¹³⁰

In 1976, Exchange Act Release 34-12,999¹³¹ (the 1976 Release) allowed management to exclude a proposal if it (1) concerns “business matters that are mundane in nature” and (2) does not involve “any substantial policy or other considerations.”¹³² When adopted, the SEC viewed this SEC Release as an experiment, entailing a series of observations under study, with proponents and issuers as the study subjects:

The Commission wishes to emphasize that the amendments which it has adopted are not intended as a final resolution of the questions and issues relating to shareholder participation in corporate governance and, more generally, shareholder democracy. The Commission intends to study these issues on a broader basis and the staff is presently formulating proposals for such a study. In the interim[,] the staff will monitor the operation of these shareholder proposal provisions to assess their impact on the proxy soliciting process.¹³³

The 1976 Release describes how proposals and timing questions can impact issuers in different ways.¹³⁴ For example, it describes how untimely submitted proposals can affect printing costs.¹³⁵ For many years, the SEC applied this extratextual gloss “in a manner that was, according to many commentators, neither consistent nor appropriate.”¹³⁶ The text of the 1976 Release created its own difficulties, including: What was the meaning of

¹²⁵ Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 21, 1998) (to be codified at 17 C.F.R. pt. 240). For the history of changes related to social policy, see Cohen & Scheyler, *supra* note 64, at 84.

¹²⁶ *Id.*

¹²⁷ Phillip R. Stanton, *SEC Reverses Cracker Barrel No-Action Letter*, 77 WASH. U. L. Q. 979, 981-82 (1999).

¹²⁸ *Id.*

¹²⁹ *Id.* at 981.

¹³⁰ *Id.*

¹³¹ Adoption To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Stanton, *supra* note 127, at 983.

“substantial policy” and what other events and occurrences would be addressed by “other considerations”?¹³⁷ Did “substantial policy” require a matter of social policy or public policy? Is there a difference?¹³⁸

The 1976 Release attempted to shed light on the meaning of “substantial policy” in an example of a nuclear power facility.¹³⁹ In this example, building such a facility, with the economic and safety considerations it entails, would place it outside ordinary business.¹⁴⁰ However, this example was not especially helpful because it exemplified what was not ordinary business and, therefore, did not need to address “substantial policy” or “other considerations.”¹⁴¹ Unless another exclusion applies, a proposal not involving ordinary business operations cannot be excluded.¹⁴² Because a decision to build a nuclear power plant is not ordinary business, there is no need to reach the question of whether this decision involves substantial policy issues. The nuclear power plant also goes to the question of materiality (which would be present in the case of a nuclear power facility), but the SEC does not phrase this hypothetical in those terms.¹⁴³ Indeed, Rule 14a-8 makes no reference to materiality, a concept otherwise present in securities laws.¹⁴⁴ For example, even the Rule’s provision that excludes proposals related to *de minimus* percentages of assets and revenues is couched in “relevance”¹⁴⁵ and not materiality.¹⁴⁶ Meanwhile, the SEC (through the no-action letter process) ruled to consider substantial policy in several matters involving employment practices involving race and sex, which required issuers to include these proposals in proxy materials.¹⁴⁷

¹³⁷ See Caroline A. Crenshaw, *Statement on Adoption of Amendments to Proxy Rules Governing Proxy Voting Advice & Proposal of Amendments to Rule 14a-8*, U.S. SEC. & EXCH. COMM’N (July 13, 2022), <https://www.sec.gov/news/statement/crenshaw-statement-proxy-voting-amendments-071322>; see also *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM’N (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?#> (stating that the 1976 Release “provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.”).

¹³⁸ See *id.*

¹³⁹ See *id.*

¹⁴⁰ See *id.*

¹⁴¹ See *id.*

¹⁴² See *id.*

¹⁴³ See generally 17 C.F.R. § 240.14a-8 (2013).

¹⁴⁴ See, e.g., *id.* at §240.10b-5 (1951) (trading on basis of material nonpublic information); Section 11 of Securities Act of 1933, 15 U.S.C. § 77k(a) (mandating plaintiff to allege a misstatement or omission of material fact). Cf. *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976) (holding that materiality requires a substantial likelihood that disclosure of an omitted fact would have been viewed by a reasonable investor as having significantly altered the “total mix of information.”).

¹⁴⁵ 17 C.F.R. § 240.14a-8 (i)(5) (2013).

¹⁴⁶ *Id.*

¹⁴⁷ Stanton, *supra* note 127, at 983-84.

B. Cracker Barrel

In 1992, the SEC issued a no-action letter to Cracker Barrel Old Country Store that addressed the company's desire to exclude a shareholder Proposal to abolish discriminatory employment practices for gay and lesbian persons.¹⁴⁸ The Cracker Barrel no-action letter announced a new SEC policy: proposals related to employment practices would be excluded on ordinary business grounds, even if they trigger social policy concerns.¹⁴⁹ In one of the first judicial challenges to the Cracker Barrel rule, the United States District Court for the Southern District of New York declined to follow the new approach.¹⁵⁰

In *Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc.*,¹⁵¹ a shareholder brought an injunctive action to order Wal-Mart to include a proposal to prepare and distribute reports about Wal-Mart's equal employment opportunity and affirmative action policies, together with a description of Wal-Mart's efforts to publicize these policies with suppliers and to purchase goods and services from minority-owned suppliers.¹⁵² These would normally be excluded under Cracker Barrel as employment-related matters.¹⁵³ In addressing whether the court was bound to follow Cracker Barrel, the court held that an individual no-action letter is not an expression of agency interpretation (whether adjudication or rulemaking) to which a court must defer.¹⁵⁴ The *Amalgamated Clothing* court noted that a change in the SEC's position does not necessarily involve capricious action by the agency: "Changes in conditions and public perceptions justify changes in the SEC's construction of the 'ordinary business operations' exception."¹⁵⁵ However, in this instance, the court did not defer to Cracker Barrel because it "sharply deviates from the standard articulated in the 1976 Interpretive Release."¹⁵⁶ According to the court, Cracker Barrel improperly ignored the

¹⁴⁸ Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

¹⁴⁹ *Id.*

¹⁵⁰ *See* *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores*, 821 F. Supp. 877 (S.D.N.Y. 1993).

¹⁵¹ *Id.*

¹⁵² *Id.* at 879.

¹⁵³ *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).

¹⁵⁴ *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores*, 821 F. Supp. 877, 885 (S.D.N.Y. 1993) (citing *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416, 427 n.19 (D.C. Cir. 1992)).

¹⁵⁵ *Id.* at 886.

¹⁵⁶ *Id.* at 890.

1976 Release's requirement that there be "no substantial policy consideration."¹⁵⁷

Unlike no-action letters, the court treated the 1976 Release as agency rulemaking that the SEC was bound to follow.¹⁵⁸ By treating the 1976 Release as a rule within the meaning of the Administrative Procedure Act, the Staff's disregard for this rule without taking rulemaking steps would not create authority a court could follow.¹⁵⁹ The court differentiated between agency rulemaking and the internal procedures of the agency, even though a no-action letter is not about internal procedure.¹⁶⁰ In any case, such rulings are scarce in comparison to the number of matters which, as we will see, are largely governed by no-action letter decisions of the Staff.¹⁶¹ No-action letters can be seen to function as administrative adjudications without the safeguard of applicable administrative review standards.¹⁶²

Cracker Barrel inspired litigation from the New York City Employees Retirement System involving Cracker Barrel's practices that sought to exclude the retirement system's proposal on the subject of employment discrimination against gay and lesbian employees.¹⁶³ Cracker Barrel requested the no-action letter based on its belief that the proposal concerned day-to-day hiring practices, fell within the scope of the ordinary business exclusion of Rule 14a-8, and could be excluded from proxy materials.¹⁶⁴ After the SEC issued the no-action letter to Cracker Barrel (issued by the Staff and affirmed by the Commission), the retirement system brought suit against the SEC.¹⁶⁵ The retirement system alleged that the SEC's departure from past practice required notice and comment rulemaking under the Administrative Procedure Act, which the SEC had not performed.¹⁶⁶ After the United States District Court for the Southern District of New York ruled

¹⁵⁷ *Id.* (citing Amendments To Rules On Shareholder Proposals, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976)).

¹⁵⁸ *See id.*

¹⁵⁹ *See id.* at 890 n.13 ("The court's holding today is limited solely to the proposition that a court should not defer to a position taken by the SEC in a no-action letter that is inconsistent with an SEC interpretation offered in the context of formal notice and comment rulemaking.").

¹⁶⁰ *See Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores*, 821 F. Supp. 877, 890 n.13 (S.D.N.Y. 1993).

¹⁶¹ *See, e.g., Donna M. Nagy, Judicial Reliance on Regulatory Interpretations in SEC No-Action Letters: Current Problems and a Proposed Framework*, 83 CORNELL L. REV. 921, 925–26 (1998) ("[C]ourts frequently rely on no-action letter authority in the course of resolving legal disputes.").

¹⁶² *See Steel*, *supra* note 33, at 1554 n.52; *see also id.* at 945 ("In cases where the Commission has refused to review a no-action letter issued by the staff, direct judicial review under either the federal securities statutes' review provisions or the APA is generally foreclosed because there is no final agency action to review.").

¹⁶³ *See Christine L. Ayotte, Reevaluating the Shareholder Proposal Rule in the Wake of Cracker Barrel and the Era of Institutional Investors*, 48 CATH. U. L. REV. 511, 532–38 (1999).

¹⁶⁴ *Id.* at 534 n.135.

¹⁶⁵ *Id.* at 535 (citing *New York City Emps.' Ret. Sys. v. SEC*, 843 F. Supp. 858 (S.D.N.Y. 1994), *rev'd in part*, 45 F.3d 7 (2d Cir. 1995)).

¹⁶⁶ *New York City Emps.' Ret. Sys. v. SEC*, 45 F.3d 7, 9 (2d Cir. 1995).

in favor of the retirement system, the United States Court of Appeals for the Second Circuit reversed and upheld the SEC's position.¹⁶⁷ The Second Circuit found the SEC's action to involve an interpretive rule, not a legislative rule.¹⁶⁸ This confused the issue, which could have been resolved by the court refusing jurisdiction over a no-action letter that is not an agency adjudication or rulemaking.¹⁶⁹ The retirement system sought relief against the SEC and not Cracker Barrel, and this procedural posture of review of agency action doomed the case for the retirement system.¹⁷⁰ The case resulted in questionable authority that no-action letters involve interpretive rulemaking, which must still pass judicial scrutiny, albeit at a more lenient level.¹⁷¹

Cracker Barrel departed from SEC policy expressed in the 1976 Release and no-action letters forming the progeny of the 1976 Release.¹⁷² The Cracker Barrel no-action letter stood for the proposition that matters of employment should be excluded from shareholder proposals because these matters constitute ordinary business, irrespective of substantial policy consequences.¹⁷³ Under the 1976 Release, the SEC provided scant guidance on what constitutes "substantial policy" questions.¹⁷⁴ In any case, in the momentous Cracker Barrel no-action letter, the SEC stated its new policy as follows:

The fact that a shareholder proposal concerning a company's employment policies and practices for the general workforce is tied to a social issue will no longer be viewed as removing the proposal from the realm of ordinary business operations of the registrant. Rather, determinations with respect to

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 12.

¹⁶⁹ *See id.* After all, in *Amalgamated Clothing & Textile Workers Union v. SEC*, the Second Circuit held that federal jurisdiction did not exist after ruling that staff no-action letters, which do not bind the SEC, the parties, nor the courts, are interpretive. *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257 (2d Cir. 1994).

¹⁷⁰ *See New York City Emps.' Ret. Sys.*, 45 F.3d at 14. Specifically, the Second Circuit explained that it "may not even entertain the claim against the agency . . . if the plaintiffs have an adequate alternative legal remedy against someone else – a remedy that offers the same relief the plaintiffs seek from the agency." *Id.* The retirement system, the Court noted, had an effective alternative to suing the SEC, which was to sue Cracker Barrel or any other offending company under Rule 14a-8. *Id.*

¹⁷¹ *See Part IV.B infra.*

¹⁷² *See Ayotte, supra* note 163, at 530 (explaining that the SEC retained the two-part test established in the 1976 Release until 1992, when, in the Cracker Barrel No-Action Letter, "it reversed its own interpretation of the Rule without much explanation or procedure").

¹⁷³ *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).

¹⁷⁴ *See Adoption of Amendments Relating to Proposals by Security Holders*, Exchange Act Release No. 12,999, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812, at 87,123, 87,130-31 (Nov. 22, 1976).

any such proposals are properly governed by the employment-based nature of the proposal.¹⁷⁵

Unless a proponent could surmount the formidable obstacle of ordinary business operations for an employment matter, these matters were excluded under Cracker Barrel, no matter the weighty policy issue involved.¹⁷⁶

What is commonly known as the 1998 Release expressly repudiated Cracker Barrel.¹⁷⁷ The SEC explained this as a process of evolution:

[I]n light of experience dealing with proposals in specific subject areas, and reflecting changing societal views, the Division adjusts its view with respect to “social policy” proposals involving ordinary business. Over the years, the Division has reversed its position on the excludability of a number of types of proposals, including plant closings, the manufacture of tobacco products, executive compensation and golden parachutes.¹⁷⁸

Cracker Barrel rested on the idea that no social policy issue could vitiate a valid ordinary business exclusion in the employment context.¹⁷⁹ The 1998 Release restored and reaffirmed the 1976 Release’s view that social policy could be considered in the employment setting depending on the facts and circumstances.¹⁸⁰ These decisions would be handled on a case-by-case basis.¹⁸¹ As the reader will see, the Staff’s case-by-case methodology to ascertain and apply social policy is problematic. The 1998 Release largely governs these issues today.¹⁸² Also, the 1998 Release used for the first time

¹⁷⁵ Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

¹⁷⁶ *See id.*

¹⁷⁷ *See* Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240).

¹⁷⁸ *Id.*

¹⁷⁹ *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). While Rule 14a-8 precedent is largely set by the SEC in no-action requests, some caselaw exists. *See, e.g.,* New York City Emps.’ Ret. Sys. v. SEC, 45 F.3d 7, 14 (2d Cir. 1995) (explaining the general nature of no-action letters in the context of Rule 14a-8). Such caselaw can affect whether a social policy exception might apply differently to another Rule 14a-8 exclusion unrelated to ordinary business operations. *See, e.g.,* Lovenheim v. Iroquois Brands, Ltd., 618 F. Supp. 554 (D.D.C. 1985). For example, *Lovenheim v. Iroquois Brands* established a judicially created social policy concern that prevented application of the relevance (e.g. materiality) exception. *See id.* at 560-61. The shareholder proposal concerned methods of producing pate de fois gras, a business that did not contribute to net income and comprised less than 0.05 percent of assets. *Id.* at 558-59. The court denied usage of the relevance exception on social policy grounds and required submission to shareholders of the proposal. *See id.* at 561-62.

¹⁸⁰ *See* Amendments To Rules On Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240).

¹⁸¹ *See id.* (“Reversal of the *Cracker Barrel* no-action position will result in a return to a case-by-case analytical approach.”).

¹⁸² *See* Virginia H. Ho, *From Public Policy to Materiality: Non-Financial Reporting, Shareholder Engagement, and Rule 14a-8’s Ordinary Business Exception*, 76 WASH. & LEE L. REV. 1231, 1248–

in a Rule 14a-8 Release the term “social policy.”¹⁸³ The 1976 Release referred to “substantial policy.”¹⁸⁴ The extent to which these terms differ in meaning is not fully developed.¹⁸⁵

C. Current SEC Approaches and Problems

This Part discusses the current SEC approaches to the ordinary business exception, with particular emphasis on shareholder proposals related to discrimination in employment. Much of the ordinary business disagreement between issuers and proponents exists in the E&S fields of employment discrimination, global medical equity, and corporate environmental policies (among other subjects).¹⁸⁶ The discussion to follow will show that the SEC’s view changes over time and cannot be reduced to a standard to guide issuers and proponents.

As noted, a proposal may be excluded if it “deals with a matter relating to the company’s ordinary business operations.”¹⁸⁷ In 2022, James McRitchie submitted a proposal to Tractor Supply Company for its annual meeting that year.¹⁸⁸ The proposal provided:

RESOLVED, shareholders ask that the board commission and publish a report on (1) whether the Company participates in compensation and workforce practices that prioritize financial performance over the economic and social costs and risks created by inequality and racial and gender disparities and (2) the manner in which any such costs and risks threaten returns of diversified shareholders who rely on a stable and productive economy.¹⁸⁹

52 (2019) (explaining the 1998 Release and the challenges the SEC and the courts have faced in applying it).

¹⁸³ See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29106, 29108 (May 28, 1998) (to be codified at 17 C.F.R. pt. 240) (“Reversal of the *Cracker Barrel* no-action position will result in a return to a case-by-case analytical approach.”); cf. *Roosevelt v. E.I. Du Pont de Nemours & Co.*, 958 F.2d 416 (D.C. Cir. 1992) (decided on grounds of “substantial policy”).

¹⁸⁴ See Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, [1976-1977 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 80,812, at 87,123, 87,130-31 (Nov. 22, 1976).

¹⁸⁵ See, e.g., Kevin W. Waite, *The Ordinary Business Operations Exception To The Shareholder Proposal Rule: A Return To Predictability*, 64 FORDHAM L. REV. 1253, 1256 (1995) (“Trying to define ‘substantial policy’ is very difficult, if not impossible, to do. Which policies are substantial will change over time. Further, the point at which a policy issue becomes ‘substantial’ is unclear. It is a subjective standard.”).

¹⁸⁶ See, e.g., Ho, *supra* note 182, at 1233 (noting how climate change risk and corporate environmental impacts are among the top subjects of shareholder proposals).

¹⁸⁷ 17 C.F.R. § 240.14a-8(i)(7) (2023).

¹⁸⁸ See *Tractor Supply Co.*, 2022 WL 110300 (Mar. 9, 2022) [hereinafter *Tractor Supply Co.*].

¹⁸⁹ *Id.* at 13.

Citing generalized data about the effects of inequality on Gross Domestic Product (GDP), McRitchie's supporting statement voiced concerns that Tractor Supply permitted or even caused racial disparities in compensation.¹⁹⁰ This, according to McRitchie, contributed to GDP loss, harming the returns of the holders of diversified portfolios.¹⁹¹ Even accepting the data as true, such an impact by one issuer on an entire economy would be trifling.¹⁹² Besides this flaw, McRitchie contended that the drop in GDP would reduce returns on other investments entirely unrelated to Tractor Supply.¹⁹³ Such a contention, even if correct, would not seem to implicate the issuer and would have no relevance to the welfare of Tractor Supply Company shareholders. Because the proposal related to employee compensation, the ordinary business exclusion would apply absent a social policy issue.¹⁹⁴ Counsel for Tractor Supply did not attack the logic of the supporting statement (as the author has done) or attempt to show its fanciful nature.¹⁹⁵ Instead, it portrayed the references to overall portfolio returns as an attempt to concoct a social policy concern where none existed.¹⁹⁶ Perhaps McRitchie did this to place the request into a business context. In any case, Tractor Supply argued that mere reference to the effects of a policy (e.g., the decline in GDP that harms portfolio returns, rather than the performance of Tractor Supply) did not remove the proposal from the ordinary business

¹⁹⁰ See *id.* at 10–11.

¹⁹¹ *Id.* at 10.

¹⁹² Using a real-world example involving an activist seeking to impose climate change policies on an issuer, Professor Coffee formulates two classes of activists: those that are firm-specific and others that focus on systemic risk. John C. Coffee, *The Coming Shift in Shareholder Activism: From "Firm Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them)*, 16 BROOK. J. CORP. FIN. & COM. L. 45, 45-48 (2021). The latter takes a portfolio approach where losses in the issuer burdened with the shareholder proposal (viz. climate change) are offset by gains in other sectors that benefit by avoidance of climate change. *Id.* at 47-48. Under Professor Coffee's rubric, McRitchie would simply be classified as a systemic risk investor; however, the author of this Article would counter by inviting McRitchie to quantify the benefit to the aggregate portfolio. Professor Coffee appears to take at face value the motives of the systemic risk investors and does not describe them as social justice activists seeking to change the world through idiosyncratic corporate action in lieu of legislation, with returns subordinated to that goal (or ignored). See *id.* at 47-52. Professor Coffee also largely illustrates the systemic risk approach in the context of climate change but does not describe how other activists' movements (e.g., diversity, forced labor, human rights, animal rights, defense, firearms, tobacco, and medical welfare in the third world) would function within the systemic risk approach. See *id.* at 49. Perhaps this means climate change may be treated as *sui generis* among activist causes.

¹⁹³ Tractor Supply Co., *supra* note 188, at 10.

¹⁹⁴ See 17 C.F.R. § 240.14a-8(i)(7) (2023).

¹⁹⁵ See Tractor Supply Co., *supra* note 188, at 6-9.

¹⁹⁶ See *id.* at 7 ("Assuming, *arguendo*, that racial and economic inequality and their effects on the portfolio returns of diversified shareholders is a significant social policy issue, like in *Western Union* and *Wells Fargo*, that issue is not the crux of the Proposal.").

exclusion.¹⁹⁷ Relying on Staff Legal Bulletin No. 14L,¹⁹⁸ the SEC denied Tractor Supply's no-action request, stating the proposal "raises human capital issues with a broad societal impact."¹⁹⁹

New approaches by the SEC appear to have doomed Tractor Supply's no-action letter request.²⁰⁰ Specifically, Staff Legal Bulletin 14L materially revised the standards for the exclusion of ordinary business matters with questions of significant social policy.²⁰¹ Formerly, a company could satisfy the exclusion if it could show that even a significant social policy generally applicable was not actually significant to the company.²⁰² The new standard abandoned the company-specific approach, which was in effect only from 2017-2021, making it more difficult for issuers to exclude proposals.²⁰³

Staff Legal Bulletin 14L also appeared to play a role in resolving a shareholder employment-related issue at the other end of the ideological spectrum.²⁰⁴ In its proposal, the National Center for Public Policy Research (NCPFR) asked The Walt Disney Company's board of directors to

commission a workplace non-discrimination audit analyzing Disney's impacts, including the impacts arising from Disney-sponsored or -promoted employee training, on civil rights and non-discrimination in the workplace, and the impacts of those issues on Disney's business. . . . [A] report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on Disney's website.²⁰⁵

Relying on the 1998 Release, Disney argued that "at heart, the Proposal is focused on the indisputably ordinary business topic of employee training and, in particular, the Proponent's objection to the content of the Company's

¹⁹⁷ *Id.* at 6-7. The company also objected to the proposal on grounds of vagueness, asserting that the differing interpretations such that actions by the company might differ materially from those expected by shareholders. *Id.* at 7. The SEC rejected this position. *Id.* at 1.

¹⁹⁸ SEC Staff Legal Bulletin No. 14L (Nov. 3, 2021).

¹⁹⁹ Tractor Supply Co., *supra* note 188, at 1.

²⁰⁰ *See id.* (citing SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021)).

²⁰¹ *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.").

²⁰² *See* SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018) ("Determinations as to whether we agree that a proposal may be excluded 'will be made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.'").

²⁰³ *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.").

²⁰⁴ *See* The Walt Disney Co., 2021 WL 5052838, at 38-40 (Jan. 19, 2022) [hereinafter Disney/NCPFR].

²⁰⁵ *Id.* at 33.

training materials.”²⁰⁶ NCPPR’s supporting statement left little doubt that it did indeed object to the training materials, which NCPPR contended treated employees unequally and shamed white employees with “intergenerational, ineradicable guilt.”²⁰⁷ What remains unsettled is what social policy circumstances are weighty enough to take the matter beyond ordinary business matters.²⁰⁸ Again relying on the 1998 Release, Disney portrayed the proposal as directly implicating the content of employee training manuals and, therefore, failing to reach the required social policy weight.²⁰⁹ The SEC concluded that the proposal “transcends ordinary business matters and does not seek to micromanage the Company.”²¹⁰

While Disney raised the issue concerning micromanagement, it did not develop any separate argument as to why the proposal micromanaged Disney.²¹¹ Instead, it concentrated on the ordinary business nature and failure to raise significant social policy issues.²¹² The SEC rejected these arguments.²¹³ A proposal that raises social policy concerns that would otherwise be required to be submitted to shareholders may be excluded when it seeks to micromanage the company.²¹⁴ The SEC’s test for micromanagement includes proposals that “seek intricate detail, or seek to impose timeframes or methods for implementing complex policies. . . .”²¹⁵ Importantly, “micromanagement addresses the manner in which a proposal raises an issue, and not whether a proposal’s subject matter itself is proper for a shareholder proposal under Rule 14a-8.”²¹⁶ Therefore, the level of detail in a proposal may determine whether it will appear.²¹⁷ In general, elaborate details and specific timelines reduce the likelihood the issuer must submit the proposal to shareholders.²¹⁸

²⁰⁶ *Id.* at 4.

²⁰⁷ *Id.* at 35.

²⁰⁸ See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (asserting, without further explanation, that “[S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company”).

²⁰⁹ Disney/NCPPR, *supra* note 204, at 6.

²¹⁰ *Id.* at 1.

²¹¹ See *id.* at 2-8.

²¹² See *id.* 6-7.

²¹³ *Id.* at 1 (“In our view, the Proposal transcends ordinary business matters and does not seek to micromanage the Company.”).

²¹⁴ Cf. SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018) (“Proposals that focus on significant executive and/or director compensation matters and do not micromanage will continue not to be excludable under Rule 14a-8(i)(7).”).

²¹⁵ *Id.* (superseded for unrelated reasons).

²¹⁶ *Id.*

²¹⁷ See *id.*

²¹⁸ See *id.* (“For example, a proposal detailing the eligible expenses covered under a company’s relocation expense policy such as the type and duration of temporary living assistance, as well as the scope of eligible participants and amounts covered, could well be excludable on the basis of micromanagement.”).

Staff Legal Bulletin 14L played a role in denying Moderna, Inc.’s no-action letter request concerning a shareholder proposal directing Moderna to study whether it should promptly transfer (possibly on less-than-favorable terms) intellectual property and technical knowledge to facilitate the production of COVID-19 vaccines by additional qualified manufacturers in low- and middle-income countries, as defined by the World Bank.²¹⁹ Moderna argued that the proposal should be excluded as ordinary business and that the proposal would micromanage the company.²²⁰ Moderna’s request conceded that Staff Legal Bulletin 14L withdraws SEC consideration of company-specific circumstances in evaluating a social policy issue.²²¹ This change meant the SEC had greater latitude to focus on issues it considers to involve social policy without the complications of understanding how they fit into the context of a particular issue.²²² Moderna argued that decisions to dispose of intellectual property fall within the ordinary business operations exception because the decisions relate to the selling of products and services.²²³ Moderna cited prior no-action letters in Wal-Mart (gun sales) and Wells Fargo (social impact of direct deposit accounts).²²⁴ It also argued that company protection of intellectual property is part of ordinary business and that the proponents requested not just disclosures but transfers of intellectual property.²²⁵ This would be a classic case of an “overly prescriptive” proposal.²²⁶ Moderna acknowledged that “COVID-19 is an issue of global magnitude and importance.”²²⁷ Despite the importance of the issue, Moderna argued that the proposal amounted to micromanagement because “determinations about how to use and protect . . . intellectual property require a deep understanding of the Company’s business, strategy, risk profile and operating environment. . . .”²²⁸

²¹⁹ See Moderna, Inc., 2021 WL 6063317, at 1–24 (Feb. 8, 2022) [hereinafter Moderna].

²²⁰ *Id.* at 3-10.

²²¹ *Id.* at 3.

²²² See *id.*; see also SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (“[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”).

²²³ Moderna, *supra* note 219, at 4.

²²⁴ *Id.* at 5.

²²⁵ *Id.* at 7.

²²⁶ See VANGUARD, *supra* note 15 (reporting that the 2021 revised SEC guidance contributed to a significant increase in overly prescriptive shareholder proposals through which shareholders sought “more disclosure of board oversight practices, lobbying expenditures, and trade association memberships”).

²²⁷ Moderna, *supra* note 219, at 9.

²²⁸ *Id.* at 10.

The SEC denied Moderna's request without explanation.²²⁹ The proposal appeared in Moderna's 2022 Proxy Statement, and shareholders rejected the proposal by a margin of 76% to 24%.²³⁰ Oxfam International, one of the proponents, publicly praised the high percentage of votes secured by this proposal in a losing cause, which it also proposed to Pfizer, another manufacturer of COVID-19 vaccines, with similar results.²³¹ This decision is meaningful on two levels. First, Moderna could not persuade the SEC to issue a no-action letter even when the proposal went beyond disclosure to contemplating the transfer of material intellectual property.²³² Second, the shareholder reaction sent messages the board and management could not ignore.²³³ When proposals that fall short garner significant support (as here), proponents may command the attention of proxy advisors, the board, and management.²³⁴

The Moderna decision leaves issuers and proponents to ponder whether proposals may properly include specific steps that are highly prescriptive and ordinarily considered beyond the competence of shareholders.²³⁵ Because Moderna involved a complex decision with material consequences, one would have placed it within the realm of ordinary business or otherwise shielded from shareholder scrutiny by the prohibition on micromanagement.²³⁶ The SEC's unexplained rejection of Moderna's no-action letter request leads to questions of how the subject matter of an otherwise ordinary business matter colors the SEC's views.²³⁷ One may infer the SEC is balancing the weight of the social policy against consequences for the issuer. Besides questions about the legitimacy of this methodology, the

²²⁹ See *id.* at 1 (stating merely that "the Proposal transcends ordinary business matters and does not seek to micromanage the Company").

²³⁰ *Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), <https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx>.

²³¹ See *Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), <https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology>.

²³² See Moderna, *supra* note 219, at 15.

²³³ See *Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), <https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx>; see also *Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), <https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology>.

²³⁴ See *Significant number of Moderna and Pfizer shareholders support vaccine technology transfer*, OXFAM INT'L (Apr. 28, 2022), <https://www.oxfam.org/en/press-releases/significant-number-moderna-and-pfizer-shareholders-support-vaccine-technology>.

²³⁵ See Moderna, *supra* note 219, at 1, 10.

²³⁶ See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining that the ordinary business exclusion "is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters").

²³⁷ See Moderna, *supra* note 219, at 1.

SEC is ill-equipped to calculate this balance and has few, if any, legal and empirical guideposts to consult. This means the SEC must necessarily step outside its traditional role as regulator of securities markets.

In public statements after the vote, Moderna and some of its large shareholders challenged whether the proposal would attain its stated goal.²³⁸ They pointed to an ample global supply of COVID-19 vaccines and attributed any failure to reach populations to both defects in the supply chain (which Moderna does not control) and the reluctance of local populations to accept the vaccine.²³⁹ Therefore, attaining the proponent's goal would require a properly functioning supply chain and education of the populace.²⁴⁰ In short, the proponent offered no real solution, and local populations would not benefit from their proposal.²⁴¹ If the Moderna pre-proposal conversations between the proponent and Moderna had taken the typical course, Moderna would have explained its viewpoint to the proponent.²⁴² If so, this means the proponent disbelieved Moderna's assessment and substituted its own judgment.²⁴³ While disbelieving is anyone's prerogative, this raises the question: Who is in the best position to evaluate and decide?

The SEC also denied no-action relief to The Walt Disney Company, which faced a proposal from Arjuna Capital concerning pay gaps across race and gender.²⁴⁴ The proposal provided:

Resolved, Shareholders request Disney report on both *median and adjusted* pay gaps across race and gender, including associated policy, reputational, competitive, and operational risks, and risks related to recruiting and training diverse talent. The report should be prepared at reasonable cost, omitting proprietary information, litigation strategy and legal compliance information.

Racial/gender pay gaps are defined as the difference between non-minority and minority/male and female median earnings expressed as a percentage of non-minority/male earnings (Wikipedia/OECD, respectively).²⁴⁵

²³⁸ See *Moderna investors reject proposal to transfer vaccine tech*, FIN. TIMES (Apr. 27, 2022), <https://www.ft.com/content/731ae6a6-fa0d-4781-a6e3-0725e68ce060>.

²³⁹ *Id.*

²⁴⁰ See *id.*

²⁴¹ See *id.*

²⁴² See *Global Access to COVID-19 Vaccines*, MODERNA (Apr. 28, 2022), <https://investors.modernatx.com/Statements--Perspectives/Statements--Perspectives-Details/2022/Global-Access-to-COVID-19-Vaccines/default.aspx> (“[W]e will continue to address issues related to vaccine access and communicate with shareholders and others on this topic.”).

²⁴³ See, e.g., Moderna, *supra* note 219, at 10. (“Proposal seeks to substitute the Proponents’ assessment of the most effective way to address a complicated issue for that of the Company’s board and management, who have been laser-focused on combating the pandemic for nearly two years.”).

²⁴⁴ See *The Walt Disney Co.*, 2021 WL 5052834, at 1 (Jan. 19, 2022).

²⁴⁵ *Id.* at 14 (emphasis in original).

Disney objected to the proposal and, in its request for a no-action letter, argued that this proposal should be excluded on the grounds that it related to ordinary business operations.²⁴⁶ At the core of Disney's objection was its contention that the proposal would compromise the company's position in pending employment lawsuits.²⁴⁷ Disney took this position notwithstanding the express litigation carve-out contained in the proposal, with Disney contending that the litigation includes the "same subject matter as the Proposal."²⁴⁸ The SEC disagreed and was not persuaded that the proposal would compromise Disney's litigation strategy.²⁴⁹

The specific category of social policy issue is relevant to the SEC's no-action process, but the SEC does not explain its methodology.²⁵⁰ In a no-action decision that precedes Disney and Tractor Supply by two years, the SEC issued a no-action letter to Alphabet Inc. concerning a shareholder proposal related to viewpoint-based employment discrimination.²⁵¹ In the Alphabet no-action matter, the NCPPR proposal cloned and slightly modified a shareholder proposal made to CorVel Corporation that read as follows:

RESOLVED, Shareholders request that CorVel Corporation ("CorVel") issue a public report detailing the potential risks associated with omitting "sexual orientation" and "gender identity" from its written equal employment opportunity (EEO) policy. The report should be available within a reasonable timeframe, prepared at a reasonable expense and omitting proprietary information.²⁵²

NCPPR's proposal was identical to the one submitted in CorVel, except the proposal replaced references to "sexual orientation" and "gender identity" with references to "viewpoint" and "ideology."²⁵³ The SEC denied a no-action letter to CorVel, so NCPPR took the position it should deny one to Alphabet Inc., given the apparent identity of the proposals.²⁵⁴

On April 9, 2020, the SEC issued, without reasoning or explanation, the no-action letter requested by Alphabet.²⁵⁵ NCPPR submitted a request for

²⁴⁶ *Id.* at 6.

²⁴⁷ *Id.* at 5-6.

²⁴⁸ *Id.* at 3.

²⁴⁹ *See id.* at 1 ("In our view, the Proposal does not deal with the Company's litigation strategy or the conduct of litigation to which the Company is a party.")

²⁵⁰ *See* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021). Instead, the SEC seems to only indicate that it would "consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company." *Id.*

²⁵¹ *See* Alphabet Inc., 2020 WL 605360, at 1 (Apr. 9, 2020).

²⁵² *Id.* (quoting CorVel Corp. 2019 WL 1640021, at 3 (June 5, 2019)).

²⁵³ *Id.* at 4.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 1.

reconsideration to the SEC.²⁵⁶ In it, NCPPR argued that viewpoint discrimination was very much like sexual orientation discrimination in that both receive varying degrees of protection under state law.²⁵⁷ This would reach the significant social policy threshold that would transcend the ordinary business exception.²⁵⁸ The NCPPR pointed out that neither Alphabet Inc. nor the SEC had even discussed CorVel in their submissions, which, in NCPPR's view, was highly persuasive or even controlling.²⁵⁹ The NCPPR then attacked the SEC's reliance on two pre-CorVel Staff Legal Bulletins.²⁶⁰ These furnished the authority for the proposition that a proposal excludable for one issuer may not be excludable for another.²⁶¹

This raises the question: What are the discernable characteristics of an issuer that would trigger a different outcome in similar circumstances? Given Staff Legal Bulletin 14L's mandate to disregard issuer differences, the decision rested upon the difference between sexual orientation and viewpoint discrimination.²⁶² The NCPPR attributed this to the SEC's then-recognized approach as using Rule 14a-8 "under the guise of determining the substantiality of the issue raised by the proposal—as a multi-factor test that allows the Staff to aggregate grounds, none of which themselves justify exclusion, into a 'lump-sum' exclusion decision."²⁶³ The NCPPR's contention that the SEC had migrated to a multi-factor test largely derived from now-superseded 2017 and 2018 Staff Legal Bulletins with a particular focus on how they invite boards of directors to involve themselves in determining social policy concerns that take a matter beyond ordinary business.²⁶⁴ Under the now-superseded Staff Legal Bulletin 14J, the SEC furnished guidance to boards of directors to address this question in multi-part factors that focused on the importance of the matter from the perspective of the issuer and its board, including materiality, whether actions had already been taken in relation to the subject matter and shareholder engagement.²⁶⁵

Recently, the SEC has either eliminated or deemphasized particular corporate circumstances as a factor, shifting its approach to favor uniformity

²⁵⁶ *Id.*

²⁵⁷ Alphabet, Inc., 2020 WL 2466907, at 1 (Apr. 15, 2020).

²⁵⁸ See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).

²⁵⁹ Alphabet, Inc., 2020 WL 2466907, at 2 (Apr. 15, 2020).

²⁶⁰ *Id.* at 4-5, 30 (citing SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017) & SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018)).

²⁶¹ *Id.* at 5.

²⁶² See *id.* at 1-2 (explaining that it is impossible to eliminate the supposition that the SEC based their decision on distinguishing between similarly situated proposals, where the only difference was that the proposal in this case, unlike the proposal in *CorVel* that dealt with sexual orientation discrimination, involved viewpoint discrimination).

²⁶³ *Id.* at 2.

²⁶⁴ *Id.* at 4-5.

²⁶⁵ SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018).

without regard to issuer circumstances.²⁶⁶ If the NCPPR correctly stated the SEC's position and methodology that existed at the time, then proponents would benefit from an explanation from the SEC of how the SEC applied the multi-factor test.²⁶⁷ What were the factors, and how did each weigh in the ultimate decision? But the SEC has furnished no guidance.²⁶⁸ With no reasons or explanations, neither issuers nor proponents could understand with any confidence what was required.²⁶⁹ In the NCPPR's view, this would further lead not just to the appearance of bias, but would also open the door to political bias by the Staff.²⁷⁰ This fosters bad public policy, and the SEC acted "in contravention of its own published guidance."²⁷¹ This problem was not lost on the Staff.²⁷² As noted, Staff legal bulletins now make increasingly difficult differences in issuer circumstances as a factor in whether a proposal must appear.²⁷³ But this just means the social policy issue takes center stage when no one knows its contours.²⁷⁴ This issue has insurmountable problems of understanding and interpretation.²⁷⁵ Now, an outcome would be governed solely by the social policy matter in the proposal and not the identity or

²⁶⁶ See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) ("[S]taff will no longer focus on determining the nexus between a policy issue and the company.").

²⁶⁷ See Alphabet, Inc., 2020 WL 2466907, at 2 (Apr. 15, 2020) ("Multi-factor tests are often used in the law, but where they are used, they are carefully explained. These explanations allow parties to understand how the various factors have been weighed, and what contrary considerations have been taken into account and why they have been found wanting, so that parties know how to fashion their behavior in the future.").

²⁶⁸ *Id.* ("But this change in the treatment of Rule 14a-8(i)(7) has come exactly as the Staff has shifted to providing no explanation of any kind for many of its decisions. It provided no explanation in this proceeding.").

²⁶⁹ *Id.* at 6 ("When such very case-specific decisions are made, but no explanations are provided, parties are left with no idea at all what factors were decisive and which were less or not relevant, and how all of the various factors fit together. This leaves parties with no information about how to proceed in future cases.").

²⁷⁰ *Id.* at 8 ("[F]acts that on their own would be insufficient to trigger any other ground to permit exclusion can be amalgamated together to somehow result in exclusion under the ordinary-business exception – and the staff will, at its sole determination, refuse to explain just how that alchemy occurred. This will leave room for the inference that the staff is merely excluding proposals with which it disagrees on the basis of substantive policy, even though such subject-matter considerations are, by regulation, supposed to play no part in its analysis.").

²⁷¹ *Id.* at 9.

²⁷² See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).

²⁷³ See *id.* ("Under this realigned approach, proposals that the staff previously viewed as excludable because they did not appear to raise a policy issue of significance for the company may no longer be viewed as excludable under Rule 14a-8(i)(7).").

²⁷⁴ See *id.* ("[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.").

²⁷⁵ See *id.* After all, the SEC did not provide much guidance for determining when a proposal raises issues with broad societal impact to where "they transcend the ordinary business of the company." *Id.*

circumstances of the issuer.²⁷⁶ What policies attain favor is not communicated by the SEC.²⁷⁷

Examining Staff refusals to issue no-action letters furnishes a useful, albeit somewhat limited, basis for analysis. It is also useful to examine proposals submitted to shareholders, and this analysis chooses one where social policy and critical business interests align.²⁷⁸ Despite alignment in principle, there remained debate over proper measures to address the problem of child sexual exploitation affecting Meta Platforms Inc., which operates (among other things) Facebook, Instagram, and WhatsApp.²⁷⁹ In 2022, a collection of shareholders introduced the following resolution, which was submitted to a shareholder vote:

RESOLVED: Shareholders request that the Board of Directors issue a report by February 2023 assessing the risk of increased sexual exploitation of children as the Company develops and offers additional privacy tools such as end-to-end encryption. The report should address potential adverse impacts to children (18 years and younger) and to the company's reputation or social license, assess the impact of limits to detection technologies and strategies, and be prepared at reasonable expense and excluding proprietary/confidential information.²⁸⁰

The crux of the proponents' demand was to end Meta's proposed implementation of end-to-end encryption of all its messaging platforms.²⁸¹

²⁷⁶ See *id.* (“[S]taff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal.”).

²⁷⁷ See SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021).

²⁷⁸ See Adrien K. Anderson, *The Policy of Determining Significant Policy Under Rule 14a-8(i)(7)*, 93 DENV. L. REV. ONLINE 183, 196 (2016) (explaining that shareholder proposals implicating “ordinary business” should be weighed against social policy implications because shareholders submitting proposals regarding a company’s business typically select topics that raise some public concern).

²⁷⁹ See, e.g., Antigone Davis, *Preventing Child Exploitation on Our Apps*, META NEWS (Feb. 23, 2021), <https://about.fb.com/news/2021/02/preventing-child-exploitation-on-our-apps/> (explaining Meta’s targeted solutions for combating child exploitation).

²⁸⁰ *Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>; see also META, 2022 NOTICE OF ANNUAL MEETING & PROXY STATEMENT 81 (2022), https://materials.proxyvote.com/Approved/30303M/20220401/NPS_504647/?page=81. The Child Sexual Exploitation Online shareholder resolution was filed by Proxy Impact (on behalf of Lisette Cooper), Adrian Dominican Sisters, CommonSpirit Health, Congregation of St. Joseph, Dana Investment Advisors, Maryknoll Sisters, Providence St. Joseph Health, Sisters of the Presentation of the Blessed Virgin Mary, and Ms. Linda Wisnewski. *Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>.

²⁸¹ See *Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm> (“Shareholders are not opposed to encryption, but we believe that Meta should apply new privacy

According to the proponents, this form of encryption would “cloak the actions of child predators, make children more vulnerable,” and cause incidents of sexual abuse to go ignored.²⁸² The proponents were sophisticated enough to know the proposal would need to take on the form of a demand for a report and not an overly prescriptive set of demands.²⁸³

In contrast to Moderna, the Meta proposal illustrates how social policy and business interests might align.²⁸⁴ Meta’s mere compliance with the law would not suffice on an issue of family personal safety.²⁸⁵ The questions remained whether the proponents’ charges were valid and whether Meta’s management was doing all it could to address a problem.²⁸⁶ Here, awareness in the shareholder community might exert a largely constructive influence on Meta’s board and management.²⁸⁷ However, the question remains: What is the proper solution? Assuredly, all this entails ordinary business operations, but shareholder involvement, whether in the form of pressure or mere awareness, might, in averting a disaster, be healthy for Meta’s long-term business prospects.²⁸⁸

The Meta proposal may appear to illustrate how well-meaning shareholder proposals affect responsibilities ordinarily reserved for the board.²⁸⁹ Boards have affirmative fiduciary duties of care and loyalty to

technologies in a way that will not pose additional threats to children, like sexual grooming (i.e., the luring or enticement of children for sexual purposes) or exploitation itself. Enhanced internet privacy is important, but it should not come at the expense of unleashing a torrent of virtually undetectable child sexual abuse materials on Meta.”).

²⁸² *Id.*

²⁸³ *See id.*

²⁸⁴ *See id.*; *see also* Moderna, *supra* note 219, at 15.

²⁸⁵ *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm> (“Despite its new policies, the number of CSAM reports from Meta to NCMEC has escalated dramatically year over year.”).

²⁸⁶ *See id.* (“Meta has little to say about its failed age enforcement verification policies that are likely a major contributor to sexual grooming, sextortion and sex trafficking.”).

²⁸⁷ *But see id.* (“Meta’s lack of response to shareholders should also be noted Meta has only offered one call with shareholders in response to our repeated requests beginning 30 months ago. By comparison, shareholders have had productive dialogues and withdrawn resolutions, or not filed resolutions, at Apple, Alphabet, ATT and Verizon and others, as those companies have engaged shareholders on this issue.”).

²⁸⁸ *See Amendments To Rules On Shareholders Proposals*, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240) (describing ordinary business exclusions to apply to proposals “involving business matters that are mundane in nature and . . . do not involve any substantial policy or other considerations”). Meta would not be an example of management of systemic risk posited by Professor Coffee. *See* Coffee, *supra* note 192, at 47-52. The concern is issuer-specific (not systemic) and focuses on Meta’s bottom line, not an unidentified array of other industry actors. *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>.

²⁸⁹ *See Meta, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>.

monitor and address compliance matters.²⁹⁰ No matter whether encryption is required by law, the board has a duty to determine if encryption creates a danger to a large and vulnerable segment of Meta's customer base.²⁹¹ Having a legal duty to do this presents a plausible case for circumstances like Meta to be reserved for the board. Setting aside the very real questions of whether shareholders know the facts and have the competency to address the question, to fulfill its duties, the board must inquire and obtain answers to whether a specific method of encryption presents a credible threat and, if so, how to address it. Meta now has a history of legal violations related to customer data, including class action settlements for violating state biometric data laws²⁹² and for improper sharing of customer data with third parties.²⁹³ While these may signal failings by the board, the question remains whether these problems are for the board or shareholders to solve.

D. Caselaw Does Not Address SEC Problems

In the leading case deciding a social policy issue, *Trinity Wall Street v. Wal-Mart Stores, Inc.*,²⁹⁴ a shareholder submitted a proposal asking Wal-Mart's board of directors to consider whether to continue selling high-capacity firearms in light of dangers to the public and reputational risk.²⁹⁵ The United States Court of Appeals for the Third Circuit was tasked with reviewing a district court ruling that held Wal-Mart could not exclude the proposal.²⁹⁶ The district court ruled that the proposal did not involve ordinary business because it concerned the board of directors, not management.²⁹⁷ The Third Circuit reversed the district court and rejected strict limitation to board

²⁹⁰ *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 970 (Del. Ch. 1996) (approving settlement: "It is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility."); *see also* *Paramount Commc'ns, Inc. v. QVC Network Inc.*, 637 A.2d 34, 43-44 (Del. 1993) (quoting *Mills Acquisition Co. v. MacMillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1989)); *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

²⁹¹ *See* META, 2022 NOTICE OF ANNUAL MEETING & PROXY STATEMENT 82 (2022), available at https://materials.proxyvote.com/Approved/30303M/20220401/NPS_504647/?page=1 ("Our goal is to provide the highest levels of private, secure communication while keeping people safe on our platforms.").

²⁹² *See* *Parris v. Meta Platforms, Inc.* No. 20023 LA 000672 Ill. Cir. Ct. Nov. 21, 2023, INSTAGRAM PRIV. SETTLEMENT, <https://instagrabipasettlement.com> (last visited Jan. 30, 2024).

²⁹³ *See In re: Facebook, Inc. Consumer Privacy User Profile Litigation, No. 3:18-md-02843-VC N.D. Cal. Sept. 7, 2023*, FACEBOOK CONSUMER PRIV. USER PROFILE LITIG., <https://www.facebookuser.privacysettlement.com/#submit-claim> (last visited Jan. 30, 2023).

²⁹⁴ *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

²⁹⁵ *Id.* at 327.

²⁹⁶ *See id.* at 327-38.

²⁹⁷ *Id.*

involvement as a standard for the ordinary business exclusion.²⁹⁸ Instead, the court concluded the subject of the proposal is its ultimate consequence (whether a matter for the board or management), in this case, a potential change in the way Wal-Mart decides what products to sell.²⁹⁹ The court viewed the proposal, ultimately, as directed toward the products Wal-Mart would or would not sell.³⁰⁰ Understood in that manner, the proposal fell within the ordinary business exclusion.³⁰¹ However, the purpose of the social policy provision was to put ordinary business matters that are transcended by social policy considerations to a shareholder vote.³⁰² This the court did not do.³⁰³ To illustrate this, the court contrasted a proposal to consider banning the sale of sugary drinks against matters of employment discrimination.³⁰⁴ The first, like the case at hand, involves ordinary business, while the latter can be found to trigger social policy issues that transcend ordinary business.³⁰⁵ This view would vary the social policy exception based on the type of conduct involved rather than the generalized impact on society with a special (and perhaps unjustified) carve out for business line decisions.³⁰⁶ The sale of guns and drinks constitutes ordinary business, yet for some, they raise social policy concerns.³⁰⁷

Trinity Wall Street declined to recognize social policy when the matter involves the decision to be in a particular business line.³⁰⁸ The case ignored social policy in matters involving business line proposals, which otherwise is intended to permit the proposal even when involving ordinary business, so long as it does not micromanage the business.³⁰⁹ Both the social policy and micromanagement tests that appear in SEC releases have been subjected to notice and comment rulemaking.³¹⁰ To handle this, the court resorted to its own judicially created exception to an exception contained within an

²⁹⁸ *Id.* at 342.

²⁹⁹ *Id.* at 342.

³⁰⁰ *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 342 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

³⁰¹ *See id.* at 351 (“[W]e hold here that Trinity’s proposal is excludable from Wal-Mart’s proxy materials under Rule 14a-8(i)(7).”).

³⁰² *Id.* at 346-47.

³⁰³ *See id.* at 347.

³⁰⁴ *Id.*

³⁰⁵ *Id.* (establishing a test that involved inquiring whether the challenged activity was “disengaged from the essence of a . . . business.”).

³⁰⁶ *See Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 347 (3d Cir. 2015), *cert. dismissed*, 577 U.S. 982 (2015).

³⁰⁷ *See, e.g., id.* at 348 (explaining Trinity’s view that Walmart’s merchandising decisions regarding dangerous products directly raise social policy concerns).

³⁰⁸ *See id.* at 351 (“For a policy issue here to transcend Wal-Mart’s business operations, it must target something more than the choosing of one among tens of thousands of products it sells.”).

³⁰⁹ *See id.* at 349-50.

³¹⁰ *See, e.g.*, SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (providing tests for determining when a shareholder proposal triggers the significant social policy exception and when it micromanages a company).

exclusion.³¹¹ *Trinity Wall Street* establishes no broad proposition upon which analysis can be built but (in the author's view) was correct to classify business line decisions as ordinary business.

More than two decades before *Trinity Wall Street*, the United States Court of Appeals for the District of Columbia ruled that the ordinary business exclusion permits an issuer to resist a shareholder proposal requesting the board of directors of a chemical company expedite plans to phase out production of chlorofluorocarbons and halon.³¹² In *Roosevelt v. E. I. Du Pont de Nemours & Co.*,³¹³ the issuer sought and obtained a no-action letter approving exclusion on the grounds of ordinary business operations.³¹⁴ When the proponent challenged the issuer's denial, the court had to decide two issues: (1) whether the proponent enjoyed a private right of action to challenge the decision in court and (2) whether the ordinary business exclusion applied.³¹⁵

In an opinion by then-judge Ruth Bader Ginsburg, the court ruled a private right of action exists but that the proposal was properly excluded as ordinary business operations.³¹⁶ Because *Roosevelt* did not involve employment matters, Cracker Barrel was not in play.³¹⁷ Instead, the outcome turned on the lack of disagreement between the issuer and proponent about the need to phase out the products in question.³¹⁸ The proponent merely sought to expedite the timeline,³¹⁹ resulting in a potential difference of one year in the timing of the implementation—a relatively short time span.³²⁰ While the court did not use the term “micromanagement,” the narrowness and specificity of the disagreement would support classification as micromanagement.³²¹ *Roosevelt* furnishes support for the requirement that proposals of social policy weight must avoid micromanagement.³²² However, the court did not articulate its ruling in these terms.³²³

³¹¹ See *Trinity*, 792 F.3d at 347 (establishing a test that involved inquiring whether the challenged activity was “disengaged from the essence of a . . . business.”).

³¹² See *Roosevelt v. E. I. Du Pont de Nemours & Co.*, 958 F.2d 416, 417 (D.C. Cir. 1992).

³¹³ *Id.*

³¹⁴ *Id.* at 418.

³¹⁵ See *id.*

³¹⁶ *Id.* at 429.

³¹⁷ See *id.* at 417-18; see also Cracker Barrel Old Country Store, Inc., SEC No-Action Letter, [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 76,418 (Oct. 13, 1992).

³¹⁸ See *Roosevelt v. E. I. Du Pont de Nemours & Co.*, 958 F.2d 416, 425 (D.C. Cir. 1992) (“[W]e emphasize that Roosevelt’s disagreement with Du Pont’s current policy is not about whether to eliminate CFC production or even whether to do so at once.”).

³¹⁹ *Id.* at 427.

³²⁰ See *id.* at 428 (“The gap between [Roosevelt’s] proposal and the company’s schedule is now one year, not five.”).

³²¹ See *id.* at 427-28; see also SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining when a proposal micromanages a company).

³²² See *id.*

³²³ See *id.* at 428.

Importantly, the court did not accord dispositive weight to “the President’s headline-attracting decision to accelerate the [phase-out] schedule initially set by Congress.”³²⁴ This momentous event did not create any substantial policy question, which the court instead required to be encapsulated in the content of the proposal (and which it found to be lacking).³²⁵ One might view this decision as one of deference to the issuer’s scientific and operational experts.³²⁶ Another way to view it is there was nothing of importance for the shareholders.³²⁷ The proponent got its way, cutting the interval down to one year.³²⁸

A United States District Court ruling followed *Trinity Wall Street* to exclude a shareholder proposal to phase out a public utility’s fossil fuel plant and replace it with renewable energy within an identified time period.³²⁹ In *Tosdal v. NorthWestern Corporation*,³³⁰ the court (like the *Trinity Wall Street* court) examined whether the proposal was “too entwined with the fundamentals of the daily activities of a public utility running its business.”³³¹ The court concluded the proposal was too entwined for submission to a shareholder vote because it proposed a myriad of scientific and operational considerations inappropriate for involvement at the shareholder level.³³² This allowed the court to reject Tosdal’s argument that the proposal was no different than the nuclear power plant example, deemed fair game for a proposal in the 1976 Release.³³³ Like *Roosevelt*, *Tosdal* was about micromanagement.³³⁴ While the opinion cited *Trinity Wall Street*, *Tosdal* reached its results differently.³³⁵ Examining whether the activity goes to questions of product mix would not reach the *Tosdal* result.³³⁶ In *Tosdal*, the

³²⁴ *Roosevelt v. E. I. Du Pont de Nemours & Co.*, 958 F.2d 416, 428 (D.C. Cir. 1992).

³²⁵ *See id.* (“Rule 14a-8I(7) requires us to home in on Roosevelt’s proposal, to determine whether her request dominantly implicates ordinary business matters.”). Unresolved is whether “significant policy” means the same as “social policy,” the term now used. *See id.*

³²⁶ *See id.* (affirming the district court’s finding that the steps for accomplishing the phase out are complex to where day-to-day business and technical skills are necessary).

³²⁷ *See id.* (affirming the district court’s finding that the steps for accomplishing the phase-out are complex enough to where they are not meant for shareholder participation and debate).

³²⁸ *See id.* (“Du Pont has undertaken to eliminate the products in question by year-end 1995, and has pledged to do so sooner if ‘possible.’”).

³²⁹ *See Tosdal v. NorthWestern Corp.*, 440 F. Supp. 3d 1186, 1188–89 (D. Mont. 2020).

³³⁰ *Id.*; *cf. New York City Emps.’ Ret. Sys. v. Dole Food Co.*, 795 F. Supp. 95, 100-01 (S.D.N.Y. 1992), *appeal dismissed*, 969 F.2d 1430 (2d Cir. 1992) (rejecting issuer’s request to exclude shareholder proposal related to employee healthcare program because the proposal “primarily relates to Dole’s policy making on an issue of social significance. . .”).

³³¹ *Tosdal v. NorthWestern Corp.*, 440 F. Supp. 3d 1186, 1198 (D. Mont. 2020).

³³² *See id.* at 1199-1200 (finding that Tosdal “is not well-positioned to opine on the basic planning choices made by NorthWestern’s management”).

³³³ *Id.*

³³⁴ *See id.*; *see also* SEC Staff Legal Bulletin No. 14L (CF) (Nov. 3, 2021) (explaining when a proposal micromanages a company).

³³⁵ *See Tosdal*, 440 F. Supp. 3d at 1198–1200.

³³⁶ *See id.*

core business was the sale of energy, and the proposal, while impactful on the business, said nothing about the sale of the product.³³⁷ While *Tosdal* did not use the term “micromanagement,” the court saw the proposal (which was not grounded in technical proficiency with nuclear energy) as presenting potential interference with day-to-day business management, which is the prerogative of management and the board.³³⁸

IV. EXPLAINING THE INCONSISTENCIES AND DEFICIENCIES IN GUIDANCE

This Part attempts to explain the inconsistencies in SEC approaches by pinpointing some of their origins and explains how deficiencies in guidance result in uncertainty for proponents and issuers alike, especially when social policy issues exist.

A. Commission and Staff

The SEC’s occasionally inconsistent handling of no-action requests creates a blind alley for proponents and issuers alike.³³⁹ Part IV. A. attempts to analyze the SEC’s methodologies in the issuance of no-action letters related to shareholder proposals involving the ordinary business operations exclusion. To start, one must understand the difference between the “Commission” and the SEC Staff (the “Staff”). In furtherance of its mission “to maintain fair, orderly and efficient markets and facilitate capital formation,”³⁴⁰ the Commission “promulgates rules and regulations, which generally have the force and effect of law, and enforces compliance with its rules and regulations.”³⁴¹ In contrast, the Staff makes its views known about SEC rules and regulations and may issue guidance to parties about how they apply.³⁴² No-action letters are included in this guidance and issued by the Staff.³⁴³ Importantly, the “Commission’s longstanding position is that all Staff statements are nonbinding and create no enforceable legal rights or obligations of the Commission or other parties.”³⁴⁴ When evaluating

³³⁷ *See id.*

³³⁸ *See id.*

³³⁹ *See, e.g.,* Anderson, *supra* note 278, at 183 (noting that the SEC’s Staff has applied the public policy exception “in the absence of meaningful and objective standards, resulting in ambiguous and inconsistent interpretations”).

³⁴⁰ Jay Clayton, Chairman, Statement Regarding SEC Staff Views, U.S. SEC. & EXCH. COMM’N (Sept. 13, 2018), https://www.sec.gov/news/public-statement/statement-clayton-091318#_ftnref1.

³⁴¹ *Id.*

³⁴² *Id.*

³⁴³ *Id.* (“Staff of the SEC frequently make their views known through a variety of communications, including written statements, compliance guides, letters, speeches, responses to frequently asked questions and responses to specific requests for assistance.”).

³⁴⁴ *Id.*

prospects for judicial review, one must understand if the Commission or the Staff has taken SEC action.³⁴⁵ Because Staff-prepared no-action letters predominate decision making related to shareholder proposals, Staff responses have come to be viewed as de facto, legally-consequential adjudications, despite the Staff's insistence that there are no legal consequences to the issuance of no-action letters.³⁴⁶

Because no-action letters comprise mere Staff guidance, courts have no jurisdiction to review no-action letters or compel their issuance.³⁴⁷ In *Amalgamated Clothing and Textile Workers Union v. SEC*,³⁴⁸ a pension fund brought a shareholder-proposal-related challenge against the SEC under Section 25(a)(1) of the Securities Exchange Act of 1934.³⁴⁹ The pension fund sought judicial review of the SEC's no-action decision pertaining to the fund's proposal that would require the issuer to evaluate then-current healthcare reform proposals.³⁵⁰ The United States Court of Appeals for the Second Circuit ruled that because the no-action letter binds no one, the court lacked jurisdiction to hear the case.³⁵¹ Under this ruling, a shareholder may only judicially challenge pronouncements of the Commission that have the force of law.³⁵²

Likewise, courts are not bound to observe Staff Legal Bulletins, although, like a no-action letter, they may find them persuasive or helpful in understanding an issue.³⁵³ Staff Legal Bulletins, which may have immense substantive impact on registrants and proponents alike, are not part of the SEC's rulemaking function and are not legally binding.³⁵⁴ For example, this Article has discussed how Staff Legal Bulletins have differed over time on the question of whether to recognize differences in issuer circumstances.³⁵⁵

³⁴⁵ See *id.* (“Statements issued by SEC staff frequently include a disclaimer underscoring the important distinction between the Commission’s rules and regulations, on the one hand, and staff views on the other.”).

³⁴⁶ Steel, *supra* note 33, at 1554 n.52.

³⁴⁷ See, e.g., *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254, 257–58 (2d Cir. 1994).

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 255.

³⁵⁰ *Id.*

³⁵¹ See *id.* at 257 (“Administrative orders, such as those issued by the SEC, are not reviewable ‘unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.’”).

³⁵² See *id.*

³⁵³ See, e.g., *Argentinian Recovery Co. v. Bd. of Dirs. of Multicanal S.A.*, 331 B.R. 537, 550 (S.D.N.Y. 2005) (explaining that a staff bulletin may provide “guidance based on expertise, which should be considered.”).

³⁵⁴ *Staff Legal Bulletins*, SEC, <https://www.sec.gov/regulation/staff-interpretations/legal-bulletins#:~:text=Staff%20Legal%20Bulletins%20summarize%20the,Management%20on%20an%20given%20matter> (last visited Jan. 30, 2024).

³⁵⁵ See, e.g., Laura Carrier, *Raising the Floor from the Back Door: Shareholder Proposals as a Mechanism for Raising Minimum Wage*, 80 WASH. & LEE L. REV. 1239, 1255–56 (2023)

All were accomplished without public comment, administrative procedure, or judicial review.³⁵⁶ These safeguards do not apply because these matters are considered internal to the agency, even though they have immense public impact.³⁵⁷

On the other hand, final agency action under SEC rulemaking, such as in releases under the various federal securities laws, will be available for judicial scrutiny, albeit entitled to certain quantities of judicial deference to the agency.³⁵⁸ In *Natural Resources Defense Council, Inc. v. SEC*,³⁵⁹ an environmental activist group challenged the SEC's failure to require issuer reporting of data arising under the National Environmental Protection Act (NEPA) and reporting of employment-related information relevant under Title VII of the Civil Rights Act of 1964.³⁶⁰ The case was about what disclosures the SEC should require of issuers, and the shareholder activists sought more rigorous disclosures.³⁶¹ The United States District Court for the District of Columbia held that the SEC Release under review arose pursuant to rulemaking under the Administrative Procedure Act (APA)³⁶² and constituted judicially reviewable final agency action.³⁶³ The court then concluded that a reasonable investor would want the information sought by the activists, and therefore, "the SEC has not entered into an informed and reasoned consideration of the changes which it should effect in its disclosure rules and regulations as a result of NEPA's passage."³⁶⁴ The court made it clear that it had both a duty and a prerogative to determine whether the action of the Commission adhered to the statute: "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."³⁶⁵ Interestingly, the court ruled in

(explaining that SEC Staff Legal Bulletin 14L, issued in November 2021, rejected the approach of accounting for a particular company's circumstance to determine a policy issue's significance).

³⁵⁶ See *Staff Legal Bulletins*, SEC, <https://www.sec.gov/regulation/staff-interpretations/legal-bulletins#:~:text=Staff%20Legal%20Bulletins%20summarize%20the,Management%20on%20any%20given%20matter> (last visited Jan. 30, 2024).

³⁵⁷ See *id.*; see also Christina M. Thomas et al., *Responding to Rule Changes When the Rule Has Not Actually Changed: How Companies Should Approach Shareholder Proposals This Proxy Season*, KIRKLAND & ELLIS (Nov. 17, 2022), <https://www.kirkland.com/publications/kirkland-alert/2022/11/shareholder-proposals-this-proxy-season> (explaining that under SEC Staff Legal Bulletin No. 14L, "years of staff guidance and no-action precedent could no longer be relied upon, which resulted in increased costs for companies to evaluate and prepare no-action requests, only to have them denied.").

³⁵⁸ See 5 U.S.C. § 704 (2023) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

³⁵⁹ *Nat. Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689 (D. D.C. 1974).

³⁶⁰ *Id.* at 692.

³⁶¹ *Id.* at 692, 694.

³⁶² 5 U.S.C. §§ 551–559 (2023).

³⁶³ *Nat. Res. Def. Council, Inc.*, 389 F. Supp. at 696.

³⁶⁴ *Id.* at 699.

³⁶⁵ *Id.* (quoting *NLRB v. Brown*, 380 U.S. 278, 291–92 (1965)).

this manner without citation to the actual statutory text that made the exclusion of the contested issues so troubling and merited overriding the agency's will.³⁶⁶

A decade after *Natural Resources Defense Council*, the United States Supreme Court issued its transformational ruling in *Chevron v. NRDC*.³⁶⁷ *Chevron* clarified standards for judicial deference to agency rulemaking.³⁶⁸ Under *Chevron*, a court should defer to an agency's interpretation of an ambiguous term in a statute.³⁶⁹ More precisely, "[l]egislative regulations are given controlling weight unless they are arbitrary, capricious or manifestly contrary to the statute."³⁷⁰ This contrasts with the less deferential *Natural Resources Defense Council* standard, where the reviewing court is free to adopt its own interpretation of the ambiguous statute without required deference to the agency.³⁷¹ Through their breadth and ambiguity, securities laws—which delegate to the SEC authority "to protect interstate commerce, the national credit, the Federal taxing power, to protect and make more effective the national banking system and Federal Reserve System, and to insure the maintenance of fair and honest markets in [securities] transactions"³⁷²—afford latitude to the SEC under *Chevron*.³⁷³ Today, one would be hard-pressed to find a case where a court substituted its judgment for the SEC on core disclosure issues of the type reviewed in *Natural Resources Defense Council*.³⁷⁴

Whether *Natural Resources Defense Council* retains its vitality in light of *Chevron*, the case furnishes an opportunity to explain when judicial review might be available to affected parties. This depends in large measure on whether and how the APA applies.³⁷⁵ Under the APA, the court may review "agency action," which "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."³⁷⁶ Relevant to our purpose would be the agency action that comprises a rule. A rule is:

the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe

³⁶⁶ See *id.*

³⁶⁷ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

³⁶⁸ See *id.* at 864–65.

³⁶⁹ *Id.*

³⁷⁰ *Gryl ex. rel. Shire Pharms. Grp. PLC v. Shire Pharms. Grp. PLC*, 298 F.3d 136, 145 n.8 (2d Cir. 2002), *cert. denied*, 537 U.S. 1191 (2003) (citing *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984)).

³⁷¹ *Nat. Res. Def. Council, Inc. v. SEC*, 389 F. Supp. 689, 698–99 (D. D.C. 1974).

³⁷² 15 U.S.C. § 78b (2018).

³⁷³ See *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 844 (1984).

³⁷⁴ See *id.*; *Nat. Res. Def. Defense Council, Inc.*, 389 F. Supp. at 689.

³⁷⁵ Administrative Procedure Act, 5 U.S.C. §§ 551–559.

³⁷⁶ *Id.* at § 551(13).

law or policy or describing the organization, procedure or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.³⁷⁷

Inter alia, a reviewing court shall hold unlawful and set aside agency action (which includes the making of a rule) that is “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.”³⁷⁸ An agency’s interpretative rules, general statements of policy, rules of agency organization, procedure, or practice (such as the activities of the Staff) are not part of rulemaking³⁷⁹ and, therefore, not subject to judicial review applicable to an agency rule.³⁸⁰ No-action letters fall within this category of unreviewable agency procedure or practice even though, in practice, they express rules and have great influence not just on whether a proposal appears but on investor and issuer behavior generally.³⁸¹

B. Interpretive Rule Versus Legislative Rule

The conventional view is Staff Legal Bulletins, which are informal opinions of the Staff are (like no-action letters) not judicially reviewable.³⁸² On the other hand, Exchange Act Releases are subject to judicial review, and the outcome may depend on whether they comprise legislative or mere interpretive rules.³⁸³ A legislative rule is subject to judicial review under an arbitrary and capricious/abuse of discretion standard.³⁸⁴ An interpretive rule is subject to judicial review under a more relaxed standard.³⁸⁵ An interpretive rule will be upheld unless “plainly erroneous or inconsistent with the regulation.”³⁸⁶ The distinction applies no matter how significant the outcome

³⁷⁷ *Id.* at § 551(4).

³⁷⁸ *Id.* at § 706(2) (A-C).

³⁷⁹ *Id.* at § 553(b)(A).

³⁸⁰ *Id.*

³⁸¹ *See* 5 U.S.C. §704.

³⁸² *See* Steel, *supra* note 33, at 1557 n.78.

³⁸³ *See* W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp., 472 S.E.2d 411, 422 (W. Va. 1996); Auer v. Robbins, 519 U.S. 452, 461 (1997).

³⁸⁴ W. Va. Health Care Cost Rev. Auth., 472 S.E.2d at 422. (“A valid legislative rule is entitled to substantial deference by the reviewing court. As a properly promulgated legislative rule, the rule can be ignored only if the agency has exceeded its constitutional or statutory authority or is arbitrary or capricious.”).

³⁸⁵ *See* Auer, 519 U.S. at 461.

³⁸⁶ *Id.* (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

of the decision is.³⁸⁷ An interpretive rule that extracts meaning from an ambiguity can be as weighty in its effects as a legislative rule.³⁸⁸

In *Clarry v. United States*, the court decided whether the Federal Office of Personnel Management could enforce a rule barring the re-hiring of air traffic controllers who had been fired during the 1982 strike by the Federal Aviation Administration.³⁸⁹ The controllers contended the decision violated the APA because it comprised a legislative rule that required notice and comment rulemaking.³⁹⁰ The United States Court of Appeals for the Second Circuit disagreed, holding that because interpretive rules such as the one under review do not create rights but merely clarify an existing statute or rule, they do not require notice and comment rulemaking under the APA.³⁹¹ Pivotal to the decision was the fact that the policy did not create new laws, rights, or duties and did not confer a right to employment to the aggrieved controllers.³⁹²

The decision is analytically unsatisfactory because it relies on an unusual distinction between the conferment of new rights (which would require rulemaking) and the curtailment of rights (which would not). The ordinary business operations exclusion, discussed in this Article, is a case in point for this problematic dichotomy. Nothing in the actual text of Rule 14a-8 addresses social policy questions that would cause the ordinary business operations exclusion not to apply.³⁹³ Likewise, the Rule has nothing to say about micromanagement, another material determinant of whether a shareholder proposal is heard.³⁹⁴ This means that even when expressed in SEC Releases, these critical determinants are reviewed as interpretive rules, examined under the lenient “plainly erroneous or inconsistent with the regulation” standard.³⁹⁵ Whether these are not legislative rules is open to question.³⁹⁶ Even if viewed as legislative rules, it is unclear if the standard would be invalidated as arbitrary or capricious.³⁹⁷ When these material determinants arise in no-action letters and Staff guidance, they are not subject to any judicial review under the APA.³⁹⁸ In the context of shareholder proposals, there is no case that holds any no-action letter or Staff Bulletin to

³⁸⁷ See generally *id.*

³⁸⁸ See *id.* at 463 (finding that an agency has the power to resolve ambiguities in its own regulations).

³⁸⁹ *Clarry v. U.S.*, 85 F. 3d 1041, 1045 (2d Cir. 1996).

³⁹⁰ *Id.* at 1048.

³⁹¹ *Id.*

³⁹² *Id.* at 1048-49.

³⁹³ See 17 C.F.R. § 240.14a-8 (2013).

³⁹⁴ See *id.*

³⁹⁵ See *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

³⁹⁶ See generally *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993) (defining a legislative rule as one that “grants rights, imposes obligations, or produces other significant effects on private interests.”).

³⁹⁷ See generally *W. Va. Health Care Cost Rev. Auth. v. Boone Mem’l Hosp.*, 472 S.E.2d 411, 422 (W. Va. 1996).

³⁹⁸ See Administrative Procedure Act, 5 U.S.C. §704.

involve an interpretive rule.³⁹⁹ Instead, these fall outside rulemaking altogether and are generally not judicially reviewable under any standard.⁴⁰⁰

C. Internal Procedure Versus Rule

Another way of resolving the important question of whether agency action or policy comprises a rule is whether it involves internal agency procedure.⁴⁰¹ Staff activities will largely be deemed internal to the agency, no matter the public consequences.⁴⁰² There is, however, authority to challenge this view when internal agency procedure impacts the public.⁴⁰³ In *Military Order of Purple Heart of USA v. Secretary of Veteran's Affairs*, veterans' organizations challenged a change to a Veteran's Administration policy that potentially reduced veterans' awards without notice to affected veterans.⁴⁰⁴ The veterans challenged the policy as a rule that required notice and comment rulemaking under the APA.⁴⁰⁵ The Veterans' Administration contended that the policy amounted to a mere internal procedure and not a rule.⁴⁰⁶ The Federal Circuit held that a procedure that redetermines awards without the knowledge of the affected veteran violates regulations and requires notice and comment under the APA.⁴⁰⁷

Military Order of Purple Heart illustrates that even bulletins prepared by the Staff could require rulemaking if the procedures outlined in the bulletins affect the public and violate a rule, as was the case with the Cracker Barrel no-action letter.⁴⁰⁸ In general, the Staff Bulletins discussed in this Article are addressed to the public and have no relationship to internal procedures.⁴⁰⁹ Therefore, under *Military Order of Purple Heart*, the SEC

³⁹⁹ See *Gryl ex rel. Shire Pharms. Group Plc v. Shire Pharms. Group Plc*, 298 F.3d 136, 145 (2d Cir. 2002); *Argentinian Recovery Co., LLC v. Bd. Dirs. Multicanal S.A.*, 331 B.R. 537, 550 (S.D.N.Y. 2005) (“Even if courts are not obligated to give full *Chevron* deference to this staff bulletin, . . . the bulletin provides guidance based on expertise, which should be considered.”).

⁴⁰⁰ See *Gryl ex rel. Shire Pharms Group Plc*, 298 F.3d at 145 (“[S]EC no-action letters constitute neither agency rule-making nor adjudication and thus are entitled to no deference beyond whatever persuasive value they might have . . .”).

⁴⁰¹ See 5 U.S.C. § 553(b)(A).

⁴⁰² See *James v. Hurson Ass'n v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000) (holding that the procedural exception applies to “agency actions that do not themselves alter the rights or interests of parties, although it may alter the manner in which the parties present themselves or their viewpoints to the agency.”).

⁴⁰³ See *Mil. Ord. Purple Heart v. Sec’y of Veterans Affs.*, 580 F.3d 1293 (Fed. Cir. 2009).

⁴⁰⁴ *Id.* at 1294.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.* at 1296.

⁴⁰⁷ *Id.*

⁴⁰⁸ See *id.* at 1293; *Cracker Barrel Old Country Store, Inc., SEC No-Action Letter*, [1992-1993 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 76, 418 (Oct. 13, 1992).

⁴⁰⁹ See generally 17 CFR § 240.14a-8 (2023); *Mil. Ord. Purple Heart v. Sec’y of Veterans Affs.*, 580 F.3d 1293, 1296 (Fed. Cir. 2009).

could not judicially defend these materials as mere internal procedures.⁴¹⁰ The author has found no meaningful attempts to challenge Staff decisions under a theory that they affect the rights of the public. Additionally, the Staff position would be that in any case, in contrast to *Military Order of Purple Heart*, its activities violate no rules.⁴¹¹ The author has found no case involving securities regulation that follows *Military Order of Purple Heart*.⁴¹²

V. RECOMMENDATIONS

Part V presents this Article's recommendations. It begins in Section A by explaining the forces and conditions that have created the disarray surrounding shareholder proposals involving ordinary business operations. Section B will address problems in the ordinary business exclusion and, to correct these problems, recommends the Commission do away with the social policy exception.

A. Forces and Conditions

What forces and conditions have led to the current state of affairs? First, judicial review is not a realistic option. Issuers may face jurisdictional objections over no-action decisions that have no formal legal effect.⁴¹³ And what issuer would relish the chance to bring litigation against its principal federal regulator? Issuers must, therefore, necessarily abide by no-action letter decisions.⁴¹⁴ When the SEC denies a no-action request, in the majority of cases, the issuer submits the proposal without further review of the merits under Rule 14a-8.⁴¹⁵ Proponents may have marginally better access to courts

⁴¹⁰ See *Mil. Ord. Purple Heart*, 580 F.3d at 1296.

⁴¹¹ See generally *James v. Hurson Ass'n v. Glickman*, 229 F.3d 277, 280 (D.C. Cir. 2000); see also *id.* at 1296.

⁴¹² See generally *Mil. Ord. Purple Heart*, 580 F.3d at 1296 (no superseding case law found through Shepherd's). One unresolved issue is whether an agency principally charged with the dispensation of benefits, such as the Veterans' Administration, should be treated differently from a regulatory agency such as the SEC. Cf. *Military-Veterans Advoc. v. Sec'y Veterans Affs.*, 7 F.4th 1110, 1138 (Fed. Cir. 2021) (considering that a statute awarding attorneys' fees is devoid of any indication that a supplemental claim should be treated differently from other types of administrative review, yet no other form of review is subject to the same restrictions on attorneys' fees under the Department of Veterans Affairs' regulation.).

⁴¹³ See e.g., *Amalgamated Clothing & Textile Workers Union v. Wal-Mart Stores, Inc.*, 821 F. Supp. 877, 885 (S.D.N.Y. 1993) ("[A]n SEC no-action letter regarding shareholder proposals . . . does not 'rank[] as an agency adjudication or rulemaking.'").

⁴¹⁴ See *Clarke v. CFTC*, 74 F.4th 627, 634 (5th Cir 2023) ("Only the division that issued the no-action letter is bound by it and only the Beneficiary may rely upon the no-action letter.").

⁴¹⁵ See *KBR Inc. v. Chevedden*, 776 F. Supp.2d 415, 432 n.8 (S.D. Tex. 2011) (listing a number of cases in which the SEC staff rejected no-action requests from companies); see also 17 CFR § 240.14a-8 (2023).

but may lack the resources necessary to bring litigation against well-represented issuers.⁴¹⁶ Proposals are also very time-sensitive, and once deadlines pass, rights diminish, and goals must be pursued by other means.⁴¹⁷

The 1976 Release introduced major social policy considerations, which were not defined and seldom illustrated in a consistent, intelligible manner.⁴¹⁸ As Cracker Barrel taught, these were honored in the breach.⁴¹⁹ In Cracker Barrel, the Staff upended these with respect to employment matters without resorting to notice and comment rulemaking.⁴²⁰ The 1998 Release reinstated social policy without subject matter restrictions but did nothing to shape the contours of social policy issues eligible for proposal.⁴²¹ Instead, the SEC left the no-action letter process to a string of either inconsistent or indecipherable no-action decisions.⁴²² Concomitantly, the SEC has vacillated over time.⁴²³ While these vacillations are normal and sometimes healthy, there is no mechanism to limit the agency.⁴²⁴ In the domain of shareholder proposals, the agency largely escapes judicial review and even notice and comment rulemaking.⁴²⁵ The SEC was right to supersede Staff Legal Bulletins from 2017 and 2018 that concentrated on issuer circumstances that reduced no-action determinations to a near-total mystery.⁴²⁶ But what replaced them did not resolve the problem of understanding when a proposal could be embraced or rejected and why.⁴²⁷ Treating all issuers the same introduces its own set of problems, most notably failure to understand the impact of problems and the ability to handle them for the benefit of the enterprise. These vary by industry and the resources available to the issuer.

⁴¹⁶ See *KBR Inc.*, 776 F. Supp.2d at 432 n.8.

⁴¹⁷ See 17 CFR §240.14a-8(e) (2023) (stating the deadline for submitting shareholder proposals).

⁴¹⁸ Notice of Proposed Amendments to Proxy Rule 14a-8 Relating to Shareholder Proposals, 9 SEC Docket No. 19; see also *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?#> (stating that the 1976 Release “provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release.”).

⁴¹⁹ See *N.Y.C. Emp.'s. Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995).

⁴²⁰ *Id.* at 10.

⁴²¹ See *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM'N (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?#> (“[S]taff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.”).

⁴²² Cohen & Schleyer, *supra* note 64, at 121-22 (“The lack of consistency over time is not an indication of inadequate analysis by the SEC staff—the SEC’s 1998 release expressly contemplated that the same proposal might be treated differently at different times, depending on the level of public debate on the topic.”); see also Ayotte, *supra* note 163, at 532-38.

⁴²³ See, e.g., *id.* at 530 (“[I]n a no-action letter, [the Commission] reversed its own interpretation of [Rule 14a-8] without much explanation or procedure.”).

⁴²⁴ See, e.g., *Amalgamated Clothing & Textile Workers Union v. SEC*, 15 F.3d 254 (2d Cir. 1994).

⁴²⁵ See, e.g., *id.*

⁴²⁶ See *Alphabet, Inc.*, 2020 WL 2466907, at 4-5, 30 (Apr. 15, 2020) (citing SEC Staff Legal Bulletin No. 14I (CF) (Nov. 1, 2017) & SEC Staff Legal Bulletin No. 14J (CF) (Oct. 23, 2018)).

⁴²⁷ See *Steel*, *supra* note 33, at 1552-53.

B. Options/Recommendations

What follows will discuss three possible ways to correct problems with the social-policy exception. Each is aimed to address the principal issues with the present system, which lacks reliable, binding legal precedents, lacks clear agency guidance, and sometimes creates the appearance of Staff bias. The possible approaches include (1) withdrawing altogether from the issuance of no-action letters for matters concerning ordinary business operations, (2) enumerating what comprises social policy through formal rulemaking, or (3) abolishing the social policy exception. Upon comparative analysis, this Article concludes the Commission should abolish the social policy exception and make clear that business-line decisions involve ordinary business operations. Business-line decisions expressly characterized as ordinary business would codify the holding of *Trinity Wall Street*, albeit in a more straightforward manner.

1. *Withdraw from No-Action Letter Issuance*

As this Article has demonstrated, no-action letters have an immense influence on the question of whether a shareholder proposal must appear. Nearly complete reliance on this process has inhibited both judicial review and agency rulemaking.⁴²⁸ While extensive litigation and rulemaking in any specific area may not be desirable, erratic judicial review and absent rulemaking result in a lack of guidance, which the public experiences today.⁴²⁹ The Staff is under no legal obligation to issue a no-action letter.⁴³⁰ Indeed, it denies requests in many cases but may leave the field open to issuance in circumstances it considers appropriate.⁴³¹ This solution would close the entire field to no-action issuance. Under this approach, the Staff would categorically reject no-action requests on ordinary business matters. This would leave the task of sorting out the question of social policy to the courts and the Commission. Investors and issuers could then expect a body of law and regulation to emerge that would, over the long term, place the question of whether a proposal should appear on more solid legal ground.

⁴²⁸ See generally Gary M. Bridgens, *Demystifying Reliance Interests in Judicial Review of Regulatory Change*, 29 GEO. MASON L. REV. 411, 431 (2021) (“Without a common understanding of reliance interests, it will be difficult for courts and agencies to strike an appropriate balance in the application of reliance-interest considerations.”).

⁴²⁹ See Ayotte, *supra* note 163, at 556 (“The only agency that has the power to effectuate a change in policy has remained relatively silent until recently.”).

⁴³⁰ See generally *KBR Inc. v. Chevedden*, 776 F. Supp.2d 415, 432 (S.D. Tex. 2011) (“Since the *Apache* decision, the S.E.C. staff has rejected no-action requests from a number of companies . . .”).

⁴³¹ See *id.* at 432 n.8 (listing a number of cases in which the SEC staff rejected no-action requests from companies).

In addition to an understandable refusal by the SEC to cede jurisdiction, discarding the no-action letter process would create more problems than it would solve. First, doing so for ordinary business matters would likely impact the twelve other exclusions where the no-action letter process may function productively.⁴³² Doing so would also change the composition of successful proponents, skewing those to more deep-pocketed investors equipped to bring or credibly threaten litigation or push for new rules.⁴³³ Issuers may become more cavalier in their rejection of colorably valid proposals. Alternatively, some would err on the side of inclusion to avoid costly litigation. A core problem persists, namely, applying neutral principles on the merits. While this approach would develop a body of case law and more refined rules in the long term, the cost of doing so is unjustified when the measure of improvement is uncertain. A withdrawal of the no-action process would harm small investors and heighten uncertainty for issuers. All participants, including the SEC, issuers, and proponents, would suffer.

The SEC stands accused of using the no-action letter process as de facto administrative adjudications without appropriate safeguards for valid administrative adjudication.⁴³⁴ The time factor is one possible explanation that does not really appear in the literature. Burdensome administrative adjudications do not suit the time-sensitive process of shareholder proposal review.⁴³⁵ Due to the inherent time limitations on submissions, the SEC must act promptly on no-action letter requests.⁴³⁶ The author does not have an opinion on this issue but believes it is worthy of discussion. In any case, discarding the no-action letter process altogether is not a good idea.

⁴³² See 17 CFR §240.14a-8(j); see also Steel, *supra* note 33, at 1552 (“These substantive exclusions prohibit a range of proposals, such as proposals containing false or misleading statements, proposals motivated by the proponent’s personal grievance, and proposals related to the company’s ordinary business operations.”).

⁴³³ See Jeffrey L. Kochian et al., *How to Handle Shareholder Proposals*, Practical Law, 2013 WL 4864187 (noting that companies rarely initiate litigation due to the “potential expense,” “[t]iming concerns,” and “potential for negative precedent.”).

⁴³⁴ See Steel, *supra* note 33, at 1554.

⁴³⁵ See Emily S. Bremer, *The Exceptionalism Norm in Administrative Adjudication*, 2019 WIS. L. REV. 1351 (“While insufficient procedures can endanger important interests, excessive procedures can delay time-sensitive agency decisionmaking or even block desirable agency action.”).

⁴³⁶ See generally 2021-2022 No-Action Responses Issued Under Exchange Act Rule 14a-9, U.S. SEC. & EXCH. COMM’N (last modified Aug. 24, 2023), <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action?> (showing a rough turnaround 30-days of staff response to no-action letter requests).

2. Rulemaking to Flesh Out Social Policy

A problem with the ordinary business exception is the inability of proponents and issuers to ascertain social policy.⁴³⁷ The Staff contributed to this problem by vacillating over time and showing favoritism for certain social policy issues over others without explanation.⁴³⁸ One helpful measure would be to require Staff to explain its reasons for rejecting no-action letter requests. This would furnish needed guidance, but a more effective solution would be to require the Commission to enumerate acceptable social policy matters through rulemaking. Rulemaking would then give the specified social policy matters legal force, which would be more difficult for the Staff to evade. However, as Cracker Barrel has shown, this would not prevent Cracker Barrel-style evasions, which may require many years to correct.⁴³⁹

By way of example, under this approach, climate change, fundamental business strategy, human rights, political activity, lobbying disclosures, and senior executive compensation⁴⁴⁰ might attain social policy status, notwithstanding that shareholders vote separately on some of these (such as executive compensation say on pay proposed by management).⁴⁴¹ An enumeration of social policy might exclude other causes, especially those not fitting the pattern set forth by the enumeration.⁴⁴² Ascertaining if a social policy proposal appears then becomes an exercise in statutory interpretation.⁴⁴³ For example, suppose human rights make the list of social policy concerns, but animal rights and artificial intelligence do not. Also, suppose a shareholder of Coca-Cola wants to propose the company study the effects of its products on levels of obesity and diabetes but finds these causes absent from the list.

There is also the problem of competing social policy interests and goals.⁴⁴⁴ One shareholder group wants to end mining, but this will threaten the supply of rare earth minerals needed to build electric vehicles so critical

⁴³⁷ See Cohen & Schleyer, *supra* note 64, at 119 (“[T]he SEC staff [is] in the business of deciding what is, and is not, a substantial policy consideration. The SEC and the staff have struggled valiantly ever since to bring predictability and efficiency to this inherently subjective judgment.”).

⁴³⁸ See *id.* at 121-22.

⁴³⁹ See *N.Y.C. Emp.’s. Ret. Sys. v. SEC*, 45 F.3d 7 (2d Cir. 1995).

⁴⁴⁰ See Steel, *supra* note 33, at 1570-71 (analyzing SEC Staff determinations in excluding proposals according to Rule 14a-8 through staff-imposed categories, including climate change, business strategy, human rights, political activities, and more).

⁴⁴¹ See *id.*

⁴⁴² See generally *id.* at 1584 (“Another route would be to simply eliminate the significance requirement and not replace it at all, opening Rule 14a-8 to social policy proposals of all variety.”).

⁴⁴³ See *id.* at 1587 (explaining how the SEC staff is currently in the awkward role of a social policy censor, “through which bias and shifting views may cause inconsistency and inaccuracy.”).

⁴⁴⁴ See generally Keith F. Higgins, Dir., Div. Corp. Fin., *Rule 14a-8: Conflicting Proposals Conflicting Views*, U.S. SEC. & EXCH. COMM’N, (Feb. 10, 2015) <https://www.sec.gov/news/speech/rule-14a-8-conflicting-proposals-conflicting-views> (“The Division has thus become an informal arbitrator in the shareholder proposal process . . .”).

to avert climate change. Which social policy should the SEC deem worthy? While a social policy catalog⁴⁴⁵ that lists recognized social policies would alleviate some confusion in specific domains, it would leave some constituencies confused and aggrieved. This is one of the main problems with social policy; namely, it plays to grievance-oriented activists with goals often at odds with ordinary investors and (as discussed below) undermines board authority.⁴⁴⁶ Additionally, notions of social policy evolve over time, and the Commission would be under no duty to update them.⁴⁴⁷ If updated by rulemaking, there would be some protection against arbitrary agency action but little protection against doing nothing.

Also important is the question of whether it is appropriate for the SEC to say what comprises social policy. Enumeration of social policy only partially solves the problem and creates new problems. While notice and comment rulemaking would give all interested parties a voice, it does not assure their wishes will be heard or respected.⁴⁴⁸ In the end, a specific enumeration of approved social policy causes could sow discord among those feeling their social policy had gone unrecognized. Then, upon surveying those enumerated social policy issues deemed valid, one would be left to ponder where those left out appear in the corporate governance landscape.

3. *Eliminate Social Policy*

Since 1976, social policy has formally existed to facilitate the submission of shareholder proposals otherwise excluded as ordinary business operations.⁴⁴⁹ After nearly fifty years of living with a Rule the SEC admitted to be experimental,⁴⁵⁰ it is time to examine social policy's role in the holistic workings of securities regulation. As shown, the history of social policy is erratic and heated.⁴⁵¹ There is no fixed understanding or public meaning for social policy.⁴⁵² Inherent limits on both administrative and judicial review

⁴⁴⁵ See Steel, *supra* note 33, at 1579.

⁴⁴⁶ See generally *id.* at 1574 (explaining collection-action and free-rider are problems preventing companies from litigating no-action letters).

⁴⁴⁷ See Cohen & Schleyer, *supra* note 64, at 116-124 (discussing the evolution and history of social policy proposals under Rule 14a-8).

⁴⁴⁸ See generally *A Guide to the Rulemaking Process*, OFF. FED. REG., https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf (last visited Nov. 7, 2023).

⁴⁴⁹ See Cohen & Schleyer, *supra* note 64, at 119 (explaining that the SEC expressly narrowed the ordinary business exclusion in shareholder proposals with significant social policy implications in 1976).

⁴⁵⁰ See Adoption of Amendments Relating to Proposals by Security Holders, 41 Fed. Reg. 52994, 52998 (Dec. 3, 1976) (to be codified at 17 C.F.R. pt. 240); see also Timothy L. Feagans, *SEC Rule 14a-8: New Restrictions on Corporate Democracy?*, 33 BUFF. L. REV. 225, n. 3 (1984).

⁴⁵¹ See Cohen & Schleyer, *supra* note 64, at 116-124 (discussing the evolution and history of social policy proposals under Rule 14a-8).

⁴⁵² See Lucida Platt, *What is Social Policy?*, LONDON SCH. ECON. & POL. SCI., <https://www.lse.ac.uk/social-policy/about-us/What-is-social->

ensure that social policy will remain in a state of flux.⁴⁵³ Social policy sometimes places the Staff in untenable situations, interferes with the proper functioning of board duties, threatens healthy board decision-making and continuity, duplicates and frustrates disclosure requirements, and extends undue influence to activists seeking to attain unpopular and idiosyncratic social goals not through law and government but through private ordering of property rights. These realities demonstrate that social policy should be discarded in this context.

Accompanying that decision should be clarification that business-line decisions fall under ordinary business.⁴⁵⁴ This would codify the outcome of *Trinity Wall Street*, that line of business decisions involve ordinary business.⁴⁵⁵ Additionally, removing the social policy question would eliminate the need to evaluate the question the *Trinity Wall Street* court dodged.⁴⁵⁶ Proposals to cease business lines would be deemed lines of business decisions reserved for the management to implement based on the board's instructions.

Congress authorized the SEC to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.⁴⁵⁷ Deciding at the Staff level whether to accept or reject a social policy issue is beyond the core competency of the SEC and at the fringes of its authority. The Staff is especially unsuited to evaluate how social policy impacts a particular

policy#:~:text=Social%20policy%20is%20concerned%20with,of%20poverty%2C%20migration%20and%20globalisation (last visited Jan. 30, 2024) (“Social policy is concerned with the ways societies across the world meet human needs for security, education work, health and wellbeing.”); Steel, *supra* note 33, at 1587 (explaining how the SEC Staff is currently in the awkward role of a social policy censor, “through which bias and shifting views may cause inconsistency and inaccuracy.”).

⁴⁵³ Steel, *supra* note 33, at 1555-64 (demonstrating that social policy remains in a constant state of flux through the legislative and judicial history revolving around Rule 14a-8's social policy standard); *see also* Cohen & Schleyer, *supra* note 64, at 116-124.

⁴⁵⁴ See 17 CFR § 240.14a-8(i)(7) (2023); *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 340 (3d Cir. 2015) (“[T]he term ‘ordinary business’ continues to ‘refer to matters that are not necessarily ‘ordinary’ in the common meaning of the word’ and ‘is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company’s business and operations.’”). For example, whether to sell controversial products such as alcohol, tobacco and firearms. *See id.* at 340-341 (considering whether Wal-Mart’s sale of high-capacity firearms is related to ordinary business operations).

⁴⁵⁵ *See Trinity*, 792 F.3d at 344 (“A retailer’s approach to its product offerings is the bread and butter of its business.”).

⁴⁵⁶ *See id.* at 345 (“Yet we cannot sidestep what some may deem an unreckonable area. Thus we wade in.”).

⁴⁵⁷ *Mission*, U.S. SEC. & EXCH. COMM’N, <https://www.sec.gov/about/mission> (last visited Jan. 30, 2024).

issuer.⁴⁵⁸ Instead, the Staff can only consider “broad societal impact.”⁴⁵⁹ There is no guidance as to how to accomplish this.⁴⁶⁰ The Staff is not a social science authority and, therefore, must either proceed largely in the dark or seek studies and advice from parties who may be biased and that work at cross purposes to the SEC’s mission.⁴⁶¹ The Staff’s repeal of Staff Legal Bulletins that consider specific circumstances⁴⁶² admits that the Staff is not set up to evaluate the impact on any given issuer and whether a proposal should matter to its shareholders.⁴⁶³ If the Staff concedes it is not equipped to understand issuers, then it must instead adhere to agreed, neutral notions of social policy that the public cannot learn and apply through legal research. This leaves open the question of how to foster consideration of emerging social norms that would not necessarily be picked up by mere compliance with the law. Cracker Barrel would be one example where, in 1992, few legal protections existed for gay employees.⁴⁶⁴ Presently, concerns of a social policy nature exist with respect to artificial intelligence, but governing law is still emerging.⁴⁶⁵ While the ability to spot trends that may take decades to find their way into law is a legitimate cause, the fact remains the SEC is not equipped to announce and regulate emerging social policies.

The shareholder proposals that seek social change (and not corporate reform) by corporate action in lieu of legislation and government action compound the difficulty for the SEC.⁴⁶⁶ Even under rulemaking overseen by

⁴⁵⁸ See Steel, *supra* note 33, at 1587 (explaining how the SEC Staff is currently in the awkward role of a social policy censor, “through which bias and shifting views may cause inconsistency and inaccuracy.”).

⁴⁵⁹ *Shareholder Proposals: Staff Legal Bulletin No. 14L (CF)*, U.S. SEC. & EXCH. COMM’N (Nov. 3, 2021), <https://www.sec.gov/corpfin/staff-legal-bulletin-14l-shareholder-proposals?#>.

⁴⁶⁰ See Steel, *supra* note 33, at 1571 (“[T]he staff may only be relying on ‘rules of thumb’—soft rules that provide helpful guidance but may be overridden by external exceptions or the inapplicability of the rules’ background justifications.”).

⁴⁶¹ See *id.* at 1587.

⁴⁶² See Marc S. Gerber & Ryan J. Adams, *Hitting Reset or Flipping the Table? SEC Staff Significantly Increases the Unpredictability of the Shareholder Proposal No-Action Process*, SKADDEN INSIGHTS (June 2022), <https://www.skadden.com/insights/publications/2022/06/quarterly-insights/hitting-reset-or-flipping-the-table> (“SLB 14L effectively reset the Staff’s analytical approach to the ‘ordinary business’ and ‘relevance’ exclusions for shareholder proposals to prior to November 2017, rescinding Staff Legal Bulletin Nos. 14I, 14J, and 14K from 2017, 2018, and 2019, respectively.”).

⁴⁶³ See Steel, *supra* note 33, at 1572 (discussing that the Staff Legal Bulletin emphasizing the importance of a case-by-case inquiry “does not purport to signal any sort of paradigm shift for staff interpretation of [14a-8](i)(7).”).

⁴⁶⁴ See *N.Y.C. Emp.’s. Ret. Sys. v. SEC*, 45 F.3d 7, 9 (2d Cir. 1995).

⁴⁶⁵ See Sunil Johal & Daniel Araya, Commentary, *Work and Social Policy in the Age of Artificial Intelligence*, BROOKINGS (Feb. 28, 2017), <https://www.brookings.edu/articles/work-and-social-policy-in-the-age-of-artificial-intelligence/>.

⁴⁶⁶ Cf. Steel, *supra* note 33, at 1592 (“Historically, shareholder proposals have played a small, albeit significant, role in effecting valuable social change.”); Cohen & Schleyer, *supra* note 64, at 83 (“Advocates of Rule 14a-8 social policy proposals assert that they advance ‘shareholder democracy’ and are a powerful and valid tool for social change and moral improvement of corporate behavior.”).

the Commission, no publicly available deliberative process would foster public confidence in legitimate social policy.⁴⁶⁷ As illustrated in the examples discussed in this Article, the social policy exception makes these proposals on matters such as climate change and affirmative action related to race and sex possible.⁴⁶⁸ These require no nexus to shareholder economic welfare and indeed may be highly and immediately detrimental when, for example, calling for issuers to place core lines of business at risk to attain a social policy objective. Merely presenting the proposal in terms of “sustainability” suffices to take the proposal away from a generalized societal grievance.⁴⁶⁹ For example, a proposal demanding an issuer pay workers above what the law and market requires may appear in the name of “sustainability” or similar diffuse terms.⁴⁷⁰ Under this process, the SEC functions not as a regulator of the orderly functioning of securities markets but as an arbiter of social policy messages. When the Staff enforces social policy through the no-action letter process, it sends a tacit message of worthiness or disapproval.

As the Moderna shareholder proposal dramatized, the no-action letter process has the potential to pressure business strategy in directions unimaginable to the board.⁴⁷¹ Whether the Moderna board made the proper decision is not evaluated here. Instead, Moderna is an example where activist shareholders forced a proposal that involved the ordinary business question of what markets to serve and what to do with intellectual property.⁴⁷² It is not possible to gain an understanding of the Staff’s reasoning in its rejection of Moderna’s request for a no-action letter.⁴⁷³ However, it is possible the Staff concluded the social policy impact of furnishing vaccines to developing countries towered over something as pedestrian as Moderna’s property rights.⁴⁷⁴

While Moderna is an apparent Staff failing, what about circumstances such as Meta, where social policy and shareholder economic interests appear to align?⁴⁷⁵ There should be no disagreement that Meta should take

⁴⁶⁷ See generally *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 503 (7th Cir. 2008) (“An agency is not precluded from announcing new principles in an adjudicative proceeding rather than through notice-and-comment rulemaking.”).

⁴⁶⁸ See *Steel*, *supra* note 33, at 1570-71.

⁴⁶⁹ See *Coffee*, *supra* note 192, at 50-51. In the case of climate change, Professor Coffee’s view that systemic risk could be a legitimate portfolio management tool would mean even generalized climate grievances would support social policy acceptable to the SEC. See *id.* at 49.

⁴⁷⁰ Cf. Julie Wokaty, *Worker Justice Rises to the Top of Investors’ Agenda at 2023 Annual Meetings*, INTERFAITH CTR ON CORP. RESP. (Apr. 27, 2023), <https://www.iccr.org/worker-justice-rises-top-investors-agenda-2023-annual-meetings/>.

⁴⁷¹ See *Moderna, Inc.*, SEC Staff No-Action Letter, 2021 WL 6063317 (Feb. 8, 2022) at *14.

⁴⁷² See *id.*

⁴⁷³ See *id.*

⁴⁷⁴ See *id.* at *2-3.

⁴⁷⁵ See *Meta Platforms Inc, Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>.

appropriate measures to combat child sex trafficking that may take place through its various messaging networks.⁴⁷⁶ Meta shareholder proponents argued that specific decisions by Meta’s management would facilitate sex trafficking.⁴⁷⁷ This very serious charge involves both the ordinary business question of how to administer messaging and a social policy question.⁴⁷⁸ Discarding the social policy exception might mean the meritorious Meta proposal could be suppressed by management or assigned low priority.⁴⁷⁹ Cases like Meta might justify upholding the social policy exception to force action by the board.⁴⁸⁰ But the larger question is: who decides? Does the social policy contained in the proposal limit the board’s good options to address a problem? Or does it prod the board to act?

Eliminating social policy does not mean shareholder concerns like this go unaddressed when the board functions properly.⁴⁸¹ As *Tosdal* illustrates, assigning primacy to shareholder feelings and opinions over scientific and operational considerations is both contrary to corporate law and bad business practice.⁴⁸² Meta⁴⁸³ and other meritorious social-policy-based concerns are ultimately the responsibility of the board.⁴⁸⁴ Index funds and other investors take pains to monitor the board’s handling of strategy and risk.⁴⁸⁵

⁴⁷⁶ See *id.* (“In 2021 there were nearly 29 million reported cases of online child sexual abuse material (CSAM), nearly 27 million of these (92%) stemmed from Meta platforms including Facebook, WhatsApp, Messenger and Instagram”).

⁴⁷⁷ See *id.*

⁴⁷⁸ See *id.*

⁴⁷⁹ See Steel, *supra* note 33, at 1582 (“Elimination of the social policy exception would be inconsistent with the official Commission-approved interpretations of the ordinary business operations exclusion set forth in the adopting releases to the 1976 and 1998 amendments to Rule 14a-8, . . .”).

⁴⁸⁰ See *Meta Platforms Inc., Proposal #11—Child Sexual Exploitation Online*, PROXY IMPACT (May 25, 2022), <https://www.sec.gov/Archives/edgar/data/1326801/000121465922006855/j513224px14a6g.htm>.

⁴⁸¹ See generally Steel, *supra* note 33, at 1584 (“[D]enying shareholders a voice in whether their investments are managed in what they believe to be a socially responsible manner, even if that manner is not the most profitable, would lie in considerable tension with nearly fifty years of jurisprudence and SEC practices, as well as the congressional purpose underlying section 14(a) of the ‘34 Act.”).

⁴⁸² See *Tosdal v. NorthWestern Corp.*, 440 F. Supp.3d 1186, 1190 (D. Mont. 2020).

⁴⁸³ While the author does not examine the failings of Meta’s board, he notes Meta is subject to majority control by a single individual shareholder, which may cause its practices for the screening of directors to differ from issuers with more dispersed ownership structures. *Meta (Facebook) Organization Structure*, LEXCHART, <https://lexchart.com/org-charts/meta-facebook-organization-structure/> (last visited Nov. 24, 2023).

⁴⁸⁴ See generally Steel, *supra* note 33, at 1588 n. 289 (“[P]rofit-only clauses could present public relations difficulties in light of the reputational pressures on corporations to be perceived as committed to corporate social responsibility.”).

⁴⁸⁵ See Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 881 (1992) (“[W]hat matters in the end is the balance between incentives and disincentives to monitor. In that calculus, index funds have some advantages that may offset their weaker incentives to monitor.”); see also VANGUARD, *supra* note 15, at 50-77 (listing “company engagements” on, among other things, oversight of strategy and risk).

When pondering the fate of social policy in shareholder resolutions, one question is whether a board intent on preserving and growing shareholder wealth over the long term may, in doing so, harm society and, if so, whether shareholder empowerment to propose resolutions will solve this problem.⁴⁸⁶ Even if shareholder empowerment works to solve this problem, at what cost? Does this empowerment undermine the “balance of authority”⁴⁸⁷ between the board and shareholders? Messrs. Cohen and Schleyer have encapsulated the concern:

What is of concern is how the combination of SEC policy, special interest activism, and the concentration of influence in proxy advisory firms have combined to make this a more formulaic and non-deliberative process that can impair the board's deliberation on complex social issues. If a director, or the entire board, gets voted out after the board failed to implement a shareholder proposal, this is not necessarily reflective of the collective view of all of the corporation's shareholders, or in the collective interest of the corporation, its shareholders, and its other stakeholders. The result has likely been affected, perhaps decisively, by the outsize influence and largely unregulated and potentially opaque decisions of a relatively small number of players (e.g., a special interest proponent, the major proxy advisory firms, and those institutional investors who follow these firms' recommendations virtually automatically).⁴⁸⁸

The business and affairs of a corporation are managed by and under the direction of the board of directors.⁴⁸⁹ “[D]irectors are charged with an unyielding fiduciary duty to protect the interests of the corporation and to act in the best interests of its shareholders.”⁴⁹⁰ Directors are not the agents of the corporation, and they do not answer to any specific segment of shareholders.⁴⁹¹ If disenchanted, shareholders can remove and replace directors.⁴⁹² When confronted with threats of removal for failure to agree to implement a social policy proposal approved by shareholders, the director's duties collide with the wants and needs of shareholders that may gain power through various means.⁴⁹³

⁴⁸⁶ See Cohen & Schleyer, *supra* note 64, at 114 (discussing the traditional view in corporate law that directors must focus on maximizing shareholder wealth and social policy implications of the company's actions).

⁴⁸⁷ *Id.* at 125-26.

⁴⁸⁸ *Id.* at 128-29.

⁴⁸⁹ DEL. CODE ANN. tit. 8, § 141(a) (2023).

⁴⁹⁰ *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360 (Del. 1993) (citations omitted).

⁴⁹¹ Cohen & Schleyer, *supra* note 64, at 111 (“State courts have long rejected the view of directors as mere agents of the shareholders. [] Delaware courts have expressly confirmed that directors are not obligated to follow the wishes of even the holders of a majority of shares. In fact, the courts explicitly prohibit the board from delegating its duties to shareholders.”).

⁴⁹² *Id.* at 110.

⁴⁹³ See *id.* at 110-111.

Social policy appears in now-mandated issuer disclosures, raising the question of whether social policy disclosures handle problems that would be included in social policy shareholder proposals.⁴⁹⁴ Examples include (inter alia) mine safety⁴⁹⁵ and, as proposed by the Commission, climate change-related disclosures.⁴⁹⁶ This raises the additional question of whether social policy shareholder proposals undermine, conflict with, or feed off disclosures. Periodic disclosures include, among other things, risks to the business, such as competition, supply chain, labor, regulation, financing, and litigation.⁴⁹⁷ A soon-to-appear empirical test will be SEC-proposed climate disclosure requirements.⁴⁹⁸ This means using shareholder proposals to prod issuers to work for a social policy, such as zero carbon emissions by a target date, may motivate the Commission. When issuers begin reporting, one can envisage rating agencies and other metric keepers developing measures, such as CO₂ per unit of sales, CO₂ per unit of earnings, and CO₂ per unit of capital, all to be compared to industry peers. When climate activist shareholders confront the board with lagging metrics in order to keep their positions, the board must answer.

One plausible answer would be adaptation to climate change is a long-term problem and the board is engaged in vigilant, watchful waiting to determine appropriate steps. However, at present, the board is doing nothing more than observing. Outlays deferred generally benefit the enterprise, and the board and management await technological improvements that will lessen and defer the cost to the enterprise.⁴⁹⁹ Metrics in any given year (such as those illustrated here) should be assigned lesser weight. In many respects, this is a conversation much like issuer-specific shareholder activism motivated by return.⁵⁰⁰ The hedge fund wants sales of unprofitable business

⁴⁹⁴ See John H. Matheson & Vilena Nicolet, *Shareholder Democracy and Special Interest Governance*, 103 MINN. L. REV. 1649, 1666 (2019) (discussing companies disclosing information regarding social policies).

⁴⁹⁵ Mine operators are required by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Dodd-Frank Act”), and rules promulgated by the SEC implementing that section of the Dodd-Frank Act, to provide certain information concerning mine safety violations and other regulatory matters concerning the operation of mines. See 15 U.S.C. § 78m-2; see also Cohen & Schleyer, *supra* note 64, at 107-08.

⁴⁹⁶ U.S. Securities on Exchange Comm’n, Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11117, 34-96005, IA-6162, 7C-34724, 07FR63016 (Oct. 7, 2022).

⁴⁹⁷ See Matheson & Nicolet, *supra* note 494, at 1666.

⁴⁹⁸ U.S. Securities on Exchange Comm’n, Proposed Rule, The Enhancement and Standardization of Climate-Related Disclosures for Investors, Rel. Nos. 33-11117, 34-96005, IA-6162, 7C-34724, 07FR63016 (Oct. 7, 2022).

⁴⁹⁹ See Elisabeth A. Gilmore & Travis St. Clair, *Budgeting for Climate Change: Obstacles and Opportunities at the US State Level*, 18 CLIMATE POL’Y 729 (2018) (“Between FY 2008 and FY 2013, direct federal funding to address global climate change totaled \$77 billion, approximately 0.4% of federal outlays over the time period. More than 75% has funded technology development and deployment, primarily through the Department of Energy.”).

⁵⁰⁰ See Cohen & Schleyer, *supra* note 64, at 114.

units followed by stock buybacks,⁵⁰¹ and the board disagrees. But with climate change, the Commission now assumes some role in launching these conflicts, which may have implications for board independence, authority, and efficacy. Social-policy-oriented shareholder proposals will fuel the conflagration.

Social policy also places shareholders at odds with each other in ways not seen before.⁵⁰² Some market and governance observers note that investors seeking to attain social policy goals do so as a portfolio management tool over systemic risk.⁵⁰³ Under this view, large, diversified portfolio managers will sacrifice returns in an issuer engaged in a disapproved activity (such as CO2 emissions), which substandard returns (or losses) will be offset by returns in issuers that benefit from the phase-out or curtailment of the disapproved activity.⁵⁰⁴ Besides unjustified disruption to boards, such an approach pits large diversified shareholders (such as index funds) against less diversified or concentrated investors who seek returns at the issuer level and with lesser (or no) regard for systemic risk as an investment decision-making metric.⁵⁰⁵ Professor Coffee has brought this phenomenon to light in a case study involving Exxon Mobil and notes, “small activist firms do not hold sufficiently large or diversified portfolios to enable them to . . . profit from a systemic risk campaign.”⁵⁰⁶ Professor Coffee’s study involved a climate change-related proxy contest and not a shareholder proposal; however, the principle of enmity between those with fully diversified index funds who may embrace a systemic risk approach and concentrated, issuer-focused investors remains applicable to shareholder proposals.⁵⁰⁷ Social policy considerations threaten to worsen an irreconcilable divide between issuer-focused investors and those who subscribe to systemic risk management. This may explain why shrill voices make themselves heard in these matters.

In 1976, when the social policy carve-out assumed full force, it served as a tool for shareholder messaging.⁵⁰⁸ Social media and internet-based communications now make it possible for shareholders of like mind to gather and discuss issues of concern.⁵⁰⁹ This is now common knowledge, and social science research finds online discussion boards and shareholder messaging

⁵⁰¹ See Coffee, *supra* note 192, at 52-53.

⁵⁰² See *id.* at 49-50.

⁵⁰³ See *id.* at 49.

⁵⁰⁴ See *id.*

⁵⁰⁵ See *id.* 45-48.

⁵⁰⁶ *Id.* at 59.

⁵⁰⁷ See Coffee, *supra* note 192, at 59-63.

⁵⁰⁸ See Steel, *supra* note 33, at 1559-60.

⁵⁰⁹ See Seth C. Oranburg, *A Little Birdie Said: How Twitter is Disrupting Shareholder Activism*, 20 *FORDHAM J. CORP. & FIN. L.* 695, 696 (2015) (“Tweets are a cheap and easy way for shareholders to engage with each other and build consensus and support for collective action.”).

apps commonplace.⁵¹⁰ There is institutional support and infrastructure for these methods.⁵¹¹ Both the SEC and securities exchanges require methods for shareholder communications with independent directors.⁵¹² If shareholders can communicate with each other with relative ease, collective action becomes more feasible.⁵¹³ This includes a wide range of actions, such as engagement with the board or heads of board committees.⁵¹⁴ Proponents are already doing this by teaming up in the submission of shareholder proposals, and the same can be done with other levels of engagement, such as communications with directors and committee leaders.⁵¹⁵ The most dramatic example of shareholder messaging occurred in a proxy contest.⁵¹⁶ There, shareholders collaborated to seat three climate-friendly directors on the board of directors of Exxon Mobil, even though the proxy contest challenger held only 0.02% of Exxon Mobil's shares.⁵¹⁷ Sophistication and the availability of communication means shareholders will not be without meaningful tools in the event of social policy's demise.

VI. CONCLUSION

Social policy plays a major role in whether shareholder proposals concerning an issuer's ordinary business operations must appear for a vote.⁵¹⁸ Despite its influence over whether a proposal appears, the SEC has not defined social policy and offers little guidance.⁵¹⁹ Most of the guidance takes the form of no-action letter responses, which are nonbinding, informal

⁵¹⁰ See Tim Bowley et al., *Shareholder Engagement Inside and Outside the Shareholder Meeting 5* (Eur. Corp. Governance Inst. L., Working Paper No. 709, 2023) (“Developments in computing, information technology and electronic communications assist shareholders to gather and analyse [sic] information regarding the performance of a company and to communicate instantly and cheaply with potential allies and supports among a company’s shareholder base.”).

⁵¹¹ See, e.g., *id.* at 9 (Eur. Corp. Governance Inst. L., Working Paper No. 709, 2023) (“Research has also found that it is common for corporate managers to engage with proposal proponents ahead of the shareholder vote and that such engagement frequently leads to proponents withdrawing their proposals, revealing the potential for precatory proposals to catalyse [sic] shareholder-company engagement.”).

⁵¹² See Cohen & Schleyer, *supra* note 64, at 108.

⁵¹³ See Oranburg, *supra* note 509, at 696.

⁵¹⁴ See Elizabeth Richards, *Why Company Directors Should Use Social Media*, CONF. BD. (Sept. 8, 2020), <https://www.conference-board.org/brief/environmental-social-governance/company-directors-social-media>.

⁵¹⁵ See generally *id.*

⁵¹⁶ Coffee, *supra* note 192, at 60-61 (discussing ways to minimize the costs of a proxy contest).

⁵¹⁷ See *id.* at 54.

⁵¹⁸ See Cohen & Schleyer, *supra* note 64, at 124-32.

⁵¹⁹ See *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 351 (3d Cir. 2015) (“Despite the substantial uptick in proposals attempting to raise social policy issues that bat down the business operations bar, the SEC’s last word on the subject came in the 1990s . . .”).

opinions of the Staff.⁵²⁰ Whether the Staff issues or declines to issue a no-action letter, it is under no obligation to share its reasoning, and quite often, decisions arise without explanation.⁵²¹ In general, no-action letters are not judicially reviewable, and agency oversight by the Commission is absent.⁵²² There is no meaningful process for judicial review of shareholder proposal disputes, and the scant case law that exists does not help form a useful pattern for guidance. The Commission could elect to clarify social policy under administrative rulemaking but has not done so.⁵²³ Beyond the no-action letter, the public can look only to Staff Legal Bulletins, but these are also nonbinding and of limited influence over federal courts.⁵²⁴

Social policy is very meaningful to the shareholder proposal process.⁵²⁵ Each year, shareholders submit large numbers of proposals concerning social policies such as climate change, environmental welfare, human rights and diversity, equity, and inclusion. What sometimes differentiates these social policy-based proposals from others is the absence of apparent benefit to the issuer and even the imposition of unnecessary burdens.⁵²⁶ Index funds that hold shares comprising an entire defined market may do this in order to reduce systemic risk where a harm to one portfolio company may be offset by a benefit to others in the portfolio.⁵²⁷ Others may pursue social policy with idiosyncratic motivations unrelated to returns (or highly attenuated), seeking to change society by means outside of the law and government.⁵²⁸ Shareholders who use these approaches must be taken seriously, and their methods have a number of adverse effects.⁵²⁹ These efforts threaten the proper working of the board of directors, who may have sensed a given problem but chosen to approach it differently.⁵³⁰ This means boards may not have the luxury to do what's right by their lights. Boards that disregard shareholder proposals that are approved or garner substantial support may lose their positions on account of "withhold approval" recommendations

⁵²⁰ See *Apache Corp. v. NYC Emps. Ret. Sys.*, 621 F. Supp.2d 444, 449 (S.D. Tex. 2008) (concluding that no-action letters are nonbinding, persuasive authority).

⁵²¹ See Steel, *supra* note 33, at 1549 ("[N]o-action letters typically contain minimal explanation of the staff's reasoning, and appellate review is difficult to obtain.").

⁵²² See generally *id.*

⁵²³ See *id.* at 1564-1572.

⁵²⁴ See *id.* at 1555-1558.

⁵²⁵ See Cohen & Schleyer, *supra* note 64, at 124-25.

⁵²⁶ See generally Steel, *supra* note 33, at 1592.

⁵²⁷ See Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811, 881 (1992).

⁵²⁸ See Steel, *supra* note 33, at 1592.

⁵²⁹ See *id.*

⁵³⁰ See Cohen & Schleyer, *supra* note 64, at 125-29 (discussing the practical impact of Rule 14a-8 on directors).

made by proxy advisors.⁵³¹ The sizable influence⁵³² of proxy advisors' recommendations magnifies this risk. Thus, boards may unnecessarily lose experienced talent to be replaced by less experienced activist nominees.⁵³³

Likewise, social policy divides shareholders into multiple camps with competing goals and visions.⁵³⁴ Index funds and social activist investors that seek to either reduce systemic risk or change society will have goals at odds with investors that make issuer-specific investment decisions seeking to maximize economic return on each asset held.⁵³⁵ These competing goals cannot be reconciled and by favoring systemic risk and social activist investors, social policy widens this divide without measurable offsetting benefit.

The SEC makes this state of affairs possible based on its longstanding embrace of social policy and refusal to clarify or change. The agency is, therefore, a contributor to a problem in need of correction. The SEC is not equipped to assess social policy, nor is the type of social policy this Article discusses within the purview of the SEC's role to facilitate the orderly workings of securities markets. No-action letters function as de facto administrative adjudications without the safeguards normally afforded.⁵³⁶ Judicial review is largely unavailable, and administrative rulemaking takes a distant back seat to informal, opaque, extra-administrative pronouncements by the Staff. Wholesale reform of an intractable agency structure is unrealistic. Still, a practical way to mitigate these flaws is to do away with social policy as a determinant of whether a proposal involving ordinary business operations should appear.

⁵³¹ See *id.* at 105-06.

⁵³² Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 BOSTON U. L. REV. 1459, 1461 (2019).

⁵³³ See generally Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 300 (2016) ("Here, activist shareholders tee up social policy reforms at low cost to other shareholders.").

⁵³⁴ See Maya Mueller, Comment, *The Shareholder Proposal Rule: Cracker Barrel, Institutional Investors, and the 1998 Amendments*, 28 STETSON L. REV. 451, 498 (1998) (explaining how the SEC's 1998 Amendments to Rule 14a-8 attempted to balance the competing interests between shareholders).

⁵³⁵ See Black, *supra* note 527, at 881.

⁵³⁶ See Steel, *supra* note 33, at 1575.

CONVERSION TO A BENEFIT COMPANY AND DISSENTERS' RIGHTS

Paolo Butturini*

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I. INTRODUCTION

This Article focuses on dissenters' rights (also known as appraisal rights) in cases of conversion of a company to a benefit company and termination of the benefit status. It is worth emphasizing that dissenters' and appraisal rights have the same meaning and are often used interchangeably.¹ Of course, the wording of each state statute varies, sometimes referring to one or the other concept, even though not expressly. The concept of dissenters' rights is a bit wider. It is apt to incorporate regulations that address the issue of protecting minority shareholders ("minorities"), even if they do not explicitly mention such an issue. These regulations may pertain to objections or dissent regarding charter amendments, or they may relate to the withdrawal right from an LLC, which could be outlined in the operating agreement in cases of dissent.

In addition to the rules governing Benefit Corporations, this Article also encompasses regulations concerning Benefit Limited Liability Companies (BLLC), Low-Profit Limited Liability Companies (L3C), and Limited Liability Companies (LLCs) as a flexible model, eligible for social entrepreneurs. This Article will specifically focus on states with significant

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¹ See Steven J. Cleveland, *Appraisal Rights and "Fair Value"*, 43 *CARDOZO L. REV.* 921, 922 (2022) [hereinafter Cleveland]; Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 *DUKE L.J.* 613, 614 (1998) [hereinafter Wertheimer, *Shareholders' Appraisal Remedy*].

amounts of benefit companies. Although the regulation of dissenters' rights varies across state statutes, it is possible to define a general framework and generally prevailing trends in order to analyze the most influential regulations.

In the previous decades, there have been radical changes in the cases where dissenters' rights are provided.² When comparing scholarly analysis of the late 1990s to current company law regulations, the tendency towards substantially reducing the scope of application of dissenters' rights is clear.³ Going into deep detail about the history of dissenters' rights is not the goal of this Article. However, the changes in dissenters' rights regulations, which occurred in a relatively short period, seem more relevant than their modifications during their first century of life. While it was reasonably common thirty years ago to afford the right in case of dissent from fundamental transactions or alterations of shareholders' rights, it is becoming increasingly frequent to provide for such minority protection only in cases related to minority cash out.⁴

II. THE EVOLUTION OF DISSENTERS' RIGHTS IN UNITED STATES' COMPANY LAW

A. Dissenters' Rights and Majority Rule

The origins of dissenters' rights in United States corporate law date back to the nineteenth century,⁵ when the need to overcome unanimous consent became clear.⁶ Prior to the creation of dissenters' rights, amendments to a corporate charter required a unanimous vote from all shareholders of the company.⁷ The realization that dissenters' rights were necessary stemmed from two different but related reasons. First, companies wanted to avoid the impact of minority shareholders' vetoes, which tended to obstruct valuable modifications of the company agreement.⁸ Secondly, allowing such

² See Matthew Evans Miehl, *The Cost of Appraisal Rights: How to Restore Certainty in Delaware Mergers*, 52 GA. L. REV. 651 (2018).

³ For example, Delaware regulation used to provide appraisal right in the mentioned cases, and currently does not anymore. Peter V. Letsou, *The Role of Appraisal in Corporate Law*, 39 B.C. L. REV. 1121, 1121 n.1 (1998).

⁴ See *id.*

⁵ See Thomas E. Rutledge, *The 2015 Amendments to the Kentucky Business Entity Statutes*, 43 N. KY. L. REV. 129, 134 n.25 (2016) [hereinafter Rutledge] (referring to the 1928 Uniform Business Corporation Act); see also Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GA. L.J. 1, 55 (1995) [hereinafter Thompson] (listing the origins of appraisal provisions).

⁶ See Barry M. Wertheimer, *The Purpose of the Shareholders' Appraisal Remedy*, 65 TENN. L. REV. 661, 664 (1998) [hereinafter Wertheimer, *Purpose of the Shareholders' Appraisal Remedy*].

⁷ See *id.*

⁸ See *id.*

modifications promoted company and economic progress.⁹ As a counterbalance to the exclusion of the veto right for every single shareholder, national legislation started to provide a different form of protection, consisting of the right to have one's stocks bought out by the company in case of dissent from specific relevant modifications.¹⁰

Given the history of dissenters' rights, some scholars believed there was a connection between the rights of dissenting shareholders and the fundamental transactions desired by majority shareholders.¹¹ Consequently, these scholars regarded safeguarding the interests of minority shareholders as one of the critical purposes of these rights.¹² Dissenters' rights generally provide a shareholder with a "way out" of a modified investment that no longer resembles the original investment made by the shareholder.¹³ This is particularly important in closed or private companies with no easy market exit.¹⁴ On the contrary, it usually does not apply when a market allows shareholders to sell quickly, which occurs under Delaware regulation.¹⁵

The connection between dissenters' rights and minority protection is evident in light of the most recent amendments to appraisal regulations across the United States.¹⁶ However, as this Article will highlight below, such connection should be more accurately described, paying due attention to the constant evolution of company law regulations regarding the dissenters' rights, as it often regards only some specific cases in which minority shareholders are provided such protection.

In other words, it is necessary to distinguish the links between dissenters' rights on the one hand and majority rule and minority protection on the other. While minority protection is related to majority rule, dissenters' rights tend to protect minorities only in specific cases of majority decisions.¹⁷ At this point, it is prudent to seek a more precise definition of the scope of

⁹ See *id.*; Thompson, *supra* note 5, at 3 (listing the origins of appraisal provisions); William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 5 AM. BAR FOUND. RES. J. 69, 78 (1980).

¹⁰ See Rutledge, *supra* note 5, at 135 n.26 (references to case law about the compensation granted to shareholders for the abrogation of the common law right to consent to fundamental transactions through appraisal right); Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 614.

¹¹ See Wertheimer, *Purpose of the Shareholders' Appraisal Remedy*, *supra* note 6, at 667.

¹² See Rutledge, *supra* note 5, at 134 (discussing the origin of appraisal statutes).

¹³ Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 614; Wertheimer, *Purpose of the Shareholders' Appraisal Remedy*, *supra* note 6, at 667.

¹⁴ Douglas K. Moll, *Minority Oppression & (and) the Limited Liability Company: Learning (Or Not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 891, 948 (2005) (underscoring the absence of a market for shares in close corporations).

¹⁵ See DEL. CODE ANN. tit. 8, § 262 (2023).

¹⁶ See Rutledge, *supra* note 5, at 135 n.25; George S. Geis, *An Appraisal Puzzle*, 105 NW. U. L. REV. 1635, 1644 (2011) [hereinafter Geis]; Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 615; Thompson, *supra* note 5, at 4.

¹⁷ See Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 614; Wertheimer, *Purpose of the Shareholders' Appraisal Remedy*, *supra* note 6, at 661.

application of dissenters' rights, which can be accomplished by delineating the minority interests currently associated with it.

B. Dissenters' Rights and Minority Protection

As several scholars underscore, the purpose of dissenters' rights is gradually shifting from protecting minority shareholders who dissent from fundamental transactions to protecting them in cases of squeeze-out deriving from mergers or share exchanges.¹⁸ Dissenters' rights have become a mechanism that serves as a check against management (and the majority shareholders) in mergers and other transactions where the majority forces the minority shareholders out of the company.¹⁹ As a result, it can assist in deterring opportunistic behaviors exhibited by the majority,²⁰ as well as in overseeing transactions in which management, controlling the transactions, may face conflicts of interest.²¹

The utilization of dissenters' rights as a means of protecting minority interests in merger scenarios has become a prevalent aspect of state statutes in the United States in recent decades, consistently ensuring this right in such instances.²² The sale of all or substantially all of the company's assets was frequently associated with dissenters' rights.²³ The majority of regulations typically granted these rights to shareholders who opposed specific changes to the corporate charter.²⁴ However, as already mentioned, this scenario has significantly changed over the last few years. A comparison between regulations cited twenty years ago as samples of the provision of dissenters' rights arising from charter amendments and their current formulation clearly shows a consistent reduction of the scope of application of dissenters' rights.²⁵ Certain state statutes provide protection for dissenters' rights in the event of charter amendments, using language that can encompass any

¹⁸ See Rutledge, *supra* note 5, at 135 n.25 (referring to the 1928 Uniform Business Corporation Act); Geis, *supra* note 16, at 1644 (holding that appraisal right rarely arises from dissent from a new line of business); Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 615; Thompson, *supra* note 5, at 4 (noting that less than one out of ten cases on appraisal rights arise from fundamental change concerns); *Id.* at 25 (underscoring that appraisal right is usually invoked in case of minority squeeze out).

¹⁹ *See id.*

²⁰ Thompson, *supra* note 5, at 4.

²¹ See R. Garrett Rice, *Give Me Back My Money: A Proposed Amendment to Delaware's Prepayment System in Statutory Appraisal Cases*, 73 BUS. L. 1051, 1057 (2018) [hereinafter Rice]; Thompson, *supra* note 5, at 53.

²² See Geis, *supra* note 16, at 1636 n.9 (holding that appraisal right rarely arises from dissent from a new line of business); Thompson, *supra* note 5, at 9.

²³ *See id.*

²⁴ See Letsou, *supra* note 3, at 1121 (underscoring the necessary relevance of charter amendments, like alterations of the corporate purpose).

²⁵ For example, Delaware regulation used to provide appraisal right in the mentioned cases, but no longer does so. Compare Letsou, *supra* note 3, at 1121 n.1 with DEL. CODE ANN. tit. 8, § 262 (2023).

adverse changes to stockholders' rights.²⁶ In contrast, other statutes address specific amendments, such as modifications to preferential distribution rights or the creation, alteration, or elimination of a redemption right.²⁷ Therefore, even if the dissent from charter amendments can trigger dissenters' rights, a specific definition of charter amendments relevant in this regard is necessary, and such a definition typically shows a relatively narrow extension of dissenters' rights.²⁸

In conclusion, dissenters' rights are accorded when the risk run by shareholders significantly changes due to majority alterations.²⁹ However, at the same time, while the modification of such a risk arising from a cash-out merger—consisting of potentially unfair evaluation of stock—typically entails this right, other charter amendments do not have the same consequences unless expressly provided in the state statutes or the charter of the corporation.³⁰

C. Two Influential Regulations: Model Business Corporation Act vs. Delaware Corporation Act

Two different regulatory models regarding dissenters' rights (appraisal rights) are considered particularly influential in the United States: The Model Business Corporation Act and the Delaware Corporation Act.³¹ The diffusion of rules provided by the Model Business Corporation Act through adopting resembling regulations is relevant.³² Moreover, Delaware's leading position in corporate law is also well known.³³

Delaware regulations afford appraisal rights in certain merger scenarios.³⁴ Delving into every facet of this regulation is not the objective of this Article, which primarily concentrates on appraisal rights. Nevertheless,

²⁶ See Cleveland, *supra* note 1, at 926. The case of Maryland will be analyzed in detail *infra* Part II, B.

²⁷ See Thomas E. Rutledge & Katharine M. Sagan, *An Amendment Too Far? Limits on the Ability of less than All Members to Amend the Operating Agreement*, 16 FLA. ST. U. BUS. REV. 1, 31 (2017).

²⁸ See *id.*

²⁹ See Letsou, *supra* note 3, at 1137 (underscoring the unpredictability of the alteration); *id.* at 1150 (charter amendments triggering appraisal right are supposed to be "serious," such as those altering the corporation's purposes).

³⁰ See generally Rutledge & Sagan, *supra* note 27, at 31.

³¹ MODEL BUS. CORP. ACT §§ 1.01-18.05 (2023) (AM. BAR ASS'N); DEL. CODE ANN. tit. 8, §§ 101-616 (2023).

³² See Rice, *supra* note 21, at 1083; Mary Siegel, *An Appraisal of the Model Business Corporation Act's Appraisal Rights Provisions*, 74 LAW & CONTEMP. PROBS. 231, 232 (2011) [hereinafter Siegel].

³³ Cleveland, *supra* note 1, at 924.

³⁴ See DEL. CODE ANN. tit. 8, § 262 (2023).

it is noteworthy to underscore the recent uptick in the utilization of this right, reaffirming its potential significance in broader contexts.³⁵

The provision in the Model Business Corporation Act extends to additional instances where appraisal rights apply, such as the disposition of assets and amendments of the Articles of Incorporation concerning a class, series of shares that reduce the number of shares of a class, or series owned by the shareholder to a fraction of a share (provided the corporation is obligated or entitled to repurchase the fractional share created).³⁶ It also expressly provides for the possibility of admitting appraisal through the Articles of Incorporation, bylaws, or a board of directors' resolution.³⁷

Again, even if the scope of the application of appraisal rights is relatively broad,³⁸ it is worth underscoring that the amendments from which it can arise are well-defined and clearly apt to cover only particular cases of alteration of the risk run by minority shareholders dissenting from such amendments.

D. Withdrawal Rights in LLCs

Due to the radical differences between corporations and LLCs,³⁹ considering the withdrawal rights rules in LLC statutes could seem peculiar. However, in light of the relatively high number of Benefit LLCs compared to the number of Benefit Corporations,⁴⁰ it is necessary because omitting this point would give only a partial description and analysis of the problem. Not surprisingly, despite some common attributes of dissenters' rights, withdrawal right regulations present specific features.

Corporation and LLC laws in the United States vary in every state.⁴¹ However, LLC statutes tend to vary much more than corporation statutes.⁴²

³⁵ See Charles K. Korsmo & Minor Myers, *Interest in Appraisal*, 42 J. CORP. L. 109, 111 (2016); Wei Jiang et al., *Appraisal: Shareholder Remedy or Litigation Arbitrage*, 59 J.L. & ECON. 697 (2016).

³⁶ MODEL BUS. CORP. ACT § 13.02 (2023) (AM. BAR ASS'N).

³⁷ See *id.* The radical differences between Delaware and MBCA regulations are stressed by Siegel. Siegel, *supra* note 32, at 23; Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 621.

³⁸ See Wertheimer, *Shareholders' Appraisal Remedy*, *supra* note 1, at 703 (discussing the broadness of the MBCA and the drafter's intentions in Appraisal Statutes).

³⁹ Robb Watts & Jane Haskins, *LLC Vs. Corporation*, FORBES ADVISOR (Aug. 1, 2022, 4:09 PM), <https://www.forbes.com/advisor/business/llc-versus-corporation/>.

⁴⁰ Although this data is not recent, it is interesting to note that out of more than 5,000 benefit entities in total, almost 1,000 were benefit LLCs when B Lab formed a list. See *Benefit Corporations List*, B LAB, <https://data.world/blab/benefit-corporations-list> (last visited Nov. 21, 2023). Very different ratios emerge considering Delaware (3136 PBCs vs 175 Benefit LLCs). *id.*; see also *Active Benefit Companies*, OREGON.GOV (Feb. 20, 2024), <https://data.oregon.gov/business/Active-Benefit-Companies/baig-8b9x>.

⁴¹ *State by State Corporate Law Codes*, NORTHWEST REGISTERED AGENT, <https://www.northwestregisteredagent.com/start-a-business/state-laws> (last visited Feb. 16, 2024).

⁴² See ALAN PALMITER & FRANK PARTNOY, *CORPORATION: A CONTEMPORARY APPROACH* 136 (St. Paul: West Academic Publishing ed., 1st ed. 2010).

This remark tends to have limited relevance regarding the dissenters' and withdrawal rights. As shown, there are significant differences between state corporate regulations of dissenters' rights.⁴³ On the contrary, there are clear trends in the evolution of withdrawal or dissociation rights regulations under LLC statutes.⁴⁴

When examining the regulations in place during the 1990s, it was common for LLC statutes to grant members withdrawal rights unless otherwise outlined in the operating agreement.⁴⁵ Since then, the general trend has been in the direction of removing the default right to withdraw and obtain the value of the interest.⁴⁶ Reasonably, this evolution is due to the modifications of tax law.⁴⁷ Prior to 1996, whether the LLC tax rules applied was determined by the absence of at least two out of four corporate characteristics, one of which was the continuity of life.⁴⁸ Providing for the LLC's dissolution upon the exercise of withdrawal rights, state statutes aimed to ensure the application of LLC-specific taxation.⁴⁹ Under different LLC taxation regimes introduced in 1997, there was no need to avoid the LLC's perpetual duration to secure the application of the specific rules, and the default rules about withdrawal and dissolution were modified accordingly.⁵⁰ In addition, the absence of a statutory withdrawal right can be explained by considering potential adverse tax consequences that could arise from it.⁵¹

Under current uniform and state regulations, the establishment of any member dissociation protocol typically relies on specific provisions outlined in the operating agreement,⁵² or it may be restricted to mergers, possibly due

⁴³ See Cleveland, *supra* note 1, at 926.

⁴⁴ See Allan G. Donn, *Withdrawal and Cash-out from Partnerships and LLCs*, J. PASSTHROUGH ENTITIES, Nov. -Dec. 2000, at 13, 15.

⁴⁵ Various state statutes mentioned, see Robert R. Keatinge et al., *The Limited Liability Company: A Study of the Emerging Entity*, 47 BUS. LAW. 375, 418 (1991).

⁴⁶ See Donn, *supra* note 44, at 15 (underscoring that withdrawal rights became a default rule in the Uniform Limited Liability Company Act (ULLCA) and proposing examples of state statutes in which there is no default right to withdraw). The trend is thus confirmed: see further examples in Allan G. Donn, *Unincorporated Business Entity Statutory Developments*, 2 J. PASSTHROUGH ENTITIES 15, 16 (1999).

⁴⁷ See Jens Dammann, *Homogeneity Effects in Corporate Law*, 46 ARIZ. ST. L. J. 1103, 1113 (2014).

⁴⁸ *Id.*

⁴⁹ See *id.*

⁵⁰ See *id.* at 1113-114.

⁵¹ See Daniel M. Hausermann, *For a Few Dollars Less: Explaining State to State Variation in Limited Liability Company Popularity*, 20 U. MIA. BUS. L. REV. 1, 25 (2011).

⁵² In some states, withdrawal rights can be accorded by the operating agreement. See N.Y. LTD. LIAB. CO. LAW, § 606(a) (McKinney 2023); TEXAS BUS. ORGS. CODE ANN. § 101.107 (2023) (recognizing it can be amended by the operating agreement in light of §101.054). With regard to appraisal right, this is not the same, but does have a similar function. DEL. CODE ANN. tit. 6, § 18-210 (2023); see also MD. CODE ANN. CORPS. & ASS'NS § 4A-605 (1) (2023) (stating it can be excluded). It also seems relevant to review the interest transfer regime in these cases. All of these statutes provide for the possibility of excluding transfers in the operating agreement. N.Y. LTD.

to the emulation of the corporation regime as a model.⁵³ Under the Revised Prototype Limited Liability Companies Act, there is no mandatory rule imposing a dissociation right,⁵⁴ and—even more interestingly—this right does not imply the right of dissociated members to have their interests purchased by the company.⁵⁵ Once dissociated, they lose their rights as members and become transferees.⁵⁶ This approach mitigates the primary risk faced by a company resulting from a member's departure—the obligation to buy out her interest. Of course, this approach raises a “lock in” issue,⁵⁷ which members and their advisors should consider carefully. Additionally, the possibility of waiving such a right represents another potential shortcoming of this protective measure.⁵⁸ Finally, there are also different remedies provided by the Uniform Limited Liability Company Act and the Revised Uniform Limited Liability Company Act.⁵⁹ For example, applying for dissolution of an LLC may resolve the issue, but only in the case of oppressive misconduct.⁶⁰

In summary, when it comes to addressing withdrawal rights in an LLC, it typically requires a review of the operating agreement.⁶¹ The significant freedom to customize terms within this model is crucial, as most state regulations do not establish default provisions or mandatory rules regarding this matter.⁶² It is difficult to predict how frequently members will defend themselves through appropriate provisions on withdrawal rights in the

LIAB. CO. LAW § 603(a) (McKinney 2023); TEXAS BUS. ORG. CODE, tit. 3, § 101.108 (stating it can be amended by the operating agreement in light of § 101.054); DEL. CODE ANN. tit. 6 § 18-702 (a) (2023); MD. CODE ANN. CORPS. & ASS'NS § 4A-603(a) (2023).

⁵³ See Rutledge & Sagan, *supra* note 27, at 32.

⁵⁴ See the Revised Prototype Act Comment referring to RPLCA §§ 601-602, in Revised Prototype Limited Liability Company Act Editorial Board, LLCs, Partnerships and Unincorporated Entities Committee, ABA Section of Business Law, *Revised Prototype Limited Liability Company Act*, 67 BUS. LAW. 117, 171 (2011).

⁵⁵ See the Revised Prototype Act Comment referring to RPLCA §§ 601-602, in Revised Prototype Limited Liability Company Act Editorial Board. *Id.* The same solution is proposed also in certain state statutes. See, e.g., VA. CODE ANN. § 13.1-1040.2 (2023). It is worth highlighting that under this statute it is also possible to exclude the transfer of interest in the operating agreement. See *id.* at § 13.1-1039.

⁵⁶ See *Revised Prototype Limited Liability Company Act*, *supra* note 54, at 171.

⁵⁷ See Daniel S. Kleinberger, *The LLC as Recombinant Entity: Revisiting Fundamental Questions Through The LLC Lens*, 14 FORDHAM J. CORP. & FIN. L. 473, 488 (2009) (underscoring the differences between LLCs and close corporations from this perspective and clarifying that “the transferee is ‘locked in’ to its status in perpetuity.”).

⁵⁸ See Rutledge & Sagan, *supra* note 27, at 33.

⁵⁹ See Joan MacLeod Heminway, *The Death of an LLC: What's Trending in LLC Dissolution Law*, 2016 BUS. L. TODAY 1, 2 (2016) [hereinafter Heminway, *Death of an LLC*].

⁶⁰ See *id.*

⁶¹ See Anthony Cartee, *LLC Withdrawal and the Operating Agreement: Know Where the Exits Are Before Creating Your LLC*, CARTEE, LC, <https://www.ac-legal.com/llc-withdrawal-operating-agreement/> (last visited Feb. 16, 2024).

⁶² See Donn, *supra* note 44, at 15 (proposing examples of state statutes in which there is no default right to withdraw).

operating agreement. However, this does not seem to be frequent. Especially considering that under Delaware regulation and the Revised Prototype Limited Liability Companies Act,⁶³ the operating agreement could be written, oral, or implied, and, at least in the case of oral or implied agreements, it is plausible that members could not cover some issues.

III. CONVERSION TO A BENEFIT CORPORATION AND DISSENTERS' RIGHTS

Some scholars in the United States commonly perceive dissenters' rights cases resulting from the conversion of a standard corporation to a benefit corporation as unlikely.⁶⁴ This perception endures despite the occurrence of such cases at least once in the past.⁶⁵ Given their historical incidence, it is reasonable to anticipate that similar cases may arise in the future.⁶⁶

Indeed, it is noteworthy to recognize that establishing a benefit company entails more than just converting from a standard corporation to a benefit corporation.⁶⁷ This can also be achieved through spin-offs, which do not typically trigger dissenters' rights.⁶⁸ However, this alternative is available only to companies capable of bearing its associated costs and when it aligns with their net worth. Conversion can be more demanding in certain respects. However, it may also hold potential appeal for small businesses, which comprise most of the benefit market.⁶⁹ Conversion to a benefit corporation

⁶³ Del. Ltd. Liab. Corp. Act, DEL. CODE ANN. tit. 6, § 18-101 (9) (2023), and REVISED PROTOTYPE LTD. LIAB. CORP. ACT, § 102 (13) (AM. BAR. ASS'N 2011) use the same language to this extent.

⁶⁴ J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 558 (2016); Joan Macleod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 SEATTLE U. L. REV. 611, 627 (2017) [hereinafter Heminway, *Corporate Purpose and Litigation Risk*] (making examples of possible actions brought by shareholders, without mentioning dissenters' rights).

⁶⁵ See John Montgomery, *Mastering the Benefit Corporation*, 2016 BUS. L. TODAY 3 (2016), available at <https://growthorientedandsustainableentrepreneurship.files.wordpress.com/2016/07/gv-an-introduction-to-benefit-corporations.pdf>.

⁶⁶ See Frederick H. Alexander et al., *M&A under Delaware's Public Benefit Corporation Statute: A Hypothetical Tour*, 4 HARV. BUS. L. REV. 255, 257 (2014).

⁶⁷ See, e.g., Christine Mathias, *What is a Benefit Corporation?* NOLO, https://www.nolo.com/legal-encyclopedia/what-is-a-benefit-corporation.html?cjdata=MXxOfDB8WXww&utm_campaign=cj_affiliate_sale&utm_medium=affiliate&utm_source=cj&utm_content=5250933&utm_term=12360908&cjevent=86cf7d958e5911ee82b900070a82b824&PCN=Microsoft+Shopping+%28Bing+Rebates%2C+Coupons%2C+etc.%29&PID=100357191&data=source:cj_affiliate|CID:5250933|PID:100357191 (last visited on Nov. 28, 2023).

⁶⁸ See David Porter, *Competing with Delaware: Recent Amendments to Ohio's Corporate Statutes*, 40 AKRON L. REV. 175, 191 (2007) (indicating in most states spin-offs do not require shareholder approval).

⁶⁹ See Ellen Berrey, *Social Enterprise Law in Action: Organizational Characteristics of U.S. Benefit Corporations*, 20 TRANSACTIONS: TENN. J. BUS. L. 21, 40 (2018).

generally entails an amendment of the corporate purpose,⁷⁰ which is likely to be the basis for dissenters' rights provisions.

There are at least two noteworthy observations to be made regarding this, considering two distinct perspectives on the effects of such a conversion. First, becoming a benefit corporation typically involves embracing a particular benefit objective, as mandated by Delaware regulations (though not under the Model Benefit Corporation Legislation).⁷¹ This conversion may mean shifting from a broad, general purpose to a more specific one, and this change can be significant.⁷² This becomes particularly pertinent when the intended purpose is broad and holds the potential to modify the risks borne by shareholders due to its connection with the company's initial mission and operations.⁷³

Secondly, a conversion to a benefit corporation could have substantial and non-substantial results regarding the alteration of the risk run by shareholders, depending on each case's peculiarities. With this in mind, given that public benefit definitions are intentionally broad to accommodate socially conscious entrepreneurs in choosing the most suitable objectives,⁷⁴ it is not immediately apparent that the conversion significantly affects them in terms of corporate purposes. Rather, this is contingent upon the benefit goal the corporation will pursue and the significance of the alteration in the corporation's activities resulting from the adoption of the benefit status.

Following the Model Benefit Corporation Legislation, state statutes can only require a general public benefit, which can be vague and ambiguous.⁷⁵ This ambiguity can challenge directors in later efforts to define it more precisely.⁷⁶ In these cases, assuming the existence of a fundamental amendment of the corporate purpose may not be correct. Even if Delaware regulations mandate a specific public benefit, it might be restricted to just one of several potential goals. In such cases, its significance should not be assumed to be self-evident. Scholars emphasize the potential for pursuing a

⁷⁰ See Janine S. Hiller & Scott J. Shackelford, *The Firm and Common Pool Resource Theory: Understanding the Rise of Benefit Corporations*, 55 AM. BUS. L. J. 5, 31 (2018) [hereinafter Hiller & Shackelford]; William H. Clark Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM MITCHELL L. REV. 817, 819 (2012) [hereinafter Clark Jr. & Babson].

⁷¹ See DEL. CODE. ANN. tit. 8 § 362 (2023); *contra* MODEL BENEFIT CORP. LEGIS. § 201 (B).

⁷² See Clark Jr. & Babson, *supra* note 70, at 839.

⁷³ Cf. *id.* at 850 (indicating risk of directors' abuse).

⁷⁴ See *id.* at 839-41.

⁷⁵ See Justin Blount & Kwabena Offei-Danso, *The Benefit Corporation: A Questionable Solution to A Non-Existent Problem*, 44 ST. MARY'S L.J. 617, 651 (2013) [hereinafter Blount & Offei-Danso]; Kyle Westaway & Dirk Sampselle, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1034 (2013).

⁷⁶ See J. Haskell Murray, *Social Enterprise Innovation: Delaware's Public Benefit Corporation Law*, 4 HARV. BUS. L. REV. 345, 353 (2014); J. William Callison, *Putting New Sheets on a Procrustean Bed: How Benefit Corporations Address Fiduciary Duties, the Dangers Created, and Suggestions for Change*, 2 AM. U. BUS. L. REV. 85, 108 (2012) [hereinafter Callison].

narrowly defined purpose when selecting a specific public benefit⁷⁷ along with the limited "demands on corporate production" associated with such a scenario.⁷⁸

Moreover, empirical data tends to indicate a significant reluctance among benefit corporations to clearly delineate social purposes, opting instead for succinct descriptions.⁷⁹ Although the purpose can vary depending on each case, and paradoxically, a very brief but influential benefit goal could have significant relevance for shareholders, this usually is unlikely, given that a poorly defined goal will hardly affect corporate purpose.

Currently, under state statutes, the dissenters' rights, in case of conversion to a benefit corporation, derive simply from the formal presence of a charter amendment, without a connection of the right to the relevance of the amendment.⁸⁰ As it will be analyzed in the conclusion, a different approach could be proposed. To connect the theme to minority protection, it is necessary to consider the prospective consequences of the charter amendment depending on conversion to a benefit company and its actual impact on the risk run by shareholders.⁸¹ Minority protection appears to be inconsequential when the company's purpose does not undergo significant changes following the conversion.

A. The Importance of the Issue and the Relevance of the Different Solutions

1. The Approach Adopted by the Model Benefit Corporation Legislation (and the Proposed Modifications)

Conversion to a benefit corporation or termination of benefit status does not entail the existence of specific dissenters' rights under the Model Benefit

⁷⁷ See Sarah Thornsberry, *More Burden than Benefit – Analysis of the Benefit Corporation Movement in California*, 7 J. BUS. ENTREPRENEURSHIP & L. 159, 168 (2013); Briana Cummings, *Benefit Corporations: How to Enforce a Mandate to Promote the Public Interest*, 112 COLUM. L. REV. 578, 592 f. (2012).

⁷⁸ See Hiller & Shackelford, *supra* note 70, at 35.

⁷⁹ See Dilek Cetindamar, *Designed by law: Purpose, accountability, and transparency at benefit corporations*, 5 COGENT BUS. & MGMT. 1, 8 (2018) (only half the companies replying to a survey about this clearly stated in the charter the social goals, and most of them in a very succinct way).

⁸⁰ The need for relevance of the consequences arising from this charter amendment is inspired by the Italian regulation. Despite the absence of a rule specifically dealing with the issue arising from the conversion of an ordinary corporation to a benefit one, this charter amendment requires a modification of the corporate purpose—and a material change in the corporate purpose is required to provide minority shareholders with dissenters' rights under the rule generally applicable to corporations. C.c. art. 2437, letter a (Italy); see also Marco Speranzin, *Benefit Legal Entities in Italy: An Overview*, 19 EUROPEAN CO. L. 142, 149 (2022).

⁸¹ See Dana Brakman Reiser & Steven A. Dean, *Financing the Benefit Corporation*, 40 SEATTLE U. L. REV. 793, 794 (2017) (discussing sacrificing value for shareholders).

Corporation Legislation.⁸² This approach distinguishes between these charter amendments and the events that usually trigger dissenters' rights, which involve providing cash to satisfy dissenting shareholders, known as liquidity events.⁸³ In the absence of such liquidity, any cash would necessarily come from the corporation, and this would result in a likely reduction of adoption of the benefit status by private and small companies, which are supposedly interested in the new status but could simultaneously find it difficult to cash out minority shareholders in this case.⁸⁴

However, this approach is not persuasive because the conversion to a benefit corporation could permit the company to find replacement capital, consequently allowing the payment of dissenting shareholders' shares.⁸⁵ Moreover, in general terms, the dissenters' rights do not necessarily depend on a liquidity event.⁸⁶ Although dissenters' rights are increasingly utilized in cases of mergers, some state statutes continue to acknowledge it in various instances of charter amendments other than liquidity events.⁸⁷

A proposed modification of the Model Benefit Corporation Legislation attempted to grant appraisal rights for election of the benefit status through charter amendment or mergers, but not for termination of the benefit status.⁸⁸ The proposed modification was based on the assumption that the latter would not fundamentally alter shareholders' rights.⁸⁹ Even if this proposal is not enacted, it is noteworthy to consider the disparate treatment of the election and termination of the benefit status in this context, which will be discussed further below.

⁸² See WILLIAM H. CLARK JR. & LARRY VRANKA, THE NEED AND RATIONALE FOR THE BENEFIT CORPORATION: WHY IT IS THE LEGAL FORM THAT BEST ADDRESSES THE NEEDS OF SOCIAL ENTREPRENEURS, INVESTORS, AND, ULTIMATELY, THE PUBLIC. 27 (Jan. 18, 2013), available at https://drive.google.com/file/d/1QyMrBS9_6fC9guMYotZ5DElsTxuD16K9/view?pli=1.

⁸³ See *id.*

⁸⁴ See *id.*

⁸⁵ See J. Haskell Murray, *Examining Tennessee's For-Profit Benefit Corporation Law*, 19 TRANSACTIONS: TENN. J. BUS. L. 325, 333 (2017) [hereinafter Murray, *Examining Tennessee's For-Profit Benefit Corporation Law*]; J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L. J. 485, 500 (2013) [hereinafter Murray, *Defending Patagonia*].

⁸⁶ See Wertheimer, *Purpose of the Shareholders' Appraisal Remedy*, *supra* note 6, at 683.

⁸⁷ See Cleveland, *supra* note 1, at 926; Rutledge & Sagan, *supra* note 27, at 31; see also Mary Siegel, *Back to the Future: Appraisal Rights in the Twenty-First Century*, 32 HARV. J. ON LEGIS. 79, 91-92 (1995) (summarizing variation among the states as to which transactions trigger appraisal rights).

⁸⁸ Corporate Laws Committee, ABA Business Law Section, *Proposed Changes to the Model Business Corporation Act - New Chapter 17 on Benefit Corporations*, 74 BUS. LAW. 819, 825 (2019).

⁸⁹ *Id.*

2. *Benefit Corporations Diffusion and Relevance of the Different Solutions*

Obtaining a precise understanding of the widespread prevalence of benefit corporations across the United States is not a straightforward task.⁹⁰ While some data is available, it assists in identifying where these companies are primarily located and, conversely, identifying states where these companies seem to be absent despite having specific rules in place.⁹¹ While it is anecdotal information, it is noteworthy that the number of public benefit corporations in Delaware is constantly increasing.⁹² As of the beginning of 2021, there were more than 3,000 entities, compared to a possible estimate of around 1,000 in July 2018.⁹³ In the case of Oregon, the increase is more modest. In July 2018, the estimate was 2,028; as of November 2023, there are 2,531 benefit entities, with the majority being LLCs.⁹⁴

It is important to note that benefit corporation statutes are widely adopted across the United States, with the most recent data covering thirty-seven states.⁹⁵ However, the rapid increase of statutes does not necessarily mean a corresponding spreading out of these companies. Of course, using the number of benefit corporations per state as a criterion to define the actual importance of such regulations can be subject to debate for at least two reasons.

First, accurate information about the dimensions of these companies is currently missing.⁹⁶ There are some publicly traded benefit corporations,⁹⁷

⁹⁰ See Berrey, *supra* note 69, at 51 n.133.

⁹¹ See data in *id.* at 105.

⁹² Ruth Jin, *The Development of Delaware Public Benefit Corporations and Their Access to Capital*, ABA (Apr. 21, 2023), https://www.americanbar.org/groups/business_law/resources/newsletters/delaware-public-benefit-corporations/.

⁹³ Compare the table in Berrey, *supra* note 69, at 105 with data obtained from the Delaware Secretary of State on March 2, 2023, referring to 3136 PBCs in the state at the end of January 2021. see JEFFERY W. BULLOCK, DELAWARE DIVISION ON CORPORATIONS: 2022 ANNUAL REPORT 1 (2022).

⁹⁴ Compare the table in Berrey, *supra* note 69, at 105 with data obtained from the Oregon Secretary of State, referring to the mentioned total of benefit entities, and, interestingly but not surprisingly, 2145 LLCs, 378 Business Corporations, and a small number of different entities like Professional Corporations. see *Active Benefit Companies*, OREGON.GOV, <https://data.oregon.gov/business/Active-Benefit-Companies/baig-8b9x> (last visited Nov. 26, 2023).

⁹⁵ Gargi Bohra, *Benefit Corporations: Doing Well and Doing Good*, N.Y.U. J. L. BUS. ONLINE (Feb. 28, 2022), available at <https://www.nyuylb.org/single-post/benefit-corporations-doing-well-and-doing-good>.

⁹⁶ Berrey, *supra* note 69, at 38.

⁹⁷ Alicia E. Plerhoples, *Social Enterprises and Benefit Corporations in the United States*, in THE INT'L HANDBOOK OF SOC. ENTER. L. 903, 908 (Henry Peter et al. eds., 2023) [hereinafter Plerhoples]; Michael R. Littenberg et al., *Delaware Public Benefit Corporations-Recent Developments*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 31, 2020), <https://corpgov.law.harvard.edu/2020/08/31/delaware-public-benefit-corporations-recent-developments/>; Jill E. Fisch, *Purpose Proposals*, U. PENN. INST. FOR L. & ECON., April 2022, at 1, 20.

and some big companies have adopted this form.⁹⁸ However, in general, the importance of the number of such companies could materially vary depending, for example, on their net worth and number of employees.⁹⁹

Second, as some scholars argue, many benefit corporations do not necessarily arise from a particular social consciousness of entrepreneurs or specific protection accorded by national regulation to socially oriented businesses.¹⁰⁰ The outcome often hinges on the user-friendliness and simplicity of the incorporation process.¹⁰¹ Conversely, it may steer towards a benefit corporation without adequately explaining the legal implications of this decision, as is potentially the case in Nevada.¹⁰² In relation to this particular case, it is important to note the influence of Nevada in corporate law, as this could offer additional insights into this phenomenon.¹⁰³ Nevada is trying to compete with Delaware in such a field, not only in terms of substantive corporate law but also in tax regulation, excluding corporate income tax.¹⁰⁴

Nevertheless, the numerical data seems reliable because it is not arbitrary like other ways of choosing relevant regulations. For example, some scholars deem the approval process of the statute to be relevant to this end.¹⁰⁵ Accordingly, they examine regulations that were readily adopted and, on the

⁹⁸ See Izi Pinho, *The Advent of Benefit Corporations in Florida*, 47 STETSON L. REV. 333, 358 (2018) [hereinafter Pinho]; Berrey, *supra* note 69, at 72.

⁹⁹ See Berrey, *supra* note 69, at 72.

¹⁰⁰ See *id.* at 37-38 (explaining that the bar to obtain benefit corporation status is low and lacks accountability).

¹⁰¹ *Id.* at 59.

¹⁰² See Eric Franklin Amarante, *Nudging Entrepreneurs Into Noncompliance: Why Does Nevada Have So Many Benefit Corporations?* [Blog Post], U. TENN. COLL. L., Sept. 2016, at 1, 4. (showing that the features of the incorporation process are likely to be the origin of the big number of BCs in this state); Murray, *Social Enterprise Law Market*, *supra* note 64, at 581 (referring to the relevance of the inclusion of a benefit corporation check box on the state form).

¹⁰³ See generally Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935 (2012).

¹⁰⁴ See *id.* at 940 (describing the competition between Nevada and Delaware and its focus on liability regime); Bruce H. Kobayashi & Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, 1168 (2012) (commenting the race to the bottom with regard to lax fiduciary duties and deeming Nevada to be a significant competitor of Delaware). Even if tax regulation is not the focus of this article, it can be interesting to compare different states' approaches looking at the Economic Development Office websites: the Nevada approach, described in the text is one example and is clearly different from other states' approaches. See *Nevada is a One-of-a-Kind State*, NEV. GOVERNOR'S OFFICE ECON. DEV., <https://goed.nv.gov/why-nevada/nevada-advantage/> (last visited Nov. 27, 2023). For a comparison of two other meaningful states in the benefit companies' market, California and Delaware, provide for tax credit provisions. See *Incentives, Grants & Financing*, CA.GOV, <https://business.ca.gov/advantages/incentives-grants-and-financing/> (last visited Nov. 27, 2023); see also *Incentives & Credits*, DELAWARE.GOV, <https://business.delaware.gov/incentives/> (last visited Nov. 27, 2023).

¹⁰⁵ See generally Scott J. Shackelford et al., *Unpacking the Rise of Benefit Corporations: A Transatlantic Comparative Case Study*, 60 VA. J. INT'L L. 697 (2020).

other hand, regulations whose adoption process was difficult.¹⁰⁶ This criterion is not persuasive because, generally, a legal regulation should not be influenced by the adoption process after it has been adopted. It is also worth underscoring that one of the states analyzed by scholars who utilize the method mentioned above is Virginia, which does not seem to be home to benefit corporations at all, according to some scholars.¹⁰⁷ However, other data differs and shows a limited number of these companies in this state.¹⁰⁸ Even still, the impact of a regulation never or very rarely applied in real life is at least debatable despite its history.

In accordance with the numerical criteria, this Article will closely examine the following states: Oregon, New York, Nevada, Delaware, Colorado, California, and Maryland. However, this does not imply the exclusion of other state statutes from the scope of the analysis, but rather focuses on their potential relevance. Following the clarification of how regulations pertaining to benefit corporations will be selected, some remarks are warranted regarding the significance of the topic.

The regulations that provide dissenters' rights in cases of conversion to a benefit corporation differ significantly from those that do not offer such rights. Scholars occasionally deem this difference as material.¹⁰⁹ Conversely, they may view the state provision regarding dissenters' rights as a minor difference compared to the Model Benefit Corporation Legislation, which does not include a similar provision.¹¹⁰

Including such a right in the mentioned case is highly significant.¹¹¹ This is not only because dissenters' rights provisions frequently exclude fundamental transactions but also due to specific charter amendments that result from the conversion to a benefit corporation. This is indeed a modification of the corporation's purpose,¹¹² which is altered in a way that allows a combination of profit and socially-oriented activities.¹¹³ Against a

¹⁰⁶ See *id.* at 703 n.21 (analyzing Delaware for its importance in company law, Connecticut for the difficulties faced during adoption of the regulation, and Virginia for the ease of the process).

¹⁰⁷ See Berrey, *supra* note 69, at 105.

¹⁰⁸ *Benefit Corporations List*, B LAB, <https://data.world/blab/benefit-corporations-list> (last visited Mar. 2, 2023) (referring to data updated in 2017).

¹⁰⁹ See Shackelford et al., *supra* note 105, at 712; Kathryn Acello, *Having Your Cake and Eating It, Too: Making the Benefit Corporation Work in Massachusetts*, 47 SUFFOLK U. L. REV. 91, 107 (2014) [hereinafter Acello].

¹¹⁰ See Pinho, *supra* note 98, at 348.

¹¹¹ See J. Haskell Murray, *Choose Your Own Master: Social Enterprise, Certifications, and Benefit Corporation Statutes*, 2 AM. U. BUS. L. REV. 1, 37 (2012) [hereinafter Murray, *Choose Your Own Master*].

¹¹² See Hiller & Shackelford, *supra* note 70, at 31; Emily Winston, *Benefit Corporations and the Separation of Benefit and Control*, 39 CARDOZO L. REV. 1783, 1802 (2018); Blount & Offei-Danso, *supra* note 75, at 628; Lyman Johnson, *Pluralism in Corporate Form: Corporate Law and Benefit Corps.*, 25 REGENT U. L. REV. 269, 287 (2012); Christopher Lacovara, *Strange Creatures: A Hybrid Approach to Fiduciary Duty in Benefit Corporations*, 2011 COLUM. BUS. L. REV. 815, 840 (2011).

¹¹³ See Clark Jr. & Babson, *supra* note 70, at 819.

background in which corporations often pursue goals beyond just profit,¹¹⁴ sometimes even charity goals,¹¹⁵ and are usually permitted by state statutes to engage in any lawful activity,¹¹⁶ distinguishing a public benefit from the company's ordinary activities can be challenging.¹¹⁷ Accordingly, even if the applicable rules provided for dissenters' rights in case of fundamental transactions or alteration of the corporate charter, the solution would not be obvious, as public benefit goals can materially vary,¹¹⁸ and the same is true about their impact on the company's activity and general goal.

In conclusion, it is crucial not to overlook the significance of granting dissenters' rights when a company transitions to a benefit model. This is particularly noteworthy given the uncertain resolutions stemming from the absence of a comparable provision, which will be examined further in this Article. Moreover, many scholars argue that state statutes should include provisions for such a right despite the different approach taken by the Model Benefit Corporation Legislation.¹¹⁹

B. The Absence of a Specific Rule about Dissenters' Rights and Its Implications

1. Conversion to a Benefit Corporation and General Corporate Regulation

Adhering to the criteria delineated above and considering potential dissenters' rights stemming from conversions to a benefit corporation within the framework of general corporate regulations, this Article will first focus on Oregon, followed by New York, and then Maryland.

Under Oregon's regulation, adopting the benefit status requires a minimum status vote, but there is no provision about dissenters' rights.¹²⁰ According to the standard regulations, shareholders are granted this right if they dissent from mergers, share exchanges, sales or exchanges involving a significant portion of the corporation's property, amendments to the Articles of Incorporation that materially and adversely impact rights through

¹¹⁴ See Michael B. Dorff et al., *The Future or Fancy? An Empirical Study of Public Benefit Corporations*, 11 HARV. BUS. L. REV. 113, 122 (2021) [hereinafter Dorff et al.] (underscoring that a benefit purpose could not concern investors); Heminway, *Corporate Purpose and Litigation Risk*, *supra* note 64, at 618; Ian Kanig, *Sustainable Capitalism Through the Benefit Corporation: Enforcing the Procedural Duty of Consideration to Protect Non-Shareholder Interests*, 64 HASTINGS L. J. 863, 893 (2013).

¹¹⁵ See Deborah J. Walker, *Please Welcome the Minnesota Public Benefit Corporation*, 11 U. SAINT THOMAS L. J. 151, 158 (2013).

¹¹⁶ Heminway, *Corporate Purpose and Litigation Risk*, *supra* note 64, at 618.

¹¹⁷ See *id.* at 621 (explaining that the purposes could be pursued by for-profits and non-profits alike).

¹¹⁸ *Id.* at 619.

¹¹⁹ See Murray, *Choose Your Own Master*, *supra* note 111, at 37 (underscoring the fundamental change arising from election or termination of benefit status); Callison, *supra* note 76, at 93 n.28.

¹²⁰ See OR. REV. STAT. ANN. § 60.754 (2023).

alterations or abolishment of preemptive rights, or a reduction in the number of shares owned by the shareholder to a fraction, with the fractional share to be acquired for cash.¹²¹ Furthermore, the right arises from any corporate action taken pursuant to a shareholder vote if the Articles of Incorporation, bylaws, or a resolution of the board of directors provide for it.¹²²

The mentioned amendments to the Articles of Incorporation and the provision of dissenters' rights by the Articles of Incorporation or by a resolution of the board deserve some brief analysis. The specification of the charter amendments triggering dissenters' rights to those concerning preemptive rights or reduction of the number of shares makes them unlikely to be relevant in the analyzed case of conversion to a benefit corporation. Hypothetically, such a conversion could materially and adversely affect shareholders' rights. However, the rule provides for minority protection only in those specific cases which do not seem related to the conversion.¹²³

On the contrary, the possibility of providing dissenters' rights not only through a specific clause in the Articles of Incorporation but also a resolution of the board of directors could be of great interest in cases of conversion to a benefit corporation. This option may prove advantageous when directors perceive that denying dissenters' rights to dissenting shareholders could pose long-term risks.

Under New York's regulation, dissenters' rights depend on the dissent from mergers, share exchanges, sales, or exchanges of all or substantially all of the corporation's property,¹²⁴ which differ from a conversion to a benefit corporation and are unlikely to be applicable in this case.

2. *Conversion to a Benefit Corporation as a Fundamental Transaction*

Analyzing rules in force in Maryland raises the question of whether a conversion to a benefit corporation could result in a fundamental transaction regarding the alteration of stockholders' rights.¹²⁵ It does not appear that scholars have given much attention to this problem, as they tend to underscore the absence of a specific provision granting dissenters' rights to

¹²¹ See *id.* at § 60.554.

¹²² See *id.* at § 60.554(1)(d), (1)(e) (providing for the right to dissent, and, in particular, cases “which alter or abolish a preemptive right of the holder of the shares to acquire shares or other securities or reduces the number of shares owned by the shareholder to a fraction of a share if the fractional share so created is to be acquired for cash under § 60.141” and “any corporate action taken pursuant to a shareholder vote to the extent the articles of incorporation, bylaws or a resolution of the board of directors provides that voting or nonvoting shareholders are entitled to dissent and obtain payment for their shares.”).

¹²³ See *id.*

¹²⁴ See N.Y. BUS. CORP. LAW § 910 (McKinney 2023).

¹²⁵ See generally MD. CODE ANN. CORPS & ASS'NS § 3-202 (2014).

dissenting shareholders,¹²⁶ which is clear without questioning how rules generally applicable to dissenters' rights could affect the issue.

Unlike the statutes in Oregon and New York, Maryland regulations include dissenters' rights that arise from the alteration of the articles of organization, particularly when such changes substantially and adversely impact the rights of stockholders.¹²⁷ This is an extensive formulation, as it does not limit its scope of application by specifying which rights have to be affected to raise dissenters' rights.¹²⁸ The provision relating to such a right is not mandatory, as it expressly allows the corporation's charter to reserve the right of alteration without entailing dissenters' rights.¹²⁹ However, if this does not occur, it is plausible that the provision may be applicable when a company elects the benefit status, at least when some influential alterations of the Articles of Incorporation are determined. As mentioned, converting to a benefit corporation can involve very different impacts on shareholders' rights, depending on the benefit goal.

C. State Statutes Providing a Specific Rule about Dissenters' Rights

1. *Dissenters' Rights Provided Only in Case of Conversion to a Benefit Corporation*

Dissenters' rights regulations sometimes differ in cases of election and termination of the benefit status.¹³⁰ Some state statutes provide the dissenting shareholder with this protection only when an existing company becomes a benefit one, and consequently, termination of the status follows ordinarily applicable rules.¹³¹

This approach is not frequently enacted and is adopted by states like Connecticut, Massachusetts, and South Carolina, which are beyond the scope of this Article due to their limited number of benefit corporations.¹³²

¹²⁶ See Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J. L. & SOC. POL'Y 170, 184 n.118 (2012).

¹²⁷ See MD. CODE ANN., CORPS. & ASS'NS § 3-202(a)(4) (2014).

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See J. Haskell Murray, *Corporate Forms of Social Enterprise: Comparing the State Statutes* (Jan. 15, 2015) (unpublished chart) (on file with Belmont University), available at <https://deliverypdf.ssrn.com/delivery.php?ID=396031102089030110030075083093098088058033095009026094104026114098086091111106072097029031099028051096054091121016019005127102111073000085023000112122103120084104088089039073068070084023001101008109068002064097030108127010097084004117116106082099088103&EXT=pdf&INDEX=TRUE>.

¹³¹ See *id.*

¹³² *Id.*; Murray, *Social Enterprise Law Market*, *supra* note 64, at 558; see also Shackelford et al., *supra* note 105, at 712 (with regard to Connecticut); Acello, *supra* note 109, at 107, 114 (with regard to Massachusetts); J. William Callison, *Benefit Corporations, Innovation, and Statutory Design*, 26 REGENT U. L. REV. 143, 147 n.10 (2013) (with regard to Massachusetts and South Carolina).

However, this approach is also utilized by Nevada, whose peculiar role in the benefit corporation context has already been described.¹³³ Thus, it is worth briefly analyzing this aspect of Nevada's regulation.

Nevada's approach distinctly separates the election and termination of the benefit status.¹³⁴ It grants dissenters' rights when the company becomes a benefit corporation¹³⁵ but only requires a supermajority vote—specifically, a minimum status vote—when terminating the status or in cases of disposing of all or substantially all of the property of the benefit corporation.¹³⁶ Due to this language, there is an equivalence, as to the required majority, between formal and substantial termination of status because the disposition of all property could result in such a termination.¹³⁷ This is an interesting feature of the regulation. Eventually, the general dissenting stockholders' rights rule is not applicable in case of termination of the benefit status, as it only applies in case of acquisition of a controlling interest by an acquiring person.¹³⁸

2. Dissenters' Rights Provided Both in Case of Conversion to a Benefit Corporation and in Case of Termination of the Status

In California, Florida, Minnesota, Tennessee, and Washington, dissenters' rights arise from conversion to a benefit corporation and termination of the benefit status.¹³⁹ Furthermore, some of these regulations encompass a more comprehensive provision, deriving such a right from an amendment of the social purpose in the corporation's Articles of Incorporation that would materially change one or more of the social purposes of the corporation.¹⁴⁰ Despite some potential uncertainty about what a material change is in terms of social purposes,¹⁴¹ this is also an interesting provision, as it allows for the prevention of potential indirect violations of a more restrictive rule that grants dissenters' rights solely in the event of benefit status termination, thereby incorporating a criterion for assessing the significance of the modification.¹⁴² This approach could prove helpful in

¹³³ Murray, *Social Enterprise Law*, *supra* note 64, at 558.

¹³⁴ See NEV. REV. STAT. ANN. § 78B.110 (2014); NEV. REV. STAT. ANN. § 78B.120 (2014).

¹³⁵ See *id.* at § 78B.110.

¹³⁶ See *id.*

¹³⁷ See *id.* at § 78B.120.

¹³⁸ See *id.* at § 78.3793.

¹³⁹ See Murray, *Examining Tennessee's For-Profit Benefit Corporation Law*, *supra* note 85, at 332 (with regard to Tennessee); Murray, *Social Enterprise Law*, *supra* note 64, at 558 (with regard to California, Florida, Minnesota, Washington); Walker, *supra* note 115, at 166 (with regard to Minnesota).

¹⁴⁰ See WASH. REV. CODE ANN. § 23B.25.090 (2012); WASH. REV. CODE ANN. § 23B.25.120 (2012); see also KY. REV. STAT. ANN. § 271B.13-020(e) (2017).

¹⁴¹ See WASH. REV. CODE ANN. § 23B.25.090 (2012); WASH. REV. CODE ANN. § 23B.25.120 (2012).

¹⁴² Compare WASH. REV. CODE ANN. § 23B.25.090 (2012); WASH. REV. CODE ANN. § 23B.25.120 (2012) (containing no language that would help to define "material" change), with KY. REV. STAT.

achieving a balanced consideration of the various interests associated with the subject at hand. Interestingly, although California's benefit corporation regulation¹⁴³ provides for dissenters' rights when the corporation changes either from or to a benefit corporation, California's general dissenters' rights rule does not encompass charter amendments or purpose modifications.¹⁴⁴

3. *Why the Second Approach Should Be Preferred*

It's worth commenting on the reasons for treating the election and termination of benefit status differently with regard to minority protection. Scholars have paid scant attention to this issue, but when they have analyzed it, they have regarded the difference between the election and termination of benefit status as noteworthy.¹⁴⁵ It is unclear why a shareholder should be entitled to dissenters' rights protection in one direction and not the other. This distinction does not appear justified, especially when considering the potential changes that could arise from the termination of benefit status. The sole conceivable rationale for this distinction appears to be streamlining the process for a company to relinquish its benefit status, whether transitioning from incorporation as a benefit corporation to an ordinary one or reverting to an ordinary status after a previous conversion to benefit status.

Nevertheless, irrespective of whether this goal aligns with adopting a benefit corporation statute that typically seeks to strengthen this model, the disparate treatment of two similar cases does not appear to be an appropriate solution. Moreover, it is essential to reiterate that tying dissenters' rights to the conversion to a benefit corporation (or the termination of its status) ensures legal clarity. While this linkage makes the consequences of the conversion explicit, it effectively safeguards minorities only when the amendment has a substantial impact.¹⁴⁶

D. State Statutes Repealing Rules Providing for Dissenters' Rights

1. *The Delaware Approach (and Its Influence)*

Delaware's leading role in corporate law is well known. Analyzing the evolution of Delaware public benefit corporation (PBC) regulation is crucial. Initially, rules about acquisition and termination of benefit status used to

ANN § 271B.13.020(e) (providing helpful explanation illustrating what would constitute a "material" change).

¹⁴³ See CAL. CORP. CODE § 14603(a) (2012) (election of benefit status); CAL. CORP. CODE § 14604(a) (2012) (termination of benefit status).

¹⁴⁴ Murray, *Defending Patagonia*, *supra* note 85, at 500.

¹⁴⁵ *Id.* at 508 n.138 (expressing opinion about Massachusetts that could apply to other similar cases).

¹⁴⁶ See WASH. REV. CODE ANN. § 23B.25.090 (2012); WASH. REV. CODE ANN. § 23B.25.120 (2012); see also KY. REV. STAT. ANN. § 271B.13-020(e) (2017).

differ regarding the required majority and dissenters' rights (namely, appraisal rights).¹⁴⁷ Becoming a PBC required the approval of ninety percent of the outstanding shares of each class of the stock of the corporation of which there are outstanding shares, whether voting or non-voting, and dissenters were entitled to appraisal rights.¹⁴⁸ Amending or deleting the public benefit purpose clause required approval of two-thirds of the outstanding shares of each class of the corporation's stock of which there are outstanding shares, whether voting or non-voting, without any specific provision about appraisal rights.¹⁴⁹ The initial reform in 2015 altered the required majority for converting to a PBC, lowering the threshold to two-thirds.¹⁵⁰ Simultaneously, it introduced the market exception to appraisal rights, exempting listed companies or those with over 2,000 holders from such rights, aligning with the generally applicable rule.¹⁵¹

The Delaware regulation currently in force—deriving from a further 2020 reform—made it easier for an ordinary company to convert to a public benefit corporation by requiring a simple majority.¹⁵² The current regulation repealed the former provision that previously accorded dissenting shareholders an appraisal right.¹⁵³ The precise ground of this modification is to enhance the diffusion of public benefit corporations.¹⁵⁴

2. *The Last Reform of Colorado Public Benefit Corporations*

Following a similar path, the Colorado legislature used to accord appraisal rights in case of election of benefit status in the public benefit corporations statute¹⁵⁵ and extended the same right in the event of terminating benefit status in the general corporation regulation.¹⁵⁶ A 2022 reform of the public benefit corporations statute repealed the appraisal rights provision.¹⁵⁷ Supporters of this modification argued that there is no requirement for appraisal rights in the event of a conversion to a public benefit corporation.¹⁵⁸ They asserted that since the general assembly has the authority to amend or

¹⁴⁷ See Act of July 17, 2013, ch. 122, 2013 Del. Laws, § 363(a) and (b).

¹⁴⁸ See *id.*

¹⁴⁹ See the original version of DEL. CODE ANN. tit. 8, § 363(c) (2020).

¹⁵⁰ 40 Del. Laws 9 (2015).

¹⁵¹ *Id.*

¹⁵² See the current version of DEL. CODE ANN. tit. 8, § 361 (2020), which no longer encompasses specific rules about majority and appraisal rights.

¹⁵³ See *id.*

¹⁵⁴ See Plerhoples, *supra* note 97, at 907-08; Dorff et al., *supra* note 114, at 153.

¹⁵⁵ See the original version of Colorado Public Benefit Corporation Act, COLO. REV. STAT. ANN. § 7-101-504(3) (2022).

¹⁵⁶ See COLO. REV. STAT. ANN. § 7-113-102(g) (2021).

¹⁵⁷ See Herrick K. Lidstone, *Public Benefit Corporation Act – 2022 Amendments*, BURNS, FIGA & WILL, P.C. (2022), at 3 n.11, available at <https://dx.doi.org/10.2139/ssrn.4065148>.

¹⁵⁸ *Id.* at 4.

repeal the relevant articles of the charter, and shareholders do not possess vested property rights derived from the Articles of Incorporation, appraisal rights are unnecessary.¹⁵⁹

These grounds, even if obvious in themselves, could be debated, though, as the actual existence of a link between them and the choice of repealing a provision protecting minorities does not seem to be clear. The powers of the general assembly are clear, and appraisal rights do not affect them. Such a right is, on the contrary, a compromise between the corporation's needs and minority protection. In this case, the vested property rights theory is irrelevant, as it typically refers to veto rights rather than other rights, such as the appraisal one.¹⁶⁰

Furthermore, the rule establishing appraisal rights in case of termination of benefit status is still in force.¹⁶¹ Consequently, losing the benefit status appears to be more challenging than electing it.¹⁶² However, the disparity between the two scenarios could still find its ground in the mentioned goal to enhance PBC diffusion, adding to it a further related goal to make it easier for a PBC to maintain rather than terminate its status.

3. *Abolishing the Dissenters' Rights: Benefit Corporations Diffusion vs. Shareholders' Potential Dissatisfaction?*

American scholars commonly advocate for state statutes to incorporate dissenters' rights in the event of electing benefit status, notwithstanding the absence of a similar provision in the Model Benefit Corporation Legislation.¹⁶³ While this approach may entail expenses for converting companies, these costs might be perceived as less risky than the potential legal uncertainty resulting from a significant alteration in investment, which could prompt objections from dissenting shareholders.¹⁶⁴ In essence, efforts to proliferate benefit corporations by simplifying and lowering the cost of electing the status due to the absence of dissenters' rights could introduce additional risks for companies.¹⁶⁵ Only time will reveal which solution is preferable. However, it is worthwhile to offer some insights into this trade-off.

¹⁵⁹ *Id.*

¹⁶⁰ See COLO. REV. STAT. § 7-110-101(2) (2023).

¹⁶¹ See *id.* at § 7-113-102.

¹⁶² See generally *id.*

¹⁶³ See Murray, *Choose Your Own Master*, *supra* note 111, at 36-37 (discussing why states should recognize dissenters' rights).

¹⁶⁴ See *id.* at 36; Anna R. Kimbrell, *Benefit Corporation Legislation: An Opportunity for Kansas to Welcome Social Enterprises*, 62 U. KAN. L. REV. 549, 578 (2013).

¹⁶⁵ See Murray, *Choose Your Own Master*, *supra* note 111, at 36 (discussing why states should recognize dissenters' rights).

Available data examined by the author does not currently show a clear relationship between the presence or absence of dissenters' rights and the diffusion of benefit companies. The Delaware case of publicly held PBCs could hold significance, as the number of such companies did rise following reforms that introduced the market exception to appraisal rights in 2015 and ultimately repealed the provision granting appraisal rights to dissenters in 2020.¹⁶⁶ Likely, the first reform was actually more influential than the second one, as it removed a possible obstacle to conversion, specifically for publicly held companies.¹⁶⁷ In addition, the data refers to a period close to the latter, and it is improbable that the market for benefit companies would react swiftly to a reform.¹⁶⁸ Despite this growth, the benefit phenomenon remains a niche, as we are considering extremely limited numbers.¹⁶⁹

Even if assuming the absence of dissenters' rights could improve the number of benefit companies, it is also necessary to consider a long-term perspective, focusing on the risks of actions brought by members or shareholders dissatisfied with the new goals of the company.¹⁷⁰ Moreover, it is worth articulating the discourse from at least three different perspectives.

The first interesting connection appears when reading some institutional investors' policies related to sustainability and benefit corporations.¹⁷¹ One of the main actors in this market, Blackrock, confirmed the connection between sustainability and the long-term value of the investment.¹⁷² In its Investment Stewardship, Blackrock points out that the choice to become a benefit corporation shall be approved by shareholders, even if applicable rules do not require this.¹⁷³ The investor would share this choice only in light of adequate protection provided to minority shareholders.¹⁷⁴

¹⁶⁶ See Plerhoples, *supra* note 97, at 908 (referring to an increase from three to twelve publicly held PBCs between 2020 and 2021).

¹⁶⁷ *Id.* at 907-08 (discussing the changes in Delaware legislation).

¹⁶⁸ See *id.* at 908 ("Practitioners have credited these amendments with an expansion in the number of Delaware PBCs.").

¹⁶⁹ See *id.* ("At the beginning of 2020, there were three publicly traded PBCs; by the end of 2021 there were at least 12.").

¹⁷⁰ See *id.* at 909 ("In its 2022 proxy voting guidelines, BlackRock, the world's largest asset management firm, states that it will only support shareholder proposals for PBC conversion that protect shareholder interests and specify how shareholder and stakeholder interests will be impacted; even then, it will only do so on a case-by-case basis.").

¹⁷¹ See *id.* ("In its 2022 proxy voting guidelines, BlackRock, the world's largest asset management firm, states that it will only support shareholder proposals for PBC conversion that protect shareholder interests and specify how shareholder and stakeholder interests will be impacted; even then, it will only do so on a case-by-case basis.").

¹⁷² *Blackrock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, BLACKROCK, at 21 (Jan. 2023), available at <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

¹⁷³ *Id.*

¹⁷⁴ See *id.* at 14.

Even if this is not explicit, this recommendation probably arises from the need to avoid, if possible, the effect of shareholders' dissatisfaction about an important change like the conversion to a benefit corporation, which could possibly lead to a condition of instability, with potentially many minority shareholders selling their stock.¹⁷⁵ Given that the policy explicitly addresses conversions not subject to shareholder approval per relevant regulations,¹⁷⁶ it becomes evident that the requirement for broad consensus on the conversion is likely linked not to dissenters' rights but rather to the potential sale of interests.

A second possible connection, on a very different level, could be the one between dissatisfaction and dissolution statutes, of course, when these exist and are applicable in the matter in question.¹⁷⁷ However, while the first condition depends on the single-state statute, the second (i.e., the applicability) seems unlikely in cases of conversion to a benefit model because it does not seem to resemble oppressive misconduct.¹⁷⁸ Nevertheless, a dissatisfied shareholder could be keen on invoking that remedy in case of further happenings entitling him to do so.

A third potential connection, somewhat intertwined with the preceding argument, may arise in limited liability companies when members' dissatisfaction manifests through fiduciary lawsuits filed against managers by members who allege individual harm.¹⁷⁹ This occurs because, in numerous LLC statutes, fiduciary obligations are directly extended from managers to individual members, and such legal actions are frequently utilized instead of oppression remedies.¹⁸⁰ Again, the likelihood of successfully initiating a lawsuit based on misconduct is unlikely in the event of a conversion to a benefit LLC. However, as already mentioned, a dissatisfied member could be particularly sensitive and determined to bring the action in other cases, even with uncertain outcomes.

Of course, the connections mentioned are merely a subset of the potential ramifications stemming from dissatisfied shareholders or members. Legal consultants' speculations on behalf of shareholders or members are likely to extend far beyond these. Nevertheless, emphasizing even minor consequences of repealing minority protection in the event of converting to a benefit model appears to be pertinent in offsetting the significance of having a greater number of such companies.

¹⁷⁵ See Plerhoples, *supra* note 97, at 908 (“Companies like Warby Parker state on their initial registration forms with the U.S. Securities Exchange Commission that their ‘duty to balance a variety of interests may result in actions that do not maximize stockholder value.’”).

¹⁷⁶ See *Blackrock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, *supra* note 172, at 21.

¹⁷⁷ See generally Heminway, *Death of an LLC*, *supra* note 59, at 2.

¹⁷⁸ See generally *id.*

¹⁷⁹ Moll, *supra* note 14, at 248.

¹⁸⁰ See *id.*

IV. PURPOSE MODIFICATION IN LLCs AND WITHDRAWAL RIGHT

A. The Importance of the Choices Made in the Operating Agreement

As previously noted, Limited Liability Companies (LLCs) play a crucial role in the environment of benefit companies.¹⁸¹ Given that benefit companies are often small and inclined to adopt a more straightforward and cost-effective model, LLCs serve as an important and preferred structure when feasible.¹⁸² An ordinary LLC could be suitable for benefit purposes, at least every time the LLC statute allows one to pursue any lawful purpose.¹⁸³

The central issue revolves around the legal implications that arise when a purpose is modified to incorporate beneficial goals.¹⁸⁴ Specifically, it explores whether such a change could trigger the withdrawal rights of dissenting members.¹⁸⁵ The answer largely depends on each LLC operating agreement, as LLC statutes often encompass only default rules, not always providing withdrawal rights.¹⁸⁶ Considering the approach adopted by the Revised Prototype Limited Liability Company Act, it is clear that state statutes are allowed not to encompass withdrawal right cases and to exclude the possibility for members to have such a right.¹⁸⁷

B. The Implications of Withdrawal Right

Moreover, under the Revised Prototype Limited Liability Company Act regulation,¹⁸⁸ the primary consequence one might anticipate from the exercise of the withdrawal right—namely, the right to have the interest bought by the company—does not materialize upon exercising such a right.¹⁸⁹ Instead, upon exercising one's withdrawal right, the member will transition into a transferee, retaining all the financial obligations of a member but forfeiting ownership of the business.¹⁹⁰ As a result, the individual will no

¹⁸¹ See, e.g., *Why Form a Public Benefit LLC?*, INCNOW (Sept. 24, 2021), <https://www.incnow.com/blog/2021/09/24/public-benefit-llc/>.

¹⁸² See Kimbrell, *supra* note 164, at 560.

¹⁸³ See for example DEL. CODE ANN. tit. 6, § 18-106(a).

¹⁸⁴ See Mario Stella Richter Jr. et al., *Benefit Corporations: Trends and Perspectives*, in THE INT'L HANDBOOK OF SOC. ENTER. L. 213, 223 (Henry Peter et al. eds., 2023) (discussing issues with benefit corporation regulation).

¹⁸⁵ See *id.*

¹⁸⁶ For example, New York and Texas regulations do not provide this right, that could be accorded by the operating agreement: see N.Y. LTD. LIAB. CO. LAW, § 606(a) (2021); TEXAS BUS. ORGS. CODE tit. 3, § 101.107, which could be modified under §101.054.

¹⁸⁷ See the Revised Prototype Act Comment referring to RPLCA §§ 601-602, in *Revised Prototype Limited Liability Company Act*, *supra* note 55, at 171.

¹⁸⁸ *Id.*

¹⁸⁹ See, e.g., *id.*

¹⁹⁰ *Id.*

longer possess the right to partake in the activities and affairs of the limited liability company.¹⁹¹ Adopting such an approach would be highly pertinent because it would mitigate the most significant consequence, namely the financial impact due to the buyout of minority interest.

V. CONVERSION TO BENEFIT LLC AND WITHDRAWAL RIGHT

Just as corporations may convert to benefit corporations, LLCs can convert to benefit LLCs when a state statute encompasses this model.¹⁹² In examining pertinent benefit LLC statutes, it is prudent to scrutinize Oregon and Maryland, given the notable presence of these companies in those states, while also considering the prospective significance of the Delaware statute.¹⁹³

In Oregon, the election of the benefit status only requires a minimum status vote.¹⁹⁴ However, there is no provision for withdrawal rights for dissenting members.¹⁹⁵ Thus, it becomes necessary to consider the withdrawal right regime under the LLC statute. Freedom of contract plays a fundamental role.¹⁹⁶ The operating agreement can provide for specific cases of the withdrawal right and, simultaneously, exclude or limit the otherwise existing member's power to withdraw voluntarily from the company.¹⁹⁷ In the absence of such exclusion, the member could be entitled to withdrawal by giving written notice to the LLC without needing to comply with other specific provisions about this right.¹⁹⁸

The same result occurs under Maryland's regulation.¹⁹⁹ Despite the absence of a rule regarding the withdrawal right in case of election or termination of the benefit LLC status, the general rule allows the member to withdraw by giving prior written notice unless the operating agreement excludes or limits such a right.²⁰⁰

The situation slightly varies under Delaware's regulations.²⁰¹ Like in Oregon and Maryland, there is no specific withdrawal right provision related to the election or termination of the benefit LLC status.²⁰² However, a member does not possess the withdrawal right under the default regulations

¹⁹¹ *See id.*

¹⁹² *See* OR. REV. STAT., § 60.754 (2014).

¹⁹³ *Id.*; MD. CODE ANN. CORPS. & ASS'NS § 4A-1203 (2013); DEL. CODE ANN. tit. 6, § 18-1201 (2021).

¹⁹⁴ OR. REV. STAT., § 60.754 (2014).

¹⁹⁵ *See id.* (specifying subsection (2)(b)).

¹⁹⁶ *See generally* Jens Damman & Matthias Schündeln, *Where Are Limited Liability Companies Formed? An Empirical Analysis*, 55 J. L. & ECON. 741, 754 (2012).

¹⁹⁷ *See* OR. REV. STAT. § 63.205 (2023).

¹⁹⁸ *Id.* at § 63.205(1)(b).

¹⁹⁹ MD. CODE ANN. CORPS. & ASS'NS § 4A-1203 (2013).

²⁰⁰ *See id.*; MD. CODE ANN. CORP. & ASS'NS § 4A-1205; MD. CODE ANN. CORP. & ASS'NS § 4A-605.

²⁰¹ *See* DEL. CODE ANN. tit. 6, § 18-1201 (2021).

²⁰² *See id.*

unless stipulated otherwise in the operating agreement.²⁰³ This suggests that members who initially forgo the withdrawal right during the company's formation will not enjoy this protection in conversion scenarios.²⁰⁴ This protection could be conferred not only through the operating agreement but also through a merger or consolidation agreement or a plan of merger or division.²⁰⁵

VI. TERMINATION OF LOW-PROFIT LLC STATUS AND WITHDRAWAL RIGHT

The low-profit Limited Liability Company is another model potentially suitable for social and benefit purposes, even with its legal constraints—particularly concerning the distribution of profits and the permitted activities.²⁰⁶ Similar to LLCs' conversions and corporations' conversions to a benefit company, some remarks are now due about the possible connections between the termination of low-profit LLC status and the withdrawal right.

Despite a moderate diffusion of this legal entity, it is still possible to focus on some state statutes based on the numbers of this type of company. Thus, this Article will analyze Michigan, Illinois, Louisiana, and Vermont statutes.²⁰⁷ As previously outlined regarding benefit LLCs, it is unsurprising that if a Low-Profit Limited Liability Company fails to pursue its designated objectives and fulfill its specific legal obligations, it will forfeit its status as a low-profit LLC and continue to exist as an ordinary LLC.²⁰⁸ There are no provisions in favor of minority members related to this situation, even if the termination of the status arises from a voluntary modification of the company's purpose.²⁰⁹ Consequently, the withdrawal regime provided by LLC statutes becomes relevant to this end, and various solutions emerge.

Under Michigan's regulation, a member can withdraw from an LLC only as provided in an operating agreement,²¹⁰ so it would be possible, even

²⁰³ See *id.* at § 18-210.

²⁰⁴ See *id.*

²⁰⁵ *Id.* at § 18-209.

²⁰⁶ Sandra Feldman, *What Is an L3C (Low-Profit Limited Liability Company): An Entity for Entrepreneurs Who Value Purposes and Profits*, WOLTERS KLUWER (Mar 3, 2020), <https://www.wolterskluwer.com/en/expert-insights/what-is-l3c-low-profit-limited-liability-company>.

²⁰⁷ See MICH. COMP. LAWS § 450.4509 (2023); 805 ILL. COMP. STAT. ANN. 180/35-45 (2020); LA. STAT. ANN. § 12:1325 (2023); VT. STATE ANN. tit. 11, § 4081 (2023).

²⁰⁸ J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273, 283 (2010).

²⁰⁹ All of the considered provisions about termination of low-profit status are really similar, and they never provide for withdrawal right due to the change of purpose. See MICH. COMP. LAWS § 450.4509 (2023); 805 ILL. COMP. STAT. ANN. 180/35-45 (2020); LA. STAT. ANN. § 12:1325 (2023); VT. STATE ANN. tit. 11, § 4081 (2023).

²¹⁰ MICH. COMP. LAWS § 450.4509 (2023).

if probably unlikely, to expressly entitle the member to withdraw in the case of termination of low-profit status. However, the default rules do not encompass withdrawal rights in this case.²¹¹

Illinois's LLC statute outlines withdrawal rights based on the member's explicit decision to dissociate, encompassing a wide range of scenarios, as well as specific events stipulated in the operating agreement.²¹² The member's explicit decision could be pertinent in various situations, including the aforementioned termination of a specific status.²¹³ This parallels Vermont's regulation, which employs nearly identical language.²¹⁴

By implementing a more stringent regulation, the statute in Louisiana establishes a distinction in the withdrawal right based on the company's duration.²¹⁵ When there is a term of duration, the member is entitled to such a right only in the event of just cause, specified as the failure of another member to perform an obligation.²¹⁶ If a term is missing, the right to withdraw can be provided by the operating agreement or, in the absence of such rules, exercised upon prior written notice.²¹⁷

VII. CONCLUSION

The emergence of benefit companies as relatively novel corporate models has introduced legal complexities that may not always be readily anticipated. While the issue of dissenters' rights in the context of benefit company elections or terminations is well-defined from a specific standpoint, the diverse array of approaches and solutions is contingent upon national legislative choices and general regulatory frameworks when specific benefit company regulations are silent.²¹⁸

The potential legal ambiguity stemming from the necessity to either apply overarching corporate regulations or scrutinize each LLC operating agreement poses a conceivable deterrent to the adoption of these innovative models. Even when solutions to such problems seem clear-cut, further complications, particularly in the long term, may arise. Forcing dissenting

²¹¹ *See id.*

²¹² 805 ILL. COMP. STAT. ANN. 180/35-45 (2020).

²¹³ *See id.*

²¹⁴ *See* VT. STATE ANN. tit. 11, § 4081 (2023).

²¹⁵ *See* LA. STAT. ANN. § 12:1325 (2023).

²¹⁶ *See id.* at § 12:1325(a).

²¹⁷ *See id.* at § 12:1325(b).

²¹⁸ *See* Murray, *Choose Your Own Master*, *supra* note 111, at 36; Kimbrell, *supra* note 164, at 578; *see* J. Haskell Murray, Corporate Forms of Social Enterprise: Comparing the State Statutes (Jan. 15, 2015) (unpublished chart) (on file with Belmont University), available at <https://deliverypdf.ssrn.com/delivery.php?ID=396031102089030110030075083093098088058033095009026094104026114098086091111106072097029031099028051096054091121016019005127102111073000085023000112122103120084104088089039073068070084023001101008109068002064097030108127010097084004117116106082099088103&EXT=pdf&INDEX=TRUE>.

shareholders, who do not align with the benefit status, to keep their interests could entail additional costs and risks for the company, underscoring the importance of safeguarding minority interests, especially within the LLC context.²¹⁹

Thus, it is imperative to strive for an optimal equilibrium among legal certainty, safeguarding minority interests, and mitigating potential long-term risks, as these concerns are inherently significant and intersect within this framework. Moreover, minority protection constitutes a real issue when alterations resulting from the election of benefit status is relevant and can consequently impinge upon the rights of shareholders or members akin to a fundamental transaction.²²⁰ Nonetheless, the clarity of this matter is not self-evident, as the definition of benefit goals can be substantially vague.²²¹ Moreover, such definitions may not impact the risk initially assumed by shareholders when investing in the company. Thus, while minority protection is indeed pertinent, the ambiguity surrounding the definition of benefit goals and their impact on shareholders' risk underscores the need for nuanced consideration.

Despite the prevailing trend towards curtailing dissenters' rights, the scope of application is evident, both generally and in the context of conversion of a benefit corporation. It is noteworthy to emphasize that substantial uncertainties remain, and the elimination of dissenters' rights to achieve legal certainty may give rise to additional consequences and risks. While further regulatory amendments abolishing dissenters' rights may seem unlikely, a compromised approach could be viable. This could involve refraining from automatically granting dissenters' rights upon conversion to a benefit company, reserving them for instances where a conversion entails relevant modifications. While this approach may introduce a degree of legal uncertainty, it could strike a more effective balance between minority protection and mitigation of long-term risks. This is far from being a ready-to-use solution. However, treating differing charter amendments in the same way leads to inefficient and potentially unfair solutions.

The impact of implementing benefit goals hinges on their definition within the articles of organization or operating agreement, as well as on the differences between the company's activities before and after conversion. Thus, recognizing the varied nature of benefit goals and their differential impacts necessitates a nuanced approach to dissenters' rights provisions. Such provisions should be tailored to the specific characteristics of benefit goals and their actual effects. In other words, it is imperative that the

²¹⁹ See Murray, *Choose Your Own Master*, *supra* note 111, at 36.

²²⁰ See Letsou, *supra* note 3, at 1150 (charter amendments triggering appraisal right are supposed to be "serious", such as those altering the corporation's purposes).

²²¹ See Cetindamar, *supra* note 79, at 8 (only half the companies replying to a survey about this clearly stated in the charter the social goals, and most of them did so in a very succinct way).

provision for dissenters' rights takes into account these varying features of benefit goals and their actual impacts to effectively safeguard minorities when warranted. This protection is essential not only for equity reasons but also in light of the company's long-term viability. Simultaneously, this approach allows for circumvention of the consequences of a rigid description of the cases warranting dissenters' rights, which, while more straightforward and predictable, may result in overprotection of minorities in cases of inconsequential charter amendments.

PIC-WRAP: A PICTURE IS WORTH A THOUSAND TERMS IN ONLINE CONTRACTING

Emily Smoot*

I. INTRODUCTION

Every day internet users encounter contracts when interacting with websites and apps, often accepting terms with little thought in order to conduct their immediate business.¹ When signing up for a social media account, users often unknowingly agree to give up their legal protections and personal information to participate in the online environment.² When online shopping, consumers mindlessly surrender their privacy rights to be used by the vendor in targeted advertising or sold to third parties.³ Whether engaging in social networking platforms like Facebook or ordering the latest must-have item on Amazon, online contracts have become a regular aspect of human existence.⁴

The Covid-19 pandemic accelerated the already growing centrality of online transactions.⁵ As screen time surged, social networks and online retailers gained concentrated power in the digital marketplace.⁶ Although many people have returned to their pre-pandemic routines, the convenience of having goods delivered to the front door and the communities created behind the screen remain prominent in contemporary life.⁷ To take advantage of the apps and websites that have become so integral in today's society,⁸

* J.D. Candidate, Southern Illinois University School of Law, Class of 2024. This Note is dedicated to Teresa L. Smoot, my unforgettable stepmom whose encouragement of creativity and problem-solving shaped me and will forever inspire countless others. You will always be my "TT." Also, a huge thank you to Lorelei Ritchie, William Drennan, and Peter Alexander for their support and guidance throughout the writing process.

¹ See Kevin Conroy & John Shope, *Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions*, 63 BOS. B.J. 23, 23 (2019).

² Michael Karanicolas, *Too Long; Didn't Read: Finding Meaning in Platforms' Terms of Service Agreements*, 52 U. TOL. L. REV. 1, 3 (2021).

³ Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 434 (2020).

⁴ See Lindsay Sain Jones & Tim R. Samples, *On the Systemic Importance of Digital Platforms*, 25 U. PA. J. BUS. L. 141, 161 (2023) (tagging Facebook, Amazon, Google and Microsoft as tech giants increasingly dominating the internet).

⁵ *Id.* at 175.

⁶ *Id.*

⁷ See *id.* at 172-75 (discussing the path of the digital revolution and the resulting concentrations of power in the digital marketplace).

⁸ Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 140 (2022) (referencing websites that offer services necessary to thrive in modern society in the context of adhesive online contracts that contain mandatory arbitration and limited liability clauses).

consumers often subject themselves to terms and conditions that carry serious legal consequences.⁹ For example, a typical social media user would have to read at least ten pages, on average, before reaching an arbitration clause that waives their Seventh Amendment right to a jury trial.¹⁰ Yet, it is well known that consumers do not usually read online agreements at all.¹¹ In doing so, users unknowingly waive rights.¹² How can a contract be binding when one party is completely unaware of what they are agreeing to or that there is even an agreement at all?

The primary question courts consider—whether sufficiently conspicuous notice is provided to the reasonably prudent user—is fact specific, and different courts have varying interpretations of what is reasonable.¹³ Furthermore, the reasonably prudent user is so far detached from the modern online consumer because most users do not take it upon themselves to read the contracts they agree to.¹⁴ Even if they did attempt to read them, most contracts are not written in terms a layperson would understand.¹⁵ When users are confronted with complex, non-negotiable terms by the online platforms they need to flourish in modern society, consent is not truly given, and assent is far from mutual.¹⁶

Companies have the resources and ability to change the current practice of online contracting by creating more binding and understandable

⁹ See Conroy & Shope, *supra* note 1, at 23 (listing arbitration clauses, forum selection clauses, waivers, licenses, and indemnification provisions as examples of potentially harmful terms often included by proprietors of online platforms).

¹⁰ Instagram's arbitration clause, for example, essentially requires users to waive their right to a jury trial under the Seventh Amendment. *Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> (last visited Nov. 20, 2023); Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1433, 1498 (2014).

¹¹ Matthew Hoffman, Comment, *Contract Law-Conspicuous Arbitration Agreements in Online Contracts: Contradictions and Challenges in the Uber Cases*, 43 U. ARK. LITTLE ROCK L. REV. 499, 511 (2021); see also Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2289 (2019) (“[E]xisting literature mainly argues that consumers do not read standardized contracts.”).

¹² Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1433 (2014).

¹³ Dee Pridgen, *Ali's Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 562 (2020) (discussing the uncertainty of outcomes and how the “notice and opportunity test” requires courts to involve themselves with the design of websites and apps); Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L. J. SCI. & TECH. 79, 91 (2008).

¹⁴ Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 167 (2022); Jones & Samples, *supra* note 4, at 170.

¹⁵ Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 167 (2022); Rustad & Koenig, *supra* note 12, at 1471; Jones & Samples, *supra* note 4, at 170; Kim, *supra* note 8, at 139.

¹⁶ See Kim, *supra* note 8, at 140 (discussing the lack of consent in the online environment).

agreements.¹⁷ This Note offers an innovative suggestion, utilizing design elements of adequate notice to make online contracts more comprehensible and engaging by incorporating drawn illustrations of terms. Enhancing online terms with visual explanations has the capacity to benefit both parties by increasing enforceability for the company and improving accessibility for the user.¹⁸

Part II of this Note sets the backdrop of common-law contract formation, categorical wrap agreements, and the issue of online assent in contracts of adhesion. Part III sets forth brief case analyses of notice, a discussion of common practices used to circumvent notice, and problems with the current standard of enforcement. Finally, Part IV outlines “Pic-wrap,” a proposal to increase notice by design.

II. FOUNDATION AND ISSUES IN BINDING AGREEMENTS

A. Getting Wrapped Up in Online Contracts

Common-law contract formation effectively consists of an offer, acceptance of that offer, and consideration.¹⁹ Consideration is the “bargained-for exchange,” which can be identified as a benefit to the promisor or a detriment to the promisee.²⁰ An offer is defined as a manifestation of intent to invite acceptance to enter into an agreement.²¹ Acceptance is a manifestation of assent to the terms of the offer.²² A valid offer and acceptance together form the common-law concept of mutual assent.²³ Article 2 of the Uniform Commercial Code loosens the common-law requirements of contract formation when it comes to the sale of goods; however, the parties’ objective manifestation of assent to an agreement remains essential under both constructs.²⁴

¹⁷ Clifford Fisher et al., *Evolution of Clickwrap & Browsewrap Contracts*, 48 RUTGERS COMPUT. & TECH. L.J. 147, 162 (2022) (naming Apple and Amazon as entities with the opportunity and resources to make a difference in the current practice of online contracting).

¹⁸ Michael D. Murray, *Cartoon Contracts and the Proactive Visualization of Law*, 16 U. MASS. L. REV. 98, 105–06 (2021) (“With improved accessibility and comprehension of contract terms, visualization promotes greater acceptance of contracts. This would lead not only to better and more predictable contract performance and enforcement, but also to stronger relationships between parties.”).

¹⁹ A.J. Zottola et al., *Online Contract Formation*, 22 J. INTERNET L. 3, 3 (2018) (discussing the application of traditional contract formation in the online setting).

²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981).

²¹ *Id.* at § 24.

²² *Id.* at § 50.

²³ *Id.* at § 22.

²⁴ See 1 WILLIAM D. HAWKLAND ET AL., HAWKLAND’S UNIFORM COMMERCIAL CODE SERIES § 2-204:1.

Assent refers to the mental state of agreement to a certain transaction.²⁵ Because judges and decision-makers cannot read minds, courts use an objective standard to determine when a party has consented to the terms of an offer based on observable indicators.²⁶ In the context of online contracts, courts look to indications of assent such as clicking to check a box, the continuing use of an online platform after being presented with a pop-up window, or sometimes merely browsing a website with a hyperlink at the bottom of the page.²⁷

When downloading an app, visiting a website, or making a purchase online, consumers frequently stumble into binding contracts.²⁸ Agreements commonly labeled “Terms of Service” or “Terms of Use” are found in pop-up windows, on the homepage of websites, or in separate webpages accessible by hyperlinks.²⁹ These online contracts have often been categorized into two types of legal documentation: “click-wrap” and “browse-wrap.” agreements.³⁰

Click-wrap agreements allow a person to enter a binding contract at the click of a button.³¹ By checking the box next to some acceptance message, such as “I agree,” the user has given express assent to the terms of the contract.³² Scroll-wrap contracts are a subcategory of click-wrap agreements that provide more notice by requiring the user to view the terms of the agreement through the construction and design of the website.³³ This variation of online contracts is often featured in a pop-up box, blocking the content of a given website until the user scrolls down to the bottom of the agreement, where they can manifest assent by checking a box next to the words “I agree” or by clicking a button with the same effect.³⁴ This format provides greater notice of the terms and existence of a contract.³⁵ On the other hand, browse-wrap agreements allow users to enter into a contract simply by their conduct, giving implied assent by continuing to interact with the app or

²⁵ Chunlin Leonhard, *Dangerous or Benign Legal Fictions, Cognitive Biases, and Consent in Contract Law*, 91 ST. JOHN'S L. REV. 385, 405 (2017) (discussing “consent” as an interchangeable term for “assent” or “agree”).

²⁶ *Id.* at 405-06.

²⁷ *Id.* at 416.

²⁸ Cheryl B. Preston, *“Please Note: You Have Waived Everything”: Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 538 (2015).

²⁹ Daniel D. Haun & Eric P. Robinson, *Do You Agree?: The Psychology and Legalities of Assent to Clickwrap Agreements*, 28 RICH. J.L. & TECH. 623, 626 (2022).

³⁰ Zottola et al., *supra* note 19, at 7 (discussing the application of contract law in online settings).

³¹ *Id.*

³² *Id.*

³³ Colin P. Marks, *Online Terms as in Terrorem Devices*, 78 MD. L. REV. 247, 257 (2019).

³⁴ *See id.* (describing the typical format of scroll-wrap agreements).

³⁵ *See generally id.*

website.³⁶ The terms of these contracts are accessible by hyperlink³⁷ and usually state that by continuing to use the provider's service or remaining on a given page, the user gives implied assent to be bound to the terms of the agreement.³⁸

Existing analyses of case law suggest that browse-wrap contracts are less enforceable than their click-wrap and scroll-wrap counterparts,³⁹ yet they are the more common method of online contracting.⁴⁰ The difference in their likelihood of being upheld may be attributed to the structure of browse-wrap agreements, which gives the user less prominent notice of the presence of a contract and its terms and requires no affirmative action to manifest assent besides continued use of the website.⁴¹ For online retailers, the decision is motivated by economics and expediency.⁴² The fear of losing sales drives companies away from incorporating check boxes, displaying pages of lengthy terms, or otherwise delaying the customer from spending money.⁴³ In the context of social media platforms, providing less notice results in users unsuspectingly waiving "all meaningful rights, warranties, and remedies, while the social network provider asserts its interests to the limits of the law."⁴⁴

"Hybrid-wrap" contracts combine elements of browse-wrap and click-wrap in varying degrees.⁴⁵ Social media platforms such as Facebook and X, formerly known as Twitter, utilize the hybrid-wrap format, displaying a hyperlink to their terms of service during the sign-up process⁴⁶ and requiring the user to click "sign up" to assent to the hyperlinked terms.⁴⁷ When the lines are blurred by contracts that do not fit into strict categories of click-wrap or browse-wrap, courts are forced to ditch the labels and determine

³⁶ Zottola et al., *supra* note 19, at 7.

³⁷ Colin P. Marks, *There Oughta Be a Law: What Corporate Social Responsibility Can Teach Us About Consumer Contract Formation*, 32 LOY. CONSUMER L. REV. 498, 512 (2020).

³⁸ Fisher et al., *supra* note 17, at 150.

³⁹ See Rustad & Koenig, *supra* note 12, at 1451; Marks, *supra* note 33, at 258.

⁴⁰ Marks, *supra* note 33, at 511-12; see also Marks, *supra* note 33, at 258.

⁴¹ Karanicolas, *supra* note 2, at 12.

⁴² Marks, *supra* note 33, at 258 (discussing the selection and favoritism of browse-wrap contracts by the websites that utilize them).

⁴³ *Id.*

⁴⁴ Rustad & Koenig, *supra* note 12, at 1451.

⁴⁵ Karanicolas, *supra* note 2, at 13.

⁴⁶ *Id.*; see also Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2264-65 (2019) (describing sign-in-wrap contracts as a blend of click-wrap and browse-wrap contracts).

⁴⁷ Allison S. Brehm & Cathy D. Lee, "Click Here to Accept the Terms of Service", 31 COMM. LAW. 4, 6 (2015); see also Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2264-65 (2019) (describing sign-in-wrap contracts as a blend of click-wrap and browse-wrap contracts).

enforceability by focusing on whether there is adequate notice to support a finding of assent.⁴⁸

B. The Issue: Online Assent in Contracts of Adhesion

United States contract law substantially lags behind the evolution of websites and apps that take advantage of the current state of the law by aggressively compromising consumer rights and remedies.⁴⁹ Courts have strained to extend the traditional contract law principles to adapt to the new settings brought on by technological advances.⁵⁰ However, attempts to stretch older common-law concepts in the setting of online contracts have ultimately undermined the foundations and doctrinal objectives of contract law.⁵¹ Scholars argue that change is necessary, especially regarding the issue of online assent.⁵²

Courts have examined different indications of assent when enforcing online contracts, including clicking a button, browsing a website, or simply noticing a term.⁵³ While arguably providing some evidence of assent, these indicators are not conclusive in determining the user's actual intent.⁵⁴ Clicking, for example, has become a reflexive and habitual activity.⁵⁵ Users may reflexively click icons to proceed with an online activity, not with the intention of entering a binding online agreement.⁵⁶

⁴⁸ Allison S. Brehm & Cathy D. Lee, “Click Here to Accept the Terms of Service”, 31 COMM. LAW. 4, 7 (2015); Matt Meinel, *Requiring Mutual Assent in the 21 Century: How to Modify Wrap Contracts to Reflect Consumer’s Reality*, 18 N.C. J.L. & TECH. 180, 193 (2016) (“Ultimately, ‘all these labels can take courts only so far,’ for most cases will fall somewhere in between browserwrap and clickwrap, requiring fact-based inquiries that defy bright-line rules. Therefore, regardless of how a court classifies a fact pattern, the court's finding will be determined by the manifestation of assent by the reasonably prudent offeree.”).

⁴⁹ Rustad & Koenig, *supra* note 12, at 1515.

⁵⁰ Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1141–42 (2019) (“With each small change in technology, courts tried valiantly to extend traditional contract law concepts and principles to these new settings. But much like the proverbial frog in the pot of boiling water, these attempts to stretch older terms and concepts to new situations ultimately kept the surface of contract law looking the same while obscuring a more fundamental break in function.”).

⁵¹ *Id.*

⁵² See Rustad & Koenig, *supra* note 12, at 1515-16 (discussing the need for an update in the doctrine of mutual assent in the context of social network contracts); Nicolás Rojas Covarrubias, *Limits of Assent in Consumer Contracts: A (Regulatory) View from the South*, 32 LOY. CONSUMER L. REV. 581, 601 (2020) (suggesting a reevaluation of the role of assent as foundation in modern consumer contracts); Kim, *supra* note 8, at 88 (criticizing the assumption of assent to online adhesive terms for disregarding the centrality of consent in contract law).

⁵³ Leonhard, *supra* note 25, at 416 (discussing “consent” as an interchangeable term for “assent” or “agree”).

⁵⁴ *Id.*

⁵⁵ Kim, *supra* note 8, at 97-98.

⁵⁶ *Id.* at 98.

Hypothetically, a comparison to oral contracting can be made where an individual interrupts the offeror by exclaiming, “I accept,” before the offeror can finish informing them of the terms of the agreement. Likewise, suppose that individual walks around accepting anything in earshot that resembles an offer. Are those oral contracts binding? This is effectively the type of assent users are giving online.⁵⁷ Before one could possibly finish reading the agreement, the box is checked at the click of a button, and the user has explicitly assented to the online contract. A similar question was posed in the article *Evolution of Clickwrap & Browsewrap Contracts*, which asks, “If one party does not even know what they are agreeing to, can they assent to the contract?”⁵⁸ When the average user is unaware of what they are agreeing to, it has negative implications for both the user and the companies utilizing wrap agreements.⁵⁹

Another analogous consideration is adhesion contracts, also known as boilerplate or standard form contracts.⁶⁰ These allow companies to bypass the traditional notions of negotiation and autonomy by offering take-it-or-leave-it conditions to the consumer.⁶¹ Wrap agreements fall under the parameters of adhesion contracts, as the user has no choice but to agree to the conditions of the contract if they want to use the online resource or service.⁶²

Contracts of adhesion first evolved to keep up with changes in the marketplace, such as industrialization and the mass production of goods.⁶³ Then came the rise of technology and the digital age, which allowed for further efficiency and cost-effectiveness.⁶⁴ On the internet today, entities can make an offer to invite acceptance to their terms, which is then accepted by billions of people.⁶⁵ Due to their ability to bind such large masses of users, digital platform Terms of Use agreements are the most widely used contracts in history.⁶⁶

⁵⁷ See generally Fisher et al., *supra* note 17, at 165 (examining whether a party can assent without knowledge of what they are agreeing to).

⁵⁸ *Id.*

⁵⁹ *Id.* at 167.

⁶⁰ CFI Team, *Adhesion Contract*, CFI, <https://corporatefinanceinstitute.com/resources/valuation/adhesion-contract/> (last visited Feb. 9, 2024).

⁶¹ Aaron E. Ghirardelli, *Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts*, 93 OR. L. REV. 719, 723 (2015); see also Kim, *supra* note 8, at 88.

⁶² Haun & Robinson, *supra* note 29, at 644; see also Kim, *supra* note 8, at 103.

⁶³ Kim, *supra* note 8, at 90.

⁶⁴ *Id.* at 90-91.

⁶⁵ See Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 140 (2021) (discussing contracts mediated by the internet having a “one-to-many” ratio between the party putting a contract on the web and the parties that agree to them); Jones & Samples, *supra* note 4, at 171.

⁶⁶ Jones & Samples, *supra* note 4, at 171.

It is necessary that these agreements be contracts of adhesion, as it would be impracticable and inefficient to negotiate with every individual counterparty.⁶⁷ For example, Facebook has more users than any one country has citizens,⁶⁸ with almost three billion people participating in the platform.⁶⁹ During the sign-up process, each account holder must agree to Facebook's Terms of Use agreement,⁷⁰ generating perhaps the most widely accepted contract of all time.⁷¹

Online contracts of adhesion present the consumer with an ultimatum to either accept the terms set forth by the service provider or be denied access to the platform or service.⁷² In other words, the use of apps and websites is contingent on the terms set forth by the company or service provider.⁷³ These conditions are woven into several pages of terms that commonly go unread and are thoughtlessly accepted by the user.⁷⁴ Users have credited their failure to read the terms and conditions to the nature of these agreements, which gives them no other choice but to agree if they want to view the "desired page" of the online platform.⁷⁵ Failure to read, however, is not a defense when it comes to the enforceability of written contracts.⁷⁶ Online contracts have been enforced notwithstanding the user's failure to click on the hyperlink and view the terms.⁷⁷ In fact, wrap contracts have been upheld despite the apparent absence of any knowing assent so long as the user is put on notice that a contract exists.⁷⁸

⁶⁷ See Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 140 (2021) (noting the necessity that contracts presented by one party and accepted by many parties because "there is obviously no time to negotiate the deals with every counterparty.").

⁶⁸ Jones & Samples, *supra* note 4, at 169.

⁶⁹ *Id.* at 146.

⁷⁰ Karanicolas, *supra* note 2, at 13.

⁷¹ Jones & Samples, *supra* note 4, at 146 ("[W]ith almost three billion users, Facebook's terms-of-use agreement is perhaps the most widely accepted contract in human history.").

⁷² Haun & Robinson, *supra* note 29, at 626-27.

⁷³ Kim, *supra* note 8, at 103.

⁷⁴ Aaron E. Ghirardelli, *Rules of Engagement in the Conflict Between Businesses and Consumers in Online Contracts*, 93 OR. L. REV. 719, 723 (2015).

⁷⁵ Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 296 (2012) (showing that in one study, 23.1% of participants listed having no choice as a self-reported explanation for not reading a click through agreement. Other explanations included the time it would take to read the agreement (31.3%) and "[b]ecause they're all the same and boring" (29.9%)).

⁷⁶ Matthew Hoffman, *Contract Law-Conspicuous Arbitration Agreements in Online Contracts: Contradictions and Challenges in the Uber Cases*, 43 U. ARK. LITTLE ROCK L. REV. 499, 504 (2021); see also Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 111 (2008).

⁷⁷ Ty Tasker & Daryn Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L.J. SCI. & TECH. 79, 111 (2008) (discussing the effect of design on enforceability of online agreements).

⁷⁸ Preston, *supra* note 28, at 535.

III. THE CURRENT CLIMATE OF ONLINE CONTRACTING

A. Case Analyses of Notice: Continued Confusion

The standard of “reasonable notice” has been the bedrock of online contract enforcement since the beginning of the Internet era.⁷⁹ As click-wrap, browse-wrap, and hybrid-wrap agreements have continued to blur lines in modern contracting, less importance has been given to categorizing these contracts; instead, the focus has shifted to the conspicuousness of the terms to resolve enforceability issues.⁸⁰ Courts are willing to infer constructive notice if a reasonably prudent user would be on inquiry notice of the terms of the agreement.⁸¹

In deciding the enforceability of wrap agreements, courts have used elements of design to determine if the placement and format of text have sufficiently called the user’s attention to the existence and terms of a contract.⁸² To examine the notice requirement, courts have increasingly included screenshots in their opinions to illustrate how users engage with the design of a given website or app.⁸³ Considerations relevant in determining whether there was sufficient notice include font size, hyperlink labeling, screen layout, color, presentation, and user experience.⁸⁴

In *Meyer v. Uber Technologies, Inc.*, the U.S. Court of Appeals for the Second Circuit held, as a matter of law, that inquiry notice is established where such notice is reasonably conspicuous and the manifestation of assent is unambiguous.⁸⁵ In this case, a blue hyperlink was presented to the user on an uncluttered screen along with a button to “Register” directly above the

⁷⁹ *Bekele v. Lyft, Inc.*, 918 F.3d 181,187 (1st Cir. 2019); *see also* *Kauders v. Uber Technologies, Inc.*, 159 N.E.3d 1033, 1049 (Mass. 2021); *see also* *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034-35 (7th Cir. 2016); *see also* *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017). Kim, *supra* note 8, at 85 (“Courts typically apply the standard of reasonable notice to assess the enforceability of adhesive online terms.”).

⁸⁰ Matt Meinel, *Requiring Mutual Assent in the 21 Century: How to Modify Wrap Contracts to Reflect Consumer’s Reality*, 18 N.C. J.L. & TECH. 180, 193 (2016); *see also* *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014) (“[W]hether the website puts a reasonably prudent user on inquiry notice of the terms of the contract . . . depends on the design and content of the website and the agreement’s webpage.”); *see also* *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016) (quoting *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29-30 (2d Cir. 2002)) (“[C]licking on a . . . button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the . . . button would signify assent to those terms.”).

⁸¹ *Karanicolas*, *supra* note 2, at 12; *see also* *Nicosia*, 834 F.3d at 236 (quoting *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012)).

⁸² *Tasker & Pakcyk*, *supra* note 77, at 95 (discussing the effect of design on enforceability of online agreements).

⁸³ Nancy S. Kim et al., *Notice and Assent Through Technological Change: The Enduring Relevance of the Work of the ABA Joint Working Group on Electronic Contracting Practices*, 75 BUS. LAW. 1725, 1738 (2020); *see, e.g., Meyer*, 868 F.3d at 81-82; *Sgouros*, 817 F.3d at 1031-32.

⁸⁴ Nancy S. Kim, *Online Contracting*, 72 BUS. LAW. 243, 252 (2017).

⁸⁵ *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017).

warning that “by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.”⁸⁶ The court determined this language and screen design provided adequate conspicuousness of notice based on the perspective of a reasonably prudent smartphone user.⁸⁷

Another dispute arising out of the same popular transportation app resulted in the opposite outcome.⁸⁸ In *Cullinane v. Uber Technologies, Inc.*, the U.S. Court of Appeals for the First Circuit found that the user-plaintiffs were not provided with adequate reasonable notice of the terms of the agreement.⁸⁹ The court noted that Uber strayed away from the standard method of informing users of the existence and location of terms and conditions.⁹⁰ Instead, the hyperlink was displayed in bold white font and set apart within a gray box.⁹¹ These features may have been adequate to draw enough attention for sufficient notice if the hyperlink was accompanied by an otherwise plain design and minimal other content.⁹² In this case, however, the screen included other text with similar design features⁹³ and text that was more attention-grabbing than the hyperlink.⁹⁴

The contrasting outcomes of the two Uber cases illustrate how subtle distinctions in the fact-intensive examination of design can make or break a finding of sufficient notice in the eyes of the courts.⁹⁵ The following cases further demonstrate how strict courts can be in evaluating sufficient notice; it is hard to know how conspicuous an online contract must be for it to be binding.⁹⁶

In *Nguyen v. Barnes & Noble Inc.*, an online agreement was held unenforceable by the U.S. Court of Appeals for the Ninth Circuit despite a link to the provision visible near where the user was required to click to complete their order.⁹⁷ This link was also featured in the bottom corner of

⁸⁶ *Id.* at 76.

⁸⁷ *Id.* at 78-79.

⁸⁸ *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018) (noting the presentation of the “Terms of Service & Privacy Policy” did not reasonably notify the plaintiffs of the terms of the agreement).

⁸⁹ *Id.* at 63.

⁹⁰ *Id.* at 62 (“Uber chose not to use a common method of conspicuously informing users of the existence and location of terms and conditions: requiring users to click a box stating that they agree to a set of terms, often provided by hyperlink, before continuing to the next screen.”).

⁹¹ *Id.* at 57, 63.

⁹² *Id.* at 63.

⁹³ *Id.* (explaining that the font size and bold typeface of the terms “scan your card” and “enter promo code” were displayed similarly to the “Terms of Service & Privacy Policy.”).

⁹⁴ *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 63 (1st Cir. 2018) (“The inclusion of the additional payment option and the placement of a large blue PayPal button in the middle of the screen were more attention-grabbing and displaced the hyperlink to the bottom of the screen.”).

⁹⁵ Dee Pridgen, *Ali’s Restatement of the Law of Consumer Contracts: Perpetuating a Legal Fiction?*, 32 LOY. CONSUMER L. REV. 540, 566-67 (2020).

⁹⁶ *See id.* at 562.

⁹⁷ *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1179 (9th Cir. 2014).

every page of the defendant's website.⁹⁸ Still, the court held that without evidence that the user had actual knowledge of the contract, the enforceability of the browse-wrap agreement depends on whether the reasonably prudent user would be put on inquiry notice of the contract terms based on the design and content of the website.⁹⁹ In *Nguyen*, notice was insufficient because the proximity and visibility of the hyperlink alone were not enough to infer that the consumer was aware they were entering into a binding agreement.¹⁰⁰ The Ninth Circuit relied heavily on traditional categorizations rather than providing a visual analysis of inquiry notice.¹⁰¹ The outcome demonstrates the reluctance of some courts to infer assent without an express manifestation, such as clicking "I accept" or some other equivalent.¹⁰²

Still, providing the user with the opportunity to express acceptance is not enough to ensure enforceability unless there is sufficient notice of the applicable terms of the agreement.¹⁰³ For example, in *Sgouros v. TransUnion Corp.*, the U.S. Court of Appeals for the Seventh Circuit concluded an online agreement was unenforceable despite the user clicking an "I accept" button because the website failed to call the user's attention to their purchase being subject to any terms or conditions of sale.¹⁰⁴ The court provided helpful insight that the agreement might have been binding if the location of the agreement or hyperlink to the agreement were positioned next to an "I accept" button clearly pertaining to that agreement.¹⁰⁵

More recently, in *Oberstein v. Live Nation Ent., Inc.*, a notice was displayed above action buttons that allowed the user to create an account, sign in to an account, and complete a purchase.¹⁰⁶ The language indicating the existence of a contract was clear, communicating to the user that by clicking on the button below, "you agree to our Terms of Use."¹⁰⁷ Additionally, the "Terms of Use" were accessible at each of the three independent stages via hyperlinks displayed in bright blue font, sufficiently distinguishing it from surrounding text.¹⁰⁸ The U.S. Court of Appeals for the Ninth Circuit affirmed that a reasonable user would have been put on notice

⁹⁸ *Id.* at 1178.

⁹⁹ *Id.* at 1177-79.

¹⁰⁰ *See id.* at 1178-79.

¹⁰¹ 2 IAN C. BALLON, E-COMMERCE & INTERNET LAW: TREATISE WITH FORMS ch. 21, 61 (2nd ed. 2020 update).

¹⁰² *Id.*

¹⁰³ *Id.* ("Even where express assent is obtained, courts may be reluctant to find a binding contract formed where it is unclear what document or documents constitute the agreement or where the language surrounding a request for express assent is deemed to be unclear.")

¹⁰⁴ *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1036 (7th Cir. 2016).

¹⁰⁵ *Id.*

¹⁰⁶ *Oberstein v. Live Nation Ent., Inc.*, 60 F.4th 505, 515 (9th Cir. 2023).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 516.

by the conspicuously displayed text denoting “that continued use will act as a manifestation of the user's intent to be bound.”¹⁰⁹ The court added that the crucial conspicuousness of the hyperlink made the presence of the Terms readily apparent.¹¹⁰ Based on those features, the court held that the Ticketmaster and Live Nation website design satisfied the standard of reasonably constructive notice.¹¹¹

As these examples illustrate, the caselaw surrounding the parameters of adequate notice is contradictory and confusing.¹¹² Whether the reasonably prudent user has been provided with sufficiently conspicuous notice varies because courts have differing opinions on what is reasonable.¹¹³ Accordingly, the current standard of deciding the enforceability of online contracts has generated uncertainty in the predictability of outcomes when the user challenges a website or app design.¹¹⁴ Design is central to the issue of enforceability and can be utilized by online platform providers to increase notice by drawing more attention to the terms and existence of a contract.¹¹⁵

B. Using Design to Circumvent Notice: Keeping Online Contracts Under Wraps

Although design practices can be utilized to promote enforceability by providing more notice to the user,¹¹⁶ there has been an increasing use of design techniques to keep consumers in the dark.¹¹⁷ “Dark patterns”¹¹⁸ are manipulative design tactics that steer user conduct toward making potentially harmful decisions they might not have otherwise chosen.¹¹⁹ These patterns can be observed in areas leading up to an actual agreement via deceptive marketing practices¹²⁰ and are prominent in online contracting.¹²¹

¹⁰⁹ *Id.* (quoting *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014)).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 517.

¹¹² *See* Pridgen, *supra* note 95, at 562 (discussing the uncertainty of outcomes and how the “notice and opportunity test” requires courts to involve themselves with the design of websites and apps).

¹¹³ *Id.*

¹¹⁴ *See id.*

¹¹⁵ *See generally* Kim, *supra* note 84, at 252.

¹¹⁶ *See id.* at 252-53.

¹¹⁷ FED. TRADE COMM’N, BRINGING DARK PATTERNS TO LIGHT 1 (2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf (discussing the growing use of manipulative design practices in online commerce).

¹¹⁸ *Id.* at 2 (indicating that the term “dark patterns” was coined by user design specialist, Harry Brignull, in 2010).

¹¹⁹ *Id.*

¹²⁰ *See id.* at 22-23 (depicting several examples of deceptive marketing practices such as displaying a baseless countdown timer to create a false sense of urgency to check out or formatting advertisements to look like unbiased product reviews).

¹²¹ *See id.* at 22-23, 25-26 (listing dark pattern variants such as hiding information, additional costs, automatic subscriptions in lengthy terms of service documents or nondescript hyperlinks and

Companies utilize manipulative design to hide information in dense Terms of Service documents by requiring excessive scrolling for certain conditions to become visible and tucking language between more prominent, bolded paragraphs.¹²² For example, social media providers often bury arbitration clauses deep within their Terms of Use agreements.¹²³ “On average, a consumer would have to read more than ten single-spaced pages (4615 words) before reaching the first word of the arbitration clause.”¹²⁴

Dark patterns can be encountered across all types of digital user interfaces but are particularly concerning in the online expanses of data privacy and retail.¹²⁵ The Federal Trade Commission (FTC) has scrutinized the use of dark patterns, suing companies for such deception and unfairness in the marketplace.¹²⁶ Recommendations to stay on the right side of the law include (1) ensuring that transactional procedures require an affirmative, unambiguous act by the user; (2) refraining from hiding key terms in a general terms and conditions document or behind a hyperlink; and (3) obtaining informed consent from consumers instead of using dark patterns to impair user decision making.¹²⁷ The FTC notes that manipulating users into agreeing to something by using design techniques that undermine autonomy does not effectuate express informed consent.¹²⁸

C. Flaws in the Current Standard for Online Contract Enforcement

In civil matters, the standard courts apply to determine consumer assent to online contracts involves “constructive notice and the opportunity to read.”¹²⁹ This standard is low and shows little to no resemblance to the “meeting of the minds” or mutual assent necessary for common-law contract formation.¹³⁰ The deviation from the old theoretical framework has been

subverting privacy preferences by asking users to give consent without informing them of what they are agreeing to share in a clear, understandable way).

¹²² See *id.* at 7 (describing the LendingClub’s practice of hiding the existence of fees associated with its online loans as an example of dark patterns that hide material information).

¹²³ Rustad & Koenig, *supra* note 12, at 1498.

¹²⁴ *Id.*

¹²⁵ Alfred R. Brunetti, *Dragging Dark Patterns into the Light Recognizing and Mitigating the Pervasive Risk of Manipulative Interface Design for Clients in the Digital World*, N.J. LAW., Aug. 2022, at 43 (2022).

¹²⁶ See FED. TRADE COMM’N, *supra* note 117, at 1.

¹²⁷ *Id.* at 14.

¹²⁸ *Id.*

¹²⁹ Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 874 (2016) (discussing mutual assent under the Restatement (Second) of Contracts and Article 2 of the UCC).

¹³⁰ See generally Pridgen, *supra* note 95, at 543 (critiquing the proposed Restatement and quality of assent required to bind consumers to click-wrap and browse-wrap agreements as long as the other requirements of notice and opportunity to review terms are present); Heather Daiza, Comment, *Wrap Contracts: How they Can Work Better for Businesses and Consumers*, 54 CAL. W. L. REV.

embraced to incorporate electronic technologies in the contracting world, allowing a great deal of commercial convenience in online transactions.¹³¹ However, “[b]y adopting an approach that mitigated the traditional rules of contract formation, courts have granted businesses an unfair advantage over consumers.”¹³² The modern rule is that users are bound to terms they have not seen as long as they had notice of some terms or reason to think there was a contract and were given means to access it.¹³³ This standard bears a striking resemblance to the rule that binds a person to terms that they negligently failed to read, otherwise known as the duty to read.¹³⁴

1. *Duty to Read: An Impossible Task*

The duty to read is at the crux of enforcement of all written contracts and the terms they contain.¹³⁵ This rule ensures that manifesting assent to a contract legally binds that party to all the terms within the agreement, regardless of whether they read them.¹³⁶ The duty to read has some beneficial aspects, such as protecting the drafting party from the accepting party’s negligence and providing an incentive for the accepting party to familiarize themselves with what they are agreeing to.¹³⁷ However, this rule becomes increasingly unfair in modern contracting because of the length and complexity of terms online.¹³⁸ “While a duty to read may seem reasonable in principle, it is fundamentally disconnected from the realities of modern living due to the sheer volume of contracting text that accompanies nearly every transaction.”¹³⁹ The digitalization of consumer contracts removed barriers that previously kept companies from making their agreements too lengthy.¹⁴⁰ Most websites feature more than one agreement, instead utilizing a series of documents, including privacy policies, terms of service, and other interlocking agreements.¹⁴¹ On average, it would take seventy-six working

201, 239 (2017); Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019).

¹³¹ See Amelia Rawls, *Contract Formation in an Internet Age*, 10 COLUM. SCI. & TECH. L. REV. 200, 219 (2009).

¹³² Ghirardelli, *supra* note 74, at 733.

¹³³ Karnow, *supra* note 67, at 138 (stating the old rule spawned the current rule of online contract enforceability).

¹³⁴ See *id.*

¹³⁵ Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 746 (2016) (discussing the objective theory of assent).

¹³⁶ *Id.*

¹³⁷ Preston, *supra* note 28, at 565 (discussing the scope of the duty to read rule).

¹³⁸ *Id.*

¹³⁹ Karanicolas, *supra* note 2, at 10-11.

¹⁴⁰ Kim, *supra* note 8, at 91.

¹⁴¹ Karnow, *supra* note 67, at 141 (“Most websites have a series of interlocking agreements: terms of service for the site, privacy policies, terms of sale or lease, and so on.”).

days for a user to read only the privacy policies they have agreed to over the course of a year.¹⁴²

Even if users took the time to review them, most online contracts are unreadable to the average person.¹⁴³ One study tested the readability of online consumer contracts by identifying 500 of the most popular websites in the United States and applying linguistic readability tests to their wrap agreements.¹⁴⁴ The results yielded that all but two of the 500 contracts (or 99.6%) were unreadable based on the recommended readability levels for consumer-related information.¹⁴⁵ In the context of consumer contracts, rationales for the duty to read include economic efficiency and fairness justifications.¹⁴⁶ However, if the contract is unreadable, these rationales fail, and the average user is left with no choice but to meaninglessly accept if they want to use the app or website.¹⁴⁷

2. *Notice as Proxy*

As so eloquently stated, “[t]he relish for notice is irreconcilable with our knowledge that consumers do not, and cannot, read and comprehend even a fraction of the wrap contracts they encounter.”¹⁴⁸ The lack of readability in many online contracts makes comprehension difficult, even for legal professionals.¹⁴⁹ The common practice of incorporating convoluted language and legalese in these agreements presents a barrier between the user and their ability to comprehend what they are agreeing to.¹⁵⁰ When a reasonable user does not know what the offer is, there is no real mutual assent.¹⁵¹ Still, courts use the concept of adequate notice to bridge the gap between knowing acceptance and the oblivious user.¹⁵² In doing so, they have effectively

¹⁴² Opinion, *How Silicon Valley Puts the ‘Con’ in Consent*, N.Y. TIMES (Feb. 2, 2019), <https://www.nytimes.com/2019/02/02/opinion/internet-facebook-google-consent.html>.

¹⁴³ Dustin Patar, *Most Online ‘Terms of Service’ Are Incomprehensible to Adults, Study Finds*, VICE (Feb. 12, 2019), <https://www.vice.com/en/article/xwbg7j/online-contract-terms-of-service-are-incomprehensible-to-adults-study-finds>.

¹⁴⁴ See generally Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

¹⁴⁵ *Id.* at 2278.

¹⁴⁶ *Id.* at 2296.

¹⁴⁷ See *id.*

¹⁴⁸ Preston, *supra* note 28, at 535.

¹⁴⁹ Tasker & Pakcyk, *supra* note 77, at 144-45 (“A very large percentage of contracts found on the Internet contain convoluted legalese and long, compound sentence structures that are difficult to comprehend, even for experienced judges or counsel.”).

¹⁵⁰ See Fisher et al., *supra* note 17, at 166-67.

¹⁵¹ *Id.* at 151 (discussing often-found issues with browse-wrap agreements).

¹⁵² See generally *id.* at 147.

undermined the foundations of contract law by relying so heavily on constructive notice to conclude that there was mutual assent.¹⁵³

The adequacy of notice is determined by a factual analysis of website design and contract presentation.¹⁵⁴ Some scholars argue that courts should not decide issues of reasonable notice because it is a fact-based question and is within the everyday experience of typical jury members.¹⁵⁵ Notwithstanding the factual inquiry or application of the reasonably prudent user, judges, not juries, are responsible for assessing reasonable notice.¹⁵⁶ Just as reasonable minds can differ, so can the outcomes when courts concern themselves with the design of apps and websites.¹⁵⁷ Accordingly, the more prominent notice of the contract and its terms, the more likely it is to be enforced.¹⁵⁸

IV. PIC-WRAP: A PROPOSAL TO INCREASE NOTICE BY DESIGN

Currently, companies are using inconspicuous design features,¹⁵⁹ such as dark patterns,¹⁶⁰ for fear that making their terms too visible will slow down the user and cause a decrease in sales or use.¹⁶¹ Instead of providing users with obvious notice of what they agree to by participating in the online world,¹⁶² proprietors of apps and websites make terms as inconspicuous as

¹⁵³ Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J.L. & TECH. 180, 188 (2016) (discussing the growth of concerning trends alongside wrap contract law development); *see also* Kim, *supra* note 8, at 98 (discussing that the consequence of relying on legal fictions of click assent and conspicuous notice is the morphing of constructive notice into constructive assent).

¹⁵⁴ Kim, *supra* note 84, at 252.

¹⁵⁵ Kim, *supra* note 8, at 101.

¹⁵⁶ *Id.* (comparing the determination of reasonable notice to the determination of reasonableness when it comes to warnings in tort).

¹⁵⁷ Pridgen, *supra* note 95, at 562 (discussing the uncertainty of outcomes and how the “notice and opportunity test” requires courts to involve themselves with the design of websites and apps).

¹⁵⁸ Kim, *supra* note 84, at 253 (“[B]usinesses should do more than provide notice of the existence of a contract if they want to increase the likelihood that specific terms will be enforced.”); Preston, *supra* note 28, at 589 (“Notice to the user that terms exist is a start; notice about the content of the terms is better”); Conroy & Shope, *supra* note 1, at 24 (“[I]ncorporating multiple design features that promote notice of the terms and make clear the user’s manifestation of assent will increase the likelihood that the terms will be enforced.”); Fisher et al., *supra* note 17, at 167.

¹⁵⁹ *See generally* Marks, *supra* note 33, at 289 (noting most sellers choose the type of wrap contract that is least effective at notifying buyers of the existence of terms by using browse-wrap).

¹⁶⁰ *See generally* FED. TRADE COMM’N., *supra* note 117, at 1 (discussing the increasing presence of manipulative design practices in online commerce).

¹⁶¹ *See* Marks, *supra* note 33, at 258 (discussing the selection and favoritism of browse-wrap contracts by the websites that utilize them).

¹⁶² *See* Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute’s Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 434 (2020) (discussing that consumers waive their privacy rights when shopping online, allowing their information to be used by third parties or the vendor in targeted advertising); *see also* Conroy & Shope, *supra* note 1, at

possible within the legal limits of enforceability.¹⁶³ Factors evidencing adequate notice include placement of terms on a website,¹⁶⁴ visibility of the hyperlink to an agreement,¹⁶⁵ color contrasting, font size, and user experience.¹⁶⁶ This Note suggests that online contract creators should take the design elements of adequate notice a step further. By illustrating contract provisions, users could gain the understanding necessary to truly consent, and companies could gain increased confidence that their agreements will be upheld.¹⁶⁷

Visualization is the use of visual, illustrative, and explanatory content to communicate concepts within legal documents.¹⁶⁸ “The contracting context is well-suited to the use of visual expression.”¹⁶⁹ This compatibility is especially true online, given the increasing use of visual communication across many technological platforms.¹⁷⁰ Memes, emojis, videos, and other graphics are included in messages and social media posts to communicate thoughts, feelings, and ideas.¹⁷¹ In the modern age, the use of visual media is predominant in the delivery and reception of information.¹⁷²

Incorporating visualization to communicate contractual content has the ability to generate agreements that are more user-friendly and engaging than the typical legalese in a black-and-white, text-only document.¹⁷³ This is partly because humans process visual information more effectively than

23 (showing that users often agree to arbitration clauses, forum selection clauses, waivers, licenses, and indemnification provisions and other terms with significant legal consequences).

¹⁶³ Marks, *supra* note 33, at 253 (showing that to ensure online agreements are binding, design efforts must accomplish the bare minimum: user awareness of the existence of a contract).

¹⁶⁴ Leonhard, *supra* note 25, at 412.

¹⁶⁵ Allison S. Brehm & Cathy D. Lee, “Click Here to Accept the Terms of Service,” 31 COMM. LAW. 4, 6 (2015) (discussing *Harris v. comScore, Inc.*, 825 F.Supp.2d 924, 926-27 (N.D. Ill. 2011), where the hyperlink to an agreement was obscured, therefore the challenged term was not reasonably communicated to the user).

¹⁶⁶ Kim, *supra* note 84, at 252.

¹⁶⁷ Murray, *supra* note 18, at 105-06 (“With improved accessibility and comprehension of contract terms, visualization promotes greater acceptance of contracts. This would lead not only to better and more predictable contract performance and enforcement, but also to stronger relationships between parties.”).

¹⁶⁸ *Id.* at 103 (discussing the visualization movement in Proactive Law).

¹⁶⁹ Jay A. Mitchell, *Whiteboard and Black-Letter: Visual Communication in Commercial Contracts*, 20 U. PA. J. BUS. L. 815, 850 (2018).

¹⁷⁰ See Ellie Margolis, *Visual Legal Writing*, 18 LEGAL COMM. & RHETORIC: JALWD 195, 196 (2021) (discussing the common use of memes, emojis, and other visual forms of expression to communicate ideas, thoughts, and feelings).

¹⁷¹ *Id.* (“As we have moved further into the twenty-first century, communication has become increasingly visual, using memes, emojis, video, and other visual forms to share thoughts, ideas, and feelings.”).

¹⁷² Murray, *supra* note 18, at 109 (noting the shift toward using more visual images to communicate across a wide variety of platforms and resources in the twenty-first century).

¹⁷³ Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 27 (2015); *Id.* at 173 (discussing the decision to use cartoon or comic form in the visualization of contracts).

reading text.¹⁷⁴ Moreover, images capture more attention than text alone.¹⁷⁵ Thus, companies that include them in their online contracts will increase notice by calling the user's attention to the terms of the agreement.¹⁷⁶

A. Accessibility and Understanding

Effective information design requires an understanding of the audience to ensure the presentation and delivery of the content will serve them.¹⁷⁷ On the internet, where borders disappear and distance is immaterial, pictures function as a universal language in a multicultural environment.¹⁷⁸ The growing diversity of society supports the need to communicate effectively to audiences who do not share the same native language or background as the people for whom legal content was written in the nineteenth and twentieth centuries.¹⁷⁹

Robert de Rooy is a pioneer in the development of cartoon contracts.¹⁸⁰ His initial creations used a combination of text and comic artwork to communicate employment contracts to audiences in South Africa who had limited English literacy skills.¹⁸¹ Below is an excerpt from that cartoon contract.¹⁸²

¹⁷⁴ See Murray, *supra* note 18, at 106-07 (discussing visuals as an effective tool to expand communication in contracts).

¹⁷⁵ Cecilia A. Silver, *The Writing's on the Wall: Using Multimedia Presentation Principles from the Museum World to Improve Law School Pedagogy*, 126 DICK. L. REV. 475, 490 (2022) (discussing how museum curators use visual elements to attract visitor attention so educational messages can be conveyed).

¹⁷⁶ *Id.*

¹⁷⁷ Jay A. Mitchell, *Putting some product into work-product: corporate lawyers learning from designers*, 12 BERKELEY BUS. L.J. 1, 12 (2015).

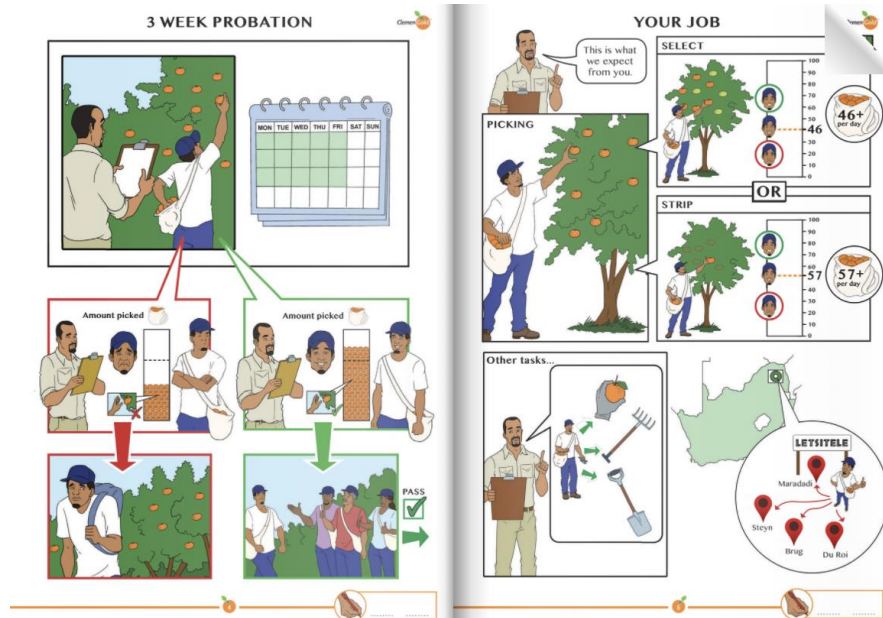
¹⁷⁸ Ebru Uzunoglu, *Using Social Media for Participatory City Branding: The Case of @cityofizmir, an Instagram Project*, in GLOB. PLACE BRANDING CAMPAIGNS ACROSS CITIES, REGIONS, AND NATIONS 94, 97 (Ahmet Bayraktar & Can Uslay, ed., 2017).

¹⁷⁹ Michael D. Murray, *A New Methodology for the Analysis of Visuals in Legal Works*, 16 FIU L. REV. 381, 428 (2022).

¹⁸⁰ Murray, *supra* note 18, at 169-270 ("Robert de Rooy was one of the first attorneys to develop cartoon contracts—a hybrid combination of text and comic artwork—designed to simplify the content of the agreements and communicate that content to audiences with limited literacy skills in the native verbal language of the agreements.").

¹⁸¹ *Id.* at 169 (showing that Robert de Rooy created his initial cartoon contracts for South African agricultural growers who employed people with little education and limited literacy skills in English).

¹⁸² JINCOM EHS, CONTRACT 4-5 (Clemen Gold 2016), available at <https://creative-contracts.com/clemengold/>.



Throughout all thirteen pages, visual depictions put the audience on notice of their training process, probation policy, employment expectations, earnings, deductions, shift times, duration of employment, and payment breakdowns, including overtime and sick leave policies.¹⁸³ The cartoon contract not only effectively conveyed the terms to an audience with limited literacy skills¹⁸⁴ but also significantly reduced employee induction time from four hours to forty minutes.¹⁸⁵

As the cartoon contract above demonstrates,¹⁸⁶ the use of visual imagery in legal documents can improve accessibility by communicating across language and cultural barriers.¹⁸⁷ Like the circumstances that sparked the creation of cartoon contracts,¹⁸⁸ users today enter into agreements made up of words they were never taught and concepts they do not understand.¹⁸⁹

¹⁸³ *Id.* at 3-13.

¹⁸⁴ Murray, *supra* note 18, at 169.

¹⁸⁵ *ClemenGold Comic Contract*, CREATIVE CONTS., <https://creative-contracts.com/clemengold/> (last visited Feb. 10, 2024).

¹⁸⁶ See Murray, *supra* note 18, at 169 (providing that these initial cartoon contracts for agricultural growers in South Africa who employed people with little education and limited literacy skills in English were created by Robert de Rooy).

¹⁸⁷ MICHAEL D. MURRAY, TOWARD A UNIVERSAL VISUAL LANGUAGE OF LAW, 1 (2021); Murray, *supra* note 179, at 428-29.

¹⁸⁸ See Murray, *supra* note 18, at 169.

¹⁸⁹ Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 832 (2022) (“Contract terms, however, are written in legal language that ordinary individuals cannot understand.”).

By using visualization to make contracts more user-friendly, companies can make their agreements more accessible than those comprised of text alone.¹⁹⁰

The possibility remains that users may continue not to read the contracts they enter, regardless of efforts to make them more understandable.¹⁹¹ Still, providing more notice by illustrating contract provisions gives users an opportunity not only to review the contract but also to understand the content within. This can help combat the power imbalance between companies and consumers, making online agreements more equitable.¹⁹² According to Professor Michael D. Murray, “even if there is unequal bargaining power, and the highly visual contract will not be negotiated or amended, the document is still readable and comprehensible by many more vulnerable and disadvantaged persons than a traditional text-only, legalese-and-boilerplate-ridden document that is an ‘agreement’ in name only.”¹⁹³ Moreover, incorporating explanatory illustrations, or Pic-wrap, in the context of online consumer contracts has the potential to reconnect the dots using design elements of notice to increase comprehensibility, reinforcing the legitimacy of the duty to read and allowing the user to gain the understanding necessary to give meaningful assent.

B. Increasing Enforceability

Innovations in technology have allowed for mass online contracting in the modern world,¹⁹⁴ and these advances make it possible to incorporate visuals in the practice of law.¹⁹⁵ Digitalization has allowed for the expansion of contracts past their physical form.¹⁹⁶ For instance, terms can be presented through various formats,¹⁹⁷ and today’s technology allows images to be implemented seamlessly in wrap agreements.¹⁹⁸ However, the legal profession is slow to adapt to change.¹⁹⁹ Despite the ease of inclusion,²⁰⁰ speed of communication, and multi-lingual capabilities of illustrated contract

¹⁹⁰ Murray, *supra* note 18, at 173.

¹⁹¹ See Benoliel & Becher, *supra* note 144, at 2288 (addressing an important reservation in improving the readability of consumer contracts).

¹⁹² See *id.* (describing leveling the consumer-seller playing field as a worthwhile objective and noting that consumers have a right to know what they are agreeing to, even if they choose not to pursue that right).

¹⁹³ Murray, *supra* note 18, at 197.

¹⁹⁴ Kim, *supra* note 8, at 90-91.

¹⁹⁵ Gerlinde Berger-Walliser et al., *From Visualization to Legal Design: A Collaborative and Creative Process*, 54 AM. BUS. L.J. 347, 349 (2017).

¹⁹⁶ See Kim, *supra* note 8, at 90 (discussing the evolution of standard form contracts).

¹⁹⁷ See *id.* (discussing the evolution of standard form contracts); see also Berger-Walliser et al., *supra* note 195, at 349.

¹⁹⁸ Ellie Margolis, *Is the Medium the Message? Unleashing the Power of E-Communication in the Twenty-First Century*, 12 LEGAL COMM. & RHETORIC: JALWD 1, 25 (2015).

¹⁹⁹ *Id.* at 28.

²⁰⁰ *Id.* at 25.

terms,²⁰¹ “[t]here is little case law or other authority relating directly to the use of visuals in contracts.”²⁰² Consequently, the incorporation of non-textual expressions in written agreements lacks the precedential certainty²⁰³ relied on so heavily by lawyers when drafting enforceable contracts.²⁰⁴ In this context, visuals should not replace textual communication but instead expand upon the language to engage users by illustrating concepts while maintaining the terms of the agreement.²⁰⁵ Drafters concerned that adding visual content to their contracts would take away from the priority of the written terms could address this directly²⁰⁶ by adding a clause such as, “This agreement has been prepared in writing and is accompanied by illustrated explanations. In the event of any questions of interpretation, the written terms shall apply and be binding upon the parties.” Similarly, when the terms of a contract are provided in more than one language, it is common practice to provide such a provision to direct the parties to the governing terms in the event of ambiguity.²⁰⁷

In litigating whether a user is bound by the terms of an app or website, the company seeking to enforce the agreement bears the burden to prove adequate notice and manifestation of assent.²⁰⁸ Evidence of what the user saw when interacting with a website or app can be presented as pivotal support for enforceability.²⁰⁹ “While courts do not demand perfection, incorporating multiple design features that promote notice of the terms and make clear the user’s manifestation of assent will increase the likelihood that the terms will be enforced.”²¹⁰ Companies that use design to illustrate contractual content will be able to provide more evidence of their efforts to put the user on notice.²¹¹ Additionally, courts may welcome the use of visuals in contracts as support for determining the mutual intention of the parties at the time of contracting.²¹²

²⁰¹ Murray, *supra* note 179, at 428.

²⁰² Mitchell, *supra* note 169, at 827.

²⁰³ *Id.* at 840 (“There seem to be rather few contract interpretation cases involving diagrams and other visuals. Those that do exist involve use of maps or other exhibits, not graphics used to capture substantive terms.”).

²⁰⁴ *Id.* at 830 (identifying the focus for contract drafters on producing predictable content rather than effective communication devices).

²⁰⁵ Murray, *supra* note 18, at 197 (clarifying the aim of the visualization movement).

²⁰⁶ Mitchell, *supra* note 169, at 841 (discussing a solution to clarify the priority of text over visual terms in case of inconsistencies).

²⁰⁷ *Id.*

²⁰⁸ Conroy & Shope, *supra* note 1, at 25.

²⁰⁹ *Id.* (discussing that the party seeking to enforce the terms will need to provide evidence of what the user saw and did).

²¹⁰ *Id.* at 24.

²¹¹ *See generally id.*

²¹² *See Mitchell, supra* note 169, at 842 (discussing the likeliness of a court welcoming the presence of a visual in a commercial contract as a resource for determining the intent of parties at the time of contracting).

Proprietors of apps and websites frequently make their use subject to terms and conditions that carry significant legal consequences.²¹³ The average user is not on notice that they are waiving important rights by entering into an online contract when key provisions cannot be understood without legal training.²¹⁴ Still, some of the most widely encountered online contracts include a standard clause for disputes to be resolved by mandatory arbitration, which is not commonly understood or recognizable in everyday life.²¹⁵ Instagram, for example, utilizes an arbitration clause, requiring users to waive their right to a trial by jury under the Seventh Amendment.²¹⁶ But if companies fail to call enough attention to an arbitration provision, that clause may not be upheld.²¹⁷ Whether the parties must resolve their disputes through arbitration or are able to take matters to court can significantly affect the outcome of a legal dispute.²¹⁸

Contract drafters can better communicate complex concepts,²¹⁹ such as arbitration,²²⁰ by using design elements of color, shape, symbols, and proximity to convey information and signal importance.²²¹ Below is an original example of a visual explanation that could accompany an arbitration clause:

²¹³ Conroy & Shope, *supra* note 1, at 23.

²¹⁴ Rustad & Koenig, *supra* note 12, at 1471.

²¹⁵ Jeremy M. Evans, LL.M., *Finding the Needle in the Haystack: Drafting Enforceable Arbitration Clauses in Online Entertainment Contracts*, 34 ENT. & SPORTS L. 8, 10 (2018).

²¹⁶ *Terms of Use*, INSTAGRAM, <https://help.instagram.com/581066165581870> (last visited Nov. 15, 2023); Rustad & Koenig, *supra* note 12, at 1433.

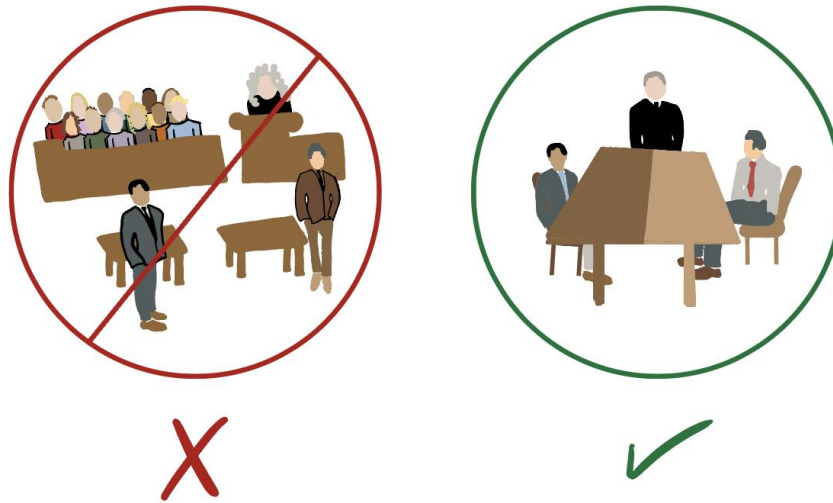
²¹⁷ Alan Wingfield, Esq. & Chris Capurso, Esq., *E-SIGN works: How the legal system got electronic contracting laws right*, PRAC. INSIGHTS COMMENTS., Apr. 2021, at 3 (“Agreements that do not give adequate notification that the user is assenting to legally binding agreements—for example, that fail to draw the user’s attention to an arbitration provision—may not be upheld.”).

²¹⁸ See Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, THE CTR. FOR AM. PROGRESS (Aug. 2, 2016), <https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses/>.

²¹⁹ Margolis, *supra* note 198, at 26-27.

²²⁰ Evans, *supra* note 215, at 8, 10.

²²¹ Mitchell, *supra* note 169, at 823.



In the arbitration illustration above, color was used to communicate the loss of the right to be tried by a jury and the underlying loss of diversity in the decision-making process.²²² Additionally, the shapes used in the illustration of attire speak to the formalities associated with a trial in comparison to the informal nature of arbitration.²²³ The red and green symbols encompassing and accompanying the two depictions signal the rejection of a trial by jury and acceptance of arbitration as the means to resolve a conflict between the parties.²²⁴ This type of design can be implemented by companies alongside the language of their agreement to (1) increase notice by drawing more attention to the content²²⁵ and (2) provide supporting evidence of the user's intent to be bound to this part of the contract.²²⁶ Promoting notice and clarity of the user's manifestation of assent in this way will increase the likelihood that the terms of an online agreement will be upheld.²²⁷

²²² Richard L. Jolly et al., *Democratic Renewal and the Civil Jury*, 57 GA. L. REV. 79, 103-04 (2022) (“[J]uries bring diverse perspectives, life experiences, and a strong grounding in community norms to the fact-finding task.”).

²²³ Evans, *supra* note 215, at 12 (“Arbitration is more informal than a lawsuit in court.”).

²²⁴ Kim, *supra* note 8, at 137 (“Graphics communicate at a glance whether activity is permitted or prohibited. For example, an image in a circle with a red or black line through it indicates prohibition.”).

²²⁵ See generally Silver, *supra* note 175, at 475.

²²⁶ Mitchell, *supra* note 169, at 842-43 (discussing the likeliness of a court welcoming the presence of a visual in a commercial contract as a resource for determining the intent of parties at the time of contracting).

²²⁷ See Conroy & Shope, *supra* note 1, at 24-26.

V. CONCLUSION

The lack of readability,²²⁸ convoluted format,²²⁹ and adhesive nature²³⁰ of online agreements contribute to the growing rift between true assent and the current standard of reasonable notice.²³¹ Still, the standard of reasonable notice serves as a proxy for true assent and is used to assess the enforceability of online terms.²³² Careful design choices should be recommended by counsel to guard against enforcement challenges.²³³ Including an “I Agree” button in close proximity to a vibrantly displayed hyperlink where the terms are accessible is a step in the right direction,²³⁴ but “businesses should do more than provide notice of the existence of a contract if they want to increase the likelihood that specific terms will be enforced.”²³⁵

With some effort in design and creativity, mandatory arbitration, forum selection, choice of law, privacy waivers, and other clauses can be drawn to visually emphasize the terms and conditions of an online agreement.²³⁶ This would be best implemented in a scroll-wrap format, where the content is displayed to the user, who must scroll past the terms and accompanying illustrations to the bottom of the contract and check the “I agree” box in order to access the app or website.²³⁷ Nonetheless, even if the contract is only viewable behind a blue underlined hyperlink,²³⁸ adding explanatory images to online contracts is more conducive to the user’s right to know what they agree to, even if they choose not to look before they click.²³⁹ Companies should aim to satisfy the current standard of adequate notice by using design practices and incorporating visual explanations in their online contracts. This

²²⁸ See Benoliel & Becher, *supra* note 144, at 2277-80 (revealing that 498 out of 500 (99.6%) of online consumer agreements of the most popular websites in the United States were deemed unreadable to the average user based on this study).

²²⁹ Karnow, *supra* note 67, at 141-44 (discussing the use of interlocking agreements spread across several lengthy documents online).

²³⁰ Jones & Samples, *supra* note 4, at 171.

²³¹ See generally Preston, *supra* note 28, at 535 (debunking the idea that notice of the existence of contract should be the standard for measuring enforceability).

²³² See generally Kim, *supra* note 8, at 85 (explaining that courts usually apply the standard of reasonable notice to assess the enforceability of adhesive online terms).

²³³ Conroy & Shope, *supra* note 1, at 26 (“Prudent counsel will do well to guard against such challenges through recommending careful design choices and electronic records retention.”).

²³⁴ Julie A. Lewis, *Anatomy of a Privacy Policy*, 77 BENCH & B. MINN. 24, 27 (2020).

²³⁵ Kim, *supra* note 84, at 253.

²³⁶ See Murray, *supra* note 18, at 103 (describing visualization as a proactive approach with the capacity to uncover terms that may have been hidden by legalese and boilerplate for the benefit of all parties).

²³⁷ See generally Marks, *supra* note 33, at 257 (describing the typical format of scroll-wrap agreements).

²³⁸ Lewis, *supra* note 234, at 27.

²³⁹ See Benoliel & Becher, *supra* note 144, at 2288-91 (noting that consumers have a right to know what they are agreeing to, even if they choose not to pursue that right); see also Murray, *supra* note 18, at 196-97.

will improve the user's understanding, which is necessary for true mutual assent,²⁴⁰ and will provide increased confidence for the company that its terms are binding.²⁴¹

²⁴⁰ Murray, *supra* note 18, at 105-06.

²⁴¹ See Conroy & Shope, *supra* note 1, at 24-25.

ACCESS DENIED: AN IMMEDIATE DISCRIMINATORY IMPACT ON WOMEN WITH CHRONIC ILLNESS AFTER *DOBBS V. JACKSON WOMEN'S HEALTH ORGANIZATION*

Mallory Maag*

I. INTRODUCTION

Myisha Malone-King is a forty-one-year-old woman living in Baltimore, Maryland with Crohn's disease.¹ Myisha is a cancer survivor and the CEO of a chronic illness virtual community called Game of Crohn's Chronic Illness.² When Myisha's primary care doctor called her to tell her that he would no longer be prescribing her methotrexate—a medication commonly used in the treatment of Crohn's and other chronic illnesses—she was shocked.³ On that same day, her team of Crohn's specialists contacted her to inform her that because methotrexate can cause a pregnancy to terminate, it will no longer be on her treatment plan.⁴ Moreover, her

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¹ Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

² *Id.*

³ *Id.*

⁴ *Id.*

insurance company ultimately informed her that the cost of methotrexate⁵ would no longer be covered by her insurance.⁶

The following week, she received a letter from her doctor and her insurance company explaining that the Supreme Court had overturned *Roe v. Wade*, and she now had to find an alternative medication for her chronic illness.⁷ It is worth noting that Maryland—where Myisha resides—is a state that protects the right to abortion for women.⁸

Crohn's patients are not the only group of women who experience issues accessing medication.⁹ In fact, many female users of reproductive age are facing restrictions on their medication as a result of the Court's decision.¹⁰ For example, methotrexate also aids in the treatment of other chronic illnesses, such as rheumatoid arthritis, lupus, and cancer.¹¹ Not only is methotrexate used to treat women who experience miscarriages and ectopic pregnancies, but according to the Arthritis Foundation ("Foundation"), it is one of the most commonly prescribed drugs for inflammatory arthritis; thus, the uncertainty around methotrexate affects a significant number of people.¹² As of November 2022, the Foundation surveyed patients and collected 524 responses; out of those responses, sixteen patients indicated they experienced difficulty accessing their medication.¹³

⁵ "The price of methotrexate 10-milligram (mg) doses depends on several factors. These include your insurance coverage (if you have it), the form of methotrexate you're prescribed, the pharmacy you use, and your treatment plan." Dedra Weiss, *Methotrexate and Cost: What You Need to Know*, HEALTHLINE (Oct. 30, 2022), <https://www.healthline.com/health/drugs/methotrexate-cost>. According to one source, the average retail price of Methotrexate is around \$71.37. Kristi C. Torres, *Methotrexate Price History & Information*, SINGLECARE, <https://www.singlecare.com/prescription/methotrexate#:~:text=How%20much%20does%20Methotrexate%20cost%20without%20insurance%3F%20Methotrexate,help%20you%20to%20save%20on%20your%20prescription%20medication> (last visited Nov. 19, 2023).

⁶ Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

⁷ *Id.*

⁸ *Id.*

⁹ See Elisabeth Mahase, *US anti-abortion laws may restrict access to vital drug for autoimmune diseases, patient groups warn*, THEBMJ (July 6, 2022), <https://www.bmj.com/content/378/bmj.o1677>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; Linda Rath, *New Barrier to Methotrexate for Arthritis Patients*, ARTHRITIS FOUND. (June 30, 2022), <https://www.arthritis.org/about-us/news-and-updates/new-barrier-to-methotrexate-for-arthritis-patients> (noting that methotrexate is the first medication prescribed for rheumatoid arthritis, psoriasis, psoriatic arthritis, lupus, and juvenile idiopathic arthritis (JIA)).

¹³ Celine Castronuovo, *Many Female Arthritis Drug Users Face Restrictions After Dobbs*, BLOOMBERG L. (Nov. 14, 2022, 4:25 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/many-female-arthritis-drug-users-face-restrictions-after-dobbs>.

These restrictions pose a substantial threat to methotrexate users, considering the drug's popularity as well as its safety and effectiveness.¹⁴ Furthermore, it helps with inflammation and controlling the symptoms of Crohn's disease.¹⁵ The rationale for banning methotrexate is weak at best. In order to cause an abortion, a woman would have to take a much higher dosage of methotrexate than the dosage used to treat arthritis.¹⁶ The Arthritis Foundation observed that a rheumatoid arthritis patient may be prescribed a maximum of twenty-five milligrams per week of methotrexate; however, it takes three times that amount to cause an abortion.¹⁷

On July 24, 2022, the Supreme Court rendered its decision in *Dobbs v. Jackson Women's Health Organization*, overturning the historic *Roe v. Wade* by ruling that the United States Constitution does not provide a right to abortion.¹⁸ The Supreme Court avers that its decision returned the authority to regulate abortion to the people through their elected state representatives.¹⁹ However, following the Court's decision in *Dobbs*,²⁰ some states have restricted access to medications that have a secondary effect of inducing abortions, thus creating a ripple effect for women of childbearing age.²¹

This Note addresses whether refusing to refill an individual's prescription based on a side effect of that medication constitutes discrimination on the basis of sex. Considering the disproportionate effect this has on women with chronic illnesses, this Note argues that *Dobbs* has had a disparate impact on women with chronic illnesses because those women have been denied their prescription medications in some instances simply because they may have the ability to become pregnant.²²

Part II of this Note will discuss the *Dobbs* decision and the impact it has on rights that were protected for fifty years after *Roe v. Wade*. Part III will discuss state laws relating to abortion where they concern abortifacient

¹⁴ Linda Rath, *New Barrier to Methotrexate for Arthritis Patients*, ARTHRITIS FOUND. (June 30, 2022), <https://www.arthritis.org/about-us/news-and-updates/new-barrier-to-methotrexate-for-arthritis-patients>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

¹⁹ *Id.*

²⁰ *Id.*

²¹ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928> [hereinafter Plank]; Elisabeth Mahase, *US anti-abortion laws may restrict access to vital drug for autoimmune diseases, patient groups warn*, THEBMJ (July 6, 2022), <https://www.bmj.com/content/378/bmj.o1677> [hereinafter Mahase]; Jen Christensen, *Women with chronic conditions struggle to find medications after abortion laws limit access*, CNNHEALTH (July 22, 2022, 7:11 AM), <https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html> [hereinafter Christensen].

²² *Id.*

medications. Part IV will examine various anti-discrimination statutes and show how denial of medication amounts to sex discrimination. Part V will examine the relevant parts of the Affordable Care Act (ACA) and discuss how denying women medication on the basis of sex violates the ACA. This Part will also examine protections for persons with disabilities under the Act. Part VI will provide an overview of the policy considerations and the impact on physicians and other healthcare workers while establishing why this particular event only adds to the uphill battle many women face in obtaining a diagnosis and treatment for their chronic illness. Finally, Part VII will propose a law as a solution to the problem faced by physicians that is unduly affecting women with chronic illnesses. The proposed solution will provide protection for physicians treating women with chronic illnesses when their treatment plans are affected by abortion regulations in the states. The law will act as a “shield” for these physicians and patients who may face fear and confusion in the wake of *Dobbs*.

II. LIBERTY AND RELIANCE INTERESTS

Fifty years ago, the Supreme Court recognized a woman’s right to an abortion under the Constitution in *Roe v. Wade*.²³ In *Roe*, the plaintiff brought a declaratory and injunctive relief action claiming that Texas criminal abortion laws were unconstitutional.²⁴ The statute at issue prohibited obtaining or attempting an abortion except on medical advice for the purpose of saving a mother’s life.²⁵ The plaintiff was a pregnant, single woman purporting to sue on behalf of herself and all other women similarly situated.²⁶ The Supreme Court recognized a substantive due process right, holding that the Constitution protects a woman’s personal privacy, including the right to an abortion.²⁷

After the Court found such privacy interest was inherently part of the Constitution, it reaffirmed *Roe* in *Planned Parenthood v. Casey*, relying on the doctrine of stare decisis, stating that “for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should

²³ *Roe v. Wade*, 410 U.S. 113, 154 (1973), *abrogated by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *and overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

²⁴ *Id.* at 120.

²⁵ *Id.* at 117-18.

²⁶ *Id.* at 121.

²⁷ *Id.* at 153.

fail.”²⁸ *Casey* was not the last of the *Roe* line of decisions.²⁹ For the past five decades, women and the courts have relied on *Roe v. Wade* as legal precedent protecting the constitutional right to privacy.³⁰

Then, in 2022, the Supreme Court overturned *Roe* in *Dobbs v. Jackson Women’s Health Organization*, reasoning that

[t]he Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey*³¹ now chiefly rely—the Due Process Clause of the Fourteenth Amendment. That provision has been held to guarantee some rights that are not mentioned in the Constitution, but any such right must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³²

The *Dobbs* Court—by characterizing the liberty interest differently than the interest articulated in *Roe*—overruled decades of precedent and ignored any reliance interest that women may have on access to certain reproductive healthcare.³³ The Supreme Court previously found a liberty interest in a right to abortion within the constitutional right to privacy.³⁴ The *Roe* Court stated,

[The] right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.³⁵

However, the Court in *Dobbs* found no such liberty interest to be a part of the Constitution.³⁶ The majority in *Dobbs* held that the Constitution does not reference abortion and stated that there is no right to abortion protected by the Constitution, including in the Due Process Clause of the Fourteenth Amendment.³⁷ Further, the Fourteenth Amendment protects some rights not

²⁸ Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992), *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

²⁹ See Doe v. Bolton, 410 U.S. 179 (1973), *abrogated by* Dobbs, 142 S. Ct. at 2228; Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976); Gonzales v. Carhart, 550 U.S. 124 (2007); Whole Woman’s Health v. Hellerstedt, 579 U.S. 582 (2016), *abrogated by* Dobbs, 142 S. Ct. at 2228.

³⁰ *Id.*

³¹ *Planned Parenthood of Se. Pa.*, 505 U.S. at 833.

³² *Dobbs*, 142 S. Ct. at 2242.

³³ See *id.*

³⁴ *Roe v. Wade*, 410 U.S. 113, 166 (1973), *abrogated by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), and *overruled by* Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022).

³⁵ *Id.* at 153.

³⁶ *Dobbs*, 142 S. Ct. at 2242.

³⁷ *Id.*

mentioned in the Constitution, but any right falling under this Amendment must be “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”³⁸ In sum, the *Roe* Court characterized the liberty interest at issue as similar to the rights recognized in past decisions³⁹ involving matters such as intimate sexual relations, contraception, and marriage; whereas the *Dobbs* Court—choosing not to characterize the liberty interest in the same way the precedent had—found that abortion was fundamentally different because it involves the interests of a fetus.⁴⁰

The differing definitions of the liberty interests at issue permitted the Court to surpass the chain of Supreme Court precedent upon which *Roe* was founded.⁴¹ *Roe* characterized the liberty interest under the Fourteenth Amendment as a right to privacy, discussing the relationship between the woman and the physician while also balancing the interests of the state and the fetus.⁴² Those interests were ultimately founded and developed through a long line of Supreme Court precedent recognizing a right to privacy in marital, sexual, and health matters and the rights of a person to control their own familial decisions—including, among other things, establishing a home, bringing up a family, and marrying.⁴³ To the contrary, *Dobbs* characterized the liberty interest as a right to abortion and found that no such right exists in the Nation’s history and tradition.⁴⁴ In characterizing the liberty interest in this way, the Court failed to consider the long history and tradition that women have enjoyed in directing their own healthcare and the reliance interest women may have on this particular freedom.⁴⁵

For instance, Myisha Malone-King⁴⁶ was shocked to learn that she had no choice in the matter of whether she would be permitted to obtain her

³⁸ *Id.*

³⁹ See also *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing a right to marital privacy as it relates to the decision to use contraceptives); *Loving v. Virginia*, 388 U.S. 1 (1967) (recognizing a freedom to marry or not to marry in the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (recognizing, within the Fourteenth Amendment, the right of the individual to contract to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home, and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men).

⁴⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

⁴¹ *Roe v. Wade*, 410 U.S. 113 (1973), *abrogated by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), and *overruled by* *Dobbs*, 142 S. Ct. at 2228.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Dobbs*, 142 S. Ct. at 2242.

⁴⁵ See generally *Planned Parenthood of Se. Pa.*, 505 U.S. at 855-56, *overruled by* *Dobbs*, 142 S. Ct. at 2228 (discussing the possible reliance interest after almost twenty years following the *Roe* decision).

⁴⁶ Myisha is the subject of our current case mentioned in the introduction. See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

medication following the *Dobbs* ruling.⁴⁷ In that case, the medication was not even being used for abortion purposes; Myisha was simply trying to manage her chronic illness in accordance with the treatment plan she and her physician had discussed—this is just one example of the implications that the Court failed to consider in overturning *Roe*.⁴⁸

In the past, when the Supreme Court considered whether to overturn precedent, the Court reviewed the reliance interests that prior decisions created.⁴⁹ In doing so, the Court considers the extent to which individuals, organizations, society, or other stakeholders have relied on the precedent, to what extent they have relied, and to what detriment if the precedent is overturned.⁵⁰ The Supreme Court stated, “Traditional reliance interests arise ‘where advance planning of great precision is most obviously a necessity.’”⁵¹ However, the Supreme Court, in *Planned Parenthood v. Casey*, held the following as it relates to the reliance interest families possess relating to abortion:

The *Roe* rule's limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed.⁵²

This holding in *Casey* encompasses much of the reliance interest *Roe* created for women in this Nation.⁵³ Justice Scalia once stated, “The doctrine of stare decisis protects the legitimate expectations of those who live under the law.”⁵⁴ Additionally, the Supreme Court in *Casey* stated, “The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Clarke D. Forsythe, *A Draft Opinion Overruling Roe v. Wade*, 16 GEO. J. OF L. & PUB. POL'Y 445, 485 (2018).

⁵⁰ *Id.*

⁵¹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2276 (2022).

⁵² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁵³ *Id.*

⁵⁴ Kate Shaw & Steven Mazie, *There's a Glaring Weakness in Justice Alito's Case Against Roe v. Wade*, TIME (May 27, 2022, 11:20 AM), <https://time.com/6182093/roe-v-wade-alito-abortion-reliance-interests/>.

who have relied reasonably on the rule's continued application.”⁵⁵ The cost of repudiating *Roe* is not only that it strips rights from all women who have relied on the ruling, in terms of the availability of abortion services, but as is presented in this Note, also those who rely on the continued access to certain medications to simply manage their chronic illnesses in accordance with the plans they have created with their physicians.⁵⁶ The repudiation of *Roe* articulated in *Dobbs* creates a chilling effect on the patient-doctor relationship and has garnered uncertainty among the medical community.⁵⁷ It is women living with chronic illnesses who are bearing the burden, at least in some respects.⁵⁸

The *Dobbs* majority declined to recognize the type of reliance interests the *Casey* Court acknowledged, stating that “assessing the novel and intangible form of reliance endorsed by the *Casey* plurality is another matter.”⁵⁹ The Court ultimately found that the reliance interest articulated in *Casey* was too difficult for the Court to adequately assess and required empirical data that courts would not be able to analyze.⁶⁰ According to the majority in *Dobbs*, the Supreme Court cannot adequately assess the effects of a woman’s right to choose on society and the particular impact on women as a whole.⁶¹ However, while *Casey* recognized that some hold the view that abortion is an unplanned activity and that, to some, this may be enough not to find a reliance interest, the Court ultimately concluded that a reliance interest exists in “people [that] have organized intimate relationships and made choices that define their views of themselves and their places in society.”⁶² These people have social and economic reliance on abortion in the event contraception should fail.⁶³

Thus, the *Casey* Court concluded that the availability of abortion has largely facilitated the ability of women to participate equally in economic and social life.⁶⁴ The *Dobbs* Court opined that the fact that women will be greatly affected by the decision is reconciled by the fact that women have political power and the ability to participate in the political system.⁶⁵ While not articulated directly by *Casey*, certain reliance interests were directly

⁵⁵ *Planned Parenthood of Se. Pa.*, 505 U.S. at 855, *overruled by Dobbs*, 142 S. Ct. at 2228.

⁵⁶ Kate Shaw & Steven Mazie, *There's a Glaring Weakness in Justice Alito's Case Against Roe v. Wade*, TIME (May 27, 2022, 11:20 AM), <https://time.com/6182093/roe-v-wade-alito-abortion-reliance-interests/>.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2277 (2022).

affected or possibly put in danger by the *Dobbs* decision that will not be adequately reconciled by women's ability to participate in politics.⁶⁶ A major example includes the interest women with chronic illness have in accessing their medication.⁶⁷ The *Casey* Court observed that

[s]ince the classic case for weighing reliance heavily in favor of following the earlier rule occurs in the commercial context, where advance planning of great precision is most obviously a necessity, it is no cause for surprise that some would find no reliance worthy of consideration in support of *Roe*.⁶⁸

The *Dobbs* Court opined that in order to assess the reliance interest resulting from *Roe*, it would need empirical evidence to measure the effects of abortion rights on society—and that, ultimately, it is too empirical of a question for the Court to evaluate.⁶⁹ However, there exists a wealth of empirical data and a great need for advanced planning in care for women with chronic illnesses.⁷⁰ A doctor and patient must meet and create a care plan that works for the patient's chronic illness and the patient herself.⁷¹ Chronic illness diagnoses require many trips to the doctor and sometimes specialists who perform lab work and other tests.⁷² Then, after considering the time expended and financial costs of repeated doctor visits and tests, it is relatively easy to assess the burden that women with chronic illness face in simply obtaining a diagnosis and preliminary treatment.⁷³ Now, imagine what happens when the Court decides to overturn fifty years of settled law, and these women are forced to change their treatment plans as a result of two factors: (1) they may or may not have the ability to become pregnant, and (2) their medication (in a much higher dosage) has the ability to cause an abortion.

While the *Dobbs* Court made it clear that no other constitutional rights will be affected by the Court's ruling,⁷⁴ the ruling has implications for any persons who may have the ability to become pregnant.⁷⁵ Evidence of

⁶⁶ *See id.*

⁶⁷ Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁶⁸ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855-56 (1992), *overruled by Dobbs*, 142 S. Ct. at 2228.

⁶⁹ *Dobbs*, 142 S. Ct. at 2277.

⁷⁰ *Id.*; *see also* Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁷¹ *See* Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275-78 (2022).

⁷⁵ *See* Plank, *supra* note 21; Mahase *supra* note 21; Christensen, *supra* note 21.

additional constitutional consequences the Court failed to consider can be found when women attempt to access their medications and are met with resistance due to confusion in the medical profession over the implications of the Supreme Court's ruling.⁷⁶

The consequences of the *Dobbs* ruling cannot be ignored. Women who may or may not have the ability to become pregnant have been denied access to their medication.⁷⁷ The American College of Rheumatology issued guidance to legislatures in July 2022, pushing them to pass legislation that would protect patients and healthcare professionals who are being prescribed or are prescribing methotrexate.⁷⁸ Some states have banned abortions outright, while other states have imposed barriers for those wishing to have medication abortions.⁷⁹ These barriers have implications for women prescribed medications such as methotrexate—that may be used as an abortifacient in the facilitation of medication abortion—even when that is not the purpose of their prescription, a concept demonstrated in Myisha Malone-King's case.⁸⁰

III. STATE LAW

Over half of the abortions in the United States are facilitated through medication,⁸¹ which involves a prescription for drugs to assist in the abortion.⁸² The drug combination used to accomplish a medication abortion

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ Celine Castronuovo, *Many Female Arthritis Drug Users Face Restrictions After Dobbs*, BLOOMBERG L. (Nov. 14, 2022, 4:25 AM), <https://news.bloomberglaw.com/pharma-and-life-sciences/many-female-arthritis-drug-users-face-restrictions-after-dobbs>.

⁷⁹ See TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

⁸⁰ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-Roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

⁸¹ The Cleveland Clinic defines medication or medical abortions as “a procedure in which medication (prescription drugs) is used to end a pregnancy. It does not require surgery and is performed through the ninth week of pregnancy. It involves taking two medications—mifepristone and misoprostol. Mifepristone works by blocking the hormone progesterone.” *Medical Abortion*, CLEVELAND CLINIC (Oct. 21, 2021), <https://my.clevelandclinic.org/health/treatments/21899-medical-abortion>. The lack of progesterone stops the growth of the fetus in the uterus then the misoprostol causes the lining of the uterus to shed. *Id.*

⁸² Brendan Pierson & Nate Raymond, *Explainer: Can abortion pills overcome U.S. state bans?*, REUTERS (June 24, 2022, 4:49 PM), <https://www.reuters.com/world/us/can-abortion-pills-overcome-us-state-bans-2022-06-24/>.

consists of a prescription for mifepristone⁸³ followed by misoprostol.⁸⁴ Methotrexate, while not used for what is commonly referred to as a “medication abortion,” has been classified by some state laws as a drug that can induce abortions.⁸⁵ States like Texas that have restrictive abortion policies have limited methotrexate’s use and, ultimately, have negatively impacted women with chronic illnesses.⁸⁶ The Texas statute defines an abortion-inducing drug as:

[A] drug, a medicine, or any other substance, including a regimen of two or more drugs, medicines, or substances, prescribed, dispensed, or administered with the intent of terminating a clinically diagnosable pregnancy of a woman and with knowledge that the termination will, with reasonable likelihood, cause the death of the woman's unborn child.⁸⁷

The statute goes on to explain that the “off-label use of drugs” is included for drugs that have “abortion-inducing properties” that are “prescribed, dispensed, or administered with the intent of causing an abortion.”⁸⁸ Texas legislatures specifically listed the Mifeprex regimen,

⁸³ It should be noted that the United States Supreme will hear a case in early 2024, which may impact the ability to get mifepristone through the mail, even for residents of states which allow such conduct. The Supreme Court will review a decision by the Fifth Circuit upholding the requirement that women will be forced to see a doctor three times prior to receiving a prescription for the drug. Some speculate that the decision undermines the FDA’s rigorous drug approval process and its authority as a regulatory authority. See Sarah Varney, *U.S. Supreme Court to Hear Case About Access to the Abortion Pill Mifepristone*, NPR ILL. (Dec. 14, 2023, 4:58 AM), <https://www.npr.org/2023/12/14/1219246992/u-s-supreme-court-to-hear-case-about-access-to-the-abortion-pill-mifepristone>; see also *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 78 F.4th 210 (5th Cir. 2023), *cert. granted sub nom. Danco Lab'ys, L.L.C. v. All. Hippocratic Med.*, No. 23-236, 2023 WL 8605744 (U.S. Dec. 13, 2023), & *cert. granted sub nom. U.S. Food & Drug Admin. v. All. Hippocratic Med.*, No. 23-235, 2023 WL 8605746 (U.S. Dec. 13, 2023), & *cert. denied sub nom. All. Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 23-395, 2023 WL 8605749 (U.S. Dec. 13, 2023) (Physicians providing pregnancy-related health care, including emergency care after unsuccessful medication abortions, and national associations of such physicians, brought judicial-review action alleging that Food and Drug Administration's (FDA) accelerated approval of brand-name mifepristone, an abortion-inducing drug, amendments to approval that lightened prior protections, approval of generic version, and decision that it would not enforce an agency regulation requiring drug to be prescribed and dispensed in person violated the Administrative Procedure Act (APA). Drug manufacturer and distributor intervened.)

⁸⁴ Brendan Pierson & Nate Raymond, *Explainer: Can abortion pills overcome U.S. state bans?*, REUTERS (June 24, 2022, 4:49 PM), <https://www.reuters.com/world/us/can-abortion-pills-overcome-us-state-bans-2022-06-24/>.

⁸⁵ TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023); see also Jen Christensen, *Women with Chronic Conditions Struggle to Find Medications After Abortion Laws Limit Access*, CNNHEALTH (July 22, 2022, 7:11 AM), <https://www.cnn.com/2022/07/22/health/abortion-law-medications-methotrexate/index.html>.

⁸⁶ *Id.*

⁸⁷ TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

⁸⁸ *Id.*

misoprostol (Cytotec), and methotrexate.⁸⁹ However, the legislature provided an exemption for drugs that “may be known to cause an abortion but [are] prescribed, dispensed, or administered for other medical reasons.”⁹⁰ Prior to *Dobbs*, Texas banned medication abortions after seven weeks of pregnancy and made it a crime to send the abortion medication through the mail.⁹¹ The Texas law was a trigger ban on abortion, and Texas’s ban on abortion came into effect on August 25, 2022.⁹² The Texas statute provides that a person “may not knowingly perform, induce, or attempt an abortion” except under limited circumstances, such as a life-threatening condition to the mother caused by the pregnancy.⁹³ This is just one of many states that have restricted abortion following *Dobbs*.⁹⁴

Tennessee enacted a trigger ban on abortions in 2019 that criminalizes performing or attempting to perform an abortion on a woman.⁹⁵ Further, the ban criminalizes attempts to procure a miscarriage through the administration of any substance with the intent to procure a miscarriage or the use of any instrument with that intent.⁹⁶ The statute makes exceptions for cases where it is necessary to prevent death or serious permanent bodily injury to the mother.⁹⁷ Subsequently, in 2020, Tennessee enacted a statute banning “chemical abortions.”⁹⁸ This statute explicitly prohibits medication abortions, which consequently regulates a doctor’s ability to prescribe Mifeprex and misoprostol.⁹⁹ It is statutes like what Texas and Tennessee have enacted that have resulted in confusion for medical professionals and have caused women with chronic illnesses to be denied certain medications to treat their chronic illnesses.¹⁰⁰

The denial of medication for women with chronic illness is not limited to states that have statutes restricting abortion.¹⁰¹ It has also occurred in states

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*; see also Eleanor Klibanoff, *Texas now bans medical abortions after seven weeks of pregnancy*, THE TEX. TRIB. (Dec. 2, 2021), <https://www.texastribune.org/2021/12/02/texas-ban-medical-abortion/#:~:text=The%20law%20makes%20it%20a%20felony%20to%20provide,Texas%20term%20their%20pregnancies%2C%20according%20to%20state%20data>.

⁹² Att’y Gen. of Tex., *Advisory on Texas Law Upon Reversal of Roe v. Wade*, Opinion Letter (June 24, 2022), available at <https://www.texasattorneygeneral.gov/sites/default/files/images/executive-management/Post-Roe%20Advisory.pdf>.

⁹³ *Id.*

⁹⁴ See TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023); TENN. CODE ANN. § 39-15-201 (2021).

⁹⁵ TENN. CODE ANN. § 39-15-201 (2021).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Tennessee Code Annotated defines a chemical abortion as “the use or prescription of an abortion-inducing drug dispensed with intent to cause the death of the unborn child.” *Id.* at §39-15-218.

⁹⁹ *Id.* at § 39-15-201.

¹⁰⁰ See *id.*; TEX. HEALTH & SAFETY CODE ANN. § 171.061 (2023).

¹⁰¹ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

without these regulations on abortion.¹⁰² Myisha Malone-King, who lives in Maryland, was denied her medication as a result of confusion resulting from the *Dobbs* decision.¹⁰³ Maryland has a statute protecting women's right to choose, which states,

[T]he State may not interfere with the decision of a woman to terminate a pregnancy: (1) Before the fetus is viable; or (2) At any time during the woman's pregnancy, if: (i) The termination procedure is necessary to protect the life or health of the woman; or (ii) The fetus is affected by genetic defect or serious deformity or abnormality.¹⁰⁴

Thus, even in states like Maryland, measures need to be taken to prevent the disproportionate effects that women with chronic illnesses have suffered as a result of the confusion surrounding the implications of *Dobbs*. Part IV of this Note defines discrimination on the basis of sex and argues that medical professionals have facilitated discrimination against women as a direct result of the *Dobbs* decision.

IV. WHAT IS DISCRIMINATION ON THE BASIS OF SEX?

According to the United States Equal Employment Opportunity Commission (EEOC), sex discrimination occurs when someone is treated unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.¹⁰⁵ The EEOC's definition of sex-based discrimination is congruent with the Supreme Court's definition.¹⁰⁶ Constitutional challenges alleging discrimination on the basis of sex are premised on either the Fourteenth Amendment¹⁰⁷ or the Fifth Amendment's¹⁰⁸ equal protection guarantees.¹⁰⁹ The *Dobbs* Court rejected

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ MD. CODE ANN., HEALTH-GEN. § 20-209 (2022).

¹⁰⁵ EEOC, *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sex-based-discrimination> (last visited Nov. 25, 2023).

¹⁰⁶ *See Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

¹⁰⁷ The Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

¹⁰⁸ While there is no explicit Equal Protection Clause in the Fifth Amendment, the Supreme Court has held that the Equal Protection analysis of the Fifth Amendment is the same as the analysis under the Fourteenth Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214–18 (1995).

¹⁰⁹ *See generally* Jody Feder, *Sex Discrimination and the United States Supreme Court: Developments in the Law*, CONG. RSCH. SERV. (Dec. 30, 2015), <https://sgp.fas.org/crs/misc/RL30253.pdf>.

the concept that a right to abortion could be grounded in the Equal Protection Clause of the Fourteenth Amendment.¹¹⁰ The Court acknowledged, in dicta, that neither *Roe* nor *Casey* found it appropriate to invoke this theory but proceeded to assert that no equal protection violation could be found here.¹¹¹ Thus, the *Dobbs* Court concluded that the theory grounding a right to abortion in the Equal Protection Clause is “squarely foreclosed by [the Court’s] precedent” despite the fact that neither *Roe* nor *Casey* invoked the Equal Protection Clause.¹¹²

Further, a state’s regulation of abortion is not a sex-based classification and thus is not subject to the “heightened scrutiny” that applies to such classifications.¹¹³ The *Dobbs* Court determined that the right to abortion cannot be grounded in the Equal Protection Clause by examining the line of authority that the Court has developed on sex-based discrimination and relating it to the *Casey* opinion.¹¹⁴ This line of cases dates back to *Reed v. Reed*.¹¹⁵ Likewise, the current definition of sex-based discrimination has evolved from a significant body of Supreme Court cases, recognizing that sex-based discrimination violates the Equal Protection Clause of the Fourteenth Amendment.¹¹⁶ Thus, in order to determine whether the denial of prescription medication to women suffering from chronic illness falls under the Court’s definition of sex-based discrimination, it will be helpful to consider a limited history of the Supreme Court’s basis for finding sex-based discrimination.

Courts have struggled with defining sex discrimination since the establishment of Title VII.¹¹⁷ When this issue was presented before various courts and judges, the courts attempted to define sex discrimination.¹¹⁸ As the “final arbiter of meanings,” the Supreme Court issued its decision in *Geduldig v. Aiello*,¹¹⁹ appearing to have finally defined the meaning of sex

¹¹⁰ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2245 (2022).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983); *United States v. Virginia*, 518 U.S. 515 (1996).

¹¹⁶ See *id.*

¹¹⁷ See Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975).

¹¹⁸ *Id.* at 442.

¹¹⁹ *Geduldig*, 417 U.S. at 484 (considering an action that challenged the constitutionality of a provision of a California program that, in defining ‘disability,’ excludes from coverage certain disabilities resulting from pregnancy).

discrimination.¹²⁰ However, this was not the first case considered by the Supreme Court relating to sex discrimination.¹²¹

In 1971, the Supreme Court, for the first time, determined that the Fourteenth Amendment prohibits discrimination on the basis of sex.¹²² The Court in *Reed v. Reed* held that an Idaho statute which provides that “as between persons equally qualified to administer estates males must be preferred to females, is based solely on a discrimination prohibited by and is violative of the equal protection clause of the Fourteenth Amendment.”¹²³ *Reed* played a fundamental role in the development of constitutional protections against sex-based discrimination.¹²⁴

Shortly after *Reed*, the Court heard *Frontiero v. Richardson*, which challenged a federal statute governing quarters allowance and medical benefits for members of the uniformed services.¹²⁵ In that case, Sharron Frontiero, a United States Air Force lieutenant, sought an increased quarters allowance plus housing and medical benefits for her husband.¹²⁶ The Court observed that if Lieutenant Frontiero had been a man, the benefits would have automatically been granted with respect to the wife of a male member of uniformed services; however, the Air Force denied Lieutenant Frontiero’s application for additional benefits because she failed to demonstrate that her husband was dependent on her for more than half of her support.¹²⁷

The Court stated that statutes created solely for administrative convenience that allow spouses of male members of the uniformed services to be identified as dependents, but provide that spouses of female members of the military are not dependents unless they are dependent for over half of their financial support, violate the Due Process Clause of the Fifth Amendment.¹²⁸ The Court reasoned that such statutes require a female member to prove the dependency of her husband while a male member receives automatic approval for increased quarters allowances upon showing that he and his spouse are lawfully married.¹²⁹ In making this decision, the Court observed that:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special

¹²⁰ Zimmerman, *supra* note 117 at 442.

¹²¹ See *Reed v. Reed*, 404 U.S. 71, 75 (1971).

¹²² Lenora M. Lapidus, *Ruth Bader Ginsburg and the Development of Gender Equality Jurisprudence Under the Fourteenth Amendment*, 43 HARBINGER 149, 150 (2019).

¹²³ *Reed*, 404 U.S. at 75.

¹²⁴ Brent Huff, *Reed v. Reed: Some Background*, CASETEXT (Sep. 17, 2015), <https://casetext.com/analysis/reed-v-reed-some-background>.

¹²⁵ *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973).

¹²⁶ *Id.* at 680.

¹²⁷ *Id.*

¹²⁸ *Id.* at 688.

¹²⁹ *Id.*

disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”¹³⁰

This has implications in today’s society. Women attempting to access their medication are denied access simply because they may have the ability to become pregnant.¹³¹ Healthcare workers are uncertain of their state’s laws and the effects of the *Dobbs* decision on their state’s laws—this has resulted in confusion surrounding whether drugs like methotrexate are legally allowed to be prescribed to women because of its alternative use as an abortifacient.¹³² Alternatively, men with chronic illnesses have not had the same experiences following the *Dobbs* decision. This is evident because there have been no reported cases relating to a man being denied medication following *Dobbs*. Men have not been met with the same burden that women suffering from chronic illness have since the Supreme Court’s decision in *Dobbs*.

There has been fear and confusion surrounding prescriptions of certain drugs like misoprostol and methotrexate for people who have the ability to become pregnant because of the secondary effects or uses of those drugs.¹³³ Women have been denied access to their prescriptions and have been forced, in some cases, to change their treatment plans, causing discomfort resulting from the discontinuation of their medication.¹³⁴ It is obvious that following such discontinuation, women have been prevented from participating in certain pain management techniques for their chronic illnesses, which could have severe effects on their lives.¹³⁵ For example, according to the Mayo Clinic, “Crohn’s disease is a type of inflammatory bowel disease (IBD)” that “causes swelling of the tissues (inflammation) in your digestive tract, which can lead to abdominal pain, severe diarrhea, fatigue, weight loss and malnutrition.”¹³⁶ Methotrexate is a drug that is typically prescribed to people with Crohn’s Disease who do not respond well to other medications.¹³⁷ The drug reduces inflammation by targeting the immune system, which produces

¹³⁰ *Id.* at 680.

¹³¹ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

¹³² Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, THE NEW YORKER (July 2, 2022), <https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients>.

¹³³ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ Mayo Clinic, *Crohn’s Disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/diagnosis-treatment/drc-20353309> (last visited Nov. 25, 2023).

¹³⁷ *Id.*

the substances that cause the inflammation.¹³⁸ Thus, methotrexate is a pain management drug that may have drastic effects on a person's life if they are forced to discontinue it.¹³⁹

Imagine that you are suffering from chronic pain that makes it difficult to get out of bed in the morning and causes you extreme discomfort while performing your daily obligations of going to work, taking care of your family, and doing household chores. Now, imagine that you are given a drug that makes your life much easier by reducing the amount of pain and discomfort that you are in on a daily basis, and you finally feel better and are able to function with some relief. But then your doctor calls you with no warning and tells you that you can no longer have a prescription for that wonder drug.¹⁴⁰ That would undoubtedly be mentally and physically exhausting and painful for the women who have been put in these situations. The drug that was once helping them live their lives is no longer available to them, despite the fact that they had no intention of using it for abortion purposes, despite how much it was actually helping them, and despite the fact that there are no reports that their male counterparts have had no interruption to the same drug.¹⁴¹ Now these women have been forced to change treatment plans in many cases, which required another doctor visit, imposing on them a higher financial burden and time burden than their male counterparts have experienced.¹⁴² Thus, just as women in the military applying for spousal benefits should not face a higher burden than men, women attempting to access their medication for the treatment of their chronic illnesses should not face a higher burden simply because they may have the ability to become pregnant.¹⁴³

Dobbs addressed sex discrimination in its finding that abortion regulations are not subject to heightened scrutiny, which has been applied to sex discrimination cases.¹⁴⁴ The Supreme Court justified its reasoning that laws regulating abortion are not subject to heightened scrutiny by relying on *Geduldig v. Aiello*.¹⁴⁵ The Court stated in *Geduldig*, “regulation of a medical procedure that only one sex can undergo does not trigger heightened constitutional scrutiny unless the regulation is a ‘mere pretext designed to effect an invidious discrimination against members of one sex or the

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortions-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁴¹ *Id.*

¹⁴² Jennifer Miller, *Women + Chronic Illness: Still Waiting to Be Heard*, HEALTHCENTRAL (Mar. 24, 2022), <https://www.healthcentral.com/article/women-and-chronic-disease>.

¹⁴³ See *Frontiero v. Richardson*, 411 U.S. 677, 680 (1973).

¹⁴⁴ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245-46 (2022).

¹⁴⁵ *Id.*

other.”¹⁴⁶ Similarly, the *Dobbs* Court relied on prior precedent set forth in *Bray v. Alexandria Women's Health Clinic*,¹⁴⁷ which previously stated that the goal of preventing abortion does not in itself constitute invidious discrimination against women.¹⁴⁸ Moreover, in *Geduldig v. Aiello*, the Court included a footnote¹⁴⁹ that clarified the Court’s definition of discrimination on the basis of sex.¹⁵⁰ The language in the footnote indicates, “[T]he Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one or the other sex.”¹⁵¹ Construed more broadly, the footnote creates a general limitation on the definition of sex-based discrimination.¹⁵²

The regulation at issue in *Geduldig* was a California program that provided disability coverage for various conditions, excluding pregnancy.¹⁵³ California denied that there was any sex-based motivation for the exclusion of pregnancy and provided several reasons.¹⁵⁴ California argued that pregnancy is a voluntary condition and a period of unemployment could be planned for—despite pregnancy being the only voluntary disability to receive such treatment.¹⁵⁵ Likewise, the State argued that pregnancy and birth are normal physiological functions—despite the high probability of pregnancy resulting in surgery or even death.¹⁵⁶ Finally, the State objected to the increased cost that covering pregnancy as a disability would require, stating that the program would be too expensive to continue if it were to cover pregnancy.¹⁵⁷ The district court rejected the State’s arguments and granted

¹⁴⁶ *Id.*

¹⁴⁷ *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273–74 (1993).

¹⁴⁸ *Dobbs*, 142 S. Ct. at 2245-46.

¹⁴⁹ Footnote 20 of the *Geduldig* opinion reads: “The dissenting opinion to the contrary, this case is thus a far cry from cases like *Reed v. Reed* and *Frontiero v. Richardson* involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification like those considered in *Reed*, *supra*, and *Frontiero*, *supra*. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition. [citations omitted].” *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

¹⁵⁰ See Zimmerman, *supra* note 117, at 446.

¹⁵¹ *Id.* at 442.

¹⁵² *Id.*

¹⁵³ *Id.*; *Geduldig*, 417 U.S. at 485.

¹⁵⁴ Diane L. Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441, 442 (1975); *Geduldig*, 417 U.S. at 487.

¹⁵⁵ Zimmerman, *supra* note 117, at 442; *Geduldig v. Aiello*, 417 U.S. 484, 490 (1974).

¹⁵⁶ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 493.

¹⁵⁷ *Id.*

summary judgment for the plaintiffs on finding that the exclusion was not rationally related to a legitimate purpose, and thus, it violates equal protection.¹⁵⁸ The Supreme Court majority in *Geduldig* reversed, focusing on preserving the fiscal integrity of the insurance plan.¹⁵⁹ The Court found that the State's cost justification for the pregnancy disability exclusion met the constitutional review standard under the Equal Protection Clause.¹⁶⁰ The Court's argument follows the traditional argument against finding sex discrimination in regulations excluding pregnancy—since there can be no direct comparison of treatment between men and women regarding a trait possessed by only one sex, no sex discrimination issue can be said to exist.¹⁶¹

In the current situation, the conditions at issue are various types of chronic illnesses.¹⁶² People who may have the ability to become pregnant have been denied their prescriptions or forced to change their treatment plans despite the fact that their male counterparts have not been presented with the same burden.¹⁶³ Whether the Court would find this is invidious discrimination on the basis of sex hinges on the Court's characterization of the current practice at issue.¹⁶⁴ If the Court found that the alleged discrimination was the result of pregnancy as a condition, then it may not find there has been sex discrimination in this case based on the *Geduldig* decision.¹⁶⁵ However, the alleged sex discrimination in this case is not discrimination based on the condition of pregnancy; it is simply discrimination based on the ability of a woman to become pregnant.¹⁶⁶ Women have been denied their prescriptions or forced to change their prescriptions even in cases where they no longer have the ability to become pregnant—whether that is due to their age, the fact that they have undergone a hysterectomy, are not sexually active, have been prescribed birth control, or have simply been diagnosed with infertility.¹⁶⁷ Thus, because women—regardless of their condition—have been denied their prescription medication

¹⁵⁸ *Geduldig*, 417 U.S. at 491.

¹⁵⁹ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 497.

¹⁶⁰ Zimmerman, *supra* note 117, at 442; *Geduldig*, 417 U.S. at 496.

¹⁶¹ Zimmerman, *supra* note 117, at 442; *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

¹⁶² See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortion-bans-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁶³ *See id.*

¹⁶⁴ *See Geduldig*, 417 U.S. at 497.

¹⁶⁵ *See id.* (holding that the Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one sex).

¹⁶⁶ See Liz Plank, *Abortion bans are stopping these women from getting medication for their chronic illness*, MSNBC (July 11, 2022, 3:53 PM), <https://www.msnbc.com/opinion/msnbc-opinion/post-roe-abortion-bans-aren-t-only-healthcare-being-denied-women-n1296928>.

¹⁶⁷ See Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

or forced to change treatment plans, the situation at hand can be distinguished from *Geduldig*.¹⁶⁸

The Supreme Court considered sex discrimination as it relates to benefits for pregnant women again in *General Electric Company v. Gilbert*.¹⁶⁹ In that case, female employees sued their employer under Title VII of the Civil Rights Acts of 1964, asserting that the employer's disability plan discriminated on the basis of sex in denying benefits for disabilities arising from pregnancy.¹⁷⁰ The Court held that an employee disability plan that excludes disabilities resulting from pregnancy does not constitute sex discrimination violative of Title VII of the Civil Rights Act of 1964.¹⁷¹ The Court based its reasoning on the *Geduldig* decision and further found that no additional evidence was presented to support a finding that the plan invidiously discriminated on the basis of sex.¹⁷² Interestingly, in the dissent, Justice Brennan took issue with the fact that the EEOC had explained that excluding pregnancy from benefits plans is contrary to the purpose of Title VII, and the majority rejected the EEOC's interpretation and applied *Geduldig* instead.¹⁷³ Additionally, a Title VII violation can be proved without evidence of intent.¹⁷⁴ The plaintiff must show that the classification has the effect of discriminating on the basis of sex.¹⁷⁵ In the present case, the plan allows benefits for all injuries and sicknesses, except one that is applicable only to women and not men.¹⁷⁶ This practice constitutes sex discrimination in violation of Title VII.¹⁷⁷

Congress specifically acted in response to *Gilbert* and narrowed the reasoning in both *Gilbert* and *Geduldig*.¹⁷⁸ However, it is worth noting that the Supreme Court has continually returned to *Geduldig*'s reasoning to make its decisions regarding sex discrimination despite Congress' intent to narrow those decisions.¹⁷⁹ The *Dobbs* decision is an example of this.¹⁸⁰

The Supreme Court once again considered sex-based discrimination as it relates to Title VII¹⁸¹ in *Newport News Shipbuilding & Dry Dock Company*

¹⁶⁸ See *Geduldig v. Aiello*, 417 U.S. 484, 486 (1974).

¹⁶⁹ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 135.

¹⁷² *Id.* at 136.

¹⁷³ *Id.* at 149 (Brennan, J., dissenting).

¹⁷⁴ *Id.* at 150.

¹⁷⁵ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 150 (1976) (Brennan, J., dissenting).

¹⁷⁶ *Id.* at 153.

¹⁷⁷ *Id.* at 160.

¹⁷⁸ See Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Reaches Full Term*, 52 IDAHO L. REV. (2016).

¹⁷⁹ See *id.*

¹⁸⁰ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2245 (2022).

¹⁸¹ Title VII defines discrimination on the basis of sex stating, "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical

v. EEOC.¹⁸² *Newport News* involved an employee benefit plan that covered pregnant female employees but did not cover the male employee's wives for pregnancy-related benefits.¹⁸³ In *Newport News*, the Court held that limiting coverage on an employer's health insurance plan discriminates against male employees in violation of Title VII, as amended by the Pregnancy Discrimination Act (PDA).¹⁸⁴ The Court stated that the limitation—which “provide[s] its female employees with hospitalization benefits for pregnancy-related conditions to the same extent as for other medical conditions” but that “provided less extensive pregnancy benefits for spouses of male employees”—discriminates against those male employees.¹⁸⁵ The Court further reasoned that the PDA “makes it clear that it is discriminatory to exclude pregnancy coverage from an otherwise inclusive benefits plan.”¹⁸⁶ This means that when the employer health plan gave married male employees a benefit package for their dependent that was less inclusive than the coverage provided to female employees for the same benefits, it was discrimination on the basis of sex.¹⁸⁷

Along similar lines, the denial of prescription medication for women with chronic illnesses coupled with the fact that men have not experienced the same phenomena signals a denial of healthcare that is discrimination on the basis of sex under the Supreme Court's reasoning in *Newport News Shipbuilding & Dry Dock Company*.¹⁸⁸ As the Court found in *Newport News*, under Title VII, if an employer's health insurance plan refused to cover medication, such as methotrexate, just because the woman may have the ability to be pregnant, it could be considered sex discrimination.¹⁸⁹ Thus, if a woman lives in a state that outlaws abortion (or, for that matter, does not outlaw abortion) and her employer's medical insurance plan refuses to cover her medication used for chronic illness management, it is discrimination on the basis of sex under Title VII.¹⁹⁰ The sex-based discrimination resulting from the denial of prescription medication to women suffering from chronic illnesses can also be examined under the Affordable Care Act.¹⁹¹

conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.” 42 U.S.C. § 2000e(k).

¹⁸² *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 671 (1983).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 670, 685.

¹⁸⁶ *Id.* at 670.

¹⁸⁷ *Id.*

¹⁸⁸ *See Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669 (1983).

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ 42 U.S.C. § 18116 (“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964

V. THE AFFORDABLE CARE ACT

There are two ways that women with chronic illnesses may be able to recover based on discrimination under the Affordable Care Act.¹⁹² This Section of this Note examines two different classifications that may be found within the Affordable Care Act for women suffering from chronic illness.

A. Sex-Based Discrimination under the Affordable Care Act (ACA).

One purpose of the Affordable Care Act is to protect individuals against sex-based discrimination while participating in any health program or activity where they are receiving federal financial assistance.¹⁹³ Section 1557 applies to any health program or activity that receives funding from the Department of Health and Human Services (HHS).¹⁹⁴ This includes (1) “hospitals that accept Medicare or doctors who receive Medicaid payments”; (2) the Health “Insurance Marketplaces and issuers that participate in those Marketplaces”; and (3) “any health program that HHS itself administers.”¹⁹⁵ The Section 1557 final rule¹⁹⁶ makes it clear that discrimination based on an individual’s sex or pregnancy, childbirth, and related medical conditions amounts to sex discrimination under the Affordable Care Act.¹⁹⁷ Further, “individuals cannot be denied health care or health coverage based on their sex.”¹⁹⁸ Under the Affordable Care Act, women must be treated equally to men in the health care they receive and the insurance coverage they obtain.¹⁹⁹ Finally, the rule provides that in order to run a sex-specific health program

(42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”).

¹⁹² See *id.*

¹⁹³ U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) (to be codified at 42 C.F.R. pts. 438, 440, 460 & 45 C.F.R. pts. 86, 92, 147, 155, 156).

¹⁹⁷ U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

or activity, the entity must demonstrate “an exceedingly persuasive justification” for such a program.²⁰⁰ The health program or activity must be “substantially related to the achievement of an important health-related or scientific objective.”²⁰¹

In an article discussing the Affordable Care Act’s purpose in prohibiting sex and gender-based discrimination, HHS Secretary Xavier Becerra states, “It is the position of the Department of Health and Human Services that everyone—including LGBTQ people—should be able to access health care, free from discrimination or interference, period.”²⁰² This statement reflects the intent behind the Department of Health and Human Services in enforcing Section 1557.²⁰³ Everyone should be able to access healthcare free from discrimination or interference by a third party.²⁰⁴ However, that intent is not furthered when women are denied their medications based on an assumption of their ability to become pregnant.²⁰⁵

In the same article, the American Hospital Association, a national organization representing and serving all types of hospitals, healthcare networks, and their patients and communities, references Section 1557, stating, “All patients deserve access to care and to be treated with dignity and respect throughout the health delivery system. Patients should also never feel discouraged from seeking medical treatment due to fear of discrimination. We are pleased to see these important protections restored.”²⁰⁶ The organization’s mission is to ensure “that members’ perspectives and needs are heard and addressed in national health policy development, legislative and regulatory debates, and judicial matters.”²⁰⁷ The organization is more than qualified to recognize the importance of certain changes in healthcare legislation, and it should be noted that it identified a need to curb discrimination in health care.²⁰⁸

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰³ See U.S. Dep’t of Health & Hum. Serv., *Section 1557: Protecting Individuals Against Sex Discrimination*, HHS.GOV (Nov. 3, 2020), <https://www.hhs.gov/civil-rights/for-individuals/section-1557/fs-sex-discrimination/index.html>.

²⁰⁴ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰⁵ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁰⁶ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²⁰⁷ AHA, *About the AHA*, AM. HOSP. ASSOC., <https://www.aha.org/about> (last visited Nov. 20, 2023).

²⁰⁸ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

The Affordable Care Act was intended to strengthen health care for women in all age groups.²⁰⁹ The Office of the Assistant Secretary for Planning and Evaluation identified several purposes for the Affordable Care Act as it relates to women.²¹⁰ The Office observed that the Act “improves coverage for important preventative services and maternity care, promotes higher quality care for older women, and ends the gender discrimination that requires women to pay more for the same insurance coverage as men.”²¹¹ The Office specifically identified improvement in chronic disease management, which is beneficial to older women because they are more likely to suffer from a chronic condition than men.²¹²

Thus, it is clear that the legislative intent behind the ACA is to decrease discrimination on the basis of sex.²¹³ In the wake of *Dobbs*, women have been denied their prescription medication or forced to change treatment plans as a result of confusion resulting from the *Dobbs* decision.²¹⁴ This is directly contrary to the intent of the Affordable Care Act articulated by the government.²¹⁵ The ACA provides for a method of enforcement for discrimination under the Civil Rights Act of 1964, Title VI, Title IX, Section 794, and the Age Discrimination Act.²¹⁶ As previously argued, because a higher burden has been imposed on women with chronic illnesses than their male counterparts, it is likely discrimination on the basis of sex and the ACA would provide for an additional enforcement mechanism.²¹⁷

B. Disability Discrimination under the ACA

Furthermore, the Affordable Care Act provides protection for people suffering from chronic illnesses because that would constitute discrimination on the basis of disability.²¹⁸ No provision in the Affordable Care Act specifically mentions discrimination for chronic illness.²¹⁹ However, if persons with chronic illness qualify under the law as disabled, then Section

²⁰⁹ Alison Cuellar, et al., *The Affordable Care Act and Women*, OFF. OF THE ASSISTANT SEC’Y FOR PLAN. AND EVALUATION (Mar. 19, 2012), <https://aspe.hhs.gov/reports/affordable-care-act-women-0>.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *See id.*

²¹⁴ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²¹⁵ AHA, *HHS prohibits discrimination based on sexual orientation, gender identity*, AM. HOSP. ASSOC. (May 10, 2021, 1:50 PM), <https://www.aha.org/news/headline/2021-05-10-hhs-prohibits-discrimination-based-sexual-orientation-gender-identity>.

²¹⁶ 42 U.S.C. § 18116.

²¹⁷ *See* *Geduldig v. Aiello*, 417 U.S. 484 (1974); *see also id.*

²¹⁸ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²¹⁹ *Id.*

1557 protects them.²²⁰ Congress outlined the definition of a person with a disability under the law in the Americans with Disabilities Act Amendments of 2008 (ADA).²²¹

The ADA defines disability as “a physical or mental impairment that substantially limits one or more major life activities.”²²² This includes “manual tasks, seeing, hearing, eating, sleeping, walking, standing, speaking, learning, and concentrating.”²²³ Additionally, when “major bodily functions” are impaired, a person may be considered disabled.²²⁴ Major bodily functions include the “immune system, normal cell growth, digestive, bladder, neurological, respiratory, circulatory, [and] endocrine” impairments.²²⁵ Therefore, persons with chronic illnesses may be covered as long as they can demonstrate that they meet the criteria set out under the Americans with Disabilities Act.²²⁶ Women with chronic illness often experience significant and painful episodes relating to their disabilities.²²⁷ For example, according to the Mayo Clinic, symptoms of Crohn's disease can range from mild to severe.²²⁸ Symptoms include “diarrhea, fever, fatigue, abdominal pain and cramping, blood in your stool, mouth sores, reduced appetite and weight loss, pain or drainage near or around the anus due to inflammation from a tunnel into the skin (fistula).”²²⁹ These symptoms may be debilitating or cause an impairment in a person's ability to participate in everyday life.²³⁰

“Legally defined, many chronic illnesses can cause a disability, both temporary and ongoing.”²³¹ Additionally, chronic illnesses affect the immune system and may cause digestive impairments.²³² These impairments are parallel to the considerations in the ADA used to determine whether a person is disabled.²³³ Based on these symptoms, a woman with a chronic

²²⁰ *Id.*

²²¹ *Id.*

²²² 42 U.S.C. § 12102.

²²³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ Mayo Clinic Staff, *Crohn's Disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/symptoms-causes/syc-20353304> (last visited Nov. 20, 2023).

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Caroline Igo & Dawnthea Price Lisco, *Chronic Illness and Disability: Key Differences and How to Get Support*, CNET (Nov. 6, 2022, 12:00 PM), <https://www.cnet.com/health/medical/chronic-illness-and-disability-key-differences-and-how-to-get-aupport/>.

²³¹ *Id.*

²³² Mayo Clinic Staff, *Crohn's disease*, MAYO CLINIC, <https://www.mayoclinic.org/diseases-conditions/crohns-disease/diagnosis-treatment/drc-20353309> (last visited Nov. 21, 2023).

²³³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

illness may be able to argue she is disabled under the ADA.²³⁴ Thus, she may be able to argue that denial of medication is disability discrimination.

VI. POLICY CONSIDERATIONS

There are several policy considerations resulting from the disparate impact on women with chronic illnesses following the decision in *Dobbs v. Jackson Women's Health Organization*. This part of the Note discusses the implications of the Court's decision on physicians and their duty to their patients—namely, women suffering from chronic illnesses. One commentator has suggested that doctors and patients are absent from the Supreme Court's decision in *Dobbs*, unlike the preceding decision in *Roe v. Wade*, which was doctor-patient centered.²³⁵

This lack of consideration for healthcare providers has carried over in ways that were not predicted by most speculating on the decision.²³⁶ As a result of *Dobbs*, women with chronic illnesses have been prevented from accessing their medication.²³⁷ Because a provider's denial of prescribed medication is not a new phenomenon, it should not have been lost on the *Dobbs* Court that such denial could be a consequence of its decision.²³⁸ In one particular instance, a woman was denied her contraceptive at a Walgreens pharmacy.²³⁹ The pharmacist cited religious reasons as to why he would not fill the prescription.²⁴⁰ In another instance, "a woman who was having a miscarriage was denied a pregnancy-terminating drug at a Walgreens in Peoria, Arizona."²⁴¹ In yet another instance, "a transgender woman was denied hormones her doctor had prescribed for her by a CVS in Fountain Hills, Arizona."²⁴² Further, it is not uncommon for a pharmacist to deny filling an opioid prescription.²⁴³ Healthcare providers are clearly caught

²³⁴ *See id.*

²³⁵ Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, SHOTS, HEALTH NEWS FROM NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines>.

²³⁶ *Id.*

²³⁷ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²³⁸ *See* Elizabeth Chuck, *Can a pharmacist legally deny a patient a prescription? It depends.*, NBC NEWS (July 28, 2018, 9:25 AM), <https://www.nbcnews.com/news/us-news/can-pharmacist-legally-deny-patient-prescription-it-depends-n894871>.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Katie Bennet, JD, *When Opioid Prescriptions Are Denied*, PRAC. PAIN MGMT. (May 6, 2019), <https://www.practicalpainmanagement.com/resources/ethics/when-opioid-prescriptions-are-denied>.

in the middle of the legal fight for abortion rights.²⁴⁴ For patients, the consequences of being denied their medication can range from frustrating to life-threatening.²⁴⁵

Another shocking example involves a woman who lives in eastern Tennessee.²⁴⁶ A pharmacist denied her access to her medication until the doctor called to confirm that the methotrexate would not be used as an abortifacient.²⁴⁷ What is shocking about this example is that the woman was forty-eight years old and had a hysterectomy—this meant she could not have become pregnant.²⁴⁸ There are many implications for healthcare providers and sometimes devastating consequences for the women who are denied access to their medication.²⁴⁹ The woman in this situation expressed that after being denied her medication, she felt devastated and angry.²⁵⁰ Further, the delay caused her symptoms—including joint pain, weakness, and fatigue—to significantly worsen.²⁵¹ This uncertainty constitutes an additional burden women with chronic illnesses must confront.²⁵²

Similarly, a patient from Texas was confronted with the choice of possibly being denied medication in the wake of Texas's abortion ban or revising her treatment plan.²⁵³ The new plan put her at a higher risk for infections like COVID-19, yet again increasing the burden on this patient who already carried the weight of Crohn's disease.²⁵⁴ Another patient from Louisiana, a state with a trigger ban,²⁵⁵ was denied access to her Cytotec, which is used to make IUD insertion less painful, after the law was triggered.²⁵⁶ According to guidance released by the Biden Administration, these barriers to healthcare constitute discrimination on the basis of sex or disability.²⁵⁷ It is apparent that pharmacists and doctors have been fearful

²⁴⁴ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *See id.*

²⁵⁰ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *See id.*

²⁵⁶ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵⁷ U.S. Dep't of Health & Hum. Serv., *Guidance to Nation's Retail Pharmacies: Obligations under Federal Civil Rights Laws to Ensure Access to Comprehensive Reproductive Health Care Services*,

after the *Dobbs* decision.²⁵⁸ Even in states that protect women’s abortion rights, women have faced unforeseen consequences from the *Dobbs* decision.²⁵⁹ A woman in Illinois²⁶⁰ faced difficulty in having her methotrexate prescription refilled at Walgreens.²⁶¹ She suffers from a connective tissue disorder and developed severe psoriatic arthritis after a COVID-19 infection.²⁶² She had never had a problem having the prescription filled until after the *Dobbs* decision.²⁶³

These restrictions will continue to impact women with chronic illness disproportionately.²⁶⁴ It is already more likely that these women will live in poverty and have difficulty accessing health care, and the burden impacts these women as a result of religious beliefs they may or may not hold.²⁶⁵ Thus, steps need to be taken to reduce the burdens these women face.

VII. THE SOLUTION

Doctors and pharmacists need clear guidance on what situations they are allowed to deny class D²⁶⁶ or class X drugs.²⁶⁷ Further, women suffering from chronic illnesses deserve clear guidance and protection from legislatures on when they are in danger of being denied access to their medication. On July 29, 2022, Massachusetts passed a “shield law” with strong protections for healthcare workers who provide abortion services to patients living outside the state—both those who travel to Massachusetts for care and those who receive care in their home states from Massachusetts providers via telemedicine.²⁶⁸ The law:

HHS.GOV (July 14, 2022), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/reproductive-healthcare/pharmacies-guidance/index.html>.

²⁵⁸ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁵⁹ *Id.*

²⁶⁰ Illinois has laws protecting abortion.

²⁶¹ Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ Drugs are classified as class D or class X when they carry serious risks to pregnant people. *Id.*

²⁶⁷ Drugs are classified as class D or class X when they carry serious risks to pregnant people. Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.

²⁶⁸ Carrie N. Baker, *Groundbreaking Massachusetts Law Protects Telemedicine Abortion Providers Serving Patients Located in States Banning Abortion*, MS. (Aug. 18, 2022), <https://msmagazine.com/2022/08/18/massachusetts-abortion-law/>.

- prohibits the extradition of Massachusetts providers who lawfully provide abortion care in Massachusetts to a resident of a different state where the procedure is illegal;
- prevents Massachusetts law enforcement officers or employees from providing information or assistance to any federal or state law enforcement agency or private citizen in relation to an investigation or inquiry into protected reproductive healthcare services;
- creates a new civil remedy for providers in Massachusetts to countersue if they are the subject of criminal prosecution or civil lawsuits filed by someone outside of the state, enabling them to recover an amount equal to the damages assessed in these out-of-state lawsuits;
- protects providers' professional licenses from any negative impacts of being sued by a resident of a state where abortion is illegal for providing legal abortion care in Massachusetts; and
- keeps malpractice insurance within reach for providers when they face out-of-state civil lawsuits for providing lawful abortion care in Massachusetts.²⁶⁹

This Note proposes that a similar law be enacted federally to protect physicians in all states, but especially states like Tennessee and Texas that have enacted abortion bans that affect medication, such as methotrexate. The law would prohibit the extradition of state physicians or medical professionals who provide women with otherwise lawful care and tools to manage their chronic illnesses.

Similar to the Massachusetts law, an ideal law would protect a professional's license from negative impacts as long as they are providing otherwise lawful care to women with chronic illnesses. Additionally, there would be provisions that keep malpractice insurance in reach for professionals who provide such care. It may also be helpful to create an available action for countersuit in the event that a physician is subject to out-of-state prosecution. Finally, the law would prevent state law enforcement officers or employees from providing information or assistance to any federal or state law enforcement agency or private citizen in relation to an investigation or inquiry into protected care for chronic illnesses.

A "shield law" similar to the one proposed would aid in putting medical professionals' minds at ease and, therefore, help protect both the medical professional and the patient. The proposed law should read similarly to the following provisions:

²⁶⁹ *Id.*

- A. Any medical professional providing or assisting a provider in the care or management of a chronic illness shall not be subject to extradition to any other jurisdiction where the care is otherwise lawful outside of the State's law prohibiting certain care—namely, with the purpose of accomplishing or performing or causing an abortion in the patient.
- B. Law Enforcement shall not provide any protected information relating to the medical care, treatment, or reproductive health of a patient with chronic illness. This includes the ability of the patient to reproduce or any stated present, future, or past care relating to the patient's reproductive health. This provision also prohibits any information from being shared with other state or federal law enforcement agencies relating to prescription medication to treat women with chronic illness where the intent of the agency is to pursue prosecution of the patient or the provider for the use of an otherwise lawful prescription.
- C. This provision establishes a mechanism for suit by physicians and patients who have been criminally charged in connection with the care of said patient's chronic illness. This provision allows for recovery from the other party if they are prosecuted for any method of otherwise lawful care for the purpose of managing the patient's chronic illness. The provision entitles the party to recover an amount equal to the damages assessed in these out-of-state lawsuits;
- D. Medical professionals may not be penalized or disciplined in connection with the care of a patient with a chronic illness where no negligent or reckless care has been provided to the patient. This provision protects medical professionals from professional license penalties that a state may attempt to impose for participation in the care of patient(s) with chronic illnesses in connection with regulations on abortion.
- E. A medical malpractice insurance agency may not deny coverage for a medical professional solely for the provider's participation in the care of a patient suffering from a chronic illness. The denial of coverage must be made in connection with other issues for which an insurance company generally and reasonably denies coverage.

VIII. CONCLUSION

Women suffering from chronic illness have been disproportionately affected by the *Dobbs* decision.²⁷⁰ The Equal Employment Opportunity Commission and the Supreme Court have provided guidance on what constitutes discrimination on the basis of sex, and denying access to medication for women with chronic illness, while providing that same medication to men with chronic illness, falls under discrimination on the basis of sex.²⁷¹ Further, the Affordable Care Act defines what constitutes sex-based discrimination and makes it unlawful for doctors and pharmacists to deny treatment based on a patient's ability to become pregnant.²⁷² The ADA also provides an additional avenue based on disability status-based discrimination as a person suffering from chronic illness often meets the Americans with Disabilities Act's definition of a disabled person.²⁷³ Finally, there are several policy considerations involving the treatment of patients and the actions of physicians and other healthcare professionals.²⁷⁴ These parties need legislative guidance on what is lawful following the *Dobbs* decision.

Had the proposed "shield law" been enacted when *Dobbs* had been decided, Myisha would have had a much different experience.²⁷⁵ Physicians, pharmacists, and insurance companies would have been at ease despite the trigger bans on abortion enacted around the country.²⁷⁶ Medical providers would not have experienced such fear and confusion as a result of the differing state laws.²⁷⁷ The proposed "shield law" protects physicians from

²⁷⁰ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁷¹ EEOC, *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/sex-based-discrimination> (last visited Nov. 25, 2023).

²⁷² 42 U.S.C. § 18116 ("Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.").

²⁷³ Douglas Jacobs & Wayne Turner, *Nondiscrimination And Chronic Conditions—The Final Section 1557 Regulation*, HEALTHAFFAIRS (July 20, 2016), <https://www.healthaffairs.org/doi/10.1377/forefront.20160720.055888>.

²⁷⁴ See Selena Simmons-Duffin, *Doctors Weren't Considered in Dobbs, but Now They're on Abortion's Legal Front Lines*, SHOTS, HEALTH NEWS FROM NPR (July 3, 2022, 5:01 AM), <https://www.npr.org/sections/health-shots/2022/07/03/1109483662/doctors-werent-considered-in-dobbs-but-now-theyre-on-abortions-legal-front-lines>.

²⁷⁵ Plank, *supra* note 21; Mahase, *supra* note 21; Christensen, *supra* note 21.

²⁷⁶ *See id.*

²⁷⁷ *See id.*

possible liability or criminal indictment in connection with regulations on abortion and the medical care of women with chronic illnesses. The law would make great progress toward helping to reduce the burdens that women with chronic illnesses face.²⁷⁸

²⁷⁸ See Laura Weiss, *Pharmacists and Patients Are Freaking Out Over New Medication Restrictions Post-Roe*, NEW REPUBLIC (July 27, 2022), <https://newrepublic.com/article/167165/dobbs-pharmacists-walgreens-methotrexate>.