

A LITTLE BIRDIE SAID:
HOW TWITTER IS DISRUPTING SHAREHOLDER ACTIVISM

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ABSTRACT

Shareholders are organizing and mobilizing on new social media platforms like Twitter. This changes the dynamics of shareholder proxy contests in ways that favor shareholders over management. Disruptive technology may bring about a shareholder revolution, which may not be in shareholders' best interests, at least from the perspective of shareholder wealth maximization, and it also has powerful implications for the future of corporate social responsibility.

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INTRODUCTION

Twitter offers a platform for global social interaction. Twitter users send “tweets,” which are a sort of 140-character text message to the world. About 500 million tweets are sent every day.¹ This social media platform can be a powerful force for enabling collective action in modern society.

This essay will focus on one type of collective action that many scholars have concluded simply does not work. Shareholder activism, which has long been plagued by collective action problems including rational apathy and free riding, could be rejuvenated by Twitter. Tweets are a cheap and easy way for shareholders to engage with each other and build consensus and support for collective action.

The notion that Twitter facilitates collective action is not new² (although this paper’s application of Twitter to *shareholder* activism is novel). Twitter and other forms of social media have been widely adopted by marketing firms and political campaigns as a means of coordinating otherwise disconnected individuals and groups. Perhaps most famously, scholars of the Arab Spring widely credit Twitter, along with Facebook, YouTube, and other social information networks, with galvanizing Arab Spring activism.³

The Arab Spring was a revolutionary movement that began in Tunisia on December 17, 2010 and erupted into large-scale protests across the Arab world by mid-2012.⁴ The result of these civil uprising

¹ *About*, TWITTER, <https://about.twitter.com/company> (last visited Jan. 5, 2015).

² *See, e.g.*, Alexandra Segerberg and W. Lance Bennett, [*Social Media and the Organization of Collective Action: Using Twitter to Explore the Ecologies of Two Climate Change Protests*](#), 13 COMM’N REV. 197 (2011).

³ *See, e.g.*, P.N. Howard, et al., *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*, PITPI (2011), http://pitpi.org/wp-content/uploads/2013/02/2011_Howard-Duffy-Freelon-Hussain-Mari-Mazaid_pITPI.pdf.

⁴ Ismaeel Naar, *Timeline:Arab Spring*, AL JAZEERA (Dec. 17, 2013), <http://www.aljazeera.com/indepth/interactive/2013/12/timeline-arab-spring-20131217114018534352.html>

was the overthrow of authoritarian and totalitarian leaders in Tunisia, Egypt, Yemen, and Libya.⁵

The root causes of these mass protests are complex and multifaceted. But many scholars agree that a major catalyst for the Arab Spring was the advent of social media, especially Twitter, and its role in driving awareness and collective action.⁶

PART I: THE REVOLUTION WILL NOT BE TELEVISED

Many have made analogies between corporations and nations. A corporations' charter is often referred to as a "private constitution." Shareholders have the right to elect the leaders of corporations, the board of directors, much as democratic citizens have the right to elect legislators. Those analogies become a lot more interesting in an era where overly authoritarian nations risk being overthrown by the tweeting masses and their charismatic leaders.

It turns out that a lot can be said in 140 characters. For example, Carl Icahn, the famous activist shareholder, moved markets when he tweeted caustically, "All would be swell at Dell if Michael and the board bid farewell."⁷ Unfortunately, the SEC-mandated disclosure that is supposed to be legended on all public-securities-related communications is not among them.⁸ Another problem with using

⁵ *Id.*

⁶ See, e.g., Howard, *supra* note 5. See also P.N., Duffy, A., Freelon, D., Hussain, M., Mari, W. & Mazaid, M. (2011). *Opening Closed Regimes: What Was the Role of Social Media During the Arab Spring?*. Seattle: PIPTI. Retrieved May 22, 2012 from <http://pitpi.org/index.php/2011/09/11/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/>. Howard et al analyzed over 3 million tweets, gigabytes of YouTube content, and thousands of blog posts. The study reported three main findings: (1) social media played a central role in shaping political debates in the Arab Spring, (2) a spike in online revolutionary conversation often preceded major events on the grounds and (3) social media helped spread democratic ideas across international borders.

⁷ Carl Icahn, TWITTER, (July 24, 2013, 8:12 AM), https://twitter.com/carl_c_ica hn/status/360054783744294913.

⁸ Recent SEC guidance allows Tweets to hyperlink to the mandatory disclosure legend. Whether each Tweet or just one in a series of Tweets must contain the legend is one of several questions remaining about how the SEC

Twitter to communicate about securities matters is that it might violate Regulation Fair Disclosure.

As a purely legal matter, Twitter is limited in its ability to facilitate shareholder activism. Shareholder communication rules are more liberal than ever, but shareholder voting rules remain strictly limited by SEC rules and securities laws. Shareholders can and do use Twitter to communicate and become informed about important upcoming shareholder votes. For example, shareholders who would never rationally read a 300-page proxy statement might respond to a 140-character tweet. But if shareholders actually want to vote for a precatory proposal or against management, they still need to fill out a proxy card or attend the annual meeting to vote.⁹ And the proposing shareholder still has to actually attend the meeting.¹⁰ In an increasingly digital world such traditional structures start to seem quaint, inconvenient, and unnecessary. Leaving one to wonder why a physical meeting even needs to take place.¹¹

The SEC-mandated shareholder voting procedure costs time and trouble beyond what a small shareholder is rationally willing to spend. But all that can change with online shareholder voting. The SEC could do away with the rules requiring physical meetings, and the proxy process could be replaced with direct, real-time democracy.

will govern Tweets. *See, e.g.*, Candace Jackson, *SEC's Social Media Guidance on Required Legends Raises More Questions*, HUSCH BLACKWELL (May 12, 2014), available at <http://www.securitieslawinsider.com/2014/05/secs-social-media-guidance-on-required-legends-raises-more-questions/>.

⁹ 17 C.F.R § 240.14a–8 (2011).

¹⁰ *Id.*

¹¹ Twenty-two states, including Delaware, allow virtual-only shareholder meetings. Federal laws are silent regarding virtual-only shareholder meetings. The New York Stock Exchange and NASDAQ requires listed companies to provide shareholder with the opportunity to discuss company affairs with management, which a virtual meeting can provide. *See, e.g.*, The Best Practices Working Group for Online Shareholder Participation in Annual Meetings, [*Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings*](#), Broadridge (2012).

In fact, it is so onerous to attend the physical annual meetings that most shareholders do not go.¹² Instead they submit ballots to designated representatives who then tabulate them and vote by proxy. Perhaps with the only exception being the widely followed and well-attended Berkshire-Hathaway annual meeting, most shareholders cannot justify the cost of exercising their voting rights in person. Thus, a great deal of shareholders cast their vote without the benefit of annual meeting presentations and participatory question and answer sessions. More shareholders might attend and vote electronically, if annual meetings were simulcast or otherwise electronically interactive.¹³

The SEC could reform Rule 14a, which governs the public shareholder voting process, to allow voting online. The formal proxy solicitation process could be replaced by a more fluid and dynamic system to facilitate social media shareholder activism. With just a few liberalizing reforms, the SEC could usher in a new era of shareholder activism, perhaps even creating a new form of corporation, governed by shareholder direct democracy.

A. RULE 14A

Rule 14a governs shareholders' rights to present proposals at the annual meeting.¹⁴ In an interesting juxtaposition of history, Rule 14a was itself born in the crucible of war. In 1942, just a few months after the December 7th attack on Pearl Harbor – when Democracy itself seemed mortally vulnerable to totalitarian regimes – Congress decided to bolster democracy at home through the institution of capitalism.

¹² Domini Hedderman, *Attending the Annual Shareholder Meeting*, THE COOPERATOR, <http://cooperator.com/articles/1557/1/Attending-the-Annual-Shareholder-Meeting/Page1.html> (last visited Jan. 5, 2015).

¹³ A simulcast or simultaneous broadcast is the transmission of a live event across multiple different media simultaneously. For example, the annual meeting could be transmitted securely over the Internet using the H.323 Internet Protocol Videoconferencing standard, while it is also being held live. For more information about secure Internet shareholder voting over webinar simulcast, please see the National Institute of Standards and Technology (NIST) Bulletin 7711: Security Best Practices for the Electronic Transmission of Election Materials for UOCAVA Voters.

¹⁴ 17 C.F.R. § 240.14a–8.

Congress determined that shareholders of public companies regulated by the Securities Exchange Act of 1934 lacked vital rights to voice their concerns about corporate mismanagement. Thus Congress passed, and the SEC promulgated, rules allowing shareholders to propose “precatory proposals” for a shareholder vote. The rules, Congress reasoned, would provide for a kind of “shareholder democracy.”

A precatory proposal is like a non-binding resolution. The shareholders get to vote on a precatory proposal, but even if it passes, management does not have to accede to shareholder demands. But precatory proposals have force nonetheless. Just like the congressman who needs to think about the next election virtually as soon as he is installed in office, directors cannot afford to alienate their voting base. A director who constantly ignores shareholder proposals may not successfully stand for reelection, just as a congressman will have trouble securing votes if he ignores demands from his constituents.

The initial problem with precatory proposals was that they were just too easy to make. Shareholders who had tiny stakes in huge companies could badger management with unrelated requests and pet projects. Over the course of the next fifty years, shareholders’ rights to make proposals and communicate with each other about voting for proposals and directors was limited by a succession of amendments to Rule 14a.¹⁵ In fact, Rule 14a is the most heavily amended rule in all of securities law.¹⁶ The result of fifty years of pro-management amendments to Rule 14a was a shareholder voting system so convoluted and challenging that shareholder democracy virtually disappeared.¹⁷

¹⁵ Rule 14a was amended with additional substantive and procedural restrictions in 1948, 1952, 1954, 1960, 1972, 1976, 1983 and 1987.

¹⁶ *See Id.*

¹⁷ In another curious plot twist, the president of the New York Stock Exchange wrote an open letter to the SEC on October 16, 1942, opposing the new shareholder precatory proposal rule (which was then known as Rule X-14A-7), on the grounds that such a rule would be another brick in the wall between markets and efficiency. “The advantages of a listed market may someday be outweighed by voluminous regulations,” NYSE President Emil Schram argued. Ironically, through the continued lobbying efforts of the NYSE and corporate groups, Rule 14a itself became a tangled morass of

B. THE 1992 AMENDMENTS

In 1992 the SEC finally reversed its course of the previous fifty years and allowed shareholders to communicate with each other about shareholder voting. SEC Chairman Richard C. Breeden gave a speech on October 15, 1992, announcing a total overhaul Rule 14a. His goal was nothing less than to change the dynamics of corporate governance in America.¹⁸

Breeden recognized that the SEC had created a system that:

“[Was] supposed to protect shareholders [but] sometimes works to insulate management in problem cases from accountability to their shareholders... a system in which it takes the permission of the federal government, teams of lawyers and millions of dollars for shareholders to discuss the future of the company they own in a newspaper op-ed or on a radio talk show.”¹⁹

Mr. Breeden analogized the proxy system to an absurdly undemocratic political system:

If the current proxy rules for corporate elections applied to our national political elections, then every time citizens wanted to discuss their views of President Bush, Bill Clinton or Ross Perot, they would have to file a description of themselves and their views with the SEC. Discussing tonight’s debate in the newspaper or on television would require mailing a proxy statement to every registered voter in the country.²⁰

voluminous regulations. Letter from Emil Schram, President of NYSE, to SEC, (Oct. 16, 1942), *available at* http://www.sechistorical.org/collection/papers/1940/1942_1010_SchramPurcell.pdf.

¹⁸ SEC Chairman Richard Breeden, Shareholder Communication and Executive Compensation, Address at the Open Meeting of the Commission, (Oct. 15, 1992), *available at* <http://www.sec.gov/news/speech/1992/101592breeden.pdf>.

¹⁹ *Id.* at 2-3.

²⁰ *Id.* at 3.

On October 22, 1992, the SEC announced that, “[t]he purposes of the proxy rules themselves are better served by promoting free discussion, debate and learning among shareholder and interested persons, then by playing restraints on that process to ensure management has the ability to address every point raised in the exchange of views.”²¹ In accord with this newly espoused democratic shareholder philosophy, the SEC amended the Rule in many critical ways, including rewriting it in a user-friendly, question-and-answer format.²²

Prior to the 1992 amendments, the SEC generally pre-reviewed all shareholder communications regarding a shareholder vote. Shareholder opinions were thereby moderated by SEC review.²³ After 1992, the SEC no longer performed this pre-review function because most shareholder communications no longer had to be filed.

After the 1992 amendments (which were not promulgated until 1998), shareholders received many new techniques to communicate, organize, meet, and share information with management without incurring huge expense or delay. Moreover, without SEC pre-review, un-moderated shareholder communications were far less polite to management. Vitriolic shareholder messages heralded in a new era of aggressive shareholder campaigns against management.

Even though Al Gore invented the Internet the early 1990s,²⁴ the SEC did not allow shareholders and companies to post shareholding

²¹Regulation of Communications Among Shareholders. Exchange Act Release Nos. 34-31, 326 57 Fed. Reg. 48276-01. (Oct. 22, 1992).

²² *Id.*

²³ See Steven A. Rosenblum, *The Shareholder Communications Proxy Rules And Their Practical Effect On Shareholder Activism And Proxy*, § 10.03[A] (2013), available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22925.13.pdf>.

²⁴ Al Gore did not actually invent the Internet. This is a reference to a political gaffe by the former Vice President during his interview with Wolf Blitzer of CNN on March 8, 1999. See Glenn Kessler, *A cautionary tale for politicians: Al Gore and the ‘invention’ of the Internet*, WASH. POST (Nov. 4, 2013), <http://www.washingtonpost.com/blogs/fact-checker/wp/2013/11/04/a-cautionary-tale-for-politicians-al-gore-and-the-invention-of-the-internet/>. The purpose of this reference is to highlight that even senior government officials

voting materials on the Internet until 2007.²⁵ That year, the SEC amended Rule 14a to allow companies to do so (rather than require companies to physically mail all that paper to shareholders).

Making shareholder communications cheaper was clearly a primary purpose of the SEC in enacting this amendment.²⁶ “The amendments put into place processes that will provide shareholders with notice of, and access to, proxy materials while taking advantage of technological developments and the growth of the Internet and electronic communications,” the SEC concluded.²⁷ “The amendments also might reduce the costs of engaging in proxy contests for soliciting persons other than the issuer.”²⁸

recognized the importance of the Internet for commerce at least as early as the 1990s.

²⁵ 17 C.F.R. § 240.14a–16 (2010).

²⁶ Internet Availability of Proxy Materials, SEC Release Nos. 34-55146; IC-27671; File No. S7-10-05 (Jan. 22, 2007), *available at* <http://www.sec.gov/rules/final/2007/34-55146.pdf>. The SEC underwent a cost-benefit analysis and determined that “[t]he costs of solicitations ultimately are borne by shareholders.” *Id.* at 1. The SEC identified the benefits of the 2007 amendment: (1) more rapid dissemination of proxy information to shareholders and (2) reduced printing and mailing costs for issuers and other soliciting persons. *Id.* at 60. During the prior (2006) proxy season, Automated Data Processing, Inc. – the corporation which handles the vast majority of proxy mailings – mailed 85.3 million proxy items to beneficial owners at an aggregate cost of \$962.4 million in printing and mailing costs. *Id.* at 61. While the 2007 amendments may save the majority of the almost \$1 billion annually spent on paper proxy mailings, the amendment also brings three notable costs: (1) the cost of preparing and sending a final paper notice to shareholders explaining that future notices would be on the Internet, (2) the cost of processing shareholders’ requests for paper copies, which are to be available on demand and (3) the cost to shareholders of printing paper copies at home. *Id.* at 65. The highest estimate suggested the rule may potentially cost up to \$100 million in website publishing, administration and home printing costs, although most of those costs can be avoided if shareholders simply view the proxy materials electronically instead of printing them. In addition to finding that the 2007 amendments would net nearly \$900 million in annual savings, the SEC also found the amendments would improve the efficiency of the proxy voting process. *Id.* at 69.

²⁷ *Id.* at 1.

²⁸ *Id.*

The next advance in shareholder communication was to allow it in real-time through “the use of electronic shareholder forums.”²⁹ The problem is, no one really know what an electronic shareholder forum is. Is it a chat room? A social media web site? An open source blog?

C. SHAREHOLDER SOCIAL MEDIA

Facebook apparently is not an “electronic shareholder forum.” Social media first got CEOs into trouble on July 3, 2012, when Netflix CEO Reed Hastings posted to his personal Facebook page, “Netflix monthly viewing exceeded 1 billion hours for the first time ever in June.”³⁰ Netflix stock price increased 10% that day, and the SEC investigated whether Hastings’s post violated Regulation Fair Disclosure.³¹

Regulation Fair Disclosure, or Reg FD, requires public companies to disclose material information to all shareholders at the same time.³² Reg FD is a relatively new rule promulgated in August 2000. At that time, only reporters and large investors were invited to the quarterly analyst conference calls, where results of the past quarter were first disclosed. Small investors who traded over the Internet wanted equal access. Reg FD granted them equal access to material non-public information.

Eventually the SEC found that Reed Hasting’s Facebook post did not violate Reg FD.³³ But that particular determination did not settle the SEC’s general position on the issue because the SEC expressly stated that the Hastings decision has no precedential value, although

²⁹ SEC Adopts Proxy Rule Amendments Encouraging Electronic Shareholder Forums, SEC (Nov. 28, 2007), <http://www.sec.gov/news/press/2007/2007-247.htm/>

³⁰ Reed Hastings, FACEBOOK (July 3, 2012), <https://www.facebook.com/reed1960/posts/10150955446914584>. The Hastings post was followed by a 10% increase in Netflix stock price.

³¹ Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934: Netflix, Inc., and Reed Hastings, Exchange Act Release No.69279 (Apr. 2, 2013), <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

³² 17 C.F.R § 243 (2011).

³³ *See supra* note 34.

the report did lay out core principles. Accordingly, to avoid liability, companies and management now tend to file a Form FD and 8-K for every potentially material tweet, blog post or other social media missive.³⁴

But activist shareholders don't have to make these filings.³⁵ In contrast to Hasting's post, the SEC did nothing when Carl Icahn tweeted, "We currently have a large position in APPLE. We believe the company to be extremely undervalued."³⁶ Apple's stock price increased 4% on the day of Icahn's tweet, adding over \$17 billion to its market capitalization.³⁷ Icahn has since become a poster child for Twitter Activism, employing Tweets to announce new activist efforts to the market, with great effect. Icahn's brief dispatches of less than 140 characters have moved markets, including announcing a 6% stake in Canadian oil & gas explorer Talisman Energy, resulting in a 6.4% stock price increase in after-hours trading,³⁸ and announcing a 9.4% stake in Family Dollar Stores, resulting in a 9.7% stock price increase in after-hours trading.³⁹ Forbes described Icahn's use of Twitter to publicize an investment in Gannett as "typical Icahn fashion." Shares

³⁴ See Holly J. Gregory, *Social Media and Regulation FD*, WEIL GOTSHAL & MANAGES LLP (May 2013), http://www.weil.com/~media/files/pdfs/May2013_Opinion.pdf.

³⁵ Shareholders have some additional disclosure responsibilities after they become "material" filers pursuant to Regulation 13(d) or 13(g). Obtaining more than 5% of the outstanding stock or purchasing stock with the intent to solicit a tender offer can trigger material filer status. 17 C.F.R. § 240.13d-1 (2011).

³⁶ Carl Icahn, TWITTER (Aug. 13, 2013, 11:21 AM), https://twitter.com/carl_c_icahn/status/367350206993399808.

³⁷ Icahn's tweet was followed by a 4% increase in Apple stock price. Commentators attribute to the Icahn tweet a \$12.5 billion increase to Apple's market cap in just 100 minutes. See, e.g., Julianne Pepitone, *Carl Icahn Takes 'Large' Apple Stake*, CNN MONEY (Aug. 13, 2013), available at <http://money.cnn.com/2013/08/13/technology/mobile/carl-icahn-apple/>. By the end of that day, Apple's market cap had increased by \$17 billion. Steven Russolillo, *The iCahn Effect: Apple's Market Cap Jumps by \$17 Billion After Tweets*, THE WALL STREET JOURNAL (Aug. 13, 2013). See also, Mary Catherine Wellons, *When tweets move markets: Icahn and Apple*, CNBC (Aug. 13, 2013).

³⁸ Agustino Fontevicchia, *Tweeting Carl Icahn: Billionaire Unveils 6% Stake in Talisman Energy*, FORBES (Oct. 7, 2013).

³⁹ William Alden, *Carl Icahn Discloses Stake in Family Dollar*, DEALBOOK – NEW YORK TIMES (June 6, 2014).

in the media company rose 5% in after-hours trading following Icahn's announcement.⁴⁰

PART II. TILTING THE PLAYING FIELD AGAINST MANAGEMENT

Shareholders can use social media in ways management cannot. Reg FD applies to Reed Hastings, CEO of Netflix, but not Carl Icahn, stockholder of Apple. Activists can now access virtually all shareholders and influence public opinion through social networks, relatively unencumbered by reporting requirements under SEC rules. But management cannot simply tweet back to activists' critiques. Despite the fact that Hastings was found not to have violated Reg FD with his Facebook post, it is not clear that management can simply respond to activist banter without risking a disclosure violation. Management has to fight proxy battles in the social network arena with one hand tied behind its keyboard while activists use the full power of social media to their advantage.

Management does have one advantage: the power of the purse. Management can pay for its own re-election campaign with corporate money. In such a "proxy contest," management might spend up to \$22,000,000 of corporate money to stay in power.⁴¹ This is lawful under Delaware law. In sharp contrast, Republican National Committee Chairman Reince Priebus filed a complaint with the General Accounting Office for President Barack Obama's use of Air Force One for political campaign travel.⁴²

⁴⁰ Samantha Sharf, *Carl Icahn Reveals Gannett Stake, Breakup Support*, FORBES (August 14, 2014).

⁴¹ The estimated cost of the management of CSX Corporation to battle 3G Capital Partners in the proxy contest announced on October 16, 2007 was \$22 million. The dissident—who won—spent approximately \$9 million to obtain board representation of this \$18.6 billion company.

⁴² George E. Condon Jr., *Obama Undeterred by GOP Complaints about Air Force One*, NATIONAL JOURNAL (July 12, 2012), <http://www.nationaljournal.com/whitehouse/obama-undeterred-by-gop-complaints-about-air-force-one-20120712>.

A. EVOLVING GRASSROOTS SHAREHOLDER ACTIVISM

Board access to the corporate coffers to fund reelection campaigns—an antidemocratic feature of corporate law—might become less significant as shareholder engagement gets cheaper and more grassroots.⁴³ Modern low-cost yet effective shareholder campaigns abound. For example, shareholders have organized for four consecutive years to press ExxonMobil and other oil and gas companies to disclose the dangers of hydraulic fracking. Management vehemently opposed this corporate social responsibility initiative. But when the ExxonMobil shareholders got enough votes to pass a precatory proposal for fracking risk disclosure, management capitulated.⁴⁴

Other shareholder campaigns are less successful in moving management to change its policies, but they may yet be effective in accomplishing goals of awareness and corporate social responsibility. For example, Grassroots activist shareholders – who originally organized on the Internet – descended on Safeway’s annual shareholder meeting to protest genetically modified (GMO) foods. Inside the meeting, shareholder voted on a proposal to remove GMO foods from Safeway shelves that was proposed by the Sisters of Notre Dame de Namur, a Roman Catholic order, who owned 8,800 shares of Safeway stock,⁴⁵ representing only about [*]% of the outstanding shares at that time.

Only 2% of shareholders supported the proposal to remove genetically engineered ingredients from its products,⁴⁶ and the proposal did not pass, but the demonstrations – which consisted of shareholders in biohazard suits dumping Safeway produce in garbage

⁴³ Tina Casey, *Shareholders Press for More Disclosure from Fracking Companies*, TRIPLEPUNDIT (May 23, 2013), <http://www.triplepundit.com/2013/05/shareholders-press-companies-to-disclose-fracking-risk/>.

⁴⁴ Ernest Scheyder, *ExxonMobil Agrees to Share More Data on Fracking Risks*, REUTERS (Apr. 3, 2014), <http://www.reuters.com/article/2014/04/03/us-exxonmobil-fracking-data-idUSBREA3227020140403>.

⁴⁵ Dale Kasler, *Biotech Foods Get Safeway Yes Vote - Shareholders Soundly Reject Ban Proposal*, Sacramento Bee (May 10, 2000).

⁴⁶ Sandra Gonzales, *Ban on Genetically Engineered Foods Sacked by Safeway Shareholders Defeat Activists’ Bid*, San Jose Mercury News (May 10, 2000)

bins in front of the hotel where the annual meeting was held – attracted significant media attention.⁴⁷

Another grassroots movement, 99% Power, an offshoot from the Occupy Wall Street movement,⁴⁸ organized protests at the shareholder meetings of major banks during their annual meetings in Spring 2012.⁴⁹ At least 500 protesters gathered at the Wells Fargo annual shareholders’ meeting, of which about two dozen were arrested for chaining themselves together to block entry to the meeting at the bank’s headquarters and for entering the meeting and interrupting CEO John Stumpf during his presentation.⁵⁰ The protest out, which included signs that read “Hells Fargo” and hand-outs of dollars bills with an image of a stagecoach (Wells Fargo’s corporate logo) pulled by human being with the caption “Debt Slavery,” became so active that some shareholders were not allowed to enter the meeting.⁵¹ One such

⁴⁷ Julie Light, *Seeds of Resistance: Grassroots Activism vs. Biotech Agriculture*, CORPWATCH (May 25, 2000), <http://www.corpwatch.org/article.php?id=572>; Dale Kasler, Biotech Foods Get Safeway Yes Vote – Shareholders Soundly Reject Ban Proposal, THE SACRAMENTO BEE (May 10, 2000); Sandra Gonzales, Ban on Genetically Engineered Foods Sacked By Safeway Shareholders Defeat Activists’ Bid, SAN JOSE MERCURY NEWS (May 10, 2000).

⁴⁸ See Jason Cherkis, Ninety-Nine Percent Power: Activists Ready to Crash Wells Fargo, General Electric Shareholder Meetings, HUFFINGTON POST (Apr. 23, 2012), http://www.huffingtonpost.com/2012/04/23/ninety-nine-percent-power_n_1446605.html.

⁴⁹ The protests are well documented in mainstream media, but curiously they are only attributed to “the 99%” by activist media. See, e.g., Maria Poblet, *99% Power Movement Kicks Off with Massive Actions at Wells Fargo Shareholder Meeting*, Alternet (Apr. 22, 2012); Tcnk, *99% Power – Wells Fargo Shareholders Meeting Disrupted*, In Your Face Radio (Apr. 26, 2012); *99% Power Week of Action: Confront the Corporate 1% April 22-28*, ActionWeb, <https://actionnetwork.org/campaigns/99-power-week-of-action-confronting-the-corporate-1-including-walmart-bank-of-america-wellsfargo-and-sallie-april-22-28> (last visited Jan. 16, 2015).

⁵⁰ Dakin Campbell and Mark Chediak, *Wells Fargo Protestors Disrupt Stumpf Speech at Meeting*, Bloomberg (Apr. 25, 2012).

⁵¹ Josh Harkinson, Wells Fargo Turns Away Its Own Shareholders from Its Shareholder Meeting, Mother Jones (Apr. 24, 2012)

shareholder even used the protest’s Twitter hashtag to voice her frustration that the protest prevented her from voting her shares.⁵²

Just like the physical protests in the Arab Spring that were organized through social media platforms, grassroots shareholder activism can be organized and empowered by Twitter and Facebook. In fact the Wells Fargo protest was planned, organized and broadcast live using social media. The web site “Stop Wells Fargo” was established to focus attention on and raise support for “major disruption” at the Wells Fargo shareholder meeting.⁵³ Visitors to that web site are invited to “Follow the action on Twitter with #wf24 #wfshareholders #notfeelingwells”⁵⁴ and on Facebook.⁵⁵

Such happenings suggest that shareholder activism may face some of the same challenges as political activism and potentially look less like Bulldog Investors⁵⁶ and more like Occupy Wall Street.⁵⁷ Braydon King has noted that activism through social media is inherently different from “classic” activism. It’s not, “we’re going to tout the party line, we’re going to say what the NGOs are telling us to say.” Instead, King asserts, “we’re going to personalize it. And this can catch activists by surprise. They may have gotten the ball rolling, but what actually

⁵² @itsWanda, 7:17 PM – 24 Apr 2012, TWITTER (“Protesters air grievances at WellsFargo mtg ... #wf24 #wfshareholders #OSF #OWS Too bad I couldn't get in to vote my shares”); @itsWanda, 6:21 PM – 24 Apr 2012, TWITTER (“I was disappointed I didn't get in to vote my shares at #WF24. &was lectured by a few brave human blockaders for trying to go in. #suitbloc”).

⁵³ <http://www.stopwellsfargo.com/en/press>

⁵⁴ *Id.*

⁵⁵ Facebook, The 99% Take Over #wf24, <https://www.facebook.com/events/203308649774621/> (last visited Jan. 16, 2015).

⁵⁶ Bulldog Investors is run by activist investor Phillip Goldstein, who is notable for his consistent value-oriented investment strategy. Goldstein identifies companies that appear to be undervalued because of mismanagement and seeks to replace management.

⁵⁷ Occupy Wall Street was a grassroots protest movement characterized by concerns with global and social inequality but lacking central leadership or a clear message. In fact, Adbusters lampooned the movement in an advertisement for it which read, “What is our one demand? #occupywallstreet September 17th. Bring Tent.” The ‘#’ symbol, called a hashtag, is a Twitter convention used to connect a specific tweet with a trending topic.

occurs falls out of the control of any hierarchical entity.”⁵⁸ For our purposes the most poignant distinction is that grassroots shareholder activism can quickly become unpredictable.

Grassroots shareholder activism is not necessarily directed at unlocking shareholder value. There have been numerous studies on whether shareholders’ ability to control or at least reign in corporate activity increases share prices.⁵⁹ This inquiry is particularly pertinent to the shareholder social media activism. Many grassroots shareholder campaigns are sponsored by shareholders with minimal holdings. The old name for these pesky shareholders was to call them “corporate gadflies.”⁶⁰ Some gadflies are peskier than others: two-thirds of all proposals submitted to Fortune 150 companies between January 1, 2008 and August 1, 2011 by individual investors came from Evelyn Davis and members of the Steiner, Chevedden and Rossi families.⁶¹

Non-profits have formed solely to purchase minimal amounts of securities and leverage Rule 14a to make precatory proposals to major corporations. As You Sow, a non-profit founded in 1992 to increase corporate accountability, launched its shareholder activism program in 1997,⁶² whereby As You Sow would purchase \$2,000 in securities, hold them for one year, then make precatory proposals related to various social issues.⁶³ Corporate social responsibility activist As You Sow is a

⁵⁹ See, e.g., *Activists Beat S&P 500 in 48 Percent Gain for Shareholders*, BLOOMBERG (Mar. 31, 2014), <http://www.bloomberg.com/infographics/2014-03-31/activists-beat-s-p-500-in-48-percent-gain-for-shareholders.html>.

⁶⁰ The gadfly is a tiny fly that annoys horses. The name also refers to a person who upsets the status quo.

⁶¹ *A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR (Fall 2011), http://www.proxymonitor.org/forms/pmr_02.aspx

⁶² This program used to be described on the website of As You Sow under a section titled “Our Methods,” but that non-profit has since removed any explanation of its methods from its web site. Instead, their tactic is now described in a blurb titled “Power of the Proxy” on their web site.

<http://www.asyousow.org/our-work/>

⁶³ As You Show has proposed shareholder votes on topics including: no smoking in movies (not only in the theatre but also on the screen), keeping nanomaterials and genetic modifications out of food, reducing consumer packaging, eliminating child labor from cotton fields in Uzbekistan and mineral mines in the Congo, and reducing executive compensation.

perfect example of how a shareholder may purchase securities for purposes other than value creation.

Whether shareholder democracy is good or bad is an immensely personal and political question. Corporate law has not – and may never – settle on whether corporations must maximize shareholder wealth or prioritize corporate social responsibility. It is clear, however, that social media, in an age of already increasing shareholder democracy and activism, is a powerful new tool for proponents of corporate social responsibility.

B. TECHNOLOGY AND DEMOCRATIC SHAREHOLDER REFORMS

A public corporation is similar to a republic in that both employ representative democracy. Shareholders delegate broad decision-making powers to a board of directors, just as voting citizens delegate lawmaking powers to legislators. A direct democracy, on the other hand, allows citizens to directly partake in voting on policy decisions through a national referendum mechanism. The framers of the American constitution distrusted direct democracy,⁶⁴ like the Classical Greek city-state of Athens, but citizen lawmaking still exists today in the modern Swiss Cantons of Glarus and Appenzell Innerrhoden and several American states.⁶⁵

Historic transformations in the way we communicate could make corporate direct democracy, in which shareholder voters play an integral role in a broad scope of corporate decision-making, possible and even practical. With just a few SEC-sponsored tweaks to the federal securities law and some modifications to key state statutes like the Delaware General Corporations Law, American public companies could be run as direct democracies. Innovations like webcasting, Twitter and Internet Protocol Security make it feasible for shareholders to gain immediate access to extensive managerial and operational information and vote in real-time on a wide array of corporate matters.

In light of the social-media organized mass movements like the Arab Spring and Occupy Wall Street – and being mindful of corporate social responsibility organizations like As You Sow – would shareholder direct democracy be a glorious conclusion to the capitalist era, or would it be a crippling impediment to efficient economic functioning? Alexander Hamilton once stated, “That a pure democracy if it were practicable would be the most perfect government. Experience has proved that no position is more false than this. The ancient democracies in which the people themselves deliberated never possessed one good feature of government. Their very character was tyranny; their figure, deformity.”⁶⁶ Some may have a bias toward one approach or the other. But a middle road to this modern circumstance is to let the market determine which corporate political structure is best.

The SEC does not have to mandate corporate direct democracy. But the SEC could allow it. Individual public corporations would then have the option to allow shareholder direct democracy or retain the traditional framework of delegation to and representation by a board of directors.

Empirical studies are conflicted on whether shareholder primacy is efficient, and whether markets value it.⁶⁷ A 2003 study found that stronger shareholder rights correlated with higher firm value, higher profits, higher sales growth, lower capital expenditures and fewer corporate acquisitions.⁶⁸ But in 2013, Lynn Stout argued that more recent studies conclusively show that shareholder primacy does not maximize shareholder value (measured by share price).⁶⁹

⁶⁶ See Rosemarie Zagarri (2010). *The Politics of Size: Representation in the United States, 1776-1850*. Cornell University.

⁶⁷ See, e.g., Jill E. Fisch, Institute for Law and Economics, University of Pennsylvania Law School, “Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy,” *Journal of Corporation Law*, Vol. 31, p. 637, 2006.

⁶⁸ Paul Gompers, Joy Ishii and Andrew Metrick, “Corporate Governance and Equity Prices,” *The Quarterly Journal of Economics*, February 2003.

⁶⁹ Lynn. A Stout, *The Shareholder Value Myth*, available at http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2311&context=facpub&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar%3Fq%3Dshareholder%2Brights%2Bstock%2Bvalue%26btnG%3D%26hl%3Den%26as_sdt

Maximizing shareholder value, however, is only one goal of corporate activity. Corporate social responsibility is, increasingly, another. Even if corporate direct democracy does not maximize shareholder value in every instance or even in the majority of cases does not mean it should be prohibited as a possible corporate form.

Certain businesses may benefit from direct shareholder democracy while others may be harmed by it. Highly secretive firms like Apple, for instance, may find their bottom line is hit hard when decisions are made by the masses. Organic food retailers like Whole Foods, however, may find shareholder direct democracy gives them legitimacy in a marketplace where shoppers choose the most transparent and community oriented company.

In point of fact, many corporations today voluntarily expend money, make disclosures, and commit to social-benefit promises to become certified as benefit corporations, or B-corporations.⁷⁰ A B-corporation is a type of for-profit entity that has some non-profit characteristics (but not its tax-exempt treatment). The shareholders of a B-corporation agree (at least theoretically) to evaluate that company based on its societal or environmental impact, and not solely on its profits.

The corporate landscape is changing. Corporations have a broader range of purposes than they did even a few short years ago. The world is changing, too. Technology is allowing people to connect and coordinate across virtually any distance, regardless of social or political barriers.

Corporate America is not immune to these changes. New forms of corporations are emerging, as are new forms of corporate governance,

[%3D0%252C33%26as_ylo%3D2010#search=%22shareholder%20rights%20stock%20value%22](#)

⁷⁰ Today there are at least 12 third party companies that provide standards and evaluations to register as a B-corporation. B-corporations is not a legal status. The B-corporation designation is more like a USDA Organic certification. Most B-corporations are, from a legal perspective, Delaware corporations that do not make the S election. However, B-corporations in certain states may not have to conform with shareholder wealth maximization modes of existence such as those articulated by the seminal case *Dodge v. Ford Motor Company*, 170 NW 668 (Mich. 1919).

and new goals of investors. In light of these changes, the SEC has the opportunity to unlock shareholder governance, allowing states to create new kinds of corporations. Justice Brandeis famously stated that, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁷¹ Shareholder direct democracy is a prime example of just such an economic experiment. Continuing the trend of shareholder empowerment exemplified by states like North Dakota,⁷² a courageous state might take on Delaware’s hegemony over incorporation by offering shareholders an unprecedented level of influence and involvement in the companies they own.

One way to unlock new shareholder governance regimes is simply to allow Internet voting. The shareholder annual meeting is an anachronism. It imposes great expenses on shareholders, effectively excluding many would-be participants. The direct beneficiaries of the current system are the institutional investors. Small shareholders who cannot afford to attend the meeting are excluded from the process, or at the very least left with limited access to information and diminished interaction with board members and management, just as small shareholders who were not invited to attend the quarterly analyst calls were excluded from timely receiving material non-public information.

Corporations will either modify their bylaws to allow virtual shareholder meetings and Internet voting, or they will preserve the status quo. By opening up a new avenue for shareholder engagement, the SEC will create an opportunity for the market to decide what mixture of shareholder corporate control it values most—even if that control is democratized.

⁷¹ *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932).

⁷² See Larry Ribstein, *The North Dakota Experiment*, THE HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE AND FINANCIAL REGULATION (Apr. 23, 2007), available at <http://blogs.law.harvard.edu/corpgov/2007/04/23/the-north-dakota-experiment/>

CONCLUSIONS

The shareholder revolution will not be televised. It will be simulcast, tweeted, liked, shared and +1'd. Human communication is changing due to technologic advancement, and inter-shareholder communication is changing along with it. SEC rules about how shareholders may communicate with each other and management currently restrain the potentially disruptive force of innovative communication, but changes to a few simple rules could open up a world of new possibilities for shareholder activism. If the last twenty-five years of shareholder regulation tends to predict its future, the trend of SEC liberalization of shareholder communication will likely continue. Shareholder democracy, long considered a myth, may soon become a reality. The question remains, how much democracy do we really want?