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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.

KEYWORDS: Shareholder Activism, Social Media, Internet Law, Proxy, Social Media

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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

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

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 emerging social media tools like 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 uprisings 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

2. See, e.g., Alexandra Segerberg & W. Lance Bennett, *Social Media and the Organization of Collective Action: Using Twitter to Explore the Ecologies of Two Climate Change Protests*, 13 COMM. REV. 197 (2011) (concluding that Twitter and similar social technologies provide new social organizing mechanisms that provide new data about these movements and their participants).

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/index.php/2011/09/11/opening-closed-regimes-what-was-the-role-of-social-media-during-the-arab-spring/>.

4. Ismaeel Naar, *Timeline: Arab Spring*, AL JAZEERA (Dec. 17, 2013), <http://www.aljazeera.com/indepth/interactive/2013/12/timeline-arab-spring-20131217114018534352.html>; Garry Blight, Sheila Pulham & Paul Torpey, *The Path to Protest*, THE GUARDIAN (Jan. 5, 2012), <http://www.theguardian.com/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline>.

5. *A Climate of Change*, THE ECONOMIST (July 13, 2013), <http://www.economist.com/news/special-report/21580624-spring-proved-fickle-arabs-are-still-yearning-it-says-max-rodenbeck>.

for the Arab Spring was the advent of social media, especially Twitter, and its role in driving awareness and collective action.⁶

I. THE REVOLUTION WILL NOT BE TELEVISED

Many scholars have made analogies between corporations and nations.⁷ A corporation's charter is often referred to as a "private constitution."⁸ 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 are worth revisiting in an era where overly authoritarian nations risk being overthrown by the tweeting masses and their charismatic leaders.

It turns out that a lot of things can be said in 140 characters. For example, Carl Icahn, the famous activist investor, grabbed Wall Street and the tech world's attention when he tweeted caustically, "All would be swell at Dell if Michael and the board bid farewell."⁹ However, the SEC-mandated disclosure that is supposed to be included on all public-securities-related communications is not among them.¹⁰ Another

6. See, e.g., Howard et al., *supra* note 3 (analyzing over three 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 ground and (3) social media helped spread democratic ideas across international borders).

7. See Leo E. Strine, Jr., *One Fundamental Corporate Governance Question We Face: Can Corporations Be Managed for the Long Term Unless Their Powerful Electorates Also Act and Think Long Term?*, 66 BUS. LAW. 1, 8-9 (2010) ("Although there are obvious and important reasons not to take analogizing the governance of for-profit corporations to the governance of actual political republics too far, it is also vital not to ignore the clear influence republican principles have had on the American approach to corporate law.").

8. See Alan R. Palmiter, *Public Corporation as Private Constitution*, 6 ICFAI J. CORP. & SEC. L. 8 (2009).

9. Carl Icahn, TWITTER, (July 24, 2013, 8:12 AM EST), https://twitter.com/carl_c_icaohn/status/360054783744294913.

10. 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 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

problem with using 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,¹¹ 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.¹² And the proposing shareholder still has to actually attend the meeting.¹³ 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.¹⁴

Attending an 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.¹⁵ The

<http://www.securitieslawinsider.com/2014/05/secs-social-media-guidance-on-required-legends-raises-more-questions/>.

11. See John C. Coffee, Jr., *The SEC and the Institutional Investor: A Half-Time Report*, 15 CARDOZO L. REV. 837, 840-41 (1994).

12. 17 C.F.R. § 240.14a-8 (2011).

13. *Id.*

14. 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 require listed companies to provide shareholders with the opportunity to discuss company affairs with management, which a virtual meeting can supply. See, e.g., *Guidelines for Protecting and Enhancing Online Shareholder Participation in Annual Meetings: The Best Practices Working Group for Online Shareholder Participation in Annual Meetings*, BROADRIDGE (2012), available at <http://media.broadridge.com/documents/Broadridge-Guidelines-For-Shareholder-Participation-Report.pdf>.

15. See Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1745 (2006) ("A rational shareholder will expend the effort necessary to make informed decisions only if the expected benefits outweigh the costs. Given the length and complexity of corporate disclosure documents, the opportunity cost entailed in making informed decisions is significant. In contrast, the expected benefits of becoming informed are quite low, as most shareholders'

SEC could do away with the rules requiring physical meetings, and the proxy process could be replaced with direct, real-time democracy.

In fact, it is so onerous to attend the physical annual meetings that most shareholders do not go.¹⁶ Instead they submit ballots to designated representatives who then tabulate them and vote by proxy.¹⁷ 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.¹⁸ Thus, a great deal of shareholders cast their vote without the benefit of annual meeting presentations and participatory question and answer sessions.¹⁹ More shareholders might attend and vote electronically, if annual meetings were simulcast or otherwise electronically interactive.²⁰

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.

holdings are too small to have significant effects on the vote's outcome. Accordingly, corporate shareholders are rationally apathetic.").

16. Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 844 (2013) ("[M]ost shareholders in public corporations are dispersed and hence do not attend the annual meeting in person; instead they attend and vote by proxy.").

17. *Id.*

18. See Bainbridge, *supra* note 15 and accompanying text.

19. See Fairfax, *supra* note 16, at 845.

20. 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, see Andrew Regenscheid & Geoff Beier, *Security Best Practices for the Electronic Transmission of Election Materials for UOCAVA Voters*, NAT'L INST. OF STANDARDS AND TECH. (2011).

A. RULE 14A

Rule 14a governs shareholders' rights to present proposals at the annual meeting.²¹ 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.²²

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.”²³

A precatory proposal is a type of 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 almost 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.²⁴

21. 17 C.F.R. § 240.14a-8 (2011).

22. Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879 (1994) (“The history of Rule 14a-8 offers, in microcosm, a study of federal involvement in the shareholder-management relationship of the American public corporation. Emerging from the Great Depression, the SEC promulgated the rule in 1942 to catalyze what many hoped would be a functional ‘corporate democracy.’”).

23. *Id.*

24. Leo E. Strine, Jr., *Breaking the Corporate Governance Logjam in Washington: Some Constructive Thoughts on a Responsible Path Forward*, 63 BUS. LAW. 1079, 1095-96 (2008) (“A host of precatory proposals on issues like classified boards, poison pills, executive compensation, and even the voting system have had a powerful admonitory effect on corporate boards, with corporate boards often voluntarily assenting to non-binding proposals rather than risking wrath at the next director election.”).

The initial problem with precatory proposals was that they were just too easy to make.²⁵ 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.²⁶ In fact, Rule 14a is one of the most heavily amended rules in all of securities law.²⁷ 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.²⁸

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.²⁹ SEC Chairman Richard C. Breeden gave a speech on October 15, 1992, announcing a total overhaul of Rule 14a. His goal

25. See Susan W. Liebeler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 428 (1984) ("Following the rule's adoption in 1942, the SEC continually revised the rule in an attempt to curb abuses by proponents and to determine what constitutes a 'proper subject' for proposals under state law."). In fact, 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. "[T]he advantages of a listed market may some day 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 voluminous regulations. Letter from Emil Schram, President of NYSE, to Ganson Purcell, Chairman, SEC (Oct. 16, 1942), available at http://www.sechistorical.org/collection/papers/1940/1942_1010_SchramPurcell.pdf.

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

27. See Palmiter, *supra* note 22, at 882 ("Since its promulgation five decades ago, the rule itself has undergone no less than fourteen revisions.").

28. See *id.* ("Lately, the agency's interpretive flip-flops in no-action letters have become legion. . . . In short, the rule is today in chaos.").

29. Bernard S. Black, *Next Steps in Proxy Reform*, 18 J. CORP. L. 1, 2 (1993) ("The Commission's express goal was to make it easier for shareholders to communicate with each other, and the amendments certainly move in that direction. The SEC made important strides in that direction.").

was nothing less than to change the dynamics of corporate governance in America.³⁰ 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.³¹

Mr. Breeden analogized the proxy system to an 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.³²

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, than by putting restraints on that process to ensure management has the ability to address every point raised in the exchange of views."³³ 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.³⁴

Prior to the 1992 amendments, the SEC generally pre-reviewed all shareholder communications regarding a shareholder vote.³⁵ Shareholder

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

31. *Id.* at 2-3.

32. *Id.* at 3.

33. Regulation of Communications Among Shareholders, Exchange Act Release No. 34-31326, 57 Fed. Reg. 48276-01 (Oct. 22, 1992).

34. *Id.*

35. 17 C.F.R. § 240.14a-8 (2011).

opinions were thereby moderated by SEC review.³⁶ After 1992, the SEC no longer performed this pre-review function because most shareholder communications no longer had to be filed.³⁷

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, unmoderated 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 in the early 1990s,³⁸ the SEC did not allow shareholders and companies to post shareholder voting materials on the Internet until 2007.³⁹ That year, the SEC

36. See Steven A. Rosenblum, *The Shareholder Communications Proxy Rules And Their Practical Effect On Shareholder Activism And Proxy Contests*, in A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 10-34 (Amy L. Goodman et al. eds., 5th ed. 2013), available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22925.13.pdf>.

37. See *id.* (“Prior to the 1992 amendments, the SEC generally performed a moderating function in proxy contests, tempering the more aggressive materials and forcing the contestants to provide factual support for their arguments and assertions. Now, the SEC no longer performs this function for most of the materials used in the contest.”); see also *An Overview of the Proxy Solicitation Rules*, in A PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES 9-13 (Amy L. Goodman et al. eds., 5th ed. 2013), available at <http://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22925.13.pdf> (“A benefit of circulating initial soliciting materials is that they are not subject to pre-review by the SEC staff. These materials are filed in definitive form with the SEC on the date they are first used, and can therefore be disseminated quickly and cost effectively to shareholders.”).

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

39. 17 C.F.R. § 240.14a-16 (2010).

amended Rule 14a to allow companies to do so (rather than require companies to physically mail all that paper to shareholders).⁴⁰

Making shareholder communications cheaper was clearly a primary purpose of the SEC in enacting this amendment.⁴¹ The SEC concluded that “[t]he 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.”⁴² It further stated that “[t]he amendments also might reduce the costs of engaging in proxy contests for soliciting persons other than the issuer.”⁴³

The next advance in shareholder communication was to allow it in real-time through “the use of electronic shareholder forums.”⁴⁴ The problem is, no one really knew what an electronic shareholder forum

40. Internet Availability of Proxy Materials, SEC Release Nos. 34-55146; IC-27671; File No. S7-10-05 (Jan. 29, 2007), *available at* <http://www.sec.gov/rules/final/2007/34-55146.pdf>.

41. Internet Availability of Proxy Materials, SEC Release Nos. 34-55146; IC-27671; File No. S7-10-05 (Jan. 22, 2007). 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 brought 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.

42. *Id.* at 1.

43. *Id.*

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

was. Was 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.”⁴⁵ Netflix stock price increased 10% that day, and the SEC investigated whether Hastings’ post violated Regulation Fair Disclosure.⁴⁶

Regulation Fair Disclosure, or Reg FD, requires public companies to disclose material information to all shareholders at the same time.⁴⁷ 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 Hastings’ Facebook post did not violate Reg FD.⁴⁸ But that particular determination did not settle the SEC’s general position on the issue because the SEC expressly stated that the Hastings decision had no precedential value, although the report did set 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.⁴⁹

45. Reed Hastings, FACEBOOK.COM (July 3, 2012, 10:57 AM EST), <https://www.facebook.com/reed1960/posts/10150955446914584>. The Hastings post was followed by a 10% increase in Netflix stock price.

46. 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), *available at* <http://www.sec.gov/litigation/investreport/34-69279.pdf>.

47. 17 C.F.R. § 243 (2011).

48. *See supra* note 46.

49. *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.

But activist shareholders don't have to make these filings.⁵⁰ In contrast to Hastings' 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."⁵¹ Apple's stock price increased by nearly 5% on the day of Icahn's tweet, adding over \$17 billion to its market capitalization at its intraday high.⁵² 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 and gas explorer Talisman Energy, resulting in a 6.4% stock price increase in after-hours trading,⁵³ and announcing a 9.4% stake in Family Dollar Stores, resulting in a 9.7% stock price increase in after-hours trading.⁵⁴ Forbes described Icahn's use of Twitter to publicize an investment in Gannett as "typical Icahn fashion." Shares in the media company rose 5% in after-hours trading following Icahn's announcement.⁵⁵

50. 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).

51. Carl Icahn, TWITTER (Aug. 13, 2013, 11:21 AM EST), https://twitter.com/carl_c_ica hn/status/367350206993399808.

52. Steven Russolillo, *The iCahn Effect: Apple's Market Cap Jumps by \$17 Billion After Tweets*, WALL ST. J. (Aug. 13, 2013). Commentators attribute a \$12.5 billion increase in Apple's market cap in just one hundred minutes to the Icahn tweet. 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-ica hn-apple/>.

53. Agustino Fontevecchia, *Tweeting Carl Icahn: Billionaire Unveils 6% Stake in Talisman Energy*, FORBES (Oct. 7, 2013, 5:45 PM EST), <http://www.forbes.com/sites/afontevecchia/2013/10/07/tweeting-carl-ica hn-billionaire-investor-unveils-6-stake-in-talisman-energy/>.

54. William Alden, *Carl Icahn Discloses Stake in Family Dollar*, DEALBOOK—N.Y. TIMES (June 6, 2014), http://dealbook.nytimes.com/2014/06/06/ica hn-discloses-stake-in-family-dollar/?_r=0.

55. Samantha Sharf, *Carl Icahn Reveals Gannett Stake, Breakup Support*, FORBES (Aug. 14, 2014, 6:28 PM EST), <http://www.forbes.com/sites/samanthasharf/2014/08/14/carl-ica hn-reveals-gannett-stake-breakup-support/>.

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 the critiques of activists. 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,⁵⁶ which is lawful under Delaware law.⁵⁷ However, board access to the corporate coffers to fund reelection campaigns—an antidemocratic feature of corporate law—might become less significant as shareholder engagement gets

56. 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. SHARKREPELLANT.NET (last visited Sept. 21, 2014) (on file with author).

57. See Daniel M. Friedman, *Expenses of Corporate Proxy Contests*, 51 COLUM. L. REV. 951, 952 (1951) (“The right of the management to assess the corporate treasury for certain expenses incurred in the solicitation of proxies is well settled. The only requirement laid down by the courts is that the issue presented to the stockholders must involve a ‘question of corporate policy,’ as distinguished from a ‘mere matter of personnel.’ Once this test is met, the management may properly expend corporate funds to present its side of the controversy to the stockholders and solicit their continued support.”); see also *Hand v. Missouri-Kansas Pipe Line Co.*, 54 F. Supp. 649 (D. Del. 1944) (“[W]here stockholders are called on to decide controversies over substantial questions of policy as distinguished from inconsequential matters and personnel of management, directors may make such expenditures from corporate funds as are reasonably necessary to inform stockholders of considerations in support of the policy advocated by directors under attack, and in such communications directors may solicit proxies in their favor.” (citing *Hall v. Trans-Lux Daylight Picture Screen Corp.*, 171 A. 226 (Del. Ch. 1934))).

cheaper and more democratized.⁵⁸ Modern low-cost yet effective shareholder campaigns abound. For example, for four consecutive years shareholders have organized to press ExxonMobil and other oil and gas companies to disclose the dangers of hydraulic fracking.⁵⁹ 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.⁶⁰

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, shareholders 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,⁶¹ representing only about 0.00173% of the outstanding shares at that time.⁶²

Only 2% of shareholders supported the proposal to remove GMO ingredients from its products,⁶³ and the proposal did not pass, but the demonstrations—which consisted of shareholders in biohazard suits

58. 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/>.

59. *Id.*

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

61. Dale Kasler, *Biotech Foods Get Safeway Yes Vote—Shareholders Soundly Reject Ban Proposal*, SACRAMENTO BEE, May 10, 2000, at G1.

62. See Safeway Inc., Quarterly Report (Form 10-Q) (Sept. 11, 1999) available at <https://www.sec.gov/Archives/edgar/data/86144/000095014999001830/0000950149-99-001830.txt> (“As of October 21, 1999, there were issued and outstanding 508.8 million shares of the registrant’s common stock.”).

63. Sandra Gonzales, *Ban on Genetically Engineered Foods Sacked by Safeway Shareholders Defeat Activists’ Bid*, SAN JOSE MERCURY NEWS, May 10, 2000, at C1.

dumping Safeway produce in garbage bins in front of the hotel where the annual meeting was held—attracted significant media attention.⁶⁴

Another grassroots movement, 99% Power, an offshoot from the Occupy Wall Street movement,⁶⁵ organized protests at the shareholder meetings of major banks during their annual meetings in Spring 2012.⁶⁶ 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.⁶⁷ The protest, 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 beings with the caption "Debt Slavery," became so active that some shareholders were not allowed to enter the meeting.⁶⁸ One such shareholder even used

64. See Julie Light, *Seeds of Resistance: Grassroots Activism vs. Biotech Agriculture*, CORPWATCH (May 25, 2000), <http://www.corpwatch.org/article.php?id=572>; Kasler, *supra* note 61.

65. See Jason Cherkis, *Ninety-Nine Percent Power: Activists Ready to Crash Wells Fargo, General Electric Shareholder Meetings*, HUFFINGTON POST (Apr. 23, 2012, 4:09 PM EST), http://www.huffingtonpost.com/2012/04/23/ninety-nine-percent-power_n_1446605.html (last updated Apr. 23, 2012, 5:00 PM EST).

66. 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) ("This year, there's a nationally coordinated effort of the 99% to fight back...We're starting off with Wells Fargo."), available at http://www.alternet.org/story/155097/99_power_movement_kicks_off_with_massive_actions_at_wells_fargo_shareholder_meeting; Tcnk, *99% Power—Wells Fargo Shareholders Meeting Disrupted*, IN YOUR FACE RADIO (Apr. 26, 2012), available at <http://inyourfaceradio.net/99-power-wells-fargo-shareholders-meeting-disrupted-mic-check/>; 99% Power Week of Action: *Confront the Corporate 1% April 22-28*, ACTIONWEB ("Tuesday's action was the first in a series of nation-wide protests set to taking on America's largest corporations over the next two months, organized by a national coalition of progressive organizations called 99% Power."), available at <https://actionnetwork.org/campaigns/99-power-week-of-action-confronting-the-corporate-1-including-walmart-bank-of-america-wellsfargo-and-sallie-april-22-28> (official website of the 99% Power movement) (last visited Jan. 16, 2015).

67. Dakin Campbell & Mark Chediak, *Wells Fargo Protestors Disrupt Stump Speech at Meeting*, BLOOMBERG (Apr. 25, 2012), <http://www.bloomberg.com/news/articles/2012-04-24/wells-fargo-protesters-impede-shareholders-at-annual-meeting>.

68. Josh Harkinson, *Wells Fargo Turns Away Its Own Shareholders from Its Shareholder Meeting*, MOTHER JONES (Apr. 24, 2012, 5:28 PM EST),

the protest's Twitter hashtag to voice her frustration that the protest prevented her from voting her shares.⁶⁹

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 disruptions" at the Wells Fargo shareholder meeting.⁷⁰ Visitors to that website were invited to "Follow the action on Twitter with #wf24 #wfshareholders #notfeelingwells⁷¹ and on Facebook.⁷²

Such happenings suggest that shareholder activism may face some of the same challenges as political activism and potentially look less like Bulldog Investors⁷³ and more like Occupy Wall Street.⁷⁴ Brayden King⁷⁵

<http://www.motherjones.com/mojo/2012/04/wells-fargo-turns-away-its-own-shareholders-annual-meeting>.

69. Wanda, TWITTER (Apr. 24, 2012, 7:17 PM EST), <https://twitter.com/itsWanda/status/194973491412480000> ("Protesters air grievances at WellsFargo mtg ... #wf24 #wfshareholders #OSF #OWS Too bad I couldn't get in to vote my shares[.]"); Wanda, TWITTER (Apr. 24, 2012, 6:21 PM EST), <https://twitter.com/itsWanda/status/194959323749822464> ("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[.]").

70. Press Release, Stop Wells Fargo, Major Disruptions Planned At Wells Fargo Shareholder Meeting As "The 99% Take Over" (Apr. 24, 2012), <http://www.stopwellsfargo.com/en/press> ("On Tuesday, April 24, thousands of people will confront Wells Fargo executives at the financial institution's annual shareholder meeting, risking arrest in by attempting to shut down the meeting and disrupt the proceedings in order to demand Wells Fargo CEO John Stumpf and other executives address the concerns of the 99%.").

71. *Id.* ("Follow the action on Twitter with #wf24 #wfshareholders #notfeelingwells [and] On Facebook at: <http://www.facebook.com/events/203308649774621/>.").

72. *Id.*; *see also* The 99% Take Over #wf24, FACEBOOK (last visited Mar. 5, 2015), <https://www.facebook.com/events/203308649774621/> (Facebook page used to inform participants about Stop Wells Fargo protests).

73. 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.

74. Occupy Wall Street was a grassroots protest movement characterized by concerns with global and social inequality but lacking central leadership or a clear

has noted that activism through social media is inherently different from “classic” activism. It is not, “we are going to tout the party line, we are going to say what the NGOs are telling us to say.” Instead, King notes that it is, “we are going to personalize it. And this can catch activists by surprise. They may have gotten the ball rolling, but what actually occurs falls out of the control of any hierarchical entity.”⁷⁶ 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.⁷⁷ 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 “corporate gadflies.”⁷⁸ 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.⁷⁹

Non-profits have formed solely to purchase minimal amounts of securities and leverage Rule 14a to make precatory proposals to major

message. In fact, Adbusters lampooned the movement in a poster for it that read, “What is our one demand? #occupywallstreet September 17th. Bring Tent.” See Michael Bierut, *The Poster that Launched a Movement (Or Not)*, The Design Observer Group (April 30, 2012), <http://designobserver.com/feature/the-poster-that-launched-a-movement-or-not/32588/>.

75. Northwestern University Kellogg School of Management, Associate Professor of Management and Organizations, http://www.kellogg.northwestern.edu/faculty/directory/king_brayden.aspx.

76. Jessica Love, *Corporate Activism Yesterday, Today, and Tomorrow*, KELLOGG INSIGHT (Mar. 3, 2014), available at http://insight.kellogg.northwestern.edu/article/corporate_activism_yesterday_today_and_tomorrow (Interview with Brayden King & Klaus Weber).

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

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

79. James R. Copland, *A Report on Corporate Governance and Shareholder Activism*, PROXY MONITOR (Sept. 2011), http://www.proxymonitor.org/Reports/Proxy_Monitor_2011.pdf.

corporations. As You Sow, a non-profit founded in 1992 to increase corporate accountability, launched its shareholder activism program in 1997,⁸⁰ whereby As You Sow would purchase \$2,000 in securities, hold them for one year, then make precatory proposals related to various social issues.⁸¹ Corporate social responsibility activist As You Sow is a 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.

III. 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,⁸² on the other hand, allows citizens to directly partake in voting on policy

80. This program was formerly 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. *Our Work*, AS YOU SOW, <http://www.asyousow.org/our-work/>.

81. See *id.* As You Sow 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.

82. Examples of political direct democracies include the ancient Greek city-state of Athens and the modern Swiss Cantons of Glarus and Appenzell Innerrhoden.

decisions by referendum.⁸³ The framers of the American constitution disfavored direct democracy,⁸⁴ as does corporate law.

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? 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.⁸⁵ A 2003 study found that

83. Some American states allow citizen-sponsored direct initiatives to amend the state constitution, including: Arizona, Arkansas, California, Colorado, Florida, Illinois, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Oregon and South Dakota.

84. Alexander Hamilton stated “that a pure democracy, if it were practicable, would be the most perfect government. Experience has proved, that no position in politics is more false than this. The ancient democracies, in which the people themselves deliberated, never possessed one feature of good government. Their very character was tyranny; their figure deformity. When they assembled, the field of debate presented an ungovernable mob, not only incapable of deliberation, but prepared for every enormity.” Alexander Hamilton, Speech on the Compromises of the Constitution, Poughkeepsie, New York (June 20, 1788) in *THE WORKS OF ALEXANDER HAMILTON* 22 (Federal Edition, vol. 2, Henry Cabot Lodge ed., G.P. Putnam’s Sons 1904), available at <http://oll.libertyfund.org/titles/1379>.

stronger shareholder rights correlated with higher firm value, higher profits, higher sales growth, lower capital expenditures and fewer corporate acquisitions.⁸⁶ But in 2013, Lynn Stout argued that more recent studies conclusively show that shareholder primacy does not maximize shareholder value (measured by share price).⁸⁷

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

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.⁸⁸ 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 the 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

85. See, e.g., Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 642 (2006).

86. Paul Gompers, Joy Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Quarterly J. Econ. 107, 107 (2003).

87. Lynn A. Stout, *The Shareholder Value Myth*, CORNELL LAW FACULTY PUBLICATIONS, <http://scholarship.law.cornell.edu/facpub/771/>.

88. Today, there are at least twelve third-party companies that provide standards and evaluations to register as a “B-corporation.” “B-corporation” is not a legal status. The 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 Co.*, 170 N.W. 668 (Mich. 1919).

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, 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.”⁸⁹ 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,⁹⁰ 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.

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

90. 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/>.

CONCLUSION

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 tend 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?