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### From Apathy to Activism: The Emergence, Impact, and Future of Shareholder Activism as the New Corporate Governance Norm

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**FROM APATHY TO ACTIVISM: THE EMERGENCE,  
IMPACT, AND FUTURE OF SHAREHOLDER ACTIVISM AS  
THE NEW CORPORATE GOVERNANCE NORM**

LISA M. FAIRFAX\*

ABSTRACT

*The conventional and long-held view that public company shareholders are, and should be, rationally apathetic is waning. Today, public company shareholders are active. Such shareholders have actively sought to increase their voting power and influence over director elections and other important corporate matters. These shareholders not only have been voting, but they also have been voting against management preferences. Moreover, public company shareholders increasingly have begun to request, and in some instances demand, that corporate officers and directors engage with them around a range of issues. The shift away from shareholder apathy reflects a radical departure from the traditional corporate governance norm of shareholder passivity. While many corporate governance experts have conceded the descriptive shift away from shareholder apathy (at least temporarily), few have acknowledged the normative shift and its related significance. This Article acknowledges that shift, and in so doing advances three important claims related to shareholders and the corporate governance landscape. First, this Article maintains that increased shareholder activism reflects a considerable descriptive shift in the manner in which shareholders use their voting power to engage with the corporation. Second, and more importantly, this Article asserts that such increased activism reflects a normative shift pursuant to which shareholders, corporate officers, and directors have come to believe that shareholder activism is normatively appropriate, at least to a certain extent and for certain shareholders. In light of the long-held belief in the viability and validity of shareholder apathy, this shift is remarkable. Third, this Article argues that, even if efforts to scale back shareholder activism gain some traction, those efforts will prove challenging*

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*and may be doomed to failure because of the normative shift embracing shareholder activism as an appropriate element of corporate governance. In these ways, this Article argues that shareholder activism is the new corporate governance norm and, as a consequence, corporations, officers, directors, shareholders, and regulators must both acknowledge and account for that norm.*

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## INTRODUCTION

Public company shareholders are rationally apathetic. Historically, most viewed this statement as an undisputable and uncontroversial fact.<sup>1</sup> Shareholder apathy was reflected primarily in shareholders' voting behavior, whereby most public company shareholders either did not vote or voted exactly as management recommended them to vote.<sup>2</sup> Perhaps more importantly, most viewed shareholder apathy as "rational," and as the preferred corporate governance norm. This preference rested on two distinct but related rationales. On the one hand, public company shareholders were not only too dispersed to collectively act, but also too dispersed to gain the knowledge and experience necessary to ensure that their actions would be informed and thus in the corporation's best interests.<sup>3</sup> On the other hand, directors were better situated, better informed, and thus better suited to make decisions on behalf of the corporation.<sup>4</sup> These conventional understandings rendered shareholder apathy rational and preferable. Hence, it was conventional wisdom, shared by corporate officers, directors, and shareholders alike, that shareholder apathy was *the* corporate governance norm.

Today, the public company shareholder is far from apathetic. Such shareholders<sup>5</sup> have actively sought to increase their voting power and influence over director elections and other important corporate matters.<sup>6</sup> Not only have shareholders been voting, but they also have been voting against management

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<sup>1</sup> See *infra* Part I (discussing rational apathy of dispersed public shareholders).

<sup>2</sup> See Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 521 (1990).

<sup>3</sup> See ROBERT CLARK, CORPORATE LAW 390-96 (1986) (noting that coordination costs for dispersed shareholders create rational apathy); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 395 (1983) (suggesting that dispersed shareholders are rationally apathetic because their individual votes will not likely make a difference); Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 46 (1988); Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1169 (2013) (noting that "dispersed shareholders were rationally apathetic").

<sup>4</sup> See Stephen Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1746 (2006) [hereinafter Bainbridge, *Director Primacy*]; Stephen Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 558-60 (2003) [hereinafter Bainbridge, *The Means and Ends*]; William W. Bratton & Michael L. Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 659-60 (2010).

<sup>5</sup> This Article will use the terms "shareholder" and "public company shareholder" interchangeably to refer to public (as distinct from private) company shareholders.

<sup>6</sup> See LISA FAIRFAX, SHAREHOLDER DEMOCRACY: A PRIMER ON SHAREHOLDER ACTIVISM AND PARTICIPATION 3-4 (2011).

preferences.<sup>7</sup> Moreover, shareholders increasingly have begun to request, and in some instances demand, that corporate officers and directors engage with them around a range of issues.<sup>8</sup>

The shift away from shareholder apathy reflects a radical departure from the traditional corporate governance norm. While many corporate governance experts have conceded the descriptive shift away from shareholder apathy (at least temporarily),<sup>9</sup> few have acknowledged the normative shift and its related significance. This Article acknowledges that shift, and in so doing advances three important claims related to shareholders and the corporate governance landscape. First, this Article maintains that increased shareholder activism reflects a considerable descriptive shift in the manner in which shareholders use their voting power to engage with the corporation. Second, and more importantly, this Article asserts that such increased activism reflects a normative shift pursuant to which shareholders, corporate officers, and directors have come to believe that shareholder activism is normatively appropriate, at least to a certain extent and for certain shareholders. In light of the long-held belief in the viability and validity of shareholder apathy, this shift is remarkable. Third, this Article argues that, even if efforts to scale back shareholder activism gain some traction, those efforts will prove challenging and may be doomed to failure *because* of the normative shift embracing shareholder activism as an appropriate element of corporate governance. Shareholder activism is the new corporate governance norm; as a consequence, it likely will remain a fixture of corporate governance in the future.

This Article does not seek to respond to the debate regarding the propriety of shareholder activism. Considerable ink has been spent on that endeavor. This Article also does not seek to pinpoint or otherwise assess why shareholders have become more active, though this Article would assert that the rise in activism stems from multiple factors including an increase in hedge fund activism, the increased dominance of institutional shareholders in the public sphere, and corporate scandals that have not only focused attention on public company governance, but also raised concerns about traditional corporate governance norms. However, this Article does assert that shareholder activist proponents do appear

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<sup>7</sup> See *infra* Part II (discussing rise of shareholder voting and willingness to reject director preferences).

<sup>8</sup> Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 U. ILL. L. REV. 821, 822; see also NAT'L ASS'N OF CORP. DIRS., GOVERNANCE CHALLENGES 2018: BOARD SHAREHOLDER ENGAGEMENT IN THE NEW INVESTOR ENVIRONMENT 3, 9 (2018); Deloitte, *Shareholder Engagement: A New Era in Corporate Governance*, WALL STREET J.: RISK & COMPLIANCE J. (Oct. 1, 2013, 12:01 AM), <https://deloitte.wsj.com/riskandcompliance/2013/10/01/shareholder-engagement-a-new-era-in-corporate-governance/>.

<sup>9</sup> See NAT'L ASS'N OF CORP. DIRS., DIRECTOR ESSENTIALS: PREPARING THE BOARD FOR SHAREHOLDER ACTIVISM I (2018), <https://www.nacdonline.org/files/NACD%20Director%20Essentials%20Preparing%20the%20Board%20for%20Shareholder%20Activism%20Executive%20Summary.pdf> [<https://perma.cc/ASA7-QCX9>] (referring to year-round shareholder activism as new norm in American boardrooms).

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to have convinced the corporate community that activism is preferable to apathy at least for some shareholders.

Part I explores the concept of shareholder apathy and the traditional consensus related to the reality and propriety of such apathy. Part II details the descriptive shift from apathy to activism. Part III demonstrates the manner in which the descriptive shift reflects a normative acceptance of shareholder activism. It begins by pinpointing the manner in which a broad spectrum of shareholders has come to accept the shareholder activism norm. Part III then demonstrates how corporate words and behavior reflect an embrace of the notion that shareholder activism is appropriate and in the best interests of the corporation. Indeed, corporate officers and directors not only have voluntarily implemented sweeping changes to corporate governance practices and policies, but also have actively sought to engage with shareholders in an effort to incorporate shareholder concerns into their business practices and plans. Importantly, as they engage in such behaviors, corporate officers and directors have expressed their belief that shareholder activism, in the form of shareholder influence and engagement, is in the corporation's best interests. In these ways, corporate officers and directors have demonstrated a normative acceptance of shareholder activism, coupled with a rejection of the apathy norm.

Part III then grapples with arguments against such acceptance. Some may disagree with this Article's thesis based on the notion that directors have acquiesced to shareholder demands because they feel pressured, coerced, or even blackmailed,<sup>10</sup> and thus may insist that such acquiescence cannot be construed as any form of agreement or acceptance of shareholder activism. Others may disagree based on the notion that directors' behavior reflects a strategic decision, such as a preemptive strike or a cost-benefit analysis, rather than acceptance or agreement. Still others may disagree based on the claim that directors have only embraced the propriety of shareholder influence rhetorically, and hence directors' words should be understood as a form of window-dressing rather than any actual belief. However, after careful consideration of directors' behaviors, directors' disclosures in proxy statements and other public documents, and directors' understanding of their fiduciary duties, this Article refutes those arguments and instead insists that directors' words and behaviors can and should be understood as an embrace of the appropriateness of shareholder activism. Part IV addresses the implications of that embrace, especially in light of regulatory

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<sup>10</sup> See Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1922 (2013) (noting that majority voting has "swept the field with boards caving in to shareholder demands"); see also JAMES MACGREGOR, ABERNATHY MACGREGOR GRP. INC., *SHAREHOLDER ACTIVISM ISN'T ALWAYS A GOOD THING 1* (2014), [<https://perma.cc/3GZD-A4EB>] (claiming that shareholders have been allowed to hijack the corporation); SULLIVAN & CROMWELL LLP, *2014 PROXY SEASON REVIEW 6* (2014), [http://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_2014\\_Proxy\\_Season\\_Review.pdf](http://www.sullcrom.com/siteFiles/Publications/SC_Publication_2014_Proxy_Season_Review.pdf) [<https://perma.cc/3C35-26U9>] (suggesting that some corporate changes may result from coercion).

efforts and private ordering mechanisms aimed at reducing shareholder influence and participation.

### I. THE SHAREHOLDER APATHY TRADITION

Conventional wisdom maintained that shareholders of public companies were rationally apathetic. This term encompassed two concepts: one descriptive and one normative. From a descriptive perspective, shareholder apathy encompasses the long-held understanding that voter turnout among public company shareholders was relatively low and that when shareholders bothered to vote, they most often voted in lock-step with management.<sup>11</sup> Commentators viewed this decision to vote with management as a reflection of shareholder apathy because it appeared to reflect a conscious choice to simply rubber-stamp the preferences of management rather than actively engage.<sup>12</sup> Shareholder apathy also was reflected in shareholders' lack of desire to engage with corporate officers and directors. Instead, shareholders appeared content to remain inactive and essentially voiceless in the corporate enterprise.<sup>13</sup>

From a normative perspective, both shareholders and corporate actors viewed shareholder apathy as "rational" and normatively appropriate. Appropriate not only because the problems associated with voting by a dispersed group of potentially uninformed and inexperienced shareholders made shareholder activism undesirable, but also because of the strong preference for granting presumably more experienced and informed directors and officers broad discretion to make business decisions free of interference from shareholders and other constituents. This Part unpacks both the descriptive and normative concepts embedded in shareholder apathy.

#### A. *The Descriptive Case for Shareholder Apathy*

From a descriptive standpoint, shareholder apathy was reflected in a variety of ways. First, voter turnout among public company shareholders was relatively low.<sup>14</sup> Corporate statutes grant shareholders the power to vote in director elections and other fundamental transactions.<sup>15</sup> However, it has been understood that, at least historically, most public company shareholders did not exercise their vote, particularly in director elections.<sup>16</sup> This understanding stemmed from the general presumption that shareholders in public companies are dispersed and

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<sup>11</sup> See Black, *supra* note 2, at 521.

<sup>12</sup> *Id.*

<sup>13</sup> See Stout, *supra* note 3, at 1169.

<sup>14</sup> See *id.*

<sup>15</sup> See, e.g., DEL. CODE ANN. tit. 8, §§ 211(b), 242(b), 251(c) (2019) (describing director elections, charter amendments, and merger or consolidation respectively); MODEL BUS. CORP. ACT §§ 7.28, 10.03, 10.20(B), 11.04 (AM. BAR ASS'N 2010) (same).

<sup>16</sup> See Black, *supra* note 2, at 521; Gordon, *supra* note 3, at 46 (noting shareholder apathy reflected in low shareholder engagement on a range of issues); Stout, *supra* note 3, at 1169.



hold relatively small amounts of shares, decreasing the likelihood that such shareholders would be incentivized to vote.<sup>17</sup>

Second, even when shareholders did vote, they rarely used their vote to challenge directors.<sup>18</sup> This rarity was reflected in both uncontested and contested elections. With respect to uncontested elections, shareholders rarely voted against incumbent directors.<sup>19</sup> Courts and corporate governance experts have referred to shareholder voting power, particularly in director elections, as quintessential and the most important power in the shareholders' arsenal.<sup>20</sup> The fact that shareholders simply rubber-stamped management choices in director elections therefore was viewed as a significant indicator of their apathy.<sup>21</sup> In addition, shareholders did not engage in many election contests—referred to as proxy contests in the public company context.<sup>22</sup> On those rare occasions when shareholders engaged in proxy contests, they seldom were successful.<sup>23</sup> To be sure, the lack of success in such contests could reflect shareholder satisfaction with incumbent directors and officers or lack of satisfaction with the dissident slate. Nevertheless, commentators viewed the low level of proxy contests

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<sup>17</sup> See Stout, *supra* note 3, at 1169 (asserting that shareholders do not pay attention or even vote because “[w]hat made the public corporation ‘public’ of course, was that it had thousands or even hundreds of thousands of shareholders, none of whom owned more than a small fraction of outstanding shares”); Julian Velasco, *The Fundamental Rights of the Shareholder*, 40 U.C. DAVIS L. REV. 407, 417 (2006) (“It is common knowledge that individual shareholders generally are not interested in—or, at least not capable of—exercising their control rights effectively.”).

<sup>18</sup> See Black, *supra* note 2, at 526-27; Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 310 (1999) (referring to rational apathy as leading shareholders to “vote for whomever and whatever management recommends” (quoting CLARK, *supra* note 3, at 94)); Stout, *supra* note 3, at 1169.

<sup>19</sup> See Black, *supra* note 2, at 526-27; Stout, *supra* note 3, at 1169.

<sup>20</sup> See *EMAK Worldwide, Inc. v. Kurz*, 50 A.3d 429, 433 (Del. 2012) (“Shareholder voting rights are sacrosanct. The fundamental governance right possessed by shareholders is the ability to vote for the directors the shareholder wants to oversee the firm.”); *Pell v. Kill*, 135 A.3d 764, 793 (Del. Ch. 2016) (noting that denial of shareholders’ right to vote causes irreparable harm); *Carmody v. Toll Bros., Inc.*, 732 A.2d 1180, 1193 (Del. Ch. 1998) (noting that “the shareholder vote has primacy in our system of corporate governance”); *Blasius Indus., Inc. v. Atlas Co.*, 564 A.2d 651, 659 (Del. Ch. 1988) (“The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.”); Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261, 274 (2001); Velasco, *supra* note 17, at 411 (“[S]hareholder rights to elect directors and sell shares are indeed fundamental.”).

<sup>21</sup> See Black, *supra* note 2, at 521; Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599, 1608 (1989) (noting that crucial premise of shareholder apathy is that “shareholders will consistently vote in support of management”).

<sup>22</sup> See Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688-89 (2007); Black, *supra* note 2, at 521.

<sup>23</sup> See Black, *supra* note 2, at 526-27.

coupled with the slim chance of success as another important indicator of shareholder apathy.<sup>24</sup>

Third, shareholders also rarely voted inconsistently with management's directives outside of the director election context.<sup>25</sup> One important example of this rarity can be seen through shareholder voting patterns related to shareholder proposals. Federal law allows shareholders to submit proposals to the corporation's proxy statement to be voted upon by other shareholders.<sup>26</sup> When shareholders submit such proposals, management can also recommend whether they believe shareholders should support the proposals.<sup>27</sup> Management almost always recommends that shareholders vote against shareholder proposals. Historically, shareholders almost always followed management's recommendation, resulting in very few shareholder proposals passing with a majority vote or otherwise receiving any significant percentage of the shareholder vote.<sup>28</sup> In other words, shareholder proposals almost never received support from other shareholders.<sup>29</sup> By 1981, one commentator had found only two proposals not supported by management that nevertheless were approved by shareholders.<sup>30</sup> Like uncontested director elections and proxy fights, shareholders' decisions not to support shareholder proposals were viewed as a prime indicator of shareholder apathy, reflecting shareholders' preference for simply rubber-stamping the choices of management and thus avoiding meaningful exercise of the vote.<sup>31</sup>

Finally, shareholders did not seek out engagement with corporate officers and directors. Historically, shareholders did not submit many shareholder proposals.<sup>32</sup> Because most public company shareholders were dispersed and thus did not attend the annual meeting in person, shareholder proposals are one of the

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<sup>24</sup> See *id.* at 521, 526-27. As Professor Bernard Black has noted, the rarity of successful proxy fights epitomized the modern symbol of shareholder apathy. *Id.*

<sup>25</sup> See Gordon, *supra* note 3, at 46.

<sup>26</sup> 17 C.F.R. § 240.14a-8 (2018); Alan R. Palmiter, *The Shareholder Proposal Rule: A Failed Experiment in Merit Regulation*, 45 ALA. L. REV. 879, 879 (1994).

<sup>27</sup> See Palmiter, *supra* note 26, at 922.

<sup>28</sup> See Stephen M. Bainbridge, *Revitalizing SEC Rule 14a-8's Ordinary Business Exclusion: Preventing Shareholder Micromanagement by Proposal*, 85 FORDHAM L. REV. 705, 709 (2016); Myron P. Curzan & Mark L. Pelesh, *Revitalizing Corporate Democracy: Control of Investment Managers' Voting on Social Responsibility Proxy Issues*, 93 HARV. L. REV. 670, 676 (1980); Palmiter, *supra* note 26, at 883.

<sup>29</sup> See Andrew R. Brownstein & Igor Kirman, *Can a Board Say No When Shareholders Say Yes? Responding to Majority Vote Resolutions*, 60 BUS. LAW. 23, 27 (2004); Susan W. Liebler, *A Proposal to Rescind the Shareholder Proposal Rule*, 18 GA. L. REV. 425, 426 (1984); Palmiter, *supra* note 26, at 883.

<sup>30</sup> See Liebler, *supra* note 29, at 426.

<sup>31</sup> See Black, *supra* note 2, at 527 (noting that shareholder passivity was reflected in low levels of support for shareholder proposals).

<sup>32</sup> See *id.* at 527, 584 (noting historical rarity of shareholder proposals); Brownstein & Kirman, *supra* note 29, at 26.

principal ways in which public company shareholders engage with management.<sup>33</sup> Indeed, while such proposals are generally nonbinding, shareholder proposals reflect one of the only ways in which shareholders (as opposed to officers and directors) can encourage the corporation to adopt some measure or take some action.<sup>34</sup> Thus, shareholder proposals can be used by shareholders to actively engage with management and to actively seek to influence managerial and corporate policies.<sup>35</sup> Hence, shareholder proposals are often used as a marker for activism or the lack thereof.<sup>36</sup> The fact that historically only a small subset of shareholders submitted proposals, and that they were not submitted in very large numbers, was another indicator of shareholders' lack of activism and thus apathy.<sup>37</sup>

Shareholders also did not seek out engagement opportunities beyond the shareholder proposal process. Indeed, historically, the idea of shareholder engagement was virtually nonexistent.<sup>38</sup> Instead, except in very rare circumstances, neither shareholders nor corporate actors had any expectation that shareholders would seek out engagement opportunities, or that corporate actors would seek to engage with their shareholders.<sup>39</sup> The fact that shareholders were not interested in engagement, or otherwise expected to engage, underscored their apathy.

#### B. *Apathy as THE Governance Norm*

Most in the corporate community viewed shareholder apathy as rational. Several reasons were advanced to support this view. Perhaps the most cited reasons have been collective action and free riding problems. The collective action problem refers to the notion that, because of their dispersed nature, public company shareholders find it difficult to act collectively and thus find it difficult to ensure that their votes would have any meaningful impact on outcomes.<sup>40</sup> This difficulty makes it rational for such shareholders to refrain from dedicating the time or resources to become more active.<sup>41</sup> The free rider problem relates to the notion that other shareholders would be able to "free ride" off of any shareholder

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<sup>33</sup> See FAIRFAX, *supra* note 6, at 63-64; Palmiter, *supra* note 26, at 884.

<sup>34</sup> See Palmiter, *supra* note 26, at 883-84.

<sup>35</sup> See *id.*

<sup>36</sup> See FAIRFAX, *supra* note 6, at 63-64.

<sup>37</sup> See Black, *supra* note 2, at 527.

<sup>38</sup> See Fairfax, *supra* note 8, at 830.

<sup>39</sup> See *id.*

<sup>40</sup> See CLARK, *supra* note 3, at 390-96; Gordon, *supra* note 3, at 43; Velasco, *supra* note 17, at 417.

<sup>41</sup> See Easterbrook & Fischel, *supra* note 3, at 395 (suggesting that dispersed shareholders are rationally apathetic because their individual votes will not likely make a difference); Gordon, *supra* note 3, at 46 (describing high costs and low benefits of shareholders' active engagement); Stout, *supra* note 3, at 1169 (noting that dispersed shareholders were rationally apathetic); Velasco, *supra* note 17, at 417.

efforts aimed at devoting the resources to become informed about particular issues to be voted upon.<sup>42</sup> In this regard, the costs of voting, or of voting in an informed manner, were significantly outweighed by any benefits to be obtained.<sup>43</sup> Taken together, collective action and free riding problems explained the rationality of shareholder apathy, demonstrating why it made sense that shareholders have no incentive to devote the time or resources to engage in the voting process.

Most also viewed this apathy as normatively appropriate. Such a view primarily stemmed from a preference in favor of directors making business decisions without influence from shareholders. Such a preference was two-fold. On the one hand, shareholder influence was undesirable for many reasons. Public company shareholders suffer from informational asymmetries because they generally are not involved in the day-to-day affairs of the company and thus have limited knowledge of corporate affairs.<sup>44</sup> They also are not in the best position to gain needed information about the company and its operations, and otherwise may not have the requisite knowledge or expertise to make informed voting decisions.<sup>45</sup> Then too, shareholders may be motivated by their personal interests or interests unrelated to corporate ones, particularly because shareholders typically have no fiduciary duty to act in the corporation's best interests.<sup>46</sup> Each of these reasons renders shareholder activism undesirable.

Importantly, both corporate actors and shareholders embraced the appropriateness of shareholder apathy. Directors and officers clearly viewed shareholder apathy as preferable to shareholder activism or influence. Based on this view, directors and officers also saw shareholder engagement as unnecessary and unwarranted. Consistent with this view, Professor Bernard Black notes that proponents of shareholder apathy viewed the shareholder proposal process with "disdain," not only because it was irrational to think that shareholders would use the process, but also because any use would be

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<sup>42</sup> See Black, *supra* note 2, at 528 ("Free-rider problems work in tandem with the rational apathy of the free riders to discourage shareholder proposals from being made."); Blair & Stout, *supra* note 18, at 310 (noting that free rider problem tended to inspire rational apathy); Gordon, *supra* note 3, at 44, 46 (discussing free rider problem in the context of shareholder opposition to management decisions).

<sup>43</sup> See Gordon, *supra* note 3, at 43. *But see* Romano, *supra* note 21, at 1611 (noting that rational apathy story greatly overstates the cost of becoming informed).

<sup>44</sup> See Gordon, *supra* note 3, at 11-12 (discussing information asymmetry rationale as justification for managerial control in the context of dual-class stock).

<sup>45</sup> See George W. Dent, Jr., *The Essential Unity of Shareholders and the Myth of Investor Short-Termism*, 35 DEL. J. CORP. L. 97, 105, 133 (2010).

<sup>46</sup> See Lisa M. Fairfax, *Making the Corporation Safe for Shareholder Democracy*, 69 OHIO ST. L.J. 53, 101 (2008); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795, 831 (1993). Courts have recognized a duty for shareholders only as it relates to majority or controlling shareholders. See Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1266 (2008).

ineffective and likely a nuisance.<sup>47</sup> Shareholders appear to have a similar disdain, reflecting their agreement with the apathy norm. The lack of shareholder support for shareholder proposals could be viewed as their embrace of the belief that they do not find it appropriate for other shareholders to seek to influence important corporate matters. In this regard, the historical lack of support for such proposals may be a reflection of shareholders' normative rejection of shareholder activism. Moreover, shareholders' voting behaviors were viewed as their endorsement of shareholder apathy as a normative preference.<sup>48</sup>

The other rationale supporting a normative preference for shareholder apathy stemmed from the notion that directors and officers are better positioned than shareholders to make decisions on behalf of the corporation.<sup>49</sup> Unlike shareholders, directors not only have a duty to act in the corporation's best interests,<sup>50</sup> but also have the necessary knowledge and expertise to take such actions. Moreover, for those who believe that corporations should focus on maximizing the interests of all of their constituents, directors and officers are better positioned to engage in such focus, while shareholders may vote in a way that furthers their own personal interests without regard to other shareholders or other corporate stakeholders.<sup>51</sup> Shareholder apathy was embraced as the appropriate corporate governance norm because shareholder power was problematic while director power was sacrosanct.

### C. *The Naysayers*

To be sure, there was never universal consensus around the conventional wisdom of rational shareholder apathy either as a descriptive or normative matter.<sup>52</sup> From a descriptive standpoint, Professor Roberta Romano notes that the characterization of shareholders as rationally apathetic involves "strong and

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<sup>47</sup> See Black, *supra* note 2, at 527.

<sup>48</sup> See *id.* (describing rationally apathetic shareholder with little interest in voting); Stout, *supra* note 3, at 1180 (noting that investors have "eagerly" bought shares in companies structured to have weak shareholder rights); Lynn A. Stout, *The Mythical Benefits of Shareholder Control*, 93 VA. L. REV. 789, 803 (2007) (noting that shareholders prefer weak voting rights).

<sup>49</sup> See *supra* note 4 and accompanying text.

<sup>50</sup> See *supra* note 46 and accompanying text; see also Blair & Stout, *supra* note 18, at 293-94 (noting that while it has become commonplace to describe directors' duties as being owed to shareholders, case law makes it clear that directors' duties are owed to the corporation itself).

<sup>51</sup> See Blair & Stout, *supra* note 18, at 304-05; Stout, *supra* note 3, at 1170-71 (noting that Berle and Means "were not troubled" by shareholder apathy because they thought it more essential that directors and officers be allowed to run the public company for the benefit of employees, consumers and the broader society, in addition to shareholders).

<sup>52</sup> See William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264 (1992); Lisa M. Fairfax, *Doing Well While Doing Good: Reassessing the Scope of Directors' Fiduciary Obligations in For-Profit Corporations with Non-Shareholder Beneficiaries*, 59 WASH. & LEE L. REV. 409, 430 (2002).

questionable assumptions concerning investor behavior.”<sup>53</sup> Along these lines, several scholars have noted that the rational apathy theory was developed by political scientists to explain why people do not vote in political elections, not why they vote in a particular way—which is how many scholars have used the theory in the corporate governance context.<sup>54</sup> In other words, is it truly accurate to characterize shareholders’ decisions to vote with management as an indicator of apathy? Some have argued that while rational apathy can be used to explain situations in which shareholders refrain from voting, it cannot be used to explain shareholders’ decisions *to vote* and to vote in a particular manner.<sup>55</sup> Thus, many resisted the claim that shareholders’ voting behavior reflected “rational apathy.”

Such scholars pointed to evidence appearing to refute shareholder apathy related to voting. This evidence stemmed not only from the fact that shareholders voted (regardless of how that vote was aligned), but also from the fact that, in some circumstances, shareholders voted against management.<sup>56</sup> In fact, federal law requires some institutions to disclose their voting criteria.<sup>57</sup> Such a requirement has resulted in increased voting by many institutional shareholders.<sup>58</sup>

Then too, many contended that shareholders’ so-called apathy stemmed from legal impediments rather than an affirmative decision to refrain from voting.<sup>59</sup> As one scholar asserted, the rational apathy story assumes a “benign legal environment” pursuant to which “shareholders are passive despite legal efforts.”<sup>60</sup> Instead, shareholders are “hobbled by a complex web of legal rules” that make it difficult for them to be active.<sup>61</sup> In this regard, shareholder apathy stemmed from legal restraints rather than shareholder preference.<sup>62</sup>

Scholars also insisted that the changing shareholder landscape undercut the shareholder apathy narrative. Indeed, the shareholder landscape has evolved from one in which individual or retail shareholders hold most of the outstanding public shares to one in which institutions are the dominant public company

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<sup>53</sup> See Romano, *supra* note 21, at 1608.

<sup>54</sup> See Peter N. Flocos, *Toward a Liability Rule Approach to the “One Share, One Vote” Controversy: An Epitaph for the SEC’s Rule 19c-4?*, 138 U. PA. L. REV. 1761, 1792 (1990); Romano, *supra* note 21, at 1608.

<sup>55</sup> See Romano, *supra* note 21, at 1608.

<sup>56</sup> See *id.* at 1608-09.

<sup>57</sup> Tamara C. Belinfanti, *Shareholder Cultivatton and New Governance*, 38 DEL. J. CORP. L. 789, 805 (2014).

<sup>58</sup> See *id.*

<sup>59</sup> See Black, *supra* note 2, at 608 (pinpointing legal barriers, agenda control, and conflicts of interests as rationales for shareholder voting behavior).

<sup>60</sup> See *id.* at 523.

<sup>61</sup> See *id.*

<sup>62</sup> See *id.* at 524-25.

shareholders.<sup>63</sup> The growth of institutional shareholders has meant that share ownership is no longer dispersed. Instead, institutions hold large shares of public company stock, and such institutions hold shares in a significant number of public companies.<sup>64</sup> As shareholders become less dispersed, the presumption that their apathy is rational becomes less persuasive.

Scholars also disagreed with the notion that apathy was the preferable corporate governance norm. Such scholars instead insisted that shareholder activism served a crucial accountability function, and thus was needed to check the behavior of directors and officers.<sup>65</sup> This disagreement with the normative preference for shareholder apathy has been a long-standing and consistent feature of the corporate governance landscape and discourse.<sup>66</sup>

Regardless of this disagreement, even opponents of the shareholder apathy norm acknowledge the traditional dominance of that norm.<sup>67</sup> Thus, as Professor Black emphasizes, most modern corporate scholars on either side of the apathy norm debate accept the dominance of the shareholder apathy norm.<sup>68</sup> In addition, even as public share ownership became less dispersed and thus apathy appeared less rational, the cultural norm favoring apathy ensured that public company shareholders also remained wedded to the view that shareholder apathy was the most acceptable and appropriate governance norm.<sup>69</sup>

## II. ACTIVISM AS THE NEW NORMAL

This decade has witnessed a significant shift away from shareholder apathy both in a descriptive and normative manner. In a descriptive manner, this shift is reflected in a wave of actions that signal increased shareholder activism and influence. To be sure, individual shareholders, also referred to as retail investors, have not been caught in this wave. Instead, retail investors have continued to be apathetic even as institutional shareholder activism has increased significantly.<sup>70</sup> This Article acknowledges that the lack of increased activism by retail investors

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<sup>63</sup> See *id.* at 524-25, 567-69; Melissa Sawyer & Marc Trevino, Sullivan & Cromwell LLP, *Review and Analysis of 2017 U.S. Shareholder Activism*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Apr. 10, 2018), <https://corpgov.law.harvard.edu/2018/04/10/review-and-analysis-of-2017-u-s-shareholder-activism> [<https://perma.cc/8Y96-45NG>] (noting that concentration of ownership continues to rise).

<sup>64</sup> See Black, *supra* note 2, at 567-69; Sawyer & Trevino, *supra* note 63.

<sup>65</sup> See FAIRFAX, *supra* note 6, at 37-39; Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 870 (2005).

<sup>66</sup> See *supra* note 65.

<sup>67</sup> See Black, *supra* note 2, at 528 (noting that shareholder apathy is “widely accepted” by both sides of the debate related to its appropriateness).

<sup>68</sup> See *id.* at 522.

<sup>69</sup> See *id.* at 523, 532, 563-64.

<sup>70</sup> See Kobi Kastiel & Yaron Nili, *In Search of the “Absent” Shareholders: A New Solution to Retail Investors’ Apathy*, 41 DEL. J. CORP. L. 55, 60-61, 66 (2016).

is cause for concern.<sup>71</sup> However, the lack of activism by retail investors does not negate this Article's thesis, given that institutional shareholders dominate the public shareholder landscape,<sup>72</sup> and that institutional shareholder activism has clearly increased. Of note, this Article uses the term "activism" to refer to activities aimed at increasing shareholder influence and power over the corporation.

A. *Shareholder Campaigns to Enhance Voting Power*

Shareholders have strenuously campaigned to increase their voting power, particularly with respect to director elections. This Section will focus on such campaigns related to majority voting, board declassification, proxy access, and supermajority voting. While there has been significant debate related to the merits and benefits of these campaigns,<sup>73</sup> those who waged such campaigns viewed them as critical for enhancing shareholders' voting power and influence.<sup>74</sup> More importantly for purposes of this Article's thesis, the mere existence and vigor of such campaigns are remarkable because they fly in the face of the notion that shareholders would not seek to use—let alone enhance—their voting power. Thus, these campaigns highlight the shift away from shareholder apathy.

1. Majority Voting

One critical element of shareholder activism has been the majority voting campaign. In 2005, shareholders began advocating in earnest for majority voting to replace the rule of plurality voting in director elections.<sup>75</sup> Plurality voting refers to a system whereby directors are elected so long as they receive a plurality or most of the favorable votes cast, without regard to withheld votes or votes cast against them.<sup>76</sup> Under such a rule, in an uncontested election it would be possible for a director to be elected even if the overwhelming majority of shareholders withheld their votes against the director, because the plurality regime ensures that such a director is elected so long as she receives at least one vote in her favor.<sup>77</sup> By contrast, majority voting ties director election results to

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<sup>71</sup> See *id.* at 57, 69, 70-73.

<sup>72</sup> See FAIRFAX, *supra* note 6, at 46-47.

<sup>73</sup> See *id.* at 37-39. Compare Bebchuk, *supra* note 65, at 913-14 (arguing for increased shareholder power), with Bainbridge, *The Means and Ends*, *supra* note 4, at 558-60 (suggesting that corporate directors are in best position to manage public companies), and Bratton & Wachter, *supra* note 4, at 659 (“[Corporate directors] are better informed than the shareholders and thus better positioned to take responsibility for both monitoring and managing the firm and its externalities.”).

<sup>74</sup> See FAIRFAX, *supra* note 6, at 37-39.

<sup>75</sup> See Fairfax, *supra* note 46, at 65-66.

<sup>76</sup> *Id.* at 63-64.

<sup>77</sup> See *id.*



obtaining a majority of the shareholder vote.<sup>78</sup> Shareholders viewed plurality voting as undermining director accountability and shareholders' ability to impact election outcomes.<sup>79</sup> Spurred by this view, in 2005, shareholders began mobilizing to replace plurality voting with majority voting by filing a record number of shareholder proposals on the issue.<sup>80</sup> Those proposals quickly began averaging fifty percent or more shareholder support.<sup>81</sup> Shareholders' efforts to dismantle plurality voting exemplify the new era of shareholder activism.

## 2. Board Declassification

Another critical element of shareholder activism has been aimed at board declassification. Board declassification refers to efforts to eliminate classified or staggered boards—that is, boards in which only a percentage of directors are elected each year—and replace them with boards that are elected annually.<sup>82</sup> Shareholders consider classified boards to be an entrenchment mechanism aimed at undermining their voting power by weakening their ability to replace the entire board in one election cycle.<sup>83</sup> Shareholders and their advocates vigorously pushed for board declassification.<sup>84</sup> The average shareholder support for board declassification has topped fifty percent for over a decade (and has often averaged close to seventy to eighty percent of the shareholder vote).<sup>85</sup> Like majority voting, shareholders' efforts to enact annual elections not only

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<sup>78</sup> There are essentially two forms of majority voting regimes. *See id.* at 64-66. In a “true majority voting” regime, director nominees must receive a majority of the shareholder vote to be elected. *See id.* at 64. Under a “plurality plus” regime, plurality voting remains the default, but when a director fails to receive a majority of the vote, she must tender her resignation, and the board has some period of time (typically ninety days) to determine if it will accept the resignation. *See id.* at 65.

<sup>79</sup> *See* FAIRFAX, *supra* note 6, at 88-90; Fairfax, *supra* note 46, at 63.

<sup>80</sup> *See* Fairfax, *supra* note 46, at 61-70.

<sup>81</sup> *See* FAIRFAX, *supra* note 6, at 90; SULLIVAN & CROMWELL LLP, *supra* note 10, at 5.

<sup>82</sup> *See* FAIRFAX, *supra* note 6, at 80.

<sup>83</sup> *See* Fairfax, *supra* note 8, at 828.

<sup>84</sup> One pivotal board declassification advocate has been Harvard Professor Lucian Bebchuk. Professor Bebchuk established the Shareholder Rights Project, a clinical and academic program at Harvard Law School that worked with institutional investors to submit close to two hundred shareholder proposals aimed at dismantling classified boards. *See* K.J. Cremers & Simone Sepe, Board Declassification Activism: The Financial Value of the Shareholder Rights Project 6-8 (June 2017) (unpublished manuscript), <https://ssrn.com/abstract=2962162>. The strength of this advocacy work is highlighted not only by its success, but also by the fact that in 2015, once the Shareholder Rights Project stopped submitting proposals, the number of submissions declined significantly. *See* SULLIVAN & CROMWELL LLP, 2015 PROXY SEASON REVIEW 9 (2015), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_2015\\_Proxy\\_Season\\_Review.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015_Proxy_Season_Review.pdf) [<https://perma.cc/R32B-FZMQ>].

<sup>85</sup> *See* FAIRFAX, *supra* note 6, at 81; SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 21 (2018), <https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf> [<https://perma.cc/9V54-XRNV>].

highlight their desire to make boards more accountable to shareholders, but also symbolize shareholders' willingness to abandon apathy.

### 3. Supermajority Voting

Supermajority voting refers to rules that require that certain fundamental transactions receive more than a simple majority shareholder vote in order to be approved. Shareholders view these rules as inhibiting their voting power. Shareholders contend that dismantling supermajority vote rules will give them a greater voice in critical corporate actions including amendments to the charter and bylaws, removal of directors, and approval of fundamental transactions such as mergers and acquisitions.<sup>86</sup>

Thus, shareholders have sought to displace supermajority rules with those that would enable such transactions to be approved with a simple majority vote. Proposals related to supermajority rules have been very popular and have garnered significant shareholder support. As one commentator noted, "When these proposals come to vote, they usually pass."<sup>87</sup> Thus, shareholder support for altering supermajority votes averaged seventy-three percent in 2018, seventy-four percent in 2017, and sixty percent in 2016.<sup>88</sup>

Board declassification, majority voting, and supermajority proposals have been the three most common shareholder proposals, as well as the three proposals most likely to garner significant shareholder support.<sup>89</sup> The strength and success of campaigns related to such proposals reflect the growing trend toward embracing shareholder activism over apathy.

### 4. Proxy Access

Many shareholders and their advocates have long viewed proxy access (a rule that would enable shareholders to nominate candidates of their choice on the corporation's proxy statement) as pivotal to shareholders' ability to meaningfully exercise their voting power.<sup>90</sup> Thus, shareholders have sought proxy access for decades.<sup>91</sup> In the past, federal law prohibited shareholders from using the shareholder proposal process to advance proxy access.<sup>92</sup> However, in 2010, the Securities and Exchange Commission ("SEC") passed two proxy access rules—one that mandated proxy access and one that allowed shareholders

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<sup>86</sup> See SULLIVAN & CROMWELL LLP, *supra* note 84, at 21.

<sup>87</sup> See SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW 11 (2017), [https://www.sullcrom.com/siteFiles/Publications/SC\\_Publication\\_2017\\_Proxy\\_Season\\_Review.pdf](https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2017_Proxy_Season_Review.pdf) [<https://perma.cc/ADU2-U75D>].

<sup>88</sup> *Id.*; SULLIVAN & CROMWELL LLP, *supra* note 85, at 21.

<sup>89</sup> See SULLIVAN & CROMWELL LLP, *supra* note 85, at 22; SULLIVAN & CROMWELL LLP, *supra* note 10, at 5.

<sup>90</sup> See FAIRFAX, *supra* note 6, at 130.

<sup>91</sup> *See id.*

<sup>92</sup> *See id.* at 128.

to submit proxy access shareholder proposals.<sup>93</sup> The Court of Appeals for the D.C. Circuit overturned the mandated proxy access rule, but left untouched the SEC rule allowing shareholders to submit proxy access bylaws.<sup>94</sup> Beginning in 2015, proxy access became the most popular shareholder proposal submitted, with the number of submissions skyrocketing by over four hundred percent from 2014 to 2105.<sup>95</sup> By 2017, proxy access had become the most prominent of shareholder proposals and the proposal that received the highest level of majority support.<sup>96</sup> Thus, it received average shareholder support of fifty-eight percent in 2017, fifty-one percent of the vote in 2016,<sup>97</sup> and fifty-five percent in 2015.<sup>98</sup> By 2018, the number of proxy access proposals had dropped due primarily to the “widespread and continued adoption of proxy access bylaws at larger companies.”<sup>99</sup>

#### B. *Votes Against Managerial Preferences*

To the extent that the hallmark of shareholder apathy is shareholders’ overwhelming tendency to vote in a manner consistent with managerial preferences, shareholders have recently rebuked that hallmark in several ways. First, there has been a rise in shareholder willingness to reject directors. This includes an increase in the number of directors against whom shareholders withhold their vote,<sup>100</sup> as well as an increase in the number of directors who receive less than a majority of the vote.<sup>101</sup> To be sure, the overall percentage of directors who do not receive an overwhelming majority of the shareholder vote remains relatively small.<sup>102</sup> Some have construed this to mean that majority voting has no impact or otherwise that shareholders are not willing to exercise

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<sup>93</sup> See 17 C.F.R. § 240.14a-8(i)(8) (2018); FAIRFAX, *supra* note 6, at 131, 136-37.

<sup>94</sup> See *Bus. Roundtable v. Sec. Exch. Comm’n*, 647 F.3d 1144, 1146 (D.C. Cir. 2011).

<sup>95</sup> See SULLIVAN & CROMWELL LLP, *supra* note 84, at 4.

<sup>96</sup> See GIBSON DUNN, SHAREHOLDER PROPOSAL DEVELOPMENTS DURING THE 2018 PROXY SEASON 4-6 (2018), <https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf> [<https://perma.cc/JXT3-UUFH>].

<sup>97</sup> See SULLIVAN & CROMWELL LLP, *supra* note 87, at 6.

<sup>98</sup> See SULLIVAN & CROMWELL LLP, *supra* note 84, at 4.

<sup>99</sup> See SULLIVAN & CROMWELL LLP, *supra* note 85, at 16.

<sup>100</sup> See Proxy Insight, *Board of the Dead*, PROXY MONTHLY, Nov. 2017, at 7; KOSMAS PAPADOPULOS, INSTITUTIONAL S’HOLDER SERVS., AN EARLY LOOK AT THE US 2018 PROXY SEASON TRENDS 2 (2018), <https://www.issgovernance.com/file/publications/early-look-us-proxy-season-trends.pdf?elqTrackId=7846f924a48945b3a09d4b10a6fcbde9&elq=9327df5b6e4b48bfbe2644dc687e188&elqaid=1192&elqat=1&elqCampaignId=> [<https://perma.cc/Q7LP-XHGQ>].

<sup>101</sup> See Proxy Insight, *supra* note 100, at 7.

<sup>102</sup> See *id.*

their voting authority.<sup>103</sup> However, the mere fact that shareholders are willing to defy management—even if in only a handful of cases—underscores their activism. Then too, the data related to director elections could indicate shareholders’ judicious use of their director election power, rather than an unwillingness to use it.<sup>104</sup> Second, there has been a rise in proxy contests coupled with a rise in shareholder support of those contests, and hence in shareholder success in such contests.<sup>105</sup> Commentators characterized the historical lack of proxy contests and shareholder support for those contests as a key symbol of shareholder apathy. By sharp contrast, the growth in proxy contests and the related growth in the success of such contests is a strong indicator of activism. Third, there has been a rise in shareholder support of shareholder proposals.<sup>106</sup> As Section II.A revealed, many shareholder proposals have begun receiving a majority of the shareholder vote, with some votes being well in excess of a simple majority. This rise is a critical signal of activism. The vast majority of shareholder proposals are accompanied by a recommendation from the board to vote against the proposal. Shareholders’ willingness to ignore that recommendation runs counter to the apathy narrative, highlighting the shift away from that narrative.

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<sup>103</sup> See Stephen Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119, 1122, 1128 (2016); William K. Sjoström & Young Kim, *Majority Voting for the Election of Directors*, 40 CONN. L. REV. 459, 469 (2007).

<sup>104</sup> See Choi et al., *supra* note 103, at 1132-33, 1173 (discussing shareholder restraint hypothesis and evidence of shareholder restraint); Sjoström & Kim, *supra* note 103, at 468-69 (“This real risk of losing the election would in turn ‘make directors more accountable to shareholders.’”).

<sup>105</sup> See Activist Insight, *Taking Care of Business: A Look at Shareholder Activism in 2014 and Beyond*, in ACTIVIST INVESTING: AN ANNUAL REVIEW OF TRENDS IN SHAREHOLDER ACTIVISM 8, 11 (2015), [http://www.shareholderforum.com/access/Library/20150130\\_ActivistInsight-SRZ.pdf](http://www.shareholderforum.com/access/Library/20150130_ActivistInsight-SRZ.pdf) [<https://perma.cc/9YN8-BX7S>] (discussing record number of activist campaigns in 2014); Martin Lipton, Watchell, Lipton, Rosen & Katz, *Some Thoughts for Boards of Directors in 2015*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Dec. 2, 2014), <http://corpgov.law.harvard.edu/2014/12/02/some-thoughts-for-boards-of-directors-in-2015/> [<https://perma.cc/5HML-3NPZ>] (noting that “[t]he number of activist attacks has surged from 27 in 2000 to nearly 250 year-to-date in 2014, in addition to numerous undisclosed behind-the-scenes situations”); Warren S. de Wied, *Proxy Contests*, PRAC. L.J., Nov. 2010, at 32, 33, <https://www.wsgr.com/publications/PDFSearch/dewied1110.pdf> [<https://perma.cc/X7DZ-F2RW>] (noting that over the past ten years there has been an eighty-seven percent increase in frequency of proxy contests); see also LAZARD’S S’HOLDER ADVISORY GRP., 2017 ACTIVISM YEAR IN REVIEW 2 (2018), <https://www.lazard.com/media/450414/lazards-review-of-shareholder-activism-q4-2017pdf.pdf> [<https://perma.cc/GDE5-45AP>]; Anthony Garcia, *In Proxy Voting, Public Disclosures Often Lead to Private Agreements*, FACTSET INSIGHT (Jan. 5, 2015), <https://insight.factset.com/in-proxy-voting-public-disclosures-often-lead-to-private-agreements> [<https://perma.cc/R3JC-WX5Q>] (showing general rise in proxy fights and a “high watermark” in 2009).

<sup>106</sup> See GIBSON DUNN, *supra* note 96, at 1 (noting that average support for proposals has increased almost four percentage points).

### C. *Engagement Activities*

Shareholders' lack of engagement, coupled with their apparent lack of interest in engagement, has been replaced by increased calls for engagement. This replacement is yet another indicator of the demise of shareholder apathy.

#### 1. Shareholder Proposals

In contrast to the apathy era in which very few shareholder proposals were submitted or supported, there has been a steady growth in this area. In the last decade, shareholders have submitted a record number of corporate governance proposals aimed at enhancing their influence over director elections and corporate affairs.<sup>107</sup> Moreover, there has been significant growth in shareholder support for those proposals.<sup>108</sup>

#### 2. Beyond Proposals

There also has been a steady rise in shareholder calls for increased engagement with the board and officers outside of the proposal process and the annual meeting.<sup>109</sup> Studies reveal that twenty-five years ago, the topic of shareholder communication outside of the limited platform of shareholder proposals had not yet surfaced.<sup>110</sup> By comparison, current interactions between

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<sup>107</sup> Over the last decade, there have been several years where the total number of shareholder proposals filed reached record highs. Even as the overall number of proposals have declined in the last two or three years, shareholder support for such proposals has increased. *See id.* at 2. A record high volume of shareholder proposals was reached in 2008 and 2009; 2012 and 2013 also showed an increased volume. *See* EY CTR. FOR BD. MATTERS, LET'S TALK: GOVERNANCE: 2014 PROXY SEASON REVIEW 6 (July 2014), [http://www.ey.com/Publication/vwLUAssets/ey-proxy-season-review/\\$FILE/ey-proxy-season-review.pdf](http://www.ey.com/Publication/vwLUAssets/ey-proxy-season-review/$FILE/ey-proxy-season-review.pdf) [<https://perma.cc/7AW3-XSQC>] (noting in recent years the number of shareholder proposals submissions have been at an "all-time high"); Matteo Tonello, The Conference Bd., *Proxy Voting Analytics (2009-2013)*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Sept. 26, 2013), <https://corpgov.law.harvard.edu/2013/09/26/proxy-voting-analytics-2009-2013/> [<https://perma.cc/UM9S-7MYD>]; Matteo Tonello, The Conference Bd., *Proxy Voting Analytics (2008-2012)*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Feb. 24, 2013), <https://corpgov.law.harvard.edu/2013/02/24/proxy-voting-analytics-2008-2012/> [<https://perma.cc/D2U5-WJ3A>]. There was a slight decline in 2017 and 2018, but there was also an increase in shareholder support for proposals. *See* GIBSON DUNN, *supra* note 96, at 3.

<sup>108</sup> *See* GIBSON DUNN, *supra* note 96, at 1.

<sup>109</sup> *See* Fairfax, *supra* note 8, at 833; James Kim & Jason D. Schloetzer, Conference Bd., *Global Trends in Board-Shareholder Engagement*, DIRECTOR NOTES 1 (Oct. 2013), <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=2618> [<https://perma.cc/M3JF-7A4W>].

<sup>110</sup> *See* Susan S. Boren et al., Spencer Stuart, *Why They Still Do It: Directors' Motivations for Joining a Board*, POINT OF VIEW: A SPECIAL ISSUE FOCUSING ON TODAY'S BOARD & CEO AGENDA 5 (2010), <https://www.spencerstuart.com/research-and-insight/why-they-still-do-it-understanding-directors-motivations-for-joining-a-board> [<https://perma.cc/Y7M3-TVRF>].

shareholders and boards are on the rise.<sup>111</sup> Boards report a rising increase in contact from shareholders regarding specific governance-related topics.<sup>112</sup> In 2018, seventy-seven percent of S&P 500 companies disclosed engaging with shareholders over the previous years, which was up from fifty-six percent in 2015.<sup>113</sup> Moreover, director involvement in such engagement has increased. In 2015, less than ten percent of S&P 500 companies indicated that their directors were involved in engagement efforts with shareholders.<sup>114</sup> In 2018, over a quarter of S&P 500 companies so indicated.<sup>115</sup> A 2018 National Association of Corporate Directors (“NACD”) study found that for the first time, a majority of their respondents had a board representative meet with institutional shareholders in the prior year.<sup>116</sup> As another study emphasized, “outreach to and direct engagement with shareholders cements itself as a key feature of the governance landscape.”<sup>117</sup>

An NACD report notes that while communications between directors and shareholders is not a new idea, it has become a new and urgent priority.<sup>118</sup> Engagement outside of the annual meeting and shareholder proposal process is perhaps more remarkable because it reveals that shareholders are not simply active but are active year-round. The rise in engagement is another indicator of the shift away from apathy.

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<sup>111</sup> See SPENCER STUART, 2017: SPENCER STUART U.S. BOARD INDEX 7, 33 (2017), [https://www.spencerstuart.com/~media/ssbi2017/ssbi\\_2017\\_final.pdf](https://www.spencerstuart.com/~media/ssbi2017/ssbi_2017_final.pdf) [<https://perma.cc/3JK5-J3FB>] (noting increase of engagement from thirty-nine percent in 2016 to fifty-five percent in 2017).

<sup>112</sup> See *id.* (noting that fifty-five percent of boards (versus thirty-nine percent in 2016) reported being contacted by large institutional investors or their largest shareholders to discuss governance related issues).

<sup>113</sup> See EY CTR. FOR BD. MATTERS, 2018 PROXY SEASON REVIEW 4 (July 2018), [https://www.ey.com/Publication/vwLUAssets/EY-cbm-proxy-season-review-2018/\\$FILE/EY-cbm-proxy-season-review-2018.pdf](https://www.ey.com/Publication/vwLUAssets/EY-cbm-proxy-season-review-2018/$FILE/EY-cbm-proxy-season-review-2018.pdf) [<https://perma.cc/M8YZ-JK59>].

<sup>114</sup> See *id.*

<sup>115</sup> See *id.*; SPENCER STUART, *supra* note 111, at 34 (noting that many shareholders engage directly with directors and the CEO, rather than investor relations officer of general counsel).

<sup>116</sup> See NAT’L ASS’N OF CORP. DIRS., *supra* note 8, at 3. Most of those meetings include the board chair or lead director. See *id.*

<sup>117</sup> See EY CTR. FOR BD. MATTERS, *supra* note 113, at 4.

<sup>118</sup> *Report of the NACD Blue Ribbon Commission on Board-Shareholder Communications*, NAT’L ASS’N OF CORP. DIRECTORS (2014), <https://www.nacdonline.org/insights/publications.cfm?ItemNumber=682> [<https://perma.cc/BQ7D-WGL7>] (“Few priorities are more urgent for boards today than communication with their shareholders. The need for engagement, however, is not a recent addition to leading governance issues.”); see also NAT’L ASS’N OF CORP. DIRS., *supra* note 8, at 24 (noting that shareholder engagement has evolved to “more year-round activity”).

No one can question the fact that public company shareholders today are far from apathetic. They vote. They vote against management preferences, looking to unseat directors and alter corporate policies and practices. They engage. They engage year-round. Shareholder apathy, as a descriptive matter, appears to be dead. Instead, as the NACD aptly notes, “year-round shareholder activism” is becoming the “new norm in the American boardroom.”<sup>119</sup>

### III. ACTIVISM AS THE NEW NORM

The descriptive shift has been accompanied by a normative shift. Shareholders as well as corporate officers and directors have rejected the propriety of apathy and embraced the appropriateness of activism, at least at some level and for some shareholders. In other words, shareholder activism has emerged as the new corporate governance norm. What does this norm encompass? It encompasses the belief that shareholders should actively engage with the corporation by using their vote to influence corporate elections and other corporate governance matters. The norm also encompasses the belief that shareholders should actively engage with corporations by engaging—and thereby communicating—with corporate officers and directors on a regular basis. Both of these beliefs run counter to the apathy norm while symbolizing a preference for activism.

#### A. *The Shareholder Shift*

The very fact that shareholders not only have engaged in campaigns aimed at augmenting their voting power, but also have used that voting power to alter corporate boards, practices and procedures, and to influence corporate policies, demonstrates a clear shift in shareholders’ normative understanding of their role.<sup>120</sup> Historically, governance experts pointed to the fact that shareholders were not active as clear evidence that shareholders did not believe that they ought to be active. In this respect, shareholder apathy itself served as the compelling evidence that shareholders had a normative preference for apathy. In this same vein, shareholders’ activism can be viewed as evidence of their normative preference for such activism.

The historically strong embrace of apathy further underscores this evidence, making shareholders’ shift towards activism especially remarkable. Evidence suggested that shareholders continued to embrace the apathy norm even when it

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<sup>119</sup> *Director Essentials: Preparing the Board for Shareholder Activism: Executive Summary*, NAT’L ASS’N CORP. DIRECTORS (2018), <https://www.nacdonline.org/insights/publications.cfm?ItemNumber=62968> [<https://perma.cc/ASG9-UDWP>].

<sup>120</sup> Through say on pay, shareholders also have used their ability to vote to influence corporate packages related to compensation. See Jill Fisch, Darius Palia & Steven Davidoff Solomon, *Is Say on Pay All About Pay? The Impact of Firm Performance*, 8 HARV. BUS. L. REV. 101, 102 (2018).

was no longer rational for them to do so.<sup>121</sup> Hence, once institutional shareholders dominated the public company shareholder landscape, undermining the extent to which public company shareholders were dispersed, the narrative of rational apathy based on collective action and free-rider concerns seemed less sanguine.<sup>122</sup> Nevertheless, shareholders remained apathetic. Some suggested that one reason for this continued embrace of apathy was shareholders' continued belief that activism was not normatively appropriate.<sup>123</sup> This means that the apathy norm was so powerful that shareholders continued to embrace it even when such embrace may not have been in their best interests. From this perspective, shareholders' embrace of activism in light of the historical dominance of apathy as the normative preference not only indicates that shareholders have consciously decided to embrace such activism, but also that they have consciously made the choice that activism is preferable to apathy.

Shareholders' desire for engagement with corporate actors is also compelling evidence of the normative embrace of shareholder activism. Indeed, apathy was typified by shareholders' apparent desire to remain voiceless. Consistent with this desire is the fact that shareholder communication with the corporation in general, and the board in particular, especially outside of the annual meeting, was virtually unheard of.<sup>124</sup> Now however, shareholder communication with the corporation has become standard practice: "Shareholders increasingly *want* to engage with boards on a range of governance issues, including succession, compensation, risk oversight and other concerns."<sup>125</sup> Shareholders have requested, and in some cases demanded, opportunities to interact with directors and officers.<sup>126</sup> The fact that shareholders specifically reach out to corporations reflects their rejection of apathy and their normative belief that they should be actively engaging with corporations.

Yet another indicator of the normative acceptance of shareholder activism can be seen in the rationale for shareholders' voting behavior in director elections. To be sure, the fact that shareholders vote in such elections, and that they are willing to withhold their vote against certain directors, undercuts the apathy narrative. As mentioned in Section II.B, shareholders continue to vote for most directors and in large percentages. However, such voting behavior does not negate the fact that shareholders clearly believe that they should have enhanced voting rights—as evidenced by their fight to obtain majority voting. Also, it does not negate the notion that directors may be receiving such strong vote totals

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<sup>121</sup> See Black, *supra* note 2, at 563-64.

<sup>122</sup> See *id.* at 563; Romano, *supra* note 46, at 795, 822.

<sup>123</sup> See Black, *supra* note 2, at 522.

<sup>124</sup> See *supra* notes 32-39 and accompanying text.

<sup>125</sup> See SPENCER STUART, *supra* note 111, at 7 (emphasis added).

<sup>126</sup> See Fairfax, *supra* note 8, at 822.



because they are viewed as responsive to shareholders.<sup>127</sup> But most telling are the reasons why shareholders decide to withhold their votes. The primary reason why shareholders will withhold their vote against directors is directors' perceived lack of responsiveness to shareholder concerns.<sup>128</sup> The percentage of directors who receive less than a majority support is very low, but it is "relatively significant" for those directors deemed to be unresponsive to shareholder concerns.<sup>129</sup> Governance experts have noted that shareholders take this issue "particularly seriously."<sup>130</sup> This suggests that shareholders believe directors should be responsive to them. Such a belief is incompatible with the notion that shareholders should be apathetic. Such a belief, therefore, reflects shareholders' embrace of activism and the appropriateness of shareholder influence.

#### 1. Everybody's In

Shareholder acceptance of activism is further highlighted by the fact that a broad spectrum of shareholders has embraced activism. If only a limited number or type of shareholder were engaging in activism, that fact would undermine the notion that public shareholders as a group have rejected apathy in favor of activism.

At first glance, evidence suggests that this may be the case. For example, shareholder proposals are often submitted by a relatively small group of shareholders.<sup>131</sup> Three individuals are responsible for over forty percent of shareholder proposal submissions and the vast majority of shareholder governance-related proposals.<sup>132</sup> Moreover, not only are a small number of entities responsible for shareholder proposal submissions from institutional shareholders, but also the same type of institutional shareholder—the public pension fund—submits the large majority of shareholder proposals.<sup>133</sup> In this regard, it could be suggested that focusing on the number of shareholder proposals as a reflection of activism may be misleading.

However, this suggestion is incorrect. First, shareholder support of shareholder proposals has risen significantly during this era, with many proposals receiving a majority and at times well over a majority of shareholder

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<sup>127</sup> See Choi et al., *supra* note 103, at 1123, 1130 (discussing deterrence or accountability hypothesis); Sjoström & Kim, *supra* note 103, at 468-69.

<sup>128</sup> See SULLIVAN & CROMWELL LLP, *supra* note 87, at 2.

<sup>129</sup> See *id.* at 23 (reporting twenty-three percent of directors received less than majority support).

<sup>130</sup> See *id.* at 27.

<sup>131</sup> See SULLIVAN & CROMWELL LLP, *supra* note 85, at 3-4.

<sup>132</sup> See *id.* at 4.

<sup>133</sup> See *id.* For many, the fact that public pension funds submit shareholder proposals may be viewed as unremarkable because such funds historically have been the primary shareholders responsible for shareholder proposal submissions.

support.<sup>134</sup> Public pension fund holdings fall well short of a majority. Thus, this majority support stems from other shareholders within the corporation, reflecting a broad base of support among all shareholders. Commentators have concurred that the broad level of support for many shareholder proposals can be characterized as an increase in traction among other types of institutional shareholders.<sup>135</sup>

Second, the fact that other shareholders have made the decision to support the actions of pension funds is itself a sign of an embrace of activism as an appropriate corporate governance mechanism. Traditionally, pension fund activism was viewed with skepticism.<sup>136</sup> Shareholders viewed pension funds' behavior as inappropriate because they were seeking to step out of their normatively appropriate role and become more active.<sup>137</sup> As a consequence, many shareholders were leery of aligning themselves with pension fund activism. The fact that shareholders are now willing to align themselves with activism led by such funds is testament to the fact that more shareholders have now come to view activism as acceptable and appropriate.

Similarly, some have insisted that activism is limited to hedge funds, whose activism many view as problematic and unacceptable.<sup>138</sup> Indeed, often the main proponents of proxy contests are hedge funds. Moreover, hedge funds have been particularly aggressive in this new era of activism, causing companies to engage in practices that many have suggested are not in the best interests of the corporation.<sup>139</sup> However, similar to the shareholder proposal context, hedge funds have not acted alone. Instead, they have managed to win proxy contests and other activist campaigns by garnering the support of other shareholders. Hence, while hedge funds may have led the charge, the fact that other shareholders support them is strong evidence for the activism norm. Indeed, the fact that other shareholders align themselves with shareholders, such as hedge funds, that have openly and unapologetically embraced the activism norm is very

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<sup>134</sup> See *supra* note 108 and accompanying text.

<sup>135</sup> See GIBSON DUNN, *supra* note 96, at 1.

<sup>136</sup> See Romano, *supra* note 46, at 796.

<sup>137</sup> See *id.* at 797.

<sup>138</sup> Thomas W. Briggs, *Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis*, 32 J. CORP. L. 681, 723 (2007); Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021, 1028 (2007); Lipton, *supra* note 105.

<sup>139</sup> See Stout, *supra* note 3, at 1184; Lipton, *supra* note 105. To be sure, there are studies that have refuted the claim that hedge funds have been detrimental to the corporation and its shareholders. See Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085, 1085 (2015); Lucian A. Bebchuk, *The Myth That Insulating Boards Serves Long-Term Value*, 113 COLUM. L. REV. 1637, 1640-41 (2013); Robin Greenwood & Michael Schor, *Investor Activism and Takeovers*, 92 J. FIN. ECON. 362, 370 (2009).

strong evidence that other shareholders have begun to view that norm as beneficial and acceptable.

Then too, the embrace of activism is even more significant because the shareholders traditionally viewed as most likely to embrace apathy also have endorsed activism. Today, mutual funds and other asset managers have become increasingly vocal in their support and affirmation of shareholder activism as an appropriate governance tool.<sup>140</sup> Mutual funds and asset managers were viewed as shareholders most likely to endorse the apathy norm. However, even these shareholders have become more active. Moreover, even these shareholders have affirmatively chosen to align themselves with shareholders, such as hedge funds and public pension funds, that are viewed as symbolizing the propriety of activism.<sup>141</sup>

## 2. No More Rubber Stamps?

Another key indicator of the normative acceptance of activism is the fact that shareholders are willing to go against management and their recommendations. For many, the *sin qua non* of shareholder apathy rested in the fact that shareholders rubber-stamped managerial preferences.<sup>142</sup> By contrast, shareholders today are challenging those preferences. The success of proxy contests is the most compelling example of this phenomenon because it reflects shareholders' willingness to vote against directors. Shareholders' support of shareholder proposals also highlights the shareholder activism norm as shareholders have demonstrated their willingness to repeatedly vote against management recommendations in very large numbers.

## 3. Proxy Advisors

Some might say that shareholders' voting behaviors are not the product of shareholder choice, but instead reflect the choice of others—proxy advisory

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<sup>140</sup> See LAZARD'S S'HOLDER ADVISORY GRP., *supra* note 105, at 1, 9 (noting rise in index funds' willingness to support dissidents in proxy fights); SULLIVAN & CROMWELL LLP, *supra* note 85, at 4; Tony Boyd, *Larry Fink Says BlackRock Will Take Activism to a 'Whole New Level,'* FIN. REV. (Nov. 1, 2017, 5:54 AM), <https://www.afr.com/business/larry-fink-says-blackrock-will-take-activism-to-a-whole-new-level-20171031-gzc2lt> [<https://perma.cc/N3W8-G5WM>]; Daniel Gross, *Some Mutual Funds Are Joining the Activist Bandwagon*, N.Y. TIMES (Jan. 15, 2006), <https://www.nytimes.com/2006/01/15/business/mut-fund/some-mutual-funds-are-joining-the-activist-bandwagon.html>; *Mutual Funds Joining Shareholder Activists in New Trend*, VALUEWALK (Aug. 10, 2015, 12:27 PM), <https://www.valuewalk.com/2015/08/mutual-funds-joining-shareholder-activists-in-new-trend/> [<https://perma.cc/EX6V-SZPX>]; Sawyer & Trevino, *supra* note 63 (noting rise in index support of dissident campaigns); Ryan Vlastelica, *Passive Funds Aren't Afraid to Throw Their Weight Around as Activists*, MARKETWATCH (May 1, 2017, 3:07 PM), <https://www.marketwatch.com/story/passive-funds-arent-afraid-to-throw-their-weight-around-as-activists-2017-05-01> [<https://perma.cc/9P5U-86R8>].

<sup>141</sup> See *supra* note 140.

<sup>142</sup> See *supra* note 12 and accompanying text.

firms. Significant concerns have been raised about the influence of proxy advisory firms on shareholder voting.<sup>143</sup> Evidence demonstrates that such firms have the ability to sway up to twenty percent of the shareholder vote.<sup>144</sup> In this regard, it may be a misnomer to suggest that shareholder voting is reflective of their normative preferences. However, the reliance on proxy advisory firms is only further evidence of the shareholder activism norm. First, the mere fact that shareholders are seeking out guidance on how they should exercise their vote is evidence of rejection of the apathy norm, which presumes that shareholders have no desire to vote, let alone vote responsibly. Second, the mere fact that shareholders are choosing to vote or otherwise follow the directions of some entity other than directors is enough to undercut the apathy norm. Hence the reliance on such firms is further evidence of the acceptance of activism.

## B. *The Corporate Shift*

### 1. By Their Own Conduct

The fact that corporations have voluntarily implemented policies and procedures whose purpose is to increase shareholders' voting power and influence reveals a normative acceptance of shareholder activism. This fact can be seen in a wave of acceptance. First, majority voting. In 2004, fewer than one hundred companies,<sup>145</sup> and fewer than thirty S&P 500 companies, had majority voting regimes.<sup>146</sup> Today, nearly ninety-three percent of S&P 500 companies have some form of majority vote regime.<sup>147</sup> Second, board declassification. In 2018, ninety-five percent of S&P 100 companies and ninety-two percent of S&P 500 companies had declassified boards as compared to fifty-five percent of S&P 500 companies in 2004.<sup>148</sup> Third, proxy access. Only two companies had

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<sup>143</sup> See Belinfanti, *supra* note 57, at 794; Fisch, Palia & Davidoff Solomon, *supra* note 120, at 129.

<sup>144</sup> See Fisch, Palia & Davidoff Solomon, *supra* note 120, at 113-14.

<sup>145</sup> See Claudia H. Allen, Study of Majority Voting in Director Elections 10 n.9 (Nov. 12, 2007) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2475122](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2475122) (revealing around one hundred corporations with majority voting regimes before majority vote campaign began).

<sup>146</sup> See Brooke A. Masters, *Shareholders Flex Muscles; Proxy Measures Pushing Corporate Accountability Gain Support*, WASH. POST, June 17, 2006, at D1.

<sup>147</sup> *Zombie Directors and Board Accountability*, ROBBINS GELLER RUDMAN & DOWD LLP (July 16, 2014), <http://www.rgrdlaw.com/news-item-Zombie-Directors-Board-Accountability-071614.html> [<https://perma.cc/44KB-QNJW>]; see also Marc S. Gerber, *US Corporate Governance: Boards of Directors Face Increased Scrutiny*, SKADDEN (Jan. 16, 2014), <http://www.skadden.com/insights/us-corporate-governance-boards-directors-face-increased-scrutiny> (reporting that as of January 2014, almost ninety percent of S&P companies had adopted a majority voting regime).

<sup>148</sup> See SPENCER STUART, 2018 UNITED STATES SPENCER STUART BOARD INDEX 15 (2018), [https://www.spencerstuart.com/-/media/2018/october/ssbi\\_2018.pdf](https://www.spencerstuart.com/-/media/2018/october/ssbi_2018.pdf) [<https://perma.cc/CGG4-LHDR>]; SPENCER STUART, 2014 SPENCER STUART BOARD INDEX 15 (2014),

adopted proxy access in 2013.<sup>149</sup> Only fifteen companies had proxy access prior to 2015.<sup>150</sup> As of July 2017, over eighty-five percent of S&P 100 companies and over sixty percent of S&P 500 companies had adopted proxy access provisions.<sup>151</sup> As of June 2018, over seventy percent of S&P 500 companies had adopted proxy access.<sup>152</sup>

Individually and collectively, the board's implementation of these procedures, clearly aimed at enhancing shareholder power and influence, appears to evidence a belief that such power and influence are appropriate. Shareholder proposals are non-binding and hence even if they receive a majority of the shareholder vote, the board is under no obligation to implement them. More importantly, boards historically have ignored shareholder votes in this area, choosing not to implement shareholder proposals even when they receive a majority of the vote.<sup>153</sup> For example, empirical evidence reveals that corporate directors strenuously and repeatedly resisted shareholder efforts to declassify the board.<sup>154</sup> Such directors refused to implement declassification even when a sizeable majority of shareholders approved proposals for declassification, and even when those proposals passed for several consecutive years in a row.<sup>155</sup> In resisting implementation of such proposals, directors stressed their belief that declassification was not in the corporation's best interests, at least in part based on the view that shareholder influence and activism was inappropriate.<sup>156</sup> The shift in favor of implementation therefore appears to reflect an acceptance that such influence is appropriate.

The fact that directors voluntarily implement proposals prior to any shareholder vote underscores the appearance of this belief. Most of the 2017 proxy access proposals never even went to a vote.<sup>157</sup> Instead, the proposals were withdrawn because companies voluntarily adopted proxy access provisions prior

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<https://www.spencerstuart.com/~media/PDF%20Files/Research%20and%20Insight%20PDFs/SSBI2014web14Nov2014.pdf> [http://perma.cc/9C4T-Z99M]; David A. Bell, *Corporate Governance Survey - 2018 Proxy Season Results*, FENWICK & WEST LLP (Jan. 7, 2019), <https://www.fenwick.com/publications/pages/corporate-governance-survey-2018-proxy-season-results.aspx> [https://perma.cc/X94Z-EWZX].

<sup>149</sup> See Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP, *Proxy Access: Highlights of the 2017 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 1, 2017), <https://corpgov.law.harvard.edu/2017/07/01/proxy-access-highlights-of-the-2017-proxy-season/> [https://perma.cc/SJG3-LXBL].

<sup>150</sup> See SULLIVAN & CROMWELL LLP, *supra* note 87, at 9.

<sup>151</sup> See *id.* at 6.

<sup>152</sup> See GIBSON DUNN, *supra* note 96, at 18. To be sure, proxy access proposals centered on changes to the proxy access rules have received significantly less support than those seeking adoption of a proxy access rule. See *id.*

<sup>153</sup> See Bebachuk, *supra* note 65, at 854; Brownstein & Kirman, *supra* note 29, at 72.

<sup>154</sup> See Bebachuk, *supra* note 65, at 854.

<sup>155</sup> See *id.*

<sup>156</sup> See SULLIVAN & CROMWELL LLP, *supra* note 10, at 5-6.

<sup>157</sup> See SULLIVAN & CROMWELL LLP, *supra* note 87, at 1.

to any vote.<sup>158</sup> Moreover, there has been a general increase in the number of withdrawn proposals as management works with shareholders to voluntarily adopt their proposals. Thus, in 2018, fifteen percent of shareholder proposals were withdrawn.<sup>159</sup> Boards presumably understand that they have no obligation to implement these procedures. Their decision to do so can be viewed as an affirmation of their belief that doing so is in the corporation's best interests and thus is normatively appropriate.

Then too, the fact that directors affirmatively implement policies even when they do not receive a shareholder proposal further highlights their shift in viewpoint. Thus, many companies simply preemptively have adopted, and continue to adopt, shareholder policies and procedures aimed at empowering shareholders.<sup>160</sup>

The fact that directors have affirmatively and actively reached out to their shareholders is another sign of their embrace of activism. In 2017, eighty-two percent of companies indicated that their board or management proactively reached out to the company's largest shareholders.<sup>161</sup> As this suggests, boards are not just willing to engage when asked, but also are affirmatively seeking out engagement because they believe it to be important. According to the 2017 Spencer Stuart Board Index, "many boards value the opportunity to meet with shareholders."<sup>162</sup> The existence and prevalence of shareholder-board engagement stands in sharp contrast to the virtual absence of such engagement in the apathy era. This increased desire to engage with shareholders can be understood as a shifting understanding of the need for shareholder influence and insight, and thus the shift towards the activism norm.

## 2. In Their Own Words

Perhaps the most compelling evidence that boards have embraced the shareholder activism norm stems from their own words. I have reviewed hundreds of federal proxy statements. In those statements, boards of directors clearly have stated that they "believe" allowing shareholders to have greater voice and influence over corporate governance affairs is in the best interests of the corporation. Those statements also reflect directors' views that consideration of shareholder perspective is an important aspect of good corporate governance. In other words, federal proxy statements of the many hundreds of companies

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<sup>158</sup> See *id.* at 6.

<sup>159</sup> See GIBSON DUNN, *supra* note 96, at 5.

<sup>160</sup> See SULLIVAN & CROMWELL LLP, *supra* note 87, at 10.

<sup>161</sup> See SPENCER STUART, *supra* note 111, at 7, 33. "The most common topics about which companies proactively engaged with shareholders were 'say on pay' and environmental/social/governance (ESG) (48% each), followed by board refreshment (43%)." *Id.* at 33.

<sup>162</sup> See *id.* at 7, 8 (noting that fifty-one percent of S&P 500 companies split their board and CEO roles).

that have adopted shareholder empowerment mechanisms are replete with language reflecting an embrace of the shareholder activism norm.

The board of Abercrombie & Fitch, Inc. not only proposed its own proxy access bylaw, but later recommended approval of a proxy access bylaw proposed by shareholders.<sup>163</sup> The Abercrombie shareholders' supporting statement declared that proxy access "will make directors more accountable."<sup>164</sup> In response, the Abercrombie board stated that it had carefully considered the proposal and was recommending adoption because the board believed such a bylaw was "in the best interests of the Company and our stockholders."<sup>165</sup> The board's response appeared to reflect their agreement with the notion that making the corporation more accountable to its shareholders was in the corporation's best interest.

In recommending that the shareholders support a proposal to declassify the board, the board of Banc of California, Inc. stated that it based its belief on the board's outreach to investors, its understanding of corporate best practices, and its belief in the importance of shareholder accountability. The Banc board stated that it had carefully considered the issue, and after such consideration, the Banc board stated that it had determined that declassification was in the corporation's best interests.<sup>166</sup> The Banc board stated, "[A] classified structure may appear to reduce directors' accountability to stockholders, since such a structure does not enable stockholders to express a view on director's performance by means of an annual vote."<sup>167</sup> The Banc board also stated that it had engaged in outreach with its large shareholders who supported declassification.<sup>168</sup> The Banc board then expressed its belief in the importance of adopting corporate governance best practices, before pointing out that majority voting had come to be viewed as a best practice.<sup>169</sup> These statements not only reveal that the Banc board believes it is important to consider shareholder views, but also that the Banc board believes it is important for shareholders to be able to use their vote to enhance accountability. This also appears to reveal a belief in the normative appropriateness of being able to ensure shareholder accountability.

According to the board of Barnes & Noble, Inc. ("B&N"), it recommended adoption of a declassified board structure because such a structure would enhance accountability to stockholders, ensure that stockholders have the capacity to influence corporate governance policies, and hold management

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<sup>163</sup> See Abercrombie & Fitch Co., Proxy Statement (Form DEF14), at 134-135 (Apr. 26, 2017).

<sup>164</sup> *Id.* at 134.

<sup>165</sup> *Id.*

<sup>166</sup> See Banc of California, Inc., Proxy Statement (Form DEF14), at 96 (Apr. 28, 2017).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

accountable for implementing those policies.<sup>170</sup> The B&N board pointed out that the company historically had believed that the classified board held advantages for the corporation.<sup>171</sup> However, the B&N board stated that it had taken note of current corporate governance trends leading away from classified boards based on the importance of ensuring accountability to shareholders.<sup>172</sup> The B&N board then stated that its institutional shareholders believed that director elections reflected “the primary means for shareholders to influence corporate governance policies.”<sup>173</sup> The B&N board noted that it had carefully considered board declassification and held ongoing discussions with its institutional shareholders.<sup>174</sup> Based on these considerations, the board concluded that declassification was in the corporation’s best interests.<sup>175</sup> These statements reveal the B&N board’s belief that it should consider shareholder views as well as its belief that the board should ensure that shareholders are able to use their vote to hold directors accountable on matters related to corporate governance. These statements also make clear that the B&N board believes that it was in the corporation’s best interest to provide structures that allow for shareholder voice and influence.

Other boards similarly have stated a belief in the appropriateness of shareholder influence along with the appropriateness of adopting corporate structures that allow for such influence. The board of Cutera, Inc. stated that, after careful consideration, it believed that declassification was in the best interests of the corporation and its stockholders because it would provide the stockholders with the “opportunity to register their views on the performance of the entire board each year and thereby enhance the board’s accountability to stockholders.”<sup>176</sup> In recommending that shareholders approve majority voting, the board of Diebold Nixdorf, Inc. stated that the majority voting standard was in the corporation’s best interests because it would give shareholders a “greater voice” in determining board composition while reinforcing shareholder accountability to directors.<sup>177</sup> The board of Southwest Gas Holdings, Inc. stated that it had decided to recommend approval of majority voting because it would “further enhance shareholder participation in the company’s corporate governance and director elections.”<sup>178</sup>

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<sup>170</sup> See Barnes & Noble, Inc., Proxy Statement (Form DEF14), at 68-69 (Aug. 7, 2017).

<sup>171</sup> *Id.* at 69.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> See Cutera, Inc., Proxy Statement (Form DEF14), at 17 (May 1, 2017).

<sup>177</sup> See Diebold Nixdorf, Inc., Proxy Statement (Form DEF14), at 44 (Mar. 13, 2017).

<sup>178</sup> See Southwest Gas Holdings, Inc., Proxy Statement (Form DEF14), at 6 (Sept. 11, 2017) (recommending elimination of cumulative voting coupled with adoption of majority voting standard).



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The weight given to shareholders' views is apparent even in disagreements between boards and shareholders. Some boards acknowledged, for example, that they may disagree with shareholder concerns, but then stated that they would recommend adoption of shareholder-empowering mechanisms despite this disagreement based on their belief in the importance of considering shareholders' views when establishing corporate governance practices and policies.<sup>179</sup> Thus, the board of United Rentals, Inc. stated the following:

The Board continues to believe that the retention of the Company's existing supermajority voting requirements for certain fundamental changes to the Company's corporate governance provides stockholders with very meaningful protections against actions that may not be in their best interests. On the other hand, the Board recognizes that certain stockholders and institutions disagree and believes *that acknowledgement of this perspective is an important matter of corporate governance*. Accordingly . . . the Board has determined to recommend a vote to approve the Simple Majority Amendment.<sup>180</sup>

The fact that directors believe that they should advance shareholders' voices in corporate governance matters even when they disagree with the mechanism related to such advancement strongly suggests boards' embrace of a norm favoring shareholder influence over apathy.

Collectively, the statements made by directors in federal proxy materials reveal that boards have come to believe that shareholder influence is normatively appropriate. These and similar statements from corporate boards reveal directors' beliefs that enhanced shareholder voice is in the best interests of the corporation and the shareholders.<sup>181</sup> They also indicate a belief that consideration of shareholder views represents a critical aspect of good corporate

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<sup>179</sup> See United Rentals, Inc., Proxy Statement (Form DEF14), at 74 (Mar. 21, 2017).

<sup>180</sup> *Id.* (emphasis added).

<sup>181</sup> See Esterline Technologies Corp., Proxy Statement (Form DEF14), at 46 (Dec. 27, 2017) (recommending approval of board declassification proposal); Gamestop Corp., Proxy Statement (Form DEF14), at 46 (May 12, 2017) (recommending approval of proposal to eliminate supermajority because in it is in the best interests of corporation and shareholder); Polaris Indus. Inc., Proxy Statement (Form DEF14), at 52 (Mar. 10, 2017) (recommending adoption of majority voting because in it is in the "best interests" of corporation and shareholders); Hain Celestial Foods Corp., Proxy Statement (Form DEF14), at 25 (Oct. 16, 2017) (recommending approval of proxy access bylaws); Sabre Corp., Proxy Statement (Form DEF14), at 31-32 (Apr. 7, 2017) (recommending approval of majority vote standard because it is in the best interests of corporation and shareholders); Southwest Gas Holdings, Inc., *supra* note 178, at 6-7 (recommending elimination of cumulative voting coupled with adoption of majority voting standard); Williams-Sonoma, Inc., Proxy Statement (Form DEF14), at 26 (Apr. 19, 2017) (recommending approval of proxy access because it is in the best interest of company and consistent with sound corporate governance practices); Willis Towers Watson Pub. Ltd. Co., Proxy Statement (Form DEF14), at 89-90 (Apr. 27, 2017) (recommending approval of proxy access).

governance.<sup>182</sup> Finally, they indicate a belief that the corporate governance norm has shifted away from apathy and towards shareholder activism.<sup>183</sup>

C. *A Norm but Not Normative?*

1. Pressure vs. Preference

Some may resist the assertion that directors have embraced the shareholder activism norm, based on the notion that directors have acceded to shareholders because of shareholder pressure rather than any affirmative preference for activism over apathy. Indeed, some have criticized shareholder activism based on their concern that shareholders have pressured directors to take actions despite directors' belief that such actions are not in the corporation's best interests.<sup>184</sup> Such critics contend that directors have bowed to the demands of shareholders with special interests even when those interests do not align with the interests of the broader shareholder class.<sup>185</sup> Others imply that directors have focused on shareholders with short-term interests or otherwise have focused on short-term goals despite their desire to focus on the corporation's long-term health and sustainability.<sup>186</sup> Such criticisms imply that directors have acquiesced to shareholder demands not because they agree with them, but rather because they feel pressured, coerced, or even blackmailed.<sup>187</sup> This critique negates any inference that director adoption of shareholder empowering mechanisms reflect their embrace in the propriety of such power or those mechanisms.

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<sup>182</sup> See Esterline Technologies Corp., *supra* note 181, at 45 (stating that board had considered fact that their institutional shareholders perceived annual elections as increasing accountability of directors to shareholders).

<sup>183</sup> See *id.*

<sup>184</sup> See LISA A. FONTENOT ET AL., PRACTICAL GUIDE TO SEC PROXY AND COMPENSATION RULES § 10.01 (6th ed. 2019) (noting that companies frequently are “bowing to the wishes” of activists or reaching compromises); Bainbridge, *Director Primacy*, *supra* note 4, at 1755-56 (noting that because managers are risk averse, they may give in to blackmail even when proposals have little chance of passage); Bebchuk, *supra* note 65, at 885 (recognizing but rejecting blackmail argument); Editorial Bd., Opinion, *When Shareholder Activism Goes Too Far*, BLOOMBERG (Apr. 10, 2014, 5:43 PM), <http://www.bloombergvew.com/articles/2014-04-10/when-shareholder-activism-goes-too-far> (noting that some “hyperactivists” have coerced companies into engaging in actions focused on short-term “instant gratification,” and noting that these actions reflect companies “taking the easy path” of giving in rather than explaining their investment strategies to shareholders); Lipton, *supra* note 105.

<sup>185</sup> See Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 577 (2006); Roberta Romano, *Less Is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance*, 18 YALE L.J. ON REG. 174, 231-32 (2001).

<sup>186</sup> See Bratton & Wachter, *supra* note 4, at 657-59; Stout, *supra* note 3, at 1180-81; Lipton, *supra* note 105.

<sup>187</sup> See MACGREGOR, *supra* note 10 (claiming that shareholders have been allowed to “hijack” the corporation); SULLIVAN & CROMWELL LLP, *supra* note 10, at 6 (suggesting that some corporate changes may be result of coercion); Rock, *supra* note 10, at 1922 (noting that majority voting has “swept the field with boards caving in to shareholder demands”).

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However, in contrast to these suggestions, when directors adopt shareholder empowering mechanisms, they profess a belief in their propriety. As noted in Section III.B.2 above, federal proxy statements are filled with language reflecting an embrace of the shareholder activism norm. These statements indicate that directors believe that shareholders should exercise their voting authority to hold directors accountable and influence corporate governance matters. These statements also indicate directors' beliefs that governance structures should be designed to facilitate such exercise. These statements therefore undermine the notion that directors' actions do not reflect a belief in the propriety of shareholder empowerment. Instead, these statements reflect directors' stated embrace of shareholder activism as an appropriate component of corporate governance.

## 2. Preemption vs. Preference

Some may disagree with the concept that directors' acquiescence to shareholder activism reflects their embrace of such activism, based on the notion that directors' acquiescence serves as a preemptive strike. Based on this disagreement, it could be argued that directors have made the decision to voluntarily implement shareholder empowering devices in order to prevent more intrusive devices that may be recommended by shareholders. Indeed, under the federal proposal rules, if directors implement their own bylaw related to a particular corporate governance matter—such as majority voting or proxy access—they can prevent shareholders from including a proposal addressing a bylaw related to the same matter.<sup>188</sup> Some corporations have successfully excluded shareholder proposals on this basis.<sup>189</sup> Moreover, these exclusions often occur under circumstances in which shareholders view the corporate proposal as less empowering than their own proposal.<sup>190</sup> Some may therefore argue that to the extent directors have chosen to implement shareholder-empowering procedures in this manner, their choice may not be characterized as an embrace of the shareholder activism norm.

However, this argument misses the point for at least two reasons. First, even if directors choose to adopt empowering devices as a preemptive strike, they nevertheless use rhetoric indicating that their adoption does aim to provide shareholders with enhanced voting power and authority. From this perspective, while directors' actions may reflect a disagreement with the shareholders regarding the appropriate mechanism by which to confer power, they nevertheless confirm the crucial norm, embracing a belief that the augmentation of such power is appropriate and in the corporation's best interests. In other words, directors' words and actions acknowledge the propriety of shareholder power, even if they indicate disagreement about the contours of that power. Second, it is possible that directors' actions can best be understood as a reflection

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<sup>188</sup> See SULLIVAN & CROMWELL LLP, *supra* note 85, at 14.

<sup>189</sup> *See id.*

<sup>190</sup> *See id.*

of a cost-benefit analysis, pursuant to which directors have made the decision that it is more beneficial to grant shareholders power under mechanisms prescribed by directors rather than by shareholders. Many of the directors' statements in federal proxy statements claimed that directors have engaged in a careful consideration of the benefits and drawbacks associated with augmented shareholder power.<sup>191</sup> However, this cost-benefit analysis does not negate an embrace of shareholder activism. At a minimum, the cost-benefit analysis underscores directors' belief that there are costs related to ignoring shareholder demands for greater influence. This analysis also reveals that directors believe it is normatively appropriate to consider shareholder influence and activism when making important governance decisions. The analysis further reveals directors' belief that it is appropriate to put a thumb on the scale in favor of activism over apathy. In this regard, even the preemptive strike reflects an embrace of the activism norm.

### 3. And Then There Were Hedge Funds

To be sure, it is undeniable that many directors have not accepted the normative premise that hedge funds should be engaged in activism.<sup>192</sup> Instead, most directors have indicated that they do not believe that shareholder empowerment, as wielded by many hedge funds, is in the corporation's best interests or is otherwise normatively appropriate.<sup>193</sup>

However, this indication does not undermine the shift away from apathy. Instead, it underscores the fact that directors have come to believe that shareholder power is appropriate for some (but not all) shareholders. Shareholder activism has highlighted the fact that shareholders have different characteristics and agendas.<sup>194</sup> It is clear that directors have embraced the propriety of activism, but only with respect to certain shareholders. Thus, through their words and actions, most directors have indicated that they believe activism is appropriate for those shareholders with a long-term interest in the company or otherwise for those shareholders who do not engage in "short-termism."<sup>195</sup> Indeed, even vocal hedge fund activism opponent Martin Lipton has begun working to facilitate engagement between public companies and institutional shareholders focused on the long term.<sup>196</sup> This is a pivotal concession. Historically, directors appeared to accept the notion that shareholder

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<sup>191</sup> See *supra* notes 163-181 and accompanying text (compiling proxy statements that deploy rhetoric of careful consideration).

<sup>192</sup> See *supra* notes 138-139 and accompanying text (detailing debates over hedge fund activism).

<sup>193</sup> See *supra* notes 138-139 and accompanying text (noting pushback against hedge fund activism).

<sup>194</sup> See Anabtawi & Stout, *supra* note 46, at 1283-84.

<sup>195</sup> See Steven A. Rosenblum, *Hedge Fund Activism, Short-Termism, and a New Paradigm of Corporate Governance*, 126 YALE L.J. FORUM 538, 542-43 (2017).

<sup>196</sup> See *id.* at 545.

apathy was appropriate for all categories of shareholders. Today, directors appear to believe influence by certain shareholders is appropriate and preferable to apathy.

#### 4. The Reality of the Rhetoric

Some may contend that this Article's reliance on directors' words is misplaced because such words are mere window-dressing and cannot be used as any indication of directors' actual normative beliefs. This contention is problematic for at least three reasons. First, directors' words and behaviors historically represented the primary evidence used to support the proposition that directors had a normative preference for apathy. Why should directors' words and behaviors have less sway as evidence to support the current preference for activism?

Second, directors have a fiduciary obligation to take actions that they reasonably believe are in the best interests of the corporation.<sup>197</sup> If their words are meaningless and therefore invalid, then should we believe that directors have adopted mechanisms that they do not believe are in the corporation's best interest? If so, does this not suggest that directors have breached their fiduciary duty? Unless we concede that directors have breached their fiduciary duty, we must acknowledge that directors actually believe that their actions in embracing shareholder activism benefit the corporation and that such actions therefore are normatively appropriate. In federal proxy disclosures, directors clearly indicate that they have "carefully" considered the shareholder proposal as well as the arguments on both sides.<sup>198</sup> Only after that consideration do directors affirmatively state their belief in the propriety of shareholder influence by recommending the adoption of particular procedures and policies. Directors' statements related to their careful consideration suggest that directors are aware of their fiduciary duty and that their statements and conclusions reflect compliance with that duty. Any other characterization almost requires the conclusion that directors have breached their fiduciary duty. This Article insists that such a conclusion is not warranted.

Third, if we believe that directors' words are mere window-dressing, then we are also suggesting that directors may be committing securities fraud. The "rhetoric" being used by directors comes in the form of statements made in the federal proxy statement and other federal disclosure documents. Federal securities laws forbid making statements that are untrue or misleading in the

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<sup>197</sup> See *Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (noting that boards' exercise of corporate power begins with basic principle that corporate directors have fiduciary duty to act in best interest of corporation's stockholders); *Aronson v. Lewis*, 473 A.2d 805, 811-812 (Del. 1984); MODEL BUS. CORP. ACT § 8.30 (a)-(b) (AM. BAR ASS'N 2016) (detailing fiduciary duties of directors to shareholders).

<sup>198</sup> See *supra* notes 163-175.

proxy statement or in connection with a proxy solicitation.<sup>199</sup> If directors have made statements that they do not actually believe, is that not tantamount to saying that directors have voluntarily committed securities fraud? Given the sophistication of directors and their counsel, this Article contends that it is more likely that directors actually believe the statements they have made in federal disclosure documents than that directors have consciously decided to engage in securities fraud.

Based on these considerations, this Article insists that directors' rhetoric is a reflection of their reality.

### 5. The Holdouts

There are some directors who have not embraced the shareholder activism norm. One example of this is Netflix, Inc. Netflix shareholders approved proposals for declassified boards at five consecutive annual meetings from 2012 to 2016, with shareholder support ranging from seventy-five percent to eighty-eight percent.<sup>200</sup> Yet Netflix has consistently refused to implement board declassification.<sup>201</sup> Similarly, Netflix shareholder proposals seeking a majority vote received more than eighty percent of the votes cast in three annual meetings.<sup>202</sup> Yet Netflix has consistently refused to adopt a majority voting standard.<sup>203</sup> Netflix directors appear to have a preference for apathy.

However, Netflix (and companies similar to Netflix that have not embraced shareholder empowering mechanisms) only highlights the importance and significance of the actions and words of other directors. As Netflix clearly reveals, directors are free to ignore shareholder preferences if they believe doing so is in the corporation's best interests. The fact that so many directors have chosen not to follow Netflix's example underscores their own assessment that these empowering mechanisms are appropriate. In other words, Netflix represents the exception that only proves the norm.

Moreover, the fact that some directors may disagree with the appropriateness of the activism norm does not negate the trend towards acceptance of the norm. Indeed, even when the apathy norm was dominant, there were instances of activism as well as some who disagreed with the norm.<sup>204</sup> In other words, the

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<sup>199</sup> See 17 C.F.R. § 240.14c-6 (2018).

<sup>200</sup> See Netflix, Inc., Proxy Statement (Form DEF14), at 25 (Apr. 24, 2017).

<sup>201</sup> See *id.* at 26.

<sup>202</sup> See *id.* at 25, 30. One of the reasons Netflix shareholders have cited when insisting that majority voting is necessary is that they believe the Netflix board is not being held accountable to its shareholders. According to the shareholder proposal, five of its directors received more than forty-eight percent negative votes. See *id.* Two of its directors failed to receive majority vote and remained on the board. *Id.*

<sup>203</sup> See *id.* at 30.

<sup>204</sup> See *supra* Sections I.B, C (discussing history of activism and criticism of apathy norm during era of apathy).

norm has never been universal. Instead, like with this current era, it represented the dominant understanding of how shareholders should behave.

#### IV. THE FUTURE OF SHAREHOLDER ACTIVISM

Recently there have been developments seeking to undermine shareholder activism. In particular, there have been developments in the capital markets designed to mute the impact of shareholders' influence, such as the re-emergence of dual-class stock and the increase in companies remaining private, thereby avoiding the public market and its attendant shareholder activism. At the federal level, several laws have been proposed that are designed to mute the impact of shareholder influence, including laws altering the shareholder proposal rules as well as laws seeking to amend say on pay provisions. This Part analyzes these developments to assess what, if any, impact they are likely to have on the shareholder activism norm.

##### A. *Snap and Dual-Class Stock*

Some companies have made the decision to issue stock to the public with reduced voting rights. In its 2017 initial public offering ("IPO"), Snap Inc. issued stock to the public with no voting rights.<sup>205</sup> To be sure, Snap represents an extreme and hence no other company has made the decision to completely eliminate voting rights for its public shareholders.<sup>206</sup> However, some companies have made the decision to issue stock with unequal voting rights. This phenomenon, known as dual- or multi-class shares, occurs when a company splits its stock into different categories and gives owners of one class greater voting rights than owners of the other.<sup>207</sup> Such a structure allows a small group of shareholders, typically the founders or key insiders, to retain control of the business.<sup>208</sup> When a public company has dual-class stock, it means that the voting power of the publicly held stock is less than that of the stock held by private investors, which generally includes company founders and other insiders.<sup>209</sup> For example, at Facebook, Inc., the Class B shares have ten times the voting rights of the Class A shares.<sup>210</sup> The Class B shares are held by Mark

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<sup>205</sup> Ken Bertsch, Council of Institutional Inv'rs, *Snap and the Rise of No-Vote Common Shares*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (May 26, 2017), <https://corpgov.law.harvard.edu/2017/05/26/snap-and-the-rise-of-no-vote-common-shares/> [<https://perma.cc/BX4T-PNDW>].

<sup>206</sup> *See id.*

<sup>207</sup> *See id.*; CFA INST., DUAL-CLASS SHARES: THE GOOD, THE BAD, AND THE UGLY 1 (2018), [https://www.cii.org/files/misc\\_files/CFAI-Dual%20Class%20Shares-05092018v2.pdf](https://www.cii.org/files/misc_files/CFAI-Dual%20Class%20Shares-05092018v2.pdf) [<https://perma.cc/YY9M-D93X>].

<sup>208</sup> *See* CFA INST., *supra* note 207, at 8; Bertsch, *supra* note 205.

<sup>209</sup> *See* CFA INST., *supra* note 207, at 1.

<sup>210</sup> *See* Bob Pisani, *Shareholders Won't Force Zuckerberg's Hand in Facebook Management*, CNBC (Mar. 21, 2018, 7:23 AM), <https://www.cnbc.com/2018/03/20/shareho>

Zuckerberg and a few other insiders, while the Class A shares are held by the public.<sup>211</sup>

The number of companies with dual-class voting structures has risen over the last decade. In 2005, only one percent of U.S. companies that went public had dual-class voting structures, but close to twenty percent of U.S. companies that went public had such structure in 2017.<sup>212</sup> The number of companies with dual-class voting structures increased by forty-four percent between 2005 and 2015.<sup>213</sup> By 2009, more than eight percent of public companies had dual-class shares; this rose to more than twelve percent in 2012.<sup>214</sup>

On the one hand, if the number of companies with dual-class structures continues to grow, that growth will have a negative impact on shareholder activism. Companies may implement these structures for different reasons. For example, such structures ensure that certain individuals, such as the founder or a key executive, maintain control in order to implement a particular vision.<sup>215</sup> However, it is clear that the impact of such structures is to limit the influence of shareholders.<sup>216</sup> Moreover, some companies have made clear that their purpose in implementing such structures was to limit the impact of shareholder activists.<sup>217</sup>

On the other hand, it is possible that shareholder activism will impede the continued growth of companies with dual-class share structures. Indeed, dual-class shares are not new. Many companies adopted dual-class stock structures in the 1980s as a response to hostile takeovers.<sup>218</sup> Shareholders raised similar

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lders-wont-force-zuckerbergs-hand-in-facebook-management.html [https://perma.cc/T29U-VB63].

<sup>211</sup> See *id.*

<sup>212</sup> See CFA INST., *supra* note 207, at 37.

<sup>213</sup> U.S. SEC. & EXCH. COMM'N, RECOMMENDATION OF THE INVESTOR ADVISORY COMMITTEE: DUAL CLASS AND OTHER ENTRENCHING GOVERNANCE STRUCTURES IN PUBLIC COMPANIES 1 (2017), <https://www.sec.gov/spotlight/investor-advisory-committee-2012/recommendation-on-dual-class-shares.pdf> [https://perma.cc/PJ98-GX3B].

<sup>214</sup> See Stout, *supra* note 3, at 1182.

<sup>215</sup> See CFA INST., *supra* note 207, at 33.

<sup>216</sup> See Joann S. Lublin, *Major Investors Push to End Dual-Class Shares*, WALL STREET J., Jan. 31, 2017, at B3 (noting investors maintained that dual-class voting limits ability of shareholders to enact change).

<sup>217</sup> See Eve Tahmincioglu, *The Pros & Cons of the Dual-Class Stock Structure: Two Corporate Governance Experts Battle It Out*, DIRECTORS & BOARDS (Aug. 30, 2018), <https://www.directorsandboards.com/news/pros-cons-dual-class-stock-structure-two-corporate-governance-experts-battle-it-out> [https://perma.cc/DGE9-BM5H]; *Dual Class Voting Share Structures*, BLG BUS. VENTURE CLINIC (Apr. 4, 2018), <http://www.businessventureclinic.ca/blog/dual-class-voting-share-structures> [https://perma.cc/GN3B-DF8W] (noting that dual-class structures allows companies to execute their visions without “being at the mercy of investors”).

<sup>218</sup> See Gordon, *supra* note 3, at 4.



concerns about its rise and impact during that era.<sup>219</sup> Ultimately, however, the number of companies embracing such structures did not rise significantly.<sup>220</sup> Hence, it is possible that concerns are unwarranted.

Moreover, it is possible that the embrace of the shareholder activism norm, particularly by shareholders, will serve to counter any increase in dual-class shares. Indeed, in the 1980s, no one considered that shareholders would seek to play a significant role in curtailing the potential rise in such structures.<sup>221</sup> Today, however, shareholders and their advocates have been vocal in their opposition to dual-class structures in the public markets.<sup>222</sup> This includes efforts to encourage legislative prohibition of such structures.<sup>223</sup> Notably, some shareholders have been successful in these efforts.<sup>224</sup> This success underscores the fact that shareholder activism has taken root as well as the fact that such activism may be very difficult to uproot.

### B. *Going Private*

Many new companies are avoiding IPOs.<sup>225</sup> Some have suggested that this avoidance is linked to shareholder activism.<sup>226</sup>

To be sure, the movement away from going public could decrease shareholder activism by shrinking the amount of activism in line with the overall public market shrinkage. It is also possible that some may seek to curtail shareholder activism based on a concern that such curtailment will make the public markets more attractive.

It is not clear how this issue will play out. A host of federal laws and other market factors have made it easier to access capital outside of the public markets.<sup>227</sup> Thus, irrespective of efforts to encourage public market participation, it is possible that the trend towards avoiding IPOs or going private may continue. However, as the next Section suggests, the normative embrace of

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<sup>219</sup> *See id.*

<sup>220</sup> *See* CFA INST., *supra* 207, at 37 (detailing number of IPOs that were multi-class over previous decade).

<sup>221</sup> *See* Gordon, *supra* note 3, at 39-40.

<sup>222</sup> *See* GIBSON DUNN, *supra* note 96, at 19.

<sup>223</sup> *See id.* at 19 n.46.

<sup>224</sup> *See id.* at 19.

<sup>225</sup> *See* Stout, *supra* note 3, at 1179.

<sup>226</sup> *See id.* at 1179-80; Emily Thornton, *Going Private*, BUSINESSWEEK, Feb. 27, 2006, at 53, 55.

<sup>227</sup> *See* EVA SU, CONG. RESEARCH SERV., R45221, CAPITAL MARKETS, SECURITIES OFFERINGS AND RELATED POLICY ISSUES 2, 24-32 (2018); Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 460-70 (2017); Amy Deen Westbrook & David A. Westbrook, *Unicorns, Guardians, and the Concentration of the U.S. Equity Markets*, 96 NEB. L. REV. 688, 696, 715-16, 721-24 (2018).

shareholder activism makes it unclear whether and to what extent legislative or other efforts will be able to entirely derail the shift away from apathy.

C. *Federal Efforts*

There have been several efforts at the federal level to reduce the impact of shareholders. In June 2017, the House passed the Financial CHOICE Act (the “Choice Act”), which includes provisions aimed at amending the shareholder proposal rule.<sup>228</sup> Those provisions include increases in eligibility rules for submitting a proposal and the resubmission thresholds.<sup>229</sup> Similarly, the House Financial Services Committee passed a bill that focuses on altering the resubmission thresholds for submitted shareholder proposals.<sup>230</sup> These efforts make clear that there is interest at the federal level to rollback shareholder activism.

However, the embrace of the shareholder activism norm may render these efforts unworkable. The institutional investor opposition was so strong that when the Choice Act was finally passed, it did not include amendments related to the shareholder proposal rule.<sup>231</sup> The fact that shareholders were able to jettison the efforts at curtailing shareholder engagement further emphasizes the activism and shareholders’ belief that their voice should not be curtailed.

Moreover, many have predicted that even if federal legislation serves to eliminate some of the mandates that encouraged shareholder influence, there may be a private ordering response that mutes the effect of such elimination.

Then too, because much of the shareholder influence emerged through private ordering, it is not clear if federal legislation can completely undercut that influence. Indeed, as Section II.C reveals, corporations have voluntarily altered their governance practices and procedures. Such corporations would have to affirmatively alter those procedures to rollback shareholder influence. It is not clear whether companies would be willing to engage in such an effort. This is especially true given companies’ growing belief that those procedures are in the corporation’s best interests. In other words, because companies not only have adapted to shareholder influence, but also have come to believe and accept the propriety of shareholder influence—at least in some respects—it seems unlikely that those companies will engage in efforts to completely dismantle that influence.

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<sup>228</sup> See Financial CHOICE Act of 2017, H.R. 10, 115th Cong. § 844 (2017).

<sup>229</sup> See *id.*; GIBSON DUNN, *supra* note 96, at 21.

<sup>230</sup> See H.R. 5756, 115th Cong. § 1 (2018).

<sup>231</sup> See GIBSON DUNN, *supra* note 96, at 21; Press Release, Council of Institutional Inv’rs, Institutional Investors Oppose Key Provisions of the Financial CHOICE Act (Apr. 24, 2017), [https://www.cii.org/choice\\_act\\_press\\_release](https://www.cii.org/choice_act_press_release) [<https://perma.cc/B2GK-ARTN>].

D. *Short-Termism Concerns*

Some have argued that shareholder activism's focus on the short term would trigger its eventual demise. In a 2013 article, Professor Lynn Stout predicted that shareholder primacy, and its related focus on increased shareholder power, seem "poised to fall, perhaps even more quickly than it ascended."<sup>232</sup> Professor Stout insisted that shareholder activists' focus on short-term stock prices, ignoring the interests of other constituents and selling vital assets, not only made shareholder power undesirable, but also increased the likelihood that it would quickly come to an end.<sup>233</sup> In support of this prediction, Professor Stout pointed out that many influential members of the corporate community who initially embraced shareholder power had come to view it with disfavor.<sup>234</sup> Importantly, corporate officers and directors have been able to stem the tide of shareholder power by strenuously insisting that such power was antithetical and dangerous to the interests of other constituents.<sup>235</sup> Hence, it is possible that such a narrative could undermine the current effort to enhance shareholder power, while encouraging a return to shareholder apathy.

However, Professor Stout admitted that her prediction about the demise of shareholder power was made with caution.<sup>236</sup> In light of the continued growth of shareholder power, coupled with its embrace by shareholders and directors alike, her prediction has not yet come to pass. Importantly, Professor Stout and others have taken aim at shareholder power particularly when it is used to promote a concept of shareholder wealth maximization that focuses on short-term financial gains at the expense of focusing on long-term interests, including those of customers, employees, and society.<sup>237</sup> One reason why shareholder influence may weather the storm is that shareholders have played a role in altering the narrative related to corporate purpose. Rather than coinciding with a crowding out of other constituent interests, the rise in shareholder activism may have ushered in a different understanding of corporate purpose, at least for some shareholders. In fact, in a 2005 article, I suggested that shareholder power could be used to advance the interests of other constituents.<sup>238</sup> Professor David Webber has made a similar suggestion.<sup>239</sup> Consistent with this prediction, some shareholders and their advocates have played a role in ensuring a corporate focus

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<sup>232</sup> See Stout, *supra* note 3, at 1180.

<sup>233</sup> See *id.*

<sup>234</sup> See *id.*

<sup>235</sup> See Fairfax, *supra* note 46, at 78.

<sup>236</sup> See Stout, *supra* note 3, at 1181.

<sup>237</sup> See *id.* at 1182.

<sup>238</sup> See Fairfax, *supra* note 46, at 82.

<sup>239</sup> See DAVID WEBBER, THE RISE OF THE WORKING CLASS SHAREHOLDER: LABOR'S LAST BEST WEAPON 1-44 (2018).

beyond short-term profits.<sup>240</sup> This includes not only public pension funds, but also influential asset managers and mutual funds such as BlackRock, State Street, and Vanguard.<sup>241</sup> The fact that shareholders have used their increased power to augment the interests of other constituents not only may make such power more appropriate in the eyes of some, but also may mute the concerns that such power may prove detrimental to other corporate stakeholders.

#### E. *Retail Investors*

As indicated in Part II, most retail investors have not been a part of the increase in shareholder activism.<sup>242</sup> This is concerning for a number of reasons, including that retail investors may have interests that diverge from those of institutional investors. Thus, future shareholder activism that continues to exclude retail investors is problematic. This Article therefore supports efforts aimed at enhancing activism and participation among retail investors.

#### F. *A Note for Regulators*

On the one hand, this Article primarily focuses on the impact of recent developments on the shareholder activism norm and thus grapples with the extent to which those developments may impact the future of shareholder activism. On the other hand, this Article maintains not only that there has been a descriptive and normative shift from apathy to activism, but also that recent developments are not likely to completely undermine that shift. As a result, this Article also maintains that regulators must better account for the shift. To be sure, the SEC appears to be mindful of the shift and hence may be better prepared to take steps that appropriately account for it. However, the SEC is not the only agency that regulates the conduct of corporations and their investors. Moreover, there are some trends suggesting that other agencies are not appropriately accounting for the shift from apathy to activism. For example, prompted by research and scholarly attention from others, a recent article by Professors

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<sup>240</sup> See Sawyer & Trevino, *supra* note 63 (noting that the three largest index funds—BlackRock, State Street, and Vanguard—have made clear that they have an interest in advancing environmental, social, and governance issues).

<sup>241</sup> See SULLIVAN & CROMWELL LLP, *supra* note 85, at 23; see also *id.* at 9 (noting corporations' recognition of growing importance of environmental and social issues to institutional investors); Martin Lipton, Wachtell, Lipton, Rosen & Katz, *BlackRock Supports Stakeholder Governance*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 18, 2018), <https://corpgov.law.harvard.edu/2018/01/18/blackrock-supports-stakeholder-governance/> [<https://perma.cc/WK7D-AXLU>]; Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES: DEALBOOK (Jan. 15, 2018), <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html>; Gillian Tett, Opinion, *In the Vanguard: Fund Giants Urge CEOs to Be 'Force for Good,'* FIN. TIMES (Feb. 1, 2018), <https://www.ft.com/content/a28203d8-067d-11e8-9650-9c0ad2d7c5b5>.

<sup>242</sup> See *supra* notes 70-71 and accompanying text.

Edward Rock and Daniel Rubinfeld illuminates some ways in which institutional shareholders' increased activism may create antitrust concerns.<sup>243</sup> Rock and Rubinfeld also suggest that the current regulatory environment may be ill-equipped to sufficiently respond to these concerns.<sup>244</sup> The authors point out that the current regulatory framework, coupled with regulators' outdated presumptions of shareholder apathy, not only may lead to inappropriate applications of the law, but also may undermine shareholder activism or otherwise lead to suboptimal behavior on the part of investors seeking to reduce their liability risks.<sup>245</sup> While a more systematic analysis of the manner in which regulators must account for the shift towards the shareholder activism norm is certainly warranted, it is beyond the scope of this Article.<sup>246</sup> However, any such analysis likely should focus on at least four considerations. First, regulators should consider the manner in which increased shareholder activism may raise concerns that are not captured by the current regulatory framework. In other words, do shareholders' increased activism and engagement trigger violations of the law in ways previously unanticipated?<sup>247</sup> Second, regulators should consider the extent to which the current regulatory framework or current interpretations of that framework, including interpretations of safe-harbor provisions, are consistent with the new shareholder activism norm.<sup>248</sup> Third, regulators should consider the extent to which the regulatory framework undermines shareholder activism or otherwise may constrain activism in an inappropriate manner.<sup>249</sup> Fourth, and consistent with these prior recommendations, regulators must plan for the future of activism. Indeed, as Rock and Rubinfeld note, scholars already are suggesting changes to federal laws that may be driven by an understanding of shareholder behavior that is incompatible with the existing shareholder activism norm.<sup>250</sup>

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<sup>243</sup> See Edward Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investors*, 82 ANTITRUST L.J. 221, 222, 229-30 (2018).

<sup>244</sup> See *id.* at 223-24, 227-29.

<sup>245</sup> See *id.*

<sup>246</sup> Special thanks to Edward Rock for pointing out the need to consider the relationship between the shift towards apathy and the broader regulatory framework.

<sup>247</sup> See Rock & Rubinfeld, *supra* note 243, at 258-63 (discussing Professor Einer Elhauge's antitrust analysis).

<sup>248</sup> See *id.* at 265-67. The antitrust laws provide a limited safe harbor, only when activities are deemed to be "solely for investment" purposes. *Id.* at 251-52. As Rock and Rubinfeld suggest, to the extent the "solely for investment" safe harbor embedded in the antitrust laws is one that protects only those investors who remain passive, the current antitrust safe harbor rule appears to presume a general passivity among all investors that is not consistent with the reality of activism in which many institutional investors participate and thus may not provide a meaningful distinction for purposes of the antitrust laws. See *id.* at 265-67.

<sup>249</sup> See *id.* at 266-67 (discussing impact of alterations to the safe harbor rules on corporate governance and activism).

<sup>250</sup> See *id.* at 263 (discussing Posner's solution).

## CONCLUSION

This Article highlights a new reality for public company shareholders. Public company shareholders have been active. Indeed, few would dispute the notion that public company shareholders have become increasingly more active around a range of governance issues and that such activism runs counter to the traditional manner in which shareholders engaged with the corporation.

This Article also highlights a lesser acknowledged normative reality. Shareholders and directors have come to accept the propriety of shareholder voice and influence. They have come to believe that shareholders can *and should* play a role in holding directors accountable and shaping corporate practices. Of course, there continues to be significant debate regarding the contours and extent of that role. There also continues to be significant debate about which shareholders should play such a role. However, there is no longer a debate about the appropriateness of the role itself. Shareholders have become active and directors have accepted that such activism can be beneficial to the corporation—at least when wielded in an appropriate fashion and when wielded by shareholders deemed to have appropriate goals.

Of course making future predictions is always difficult. It is entirely possible that the shareholder activism norm will decline as quickly as it emerged. However, even if this possibility exists, it is clear that, at least at present, shareholder activism has toppled the shareholder apathy norm. It is therefore important to at least acknowledge this present norm. Perhaps more importantly, in light of the fact that shareholder activism has been embraced by so many shareholders and by so many of the key stakeholders within the investment community, it is more probable that the activism norm will remain a fixture of the future corporate governance landscape at least to some extent and with respect to some shareholders. Hence, it is also important to more carefully consider the future implications of a corporate governance norm that favors an active shareholder.