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## Civil Rights and Shareholder Activism: *SEC v. Medical Committee for Human Rights*

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# Civil Rights and Shareholder Activism: *SEC v. Medical Committee for Human Rights*

Sarah C. Haan\*

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### I. Introduction

What does “corporate democracy” mean? How far does federal law go to guarantee public company investors a say in a firm’s policies on important social, environmental, or political issues? In 1972, the U.S. Supreme Court appeared ready to start sketching the contours of corporate democracy—and then, at the last minute, it pulled back. This Article tells the story of *Securities and Exchange Commission v. Medical Committee for Human Rights*,<sup>1</sup> in which a national civil rights organization, best known for its work at civil rights marches and protests, fought to expand the limits of corporate democracy and nearly succeeded.<sup>2</sup>

Between March 1968 and January 1972, Medical Committee for Human Rights waged a protracted battle with a major American company and the U.S. Securities and Exchange Commission (SEC) over its rights as a shareholder.<sup>3</sup> Medical Committee became the first civil society organization to pursue social change *within* a public company using shareholders’ tools, by submitting a shareholder proposal to Dow Chemical Company under SEC Rule 14a-8.<sup>4</sup> That rule, rarely used by stockholders until the late 1960s and almost never for social, political, or environmental reform, required reporting companies to publish a shareholder’s proposal in the proxy statement in advance of a full shareholder vote.<sup>5</sup> Medical Committee’s proposal, first submitted to Dow in 1968, addressed the company’s manufacture of napalm,

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1. 404 U.S. 403 (1972).

2. *See generally, id.*

3. *Id.*

4. 17 C.F.R. § 240.14a-8 (1969).

5. *See id.* (addressing when a company must include a shareholder proposal in its proxy statement).

a chemical sold by Dow to the U.S. government for use in the Vietnam War.<sup>6</sup>

Dow rejected Medical Committee's proposal, and the SEC approved the company's decision. Medical Committee won an early and important battle in the fight in 1970, however, when the United States Court of Appeals for the District of Columbia Circuit issued a "pathbreaking" decision in its favor.<sup>7</sup> A unanimous, three-judge panel of the D.C. Circuit sided with Medical Committee and suggested that the napalm proposal should have gone to a shareholder vote.<sup>8</sup> The D.C. Circuit's surprising decision, authored by the conservative federal judge Edward Allen Tamm—who, five years later, would write an influential dissenting opinion in *Buckley v. Valeo*,<sup>9</sup> in which he argued that First Amendment protection should apply to political

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6. Napalm B (herein referred to simply as "napalm") was a jellied form of gasoline made with polystyrene, benzene, and gasoline. See ROBERT M. NEER, NAPALM: AN AMERICAN BIOGRAPHY 116 (2013). As one contemporaneous writer put it, napalm was "the most popular bomb in Vietnam, because it is both cheap and deadly: a mixture of low grade jet fuel and gelignite which sticks to anything it touches and burns with such heat that all oxygen in the area is exhausted within a split second. Death is either by roasting or suffocation." Alan Williams, *Tons of Destruction*, WASH. POST, Mar. 13, 1966, at E5. Polystyrene, a key component of napalm, had been created by Dow and trademarked as "Styrofoam." NEER, *supra* at 116. Medical Committee's proposal went through two versions. The first would have required an amendment to Dow's certificate of incorporation "that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings." The second requested that Dow's board "consider the advisability of adopting a resolution setting forth an amendment to the composite certificate of incorporation of the Dow Chemical Company that the company shall not make napalm." See *infra* notes 17–42 and accompanying text.

7. Donald S. Chisum, *Napalm, Proxy Proposals and the SEC*, 12 ARIZ. L. REV. 463, 463 (1970) (describing how the case "shatter[ed] past assumptions about the reviewability of informal SEC action and about the scope of the SEC shareholder proposal rule").

8. Med. Comm. for Human Rights v. SEC, 432 F.2d 659 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972). As explained in more detail in Part III, the D.C. Circuit held that the SEC's no-action decision was judicially reviewable and sent the matter back to the SEC for "more illuminating consideration and decision" about whether Rule 14a-8 required Dow to publish Medical Committee's proposal. *Id.* at 676. However, the D.C. Circuit also expressed skepticism about the proposal's excludability and articulated an expansive view of corporate democracy. See *id.*

9. 519 F.2d 821, 912–922 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part), *overruled by* 424 U.S. 1 (1976).

spending<sup>10</sup>—framed *Medical Committee for Human Rights v. SEC*<sup>11</sup> as a case about corporate democracy. It was the first time the phrase “corporate democracy” had been used in the federal courts in the D.C. Circuit.

Ultimately, Medical Committee’s fight reached the U.S. Supreme Court, where it was billed as one of the term’s major cases. Then, when the SEC introduced a last-minute legal argument, Justice Thurgood Marshall authored an opinion declaring the case moot, and Medical Committee’s gains for corporate democracy were lost.<sup>12</sup>

Medical Committee’s activism took place at the intersection of major strands in American history: the struggle for civil rights, which had reached a crescendo in 1968; the corporate social responsibility movement, which was then in its infancy; the Supreme Court’s consistent reluctance to impede U.S. military action in Vietnam; and the end of the New Deal regulatory philosophy at the SEC. As civil rights history, the story never received much attention.<sup>13</sup> As corporate law history, it has largely receded from memory. Yet the case marks the beginning of a period, spanning decades and reaching the current day, in which the contours of corporate democracy have remained vague and contested. Over the same period, the Supreme Court has used the existence of corporate democracy to justify an expansion of corporate rights.

Recently, the story has received some renewed attention as a precursor to twenty-first-century campaigns of shareholder activism, such as the recent push by Amazon.com stockholders to end the company’s practice of selling facial recognition software to law enforcement.<sup>14</sup> Like Medical Committee and others who

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10. See *infra* note 129 and accompanying text (discussing Judge Tamm).

11. 432 F.2d 659 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972).

12. See *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 406 (1972). Although the Supreme Court’s decision vacated the D.C. Circuit’s opinion below, the D.C. Circuit’s analysis continued to be influential. See *infra* Part IV.

13. For example, John Dittmer’s history of Medical Committee includes only a few paragraphs about the organization’s trailblazing efforts in shareholder activism. JOHN DITTMER, *THE GOOD DOCTORS: THE MEDICAL COMMITTEE FOR HUMAN RIGHTS AND THE STRUGGLE FOR SOCIAL JUSTICE IN HEALTH CARE* 77–78 (2009).

14. See Kevin Roose, *Why Napalm Is a Cautionary Tale for Tech Giants Pursuing Military Contracts*, N.Y. TIMES (Mar. 4, 2019),

pursued shareholder activism in the late 1960s as an extension of their political activism, twenty-first-century investors have begun ramping up shareholder activism. Then, as now, activists have turned to private governance when the institutions of democratic governance have proved unresponsive to popular will. In the twenty-first century, the public company again has become a focal point of democratically-minded activism.

This Article proceeds in three parts. Following the introduction, Part II tells the story of how a civil rights organization advanced the cause of shareholder activism in the late 1960s. It begins with the group's first, clumsy efforts to use shareholder tools and traces developments through the tumultuous 1970 proxy season, in which major companies' annual meetings featured confrontations involving police, private security forces, guard dogs, and rock-throwing stockholders. Archival documents reveal that a Yale law student was the original donor of five shares of Dow Chemical Company stock to Medical Committee, and that he helped connect the civil rights organization to the prominent securities lawyers who litigated its case. An important victory came early: Dow stopped manufacturing napalm in May 1969, around the time of its annual shareholders meeting. However, Dow's management never admitted any concession to the investor insurgency.

Part III describes the legal wrangling that took place in the D.C. Circuit Court of Appeals and ultimately the U.S. Supreme Court. This Part excavates primary documents from the case files of Supreme Court Justices involved in the case, including those of Justice Thurgood Marshall, who wrote the opinion that declared the controversy moot, and Justice William O. Douglas, the former New Deal SEC Chair, who departed from his longstanding practice of recusing himself from securities law cases to dissent. What these documents suggest is that, if it had been decided on the merits, *SEC v. Medical Committee for Human Rights* would have been a close case. This is especially noteworthy considering that two of the nine Justices who were members of the Court when it granted certiorari—Justices Hugo Black and John Marshall Harlan—had

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<https://www.nytimes.com/2019/03/04/technology/technology-military-contracts.html> (last visited Sept. 11, 2019) (reporting that the “reputational damage” Dow suffered from the napalm campaign “haunted the company for decades”) (on file with the Washington and Lee Law Review).

resigned for health reasons by the time the case was argued. In the end, Medical Committee saw its gains for corporate democracy dissolved as fierce maneuvering by Dow's corporate management and the SEC won the upper hand.

Part IV considers the significance of *SEC v. Medical Committee for Human Rights* to history. It presents the case as civil rights history, as securities law history, and as corporate governance history, and offers some reflections on the case in light of the current debate about the right of shareholders to have a voice in a company's manufacture or sale of controversial products.

## II. Dow and the Dissenting Shareholder

*"War Is Good for Business: Invest Your Son."*<sup>15</sup>

Medical Committee for Human Rights was an organization of physicians, medical students, and other health professionals created to oppose segregation in medicine and to advance the civil rights movement.<sup>16</sup> The group emerged on the national stage during the Freedom Summer of 1964 when it provided direct medical assistance at protests and marches. By 1966, it had seventeen chapters across the U.S.<sup>17</sup> It had become "the health arm

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15. This "familiar" anti-war slogan was displayed by protestors at Dow's 1969 annual shareholders meeting. *Dow Chemical to Bid on Another Contract for Supplying Napalm*, WALL ST. J., May 8, 1969, at 18.

16. Martia Graham Goodson & Aaron O. Wells, *Aaron O. Wells, MD and the Medical Committee for Human Rights: Reflections on a Life of Conscience*, 96 J. OF NAT'L MED. ASSOCS. 1519, 1519 (2004).

17. DITTMER, *supra* note 13, at 35–36. Dr. Aaron O. Wells, a founder of Medical Committee, recalled that the organization received a telegram from Martin Luther King Jr. before the 1964 Freedom Summer, asking for the organization's assistance. Goodson & Wells, *supra* note 16, at 1522. Dr. Wells "went on national television to appeal to physicians and nurses across the nation to come to Mississippi, where we were going to act as a medical umbrella for the civil rights workers." *Id.* Medical Committee's first national convention took place in 1965 at Howard University, where the New York physician Wells was elected its first president. QUENTIN YOUNG, EVERYBODY IN, NOBODY OUT 73 (2013). Quentin Young became Medical Committee's third president in 1967 and served as its national chairman for much of the period from 1968 to 1972 when Medical Committee's battle with Dow played out. YOUNG, *supra*, at 75; *see also* Austin C. Wehrwein, *South's Hospitals Face Rights Suits*, N.Y. TIMES, Mar. 27, 1966, at 54.

of the civil rights movement and the civil rights arm of the health professions.”<sup>18</sup>

In early 1967, when the civil rights movement embraced the peace movement to oppose the Vietnam War, Medical Committee also pivoted. Dr. Quentin Young, a white physician from Chicago and Medical Committee’s national chairman when the group began its battle with Dow, wrote that Medical Committee’s leadership struggled with the decision to oppose the Vietnam War.<sup>19</sup> On April 4, 1967, Dr. Martin Luther King Jr. gave a historic speech at Riverside Church in New York City about the Vietnam War. Titled “Beyond Vietnam: A Time to Break Silence,” his speech called for a “genuine revolution in values” and pushed activists to seek out “every creative method of protest possible.”<sup>20</sup> After King’s speech, Medical Committee passed a formal resolution calling for an end to the Vietnam War, and Young received a letter from King in support of Medical Committee’s position.<sup>21</sup>

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18. Irving Spiegel, *Powell Critical of Aid to Chicago*, N.Y. TIMES, Oct. 16, 1965, at 25.

19. See YOUNG, *supra* note 17, at 75–76

As President Johnson escalated the war in Vietnam some in our organization wanted us to oppose the conflict and call for withdrawal from military activity in Asia . . . Led by a charismatic Californian named Bill Bronston, the younger members of MCHR, medical students in particular, argued that the organization’s silence on the war was antithetical to our mission to eliminate segregation. They cited the disparity between the draft status of young white and black men.

Young himself initially did not believe that Medical Committee should publicly oppose the war. See *id.* (“I didn’t disagree with the facts, but initially I did disagree with the tactics. . . . [M]any of us believed it was not fair for us as an adjunct to the black movement to create a problem for it by taking an organizational stance against the war.”). Young recalled that Dr. Martin Luther King Jr.’s famous 1967 speech at Riverside Church put the issue to rest.

20. See, e.g., Daniel S. Lucks, *Martin Luther King, Jr.’s Riverside Speech and Cold War Civil Rights*, 40 PEACE & CHANGE 395, 395 (2015) (noting that Dr. King’s speech was controversial).

21. According to Young, Dr. King wrote to him that “[w]e must continue to raise our voices loudly and clearly to end this tragic war.” YOUNG, *supra* note 17, at 76. Medical Committee also joined the Council of Health Organizations, an anti-war coalition of medical organizations, to run health clinics for men facing the draft. *Id.* “Our goal was to level the playing field, giving young people with limited or no medical history this service and a fair physical exam.” *Id.* at 77.



*A. A Donation and a Proposal*

In 1968, Medical Committee received a gift of five shares of Dow Chemical Company stock from a Yale Law student, L. Geoffrey Cowan.<sup>22</sup> Cowan was the son of Louis Cowan, a former president of the Columbia Broadcasting System, Inc. (CBS), and Pauline Spiegel Cowan, an heir to the Spiegel Catalog company and a civil rights activist.<sup>23</sup> Cowan graduated from Yale a few months after making the gift and went on to found the Center for Law and Social Policy. He would continue to play a shadow role in Medical Committee's shareholder activism at Dow.<sup>24</sup> In a letter thanking Cowan for his donation, Quentin Young expressed concern about Dow's production of napalm, and noted that Medical Committee's Executive Committee was discussing the matter.<sup>25</sup> Medical Committee sent its first shareholder proposal to Dow five days later.<sup>26</sup>

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22. See Letter from Quentin D. Young, Medical Committee for Human Rights, to L. Geoffrey Cowan (March 6, 1968) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421) ("It gives me great pleasure to acknowledge your generous gift . . ."); DITTMER, *supra* note 13, at 176. Assuming that Dow's stock was valued at roughly \$70 per share in 1968 dollars (it closed a little above \$70 on March 5, 1968), the shares would have been worth roughly \$2,600 at the time, in 2019 dollars. N.Y.S.E. Stock chart, WALL ST. J., Mar. 5, 1968, at 32.

23. See *Louis Cowan Killed with Wife in a Fire; Created Quiz Shows*, N.Y. TIMES, Nov. 19, 1976, at 1 (describing Louis Cowan's creation of "The \$64,000 Question" for CBS and Pauline Spiegel Cowan as "one of the early civil rights organizers in the South in the 1960s").

24. Cowan joined academia as a professor of communications and media law and went on to become the Dean of the University of Southern California Annenberg School of Communication. *Geoffrey Cowan*, U. OF S. CAL., <https://gould.usc.edu/faculty/?id=207> (last updated Jan. 3, 2019) (last visited Sept. 11, 2019) (on file with the Washington and Lee Law Review).

25. See March 6, 1968 Letter from Quentin D. Young, *supra* note 22 ("For my part, I would like to see my company stop producing this inhuman material."). At the time he sent the first letter to Dow, Young was Medical Committee's National Chairman. Documents in Medical Committee's archive establish that Young continued to play the lead role in Medical Committee's activism at Dow even after he stepped down from this position.

26. See Letter from Quentin D. Young, National Chairman, Medical Committee for Human Rights, to Secretary, Dow Chemical Company (March 11, 1968) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421) (showing that Geoffrey Cowan was bcc'd on the letter). At oral argument before the Supreme Court, Erwin Griswold stated that Medical Committee's first proposal to Dow was submitted "[e]ven before the shares were registered in its name." Oral argument at 03:46, SEC v. Med. Comm. For Human Rights, 404 U.S.

Dow, best known for producing Saran Wrap, had won a contract to manufacture napalm for the U.S. Air Force.<sup>27</sup> By the spring of 1966, Dow was manufacturing napalm at its Torrance, California factory.<sup>28</sup> From the beginning, its production of napalm was controversial; protests against Dow's manufacture of napalm began on the West Coast in March 1966.<sup>29</sup> Dow's executives expected picketing at their May 1966 annual meeting, but none occurred.<sup>30</sup> Although some other companies also briefly produced napalm for the government, by 1968, Dow was its only American manufacturer.<sup>31</sup>

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403 (1972), No. 70-61, <https://www.oyez.org/cases/1971/70-61>.

27. E.N. BRANDT, CHAIRMAN OF THE BOARD 94 (2003). According to Robert M. Neer, five companies submitted bids, and Dow, Witco, and United Technology Center, a subsidiary of United Aircraft Corporation, ended up contracting to produce napalm. NEER, *supra* note 6, at 116; *see also* Lawrence E. Davies, *Napalm Foes Petition for Vote to Bar Factory in Coast City*, N.Y. TIMES, Apr. 17, 1966, at 8.

28. Davies, *supra* note 27, at 8. A Dow public relations manager told the *New York Times* that Dow had "two small contracts" with the Air Force to manufacture roughly 25 million pounds of napalm, worth around \$3.5 million. Douglas Robinson, *Dow Chemical Office Picketed for Its Manufacture of Napalm*, N.Y. TIMES, May 29, 1966, at 2. Robert M. Neer reported that Dow's actual production was much greater: 54,620 tons in 1966 (more than 109 million pounds) and over 22,000 tons in the first six months of 1967. NEER, *supra* note 6, at 136.

29. *See* BRANDT, *supra* note 27, at 95.

30. Weeks later, however, Dow's headquarters in Manhattan were picketed by protestors carrying signs that said "Napalm Burns Babies, Dow Makes Money." Robinson, *supra* note 28, at 2. Another napalm manufacturer, Witco Chemical Company, did experience picketing at its 1966 annual shareholders meeting. *Witco Meeting Told Profit Is Up; Pickets Score Napalm Output*, WALL ST. J., Apr. 28, 1966, at 2. When asked how much napalm Witco produced, its chair, William Wishnick, told the *Wall Street Journal*, "I hate to tell you how little," adding later that it represented less than one-tenth of 1% of last year's sales, which would mean less than \$146,000." *Id.* The *Wall Street Journal* also reported that Wishnick said, "[i]t is the definite policy of the company to cooperate with the Government and to manufacture quality products for the Government. We also feel it is the duty of every patriotic American to do so." *Id.* E.N. Brandt wrote that "Gerstacker drew up a position statement on napalm that he put in his pocket in case he needed it" at the 1966 shareholder meeting. BRANDT, *supra* note 27, at 94. Although Gerstacker did not need to use it at the annual meeting that year, "he and the company were to use [it] extensively over the succeeding years." *Id.*

31. Kenneth C. Field, *Dow Chemical Meeting Backs Production of Napalm; Antiwar Protestors Rebuffed*, WALL ST. J., May 9, 1968, at 4; *Protest Due at Dow Meeting*, WASH. POST, May 4, 1968, at D10; *see also* ARCHIE B. CARROLL, KENNETH J. LIPARTITO, JAMES E. POST, & PATRICIA H. WERHANE, CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE 232 (2012) ("In spite of its efforts to help the military

At the time, Dow had seventeen directors.<sup>32</sup> With the exception of Melvin Calvin, who had won the 1961 Nobel Prize in chemistry, all of Dow's directors were executives of the company in one capacity or another. One was a Canadian citizen,<sup>33</sup> at least two were veterans of World War II,<sup>34</sup> and nearly all of them were scientists.<sup>35</sup> A few months before the company's 1967 shareholder meeting, Dow's board met for two days to take up the napalm issue, and ultimately voted, possibly unanimously, to continue production despite the reputational risks.<sup>36</sup> At least one Dow board member, Herbert Doan, had moral qualms about the company's napalm production.<sup>37</sup> For one of Dow's oldest board members, Earl W. Bennett, Dow's production of napalm might have offered a personal, patriotic redemption. In the early 1940s, the U.S. Justice Department had prosecuted Bennett, along with Dow Chemical Company and its then-president, Willard H. Dow, for their role in a conspiracy to restrict production of magnesium, which undermined the American defense in World War II.<sup>38</sup> This time,

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in its battles, Dow became public enemy number one, and its linkage with the war did little to enhance the business community's reputation during this time."); Anthony Ripley, *Napalm Assailed at Dow Meeting*, N.Y. TIMES, May 8, 1969, at 12 (noting that, in 1969, Dow was the only company then manufacturing napalm).

32. See THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 8, 1968 (Mar. 22, 1968). The directors were: Dow's President, Herbert D. Doan; Chair of the Board, Carl A. Gerstacker; Donald K. Ballman; Earle B. Barnes; Earl W. Bennett; Robert B. Bennett; A. P. Beutel; C. B. Branch; Melvin Calvin; William R. Dixon; Leland I. Doan; Herbert H. Dow; John M. Henske; Julius E. Johnson; Max Key; Zoltan Merszei; and Macauley Whiting.

33. See *id.* (indicating that Merszei was a Canadian citizen).

34. See *id.* at 3–6 (stating that Gerstacker and Bennet were WWII veterans).

35. See *id.* (stating that Ballman, Barnes, Beutel, Branch, Calvin, Doan, Dow, Gerstacker, Henske, Johnson, Key, and Whiting had degrees in chemistry or engineering).

36. See BRANDT, *supra* note 27, at 96–97 (stating that Dow's former president, Ted Doan, recalled "maybe one" vote "at most" against Dow's continued manufacture of napalm).

37. See Allan Sloan, *Advice from Dow Chemical: Always a Borrower Be*, N.Y. TIMES, Apr. 25, 1976, at 107 ("Herbert Doan, a member of the Dow family who had been president, was known to be troubled by the moral issue of napalm.").

38. See *Firms, Officers Indicted*, WALL ST. J., Jan. 31, 1941, at 2. Bennett and Dow pleaded nolo contendere and paid thousands of dollars in fines in a case that cast Dow and its executives as profit-hungry and disloyal to American interests. See *Magnesium Field Opened by Court*, N.Y. TIMES, Apr. 16, 1942, at 23 (detailing the settlement); see also Mark R. Wilson, *Making 'Goop' Out of Lemons: The*

Dow was a target for public condemnation because it was acting to support, rather than undermine, American military action.

Young's 1968 letter to Dow acknowledged that Medical Committee's proposal was "technically late" under the SEC's rules, but requested that Dow include a resolution in its proxy statement<sup>39</sup> on "a matter of such great urgency that we think it is imperative not to delay until the shareholders' meeting next year."<sup>40</sup> The text of the proposed resolution asked Dow's board to amend its certificate of incorporation to prohibit Dow from selling napalm "to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings."<sup>41</sup> The letter explained that the Medical Committee was "primarily" concerned about human life, but also discussed two specific financial considerations for the company: that Dow's

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*Permanente Metals Corporation, Magnesium Incendiary Bombs, and the Struggle for Profits During World War II*, 12 ENTERPRISE & SOC. 10, 14–18 (2011) (describing Dow's role); Lewis Corey, *Problems of the Peace: I. War Plants*, 3 ANTIOCH REV. 438, 442 (1943) (describing a "plot of Alcoa and Dow Chemical Company to limit American production of magnesium, while output zoomed in Germany").

39. A "proxy statement" is a lengthy publication transmitted to corporate shareholders and filed with the SEC in advance of a public company's annual shareholder meeting. See, e.g., *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 792 F.3d 323, 334 (3d Cir. 2015) (the proxy statement "is an informational package that tells shareholders 'about items or initiatives on which [they] are asked to vote, such as proposed bylaw amendments, compensation or pension plans, or the issuance of new securities'" (quoting *Apache Corp. v. Chevedden*, 696 F. Supp. 2d 723, 727 (S.D. Tex. 2010))). The purpose of the proxy statement is to provide shareholders with information about matters that will appear on the ballot at the shareholder meeting. *Id.*

40. Under a subsection of Rule 14a-8, Medical Committee was required to submit its proposal to Dow's management at least sixty days before the date corresponding to the date upon which Dow had filed its proxy statement the preceding year. See Rule 14a-8(a), 17 C.F.R. § 240.14a-8(a) (1969). Because it missed this deadline, Medical Committee's proposal was excludable.

41. *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972). The full text read:

RESOLVED, that the shareholders of the Dow Chemical Company request the Board of Directors, in accordance with the laws of the State of Delaware, and the Composite Certificate of Incorporation of the Dow Chemical Company, to adopt a resolution setting forth an amendment to the Composite Certificate of Incorporation of the Dow Chemical Company that napalm shall not be sold to any buyer unless that buyer gives reasonable assurance that the substance will not be used on or against human beings.

production of napalm had made recruitment of new employees difficult, and that “public reaction” to Dow’s role in the Vietnam War had an “adverse impact on our global business.”<sup>42</sup>

Both considerations were valid and should have concerned the company’s shareholders. From 1966 to 1970, Dow experienced more than two hundred protests, most occurring at universities when Dow recruiters visited the campus.<sup>43</sup> A significant riot broke out at the University of Wisconsin’s Madison campus in October 1967, marking the first time that tear gas was used on an American university campus.<sup>44</sup> Soon afterward, Dow began publishing an internal newsletter, the “Napalm News,” to inform company executives about protests and Dow’s precautions in response.<sup>45</sup> In February 1968, a timed bomb exploded at Dow’s Frankfurt office, and another bomb exploded at Dow’s Milan office in April.<sup>46</sup> Both attacks caused little damage but underscored the escalating public hostility toward the company.<sup>47</sup>

Dow’s general counsel, William A. Groening, Jr., wrote back to Medical Committee at the end of March to confirm that its letter had arrived too late—Dow’s proxy statement had already been

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42. See *id.* (quoting the letter).

43. BRANDT, *supra* note 27, at 96; *Dow Offices Vandalized*, CHEMICAL & ENGINEERING NEWS, Nov. 17, 1969, at 15; *Napalm and the Dow Chemical Company*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/two-days-in-october-dow-chemical-and-use-napalm/> (last visited June 13, 2019) (“Dow recruiters found themselves trapped in interview rooms, spat on, forced to hustle out of back exits, and called ‘baby killers.’”) (on file with the Washington and Lee Law Review).

44. See C. Gerald Fraser, *Antiwar Protest Ends in Violence*, N.Y. TIMES (Oct. 19, 1967), at 8 (describing “two days of protests directed at on-campus recruiting by the Dow Chemical Company” that ended in 65 injured persons and nine student arrests); NEER, *supra* note 6, at 135 (noting that the riot “triggered almost 2,000 newspaper articles and editorials about Dow and napalm: almost double the total number of articles about the firm and its controversial product published to that date”).

45. BRANDT, *supra* note 27, at 98.

46. *Violence Mounts in West Germany*, N.Y. TIMES, Feb. 4, 1968, at 23; *Bomb Shatters Dow Napalm Site*, RICHMOND TIMES-DISPATCH, Apr. 1, 1968, at A-4.

47. *Violence Mounts in West Germany*, *supra* note 46, at 23. There were also reports that Dow’s stock price suffered as a result of the napalm controversy. For example, in April 1968, one commentator noted that President Johnson’s first “peace overtures” had caused Dow’s stock price to reach “new highs” on the prospect of “seeing its contested business in napalm manufacture disappear.” John Chamberlain, *The Doves on Wall Street*, RICHMOND TIMES-DISPATCH, Apr. 25, 1968, at A-12.

printed—and to promise to study the matter and get back to them.<sup>48</sup> Medical Committee did not hear back.<sup>49</sup> The months that followed were incredibly busy for the civil rights organization. After the April 4 assassination of Martin Luther King Jr., Medical Committee personnel treated injured persons in riots around the country.<sup>50</sup> In June, Medical Committee members temporarily shut down a meeting of the House of Delegates of the American Medical Association to protest racism within the medical community's most prestigious organization.<sup>51</sup> In August, Medical Committee personnel gave assistance to civilians tear gassed in Chicago protests, while fifty Medical Committee members protested Maryland Governor Spiro T. Agnew's nomination for the vice presidency, citing his cutbacks to the state's Medicaid program.<sup>52</sup>

### *B. Dow's 1968 Shareholder Meeting*

Although Dow had refused Medical Committee's late proposal, its 1968 shareholder meeting became a focal point of anti-war protest.<sup>53</sup> In anticipation of demonstrations, Dow announced

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48. Dow's 1968 proxy statement was dated March 22, 1968. See THE DOW CHEMICAL COMPANY, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 8, 1968 (Mar. 22, 1968) (on file with author).

49. *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972). Groening remained Dow's legal representative throughout its dispute with Medical Committee. He was appointed Dow's assistant general counsel in February 1951. *Business Notes*, N.Y. TIMES, Feb. 25, 1951, at 122. In 1981, Groening published THE MODERN CORPORATE MANAGER: RESPONSIBILITY AND REGULATION (1981).

50. See YOUNG, *supra* note 17, at 78 ("Ten police precincts appealed to us for help in treating prisoners, and forty of our doctors responded. On the street, one of our doctors saved the life of a soldier who'd had a heart attack during the riots.").

51. See Victor Cohn, *AMA Meeting Disrupted by Protest Group*, WASH. POST, June 17, 1968, at A3 (describing how the AMA first cut off the microphones and then played music over statements made by Medical Committee members to protest the AMA's role in "denying health care to millions of the poor and the black").

52. Douglas E. Kneelands, *Agnew Cheered and Booed on Return to Maryland*, N.Y. TIMES, Aug. 15, 1968, at 31; *Protesters Hurt in Chicago Get Care From Volunteer Doctors*, N.Y. TIMES, Aug. 29, 1968, at 23.

53. A group of clergy had also asked the company for a shareholder vote on napalm at its 1968 meeting, though it is not clear that the clergy were stockholders. *Clergy Urge Dow Stockholder Vote on Napalm*, N.Y. TIMES, May 5,

beforehand that it would restrict admittance to the meeting.<sup>54</sup> Hundreds of activists converged on Midland, Michigan on May 8, 1968 for the meeting.<sup>55</sup> While the company's 1967 meeting was attended by 300 shareholders, its 1968 meeting had nearly 1,200 in attendance.<sup>56</sup> The "March on Midland" was led, not by Medical Committee, but by the Reverend Richard R. Fernandez of Clergy and Laymen Concerned About Vietnam, an anti-war group.<sup>57</sup> Dow's president, Ted Doan, and its Board Chair, Carl A. Gerstacker, met with Fernandez and four other anti-war activists across the street from the middle school where Dow's annual meeting took place, inside a church, before a large audience.<sup>58</sup> Gerstacker told the activists that he personally wanted the war to come to an end. "Companies don't start wars, and companies can't end them," he told the assembled group.<sup>59</sup>

Outside the shareholder meeting, "the lawn in front of the school had become a kind of slogan-chanting carnival, with discussion groups, amateur musical soloists and groups of various kinds, antiwar posters and picket signs."<sup>60</sup> Twenty-seven

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1968, at 3. Dow's 1968 shareholder meeting took place at the end of the 1967–68 school year, which saw by far more college protests than any subsequent year. See Jerry M. Flint, *Napalm Bid Lost, Dow Still Target*, N.Y. TIMES, Nov. 21, 1969, at 38 (noting that Dow experienced 133 campus demonstrations in 1967–68; 29 in 1968–69; and four in the fall of 1969).

54. See *Dow To Restrict Annual Meeting*, RICHMOND TIMES-DISPATCH, May 8, 1968, at A-11 (noting that admittance was restricted to employees and stockholders with identification).

55. See Field, *supra* note 31, at 4 (noting "[a]bout 300 college students and clergymen wearing black arm bands" picketed the meeting).

56. *Id.*; see also *Napalm Protest Planned*, N.Y. TIMES, May 3, 1968, at 95 (reporting that protest leaders "expected about 50 people representing some 500 proxies to attend" Dow's annual meeting).

57. BRANDT, *supra* note 27, at 99. A year earlier, Clergy and Laymen Concerned About Vietnam had organized a protest of the Eastman Kodak Co. shareholder meeting to challenge the company's employment practices with regard to race. See *infra* notes 228–230 and accompanying text; *Protest Due at Dow Meeting*, *supra* note 31 (describing actions a year earlier); Robert A. Wright, *Annual Meetings Calm Down*, RICHMOND TIMES-DISPATCH, May 11, 1969, at D-16 ("In 1967, Eastman Kodak Co.'s annual meeting was a focal point in the Negro civil-rights battle.").

58. BRANDT, *supra* note 27, at 99. According to the *Washington Post*, the activists were "two clergymen, a stockbroker, a housewife and a nun." *Dow Defends Napalm as GI Saver*, WASH. POST, May 9, 1968, at E20.

59. Field, *supra* note 31, at 4.

60. BRANDT, *supra* note 27, at 99–100. Although Brandt, Gerstacker's

protestors gained admission to the meeting with stockholders' proxies.<sup>61</sup> Some spoke at the meeting; Gerstacker later claimed that his "main problem" was "to try to restrain the employees and local people who wanted to throw these people out physically."<sup>62</sup> One Dow shareholder—a broker who had traveled from Scarsdale, New York—nominated an anti-war board candidate from the floor of the meeting, but the nominee was defeated in the vote.<sup>63</sup>

### *C. Medical Committee's 1969 Proposal*

The next year, Medical Committee again submitted a napalm proposal to Dow, and this time it complied with the deadline under Rule 14a-8.<sup>64</sup> Around the same time, the Union Theological Seminary divested itself of 6,000 shares of Dow stock to protest the

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biographer, claimed that Gerstacker had refused to ask police to help control the picketing, some newspaper accounts of the protests described police officers on the scene. *Id.* At the meeting, Gerstacker created a new rule "to control the lengthy, never-ending speeches to which the antiwar movement was devoted." *Id.* The new rule reportedly became known as the "Gerstacker rule" and was used at Dow's annual shareholders meeting at least through the beginning of the twenty-first century. *Id.* Under the rule, "if it takes more than five minutes to ask it, it's not a question but a speech, and if it takes more than five minutes to answer it, it's not an answer but a speech; and either one will be gavelled down." *Id.* Dow eventually reduced the time from five minutes to three and installed a big clock in the room for keeping time. *Id.*

61. See *Dow Meeting Is Picketed*, RICHMOND TIMES-DISPATCH, May 9, 1968, at G-4.

62. BRANDT, *supra* note 27, at 100. The *Wall Street Journal* reported that at the conclusion of the meeting, departing stockholders were "serenaded" by activists who sang "We Shall Overcome." Field, *supra* note 31, at 4.

63. Field, *supra* note 31, at 4. The broker was Daniel J. Bernstein. Bernstein's nominee was Marriner S. Eccles, a war critic, former Chair of the Federal Reserve Board and the president of the Utah Mining & Construction Co.; Eccles received 1,212 votes. *Id.* At an earlier meeting with Doan and Gerstacker before an audience of activists, Bernstein told the executives he thought Dow should "increase its profit margin on napalm to compensate for 'destroying' its corporate image by continued production." *Dow Defends Napalm as GI Saver*, *supra* note 58, at E20.

64. The proposal, sent to William Groening, Jr. from Dr. Quentin D. Young, noted that Medical Committee was "distressed that 1968 has passed without our having received a single word from you on this important matter." *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 662 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972).



company's involvement in the Vietnam War.<sup>65</sup> Dow responded to what was clearly escalating shareholder dissatisfaction by pushing back. It asked the SEC for a no-action letter—essentially, permission from the regulatory agency to exclude the proposal from its proxy statement. Dow claimed the proposal was excludable under two subsections of Rule 14a-8: Subsection 2, which made a proposal excludable if it was “primarily for the purpose of promoting general economic, political, racial, religious, social, or similar causes,”<sup>66</sup> and Subsection 5, the predecessor to the “ordinary business” exception, which made a proposal excludable if it recommended or requested action “with respect to a matter relating to the conduct of the ordinary business operations of the issuer.”<sup>67</sup>

Dow's response caused Medical Committee to seek out a securities lawyer. Cowan, the donor of the Dow shares, recommended that Medical Committee consult with Jeffrey Bauman, then a lawyer with Arnold & Porter in Washington D.C.<sup>68</sup> Bauman briefly represented Medical Committee in its communications with the SEC, before handing the organization off to Roberts Owen of Covington & Burling, who would represent it

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65. *Dow Stock Is Sold by Union Seminary*, N.Y. TIMES, Jan. 11, 1969, at 31. A few months later, the Massachusetts Conference of the United Church of Christ made news when it chose to take a \$15,000 loss by divesting itself of Dow stock to protest Dow's manufacture of napalm. See *Chemical Stock Sold as Protest*, RICHMOND TIMES-DISPATCH, June 11, 1969, at B-19.

66. 17 C.F.R. § 240.14a-8(c)(2). Subsection 2, about political, racial or social causes, had been added in 1952, shortly after a shareholder of the Greyhound bus company submitted a proposal seeking to end segregated seating. The Greyhound bus company refused to publish it in its proxy, and it was never put to a vote. See *generally*, *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 681 (S.D.N.Y. 1951).

67. 17 C.F.R. § 240.14a-8(c)(5); *Med. Comm. for Human Rights*, 432 F.2d at 680.

68. Letter from Quentin D. Young, Medical Committee for Human Rights, to Jeffrey Bauman, Esq., Arnold & Porter (January 21, 1969) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421) (“Geoff Cowan suggests that you would be interested in facilitating a hearing on our behalf before the Securities and Exchange Commission . . .”). According to the letter, Cowan had also explored with Young the possibility that Medical Committee would spearhead a campaign to elect progressive directors to Dow's board. *Id.* Medical Committee never pursued that plan. Bauman, who had worked for the SEC, went on to become a corporate law professor at Georgetown. *Jeffrey D. Bauman*, GEO. L., <https://www.law.georgetown.edu/faculty/jeffrey-d-bauman/> (last visited Sept. 6, 2019) (on file with the Washington and Lee Law Review).

through the conclusion of the Supreme Court litigation. On the basis of new legal advice, on February 3, Medical Committee submitted a “new request” to Dow, essentially changing the text of its January 17 proposal.<sup>69</sup> The new proposal was carefully couched in precatory terms, and now requested merely that Dow’s board “consider the advisability” of amending the certificate of incorporation to make clear that “the company shall not make napalm.”<sup>70</sup>

Dow quickly reiterated its objection to this new proposal and, on February 18, the SEC’s Division of Corporation Finance sided with Dow. It issued the requested no-action letter, giving approval to Dow’s omission of the proposal from its 1969 proxy statement.<sup>71</sup> Medical Committee responded by requesting that the full Commission review the no-action decision of the Division of Corporation Finance.<sup>72</sup>

On March 23, headlines proclaimed that protestors had broken into Dow’s Washington D.C. office and poured “human blood” on furniture and equipment.<sup>73</sup> The next day, the SEC

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69. Letter from Quentin D. Young, M.D., Member, Executive Committee, Medical Committee for Human Rights, to Mr. W. A. Groening, Jr., General Counsel, Dow Chemical Company (Feb. 3, 1969) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421). In addition, on the same day, Medical Committee sent a letter to the SEC that requested a staff review of Dow’s decision “if it still intended to omit the proposal, and requesting oral argument before the Commission if the staff agreed with Dow.” Letter from Quentin D. Young, M.D., Member, Executive Committee, Medical Committee for Human Rights, to Mr. Donald Lewis, Securities and Exchange Commission (Feb. 3, 1969) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421); *Med. Comm. for Human Rights*, 432 F.2d at 663.

70. *Med. Comm. for Human Rights*, 432 F.2d at 663.

71. *See id.*; Letter from Courtney Whitney, Chief Counsel, Division of Corporation Finance, SEC, to Herbert H. Dow, Secretary, The Dow Chemical Co., (Feb. 18, 1969) (“For reasons stated in your letter and the accompanying opinion of counsel, both dated January 17, 1969, this Division will not recommend any action to the Commission if this proposal is omitted from the management’s proxy material for the Company’s annual meeting . . .”).

72. Cert. Petition at 4; *Med. Comm. for Human Rights*, 432 F.2d at 663. This was Medical Committee’s second request that the Commission review the Division’s no-action determination.

73. *See Dow Office Invaded*, RICHMOND TIMES-DISPATCH, Mar. 23, 1969, at A-6 (describing the damage the protestors did to the premises). Although a break-in in November 1969 involved a Medical Committee officer, there is no indication that the Washington break-in involved Medical Committee members. *See infra* note 88 (discussing other protests).

considered Medical Committee's appeal and affirmed the Division's no-action determination.<sup>74</sup> Dow proceeded to print its 1969 proxy statement, omitting Medical Committee's napalm proposal.

#### *D. Dow's 1969 Shareholder Meeting*

On May 7, 1969, Dow's shareholders again gathered in Midland for the annual shareholder meeting. This time, Medical Committee sent doctors and medical students from its Detroit chapter to picket and to speak at the meeting.<sup>75</sup> Among seven protesters who gave speeches at the meeting was Theodore Tapper, a Medical Committee member and pediatrician who had flown in for the meeting from New York.<sup>76</sup> Tapper "held aloft" photographs of children injured by napalm during his presentation.<sup>77</sup> Anti-war shareholders again nominated an anti-war candidate to Dow's board.<sup>78</sup> Although the anti-war nominee was defeated with only 4,062 votes, he had won more than three times as many votes as the previous year's anti-war candidate. The activists' stockholder support was increasing.<sup>79</sup>

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74. Cert. Petition at 4. The Commission's decision was "reflected solely in a minute of its meeting." *Id.* Medical Committee learned of the Commission's decision the same day by telephone. *Id.* In the litigation that followed, the SEC argued that Medical Committee's appeal was untimely because it was not filed within the requisite number of days after the phone call. *Id.* The D.C. Circuit rejected this argument, concluding that the clock did not start to run until the SEC mailed Medical Committee notice of the Commission's decision on April 2. *See Med. Comm. for Human Rights*, 432 F.2d at 663–64 (discussing the details of the court's reasoning on timing).

75. *See* DITTMER, *supra* note 13, at 176 (describing those in attendance at the 1969 meeting).

76. *See* Justin Bavarskis, *Dow President Vows 'Patriotism': Napalm Confrontation*, WASH. POST, May 9, 1969, at D9 (discussing Trapper's involvement at the meeting).

77. *Id.* Tapper had spent several weeks touring Vietnam in 1967 with the Committee of Responsibility where he observed and photographed napalm injuries to Vietnamese civilians. Interview with Theodore Tapper, M.D. (June 3, 2019) [hereinafter "Tapper Interview"].

78. *See* Bavarskis, *supra* note 76, at D9 (stating that Gen. David Shoup, a retired Marine Corp commandant and Vietnam war critic, was nominated to the board of directors).

79. *Id.*; *see* Field, *supra* note 31, at 4 (reporting that the 1968 board nominee,

Dow's Board Chair, Carl A. Gerstacker, presided over the meeting.<sup>80</sup> He proclaimed that Dow was producing napalm not for profit, but for "patriotism," and read a letter in which a GI said that napalm had saved his platoon from certain death.<sup>81</sup> Gerstacker did not hold back on the protestors, telling them that they should feel "ashamed."<sup>82</sup> "You tell untruths about us," he said.<sup>83</sup> "And when we confront you with the truth like we did last year, you tell new and bigger untruths plus the old ones over and over again. And gentlemen, that's the Goebbels-Hitler technique that worked very well in the 30s."<sup>84</sup> Gerstacker's rhetoric at the meeting suggests that conflict between Dow's management and its anti-war shareholders had reached a high pitch, and that Dow's managers were defiant in the face of shareholder opposition.

After Dow's 1969 annual meeting, Medical Committee engaged a new lawyer, Roberts Owen of Covington & Burling, and began a fund-raising drive for its litigation campaign.<sup>85</sup> Quentin Young, who met with the new law firm as Medical Committee's representative, wrote that Covington & Burling was "interested in setting legal precedent to upgrade corporate responsibility."<sup>86</sup>

Protests against Dow continued well into the fall of 1969. In November, a group of five people, including a national officer of Medical Committee, broke into Dow's Research Center in Midland

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Marriner S. Eccles, received 1,212 votes).

80. See Ripley, *supra* note 31, at 12 (noting Gerstacker attended and spoke at the meeting).

81. Bavarskis, *supra* note 76, at D9.

82. Ripley, *supra* note 31, at 12.

83. *Id.*

84. *Id.* Gerstacker's invocation of Nazism was not random; Dow had been dogged for years by allegations that "there was a close historical connection between Dow and Nazi chemical producers." NEER, *supra* note 6, at 117. These allegations reportedly came up at the meeting. See *Dow Chemical to Bid On Another Contract For Supplying Napalm*, *supra* note 15, at 18 (stating that Gerstacker "denied accusations [from shareholders] ranging from alleged Dow Chemical cooperation with Nazi scientists to its assertedly making poison gas").

85. Letter from Quentin Young, Med. Comm. for Human Rights, to Roberts Owen, Esq., Covington & Burling (May 31, 1969) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421) ("We hope to raise \$3,000 (three thousand dollars) from friends of MCHR in support of the necessary litigation.").

86. Letter from Quentin Young, Med. Comm. for Human Rights, to Mr. Michael Donnelly (Apr. 8, 1969) (on file with author & Univ. of Penn. Archives, Coll. 641, Folder 421).

and destroyed documents and computer tapes.<sup>87</sup> It was the first time that a person affiliated with Medical Committee had broken the law in an act against Dow. After trashing Dow's office, the five held a press conference to explain their actions and surrendered to police.<sup>88</sup>

That same month, *Time* reported that a group of Notre Dame students had "locked up" a Dow recruiter to protest Dow's manufacture of napalm.<sup>89</sup> However, *Time* noted "a special irony to the encounter: Dow has quietly stopped producing the sticky incendiary jelly."<sup>90</sup> In fact, Dow was promoting the news; its loss of the contract was a front-page headline in Midland's local newspaper.<sup>91</sup> Major newspapers also reported in November that Dow's contract with the Air Force had expired in May, around the time of the annual shareholders meeting, and Dow ran ads to get the word out.<sup>92</sup> Yet Dow's management pushed back on the idea

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87. The group of five, which called itself "Beaver 55," included Jane Kennedy, an Assistant Director of Nursing Research and Studies at University of Chicago hospitals. Kennedy was a national officer of Medical Committee and a member of the executive board of Medical Committee's Chicago chapter. An audio recording of an interview of Kennedy by Studs Terkel can be found at: *Jane Kennedy Talks About Her Anti-war Activism, Crimes & Experience in Prison*, Studs Terkel Radio Archive (Nov. 6, 1975), <https://studsterkel.wfmt.com/programs/jane-kennedy-talks-about-her-anti-war-activism-crimes-and-experience-prison> (last visited July 8, 2019) (on file with the Washington and Lee Law Review). For more information on Jane Kennedy, who was nominated for the Nobel Peace Prize in 1976, see Harriet Gross, *Jane Kennedy: Making History Through Moral Protest*, 2 FRONTIERS: J. WOMEN STUD. 73 (1977).

88. *Dow Offices Vandalized*, CHEMICAL & ENGINEERING NEWS, Nov. 17, 1969, at 15. Ultimately, the five members of Beaver 55 pleaded guilty to breaking and entering and malicious mischief and received prison sentences. See THE GOOD DOCTORS, *supra* note 13, at 173–74 (discussing the criminal proceedings).

89. *Dow Drops Napalm*, TIME, Nov. 28, 1969; Flint, *supra* note 53, at 38 (noting that the Notre Dame group was led by "a mini-skirted nun").

90. *Dow Drops Napalm*, *supra* note 89; Flint, *supra* note 53, at 38 (reporting that Dow "has not made napalm for six months").

91. See Flint, *supra* note 53, at 38 ("Napalm Bid Lost, Dow Still Target").

92. See *Dow Drops Napalm*, *supra* note 89 (noting that the contract was picked up by American Electric Inc., which sold no consumer products). There was another public relations push in May 1971, around the time of the shareholder vote on napalm, to emphasize that Dow had stopped manufacturing napalm in May 1969. See, e.g., Hugh McCann, *Dow Shareholders Reject Napalm Ban*, DETROIT FREE PRESS, May 6, 1971, at 3; *Quarterly Is Boosted to 67 ½ Cents from 65 Cents; Firm Sees Net Rising in Second Quarter, Year*, WALL ST. J., May 6, 1971, at 20 ("In 1969, the company was outbid for the government's napalm supply

that it had capitulated. “Making napalm became a matter of principle,” Dow’s president, Ted Doan, said.<sup>93</sup> He emphasized that Dow had simply lost the bid, and planned to bid again on the napalm contract in the future.<sup>94</sup>

By this time, Medical Committee had already filed a petition for review in the Court of Appeals for the District of Columbia Circuit, seeking to force Dow to include its napalm proposal in its proxy statement. That court would not render a decision until July 1970, following a particularly tumultuous proxy season. Going into the case, it appeared that Medical Committee had little legal basis for victory.<sup>95</sup> Meanwhile, Medical Committee submitted its napalm proposal to Dow for a third year in a row, and Dow again rejected it.

### *E. The 1970 Proxy Season*

The 1970 proxy season was unique in American business history.<sup>96</sup> “Proxy season” is the name given to the months between March and June each year, when most American public companies hold their annual meeting for stockholders. In 1970, an unprecedented surge of shareholder activism made headlines as the corporate annual meeting became a forum for social and political debate and, in some cases, violence.<sup>97</sup>

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contract, and it hasn’t produced the chemical since, the company said.”).

93. Flint, *supra* note 53, at 38.

94. *Id.* (“Dow will bid again on napalm and could produce it again, [Doan] added.”).

95. See Patrick H. Allen, *The Proxy System and the Promotion of Social Goals*, 26 BUS. LAW. 481, 487 (1970) (stating that, based on prior case law, there was “little chance of including in a management proxy statement a shareholder proposal which would require that the corporation take either positive or negative action to accomplish a result which is deemed socially desirable by the shareholder”).

96. The *Wall Street Journal* warned in April that “[a]ctivists protesting the Vietnam war, pollution and what they charge is industrial irresponsibility are planning to press vigorously their campaigns in the coming weeks at a number of shareholder meetings across the country.” *Dissent vs. Industry: Activists Intend to Use Annual Meetings As Forums for Protests in Coming Weeks*, WALL ST. J., Apr. 7, 1970, at 40.

97. The American Society of Corporate Secretaries, anticipating a turbulent proxy season in 1970, published a “detailed how-to for maintaining peace” at the annual meeting. See *id.*; see also Robert Metz, *Market Place: Will the Meeting*

For example, the April stockholders meeting of General Electric, picketed by some 300 protestors, was disrupted by a “shouting match” on the floor of the meeting, and the meeting was ended to diffuse tensions.<sup>98</sup> In Connecticut, four proxyholders inside the annual meeting of United Aircraft Corp. were arrested for disorderly conduct and led outside the “heavily guarded” building, which was surrounded by hundreds of anti-war picketers.<sup>99</sup> In San Francisco, the annual meeting of the Columbia Broadcasting System, Inc., was suspended so that plainclothes police officers could clear the building after nine “highly vocal members of the Women’s Liberation Front” invaded to protest the company’s treatment of women.<sup>100</sup> The same month, the Union Carbide annual meeting was disrupted by students who burst into the hall and had to be “rounded up” by guards.<sup>101</sup> One hundred and sixty “new-style capitalists” crashed the Commonwealth Edison annual meeting, calling themselves the “Committee Against Pollution,” and offered an anti-pollution resolution from the meeting floor.<sup>102</sup> At the May 1970 annual meeting of Olin Corp., shareholders were besieged by twenty-eight armed, off-duty police

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*Come to Order?*, N.Y. TIMES, Apr. 3, 1970, at 52 (excerpting the publication).

98. See Gene Smith, *G.E. Stockholders Hear from Protesters*, N.Y. TIMES, Apr. 23, 1970, at 66 (reporting that five board candidates were nominated from the floor, and proposals from “several young students” with proxies were dismissed by GE’s Board Chair because “the majority of share owners,” who were not present “had not had an opportunity to study such proposals”); George C. Wilson, *Student Interrupts GE Stockholders*, WASH. POST, Apr. 23, 1970, at A20 (reporting that a student leader, one of ten proxy-wielding protestors, was interrupted by an “elderly stockholder” who shouted, “Get out, you bum”).

99. See Jack Zaiman, *Aircraft Meeting Disrupted; 4 Seized*, WASH. POST, Apr. 15, 1970, at A2 (noting that the city of Hartford had refused to give the protestors a permit to gather in a park after the meeting, and a federal judge ordered the city to allow it).

100. See Robert A. Wright, *Women Disrupt Meeting of C.B.S.*, N.Y. TIMES, Apr. 16, 1970, at 63 (reporting that protestors in the meeting were met with “hisses from stockholders” but “[l]ater, when the meeting resumed, matters proceeded smoothly after [the Chair] announced that ‘we do not dislike women’ and that 10 percent of CBS employees [sic] were women”).

101. See *Union Carbide Slapped by 2 Protest Groups—Students and Holders*, WALL ST. J., Apr. 23, 1970, at 17 (describing the company’s board chair as “visibly shaken by the student disturbance”).

102. See Seth S. King, *Protests Staged at Utility and Boeing Meetings*, N.Y. TIMES, Apr. 28, 1970, at 61 (noting that the meeting was adjourned “without any formal action on the Committee Against Pollution’s resolution”).

officers, fifteen private security guards, and a Doberman Pinscher, in anticipation of protests that never materialized.<sup>103</sup>

The most dramatic confrontation took place at the April 1970 annual meeting of Honeywell, Inc. Like Dow, Honeywell, a munitions manufacturer, was a target for anti-war protest.<sup>104</sup> At the meeting, a shareholder confronted the company's board chair by demanding, "How does it feel to be a war criminal?"<sup>105</sup> Hundreds of protestors showed up to the meeting, and Honeywell's security officers sprayed them with mace; in response, the protestors threw rocks.<sup>106</sup> Sixty police officers responded, wearing gas masks.<sup>107</sup> The "[n]early 300 shouting, screaming demonstrators, many stripped to the waist and decorated with red and white grease paint," so alarmed the company's board chair that he ended the meeting after only fourteen minutes.<sup>108</sup>

The 1970 proxy season also produced Campaign GM, a program of shareholder activism at General Motors Corporation. Campaign GM was organized by a Washington D.C.-based nonprofit, the Project on Corporate Responsibility, which had connections to Medical Committee.<sup>109</sup> Campaign GM was affiliated

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103. See *Olin Musters Force in Case of Protest, But Nothing Happens*, WALL ST. J., May 1, 1970, at 15 ("Olin's president, Gordon Grand, apologized to stockholders and reporters for what he called 'management's overreaction' to the demonstration threat."); see also Metz, *supra* note 97, at 52 (stating "[b]efore the annual meeting of Hercules, Inc., there was considerable fear that protestors might turn up and use some of the explosives manufacturer's blasting powder to reduce the meeting to smithereens," but "the atmosphere remained calm").

104. See K. Ames Smithers, *Honeywell Assailed by War Protestors; Annual Meeting Halted After 14 Minutes*, WALL ST. J., Apr. 29, 1970, at 8 (discussing the protests at Honeywell's annual meeting in 1970).

105. Joel F. Henning, *Reforming the Corporations Is Not Enough: Democracy for Whom*, WASH. POST, Aug. 29, 1971, at B5 (noting that Honeywell was "America's largest producer of anti-personnel weapons for use in Southeast Asia" and that its annual meeting "was adjourned after 13 nervous and noisy minutes when the demonstrations inside and outside the meeting were perceived by Chairman Binger to be approaching violence").

106. See Smithers, *supra* note 104, at 8 (explaining the response to protestors).

107. *Id.*

108. *Id.*

109. See Donald E. Schwartz, *The Public-Interest Proxy Contest: Reflections on Campaign GM*, 69 MICH. L. REV. 419, 423 (1971) ("The Project was formed in late 1969 to promote corporate responsibility and to educate management and the



with Ralph Nader, the consumer activist, and was organized in part by Donald E. Schwartz, a corporate law professor at Georgetown Law School.<sup>110</sup>

In February 1970, Campaign GM, which owned twelve shares of General Motors stock, made a number of demands on the company.<sup>111</sup> Ultimately General Motors succeeded in excluding seven of nine proposals, but the SEC required General Motors to include two proposals in its proxy statement.<sup>112</sup> One demanded that General Motors enlarge its board by adding three new directors; Campaign GM announced it would nominate a woman director and an African-American director to fill the new positions.<sup>113</sup> The other proposed the creation of a Shareholders Committee for Corporate Responsibility, which would include representatives of General Motors's board, the United Auto Workers, and Campaign GM.<sup>114</sup> Nader told the *Wall Street Journal* that General Motors's shareholder meeting would be "a great public debate on the giant corporation rather than a wooden recital of aggregate financial data."<sup>115</sup> The national news media provided

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public about the social role of corporations."). The connections between the two organizations only emerged after Medical Committee had its initial success in the D.C. Circuit in July 1970. For example, Roger S. Foster, a former general counsel of the SEC and a key figure in Campaign GM, would go on to accompany Medical Committee's Theodore Tapper to Dow's 1971 shareholder meeting, and the Project on Corporate Responsibility would file an amicus brief in support of Medical Committee in the Supreme Court. McCann, *supra* note 92, at 3. Roberts Owen, Medical Committee's lawyer, told the *Washington Post* that Medical Committee's victory would have an "important impact" on Campaign GM and similar activism campaigns. Peter Osnos, *Shareholders' Power Increased by Ruling*, WASH. POST, July 11, 1970, at E5.

110. See, e.g., Morton Mintz, *Nader Seeks GM Changes: Would Seat 3 on Board*, WASH. POST, Feb. 8, 1970, at A2.

111. See Schwartz, *supra* note 109, at 423 (explaining the demands made by Campaign GM in 1970).

112. See *id.* at 423–24 (describing the two included proposals in depth).

113. See *id.* at 424 (listing proposed new board members as Betty Furness, Dr. Rene Dubos, and the Reverend Channing Phillips).

114. *Id.*

115. *Nader Embarks on Campaign Against GM, Wants Holder Support on Safety, Pollution*, WALL ST. J., Feb. 9, 1970, at 9. In response, GM's Board Chair told its stockholders that the Project on Corporate Responsibility was "using General Motors as a means through which it can challenge the entire system of corporate management in the United States." Schwartz, *The Public-Interest Proxy Contest*, *supra* note 109, at 430. This message was included in a twenty-one page booklet entitled, "GM's Record of Progress," which GM enclosed in the proxy

breathless coverage of Campaign GM's challenge to General Motors's management in the spring of 1970. In the end, although the Campaign GM proposals won only a small percentage of votes, they broke new ground by garnering the support of institutional investors like the New York City pension funds.<sup>116</sup>

Amid the turmoil, Dow's 1970 shareholder meeting was relatively quiet. To more effectively control the meeting, Dow moved it to a commercial theater in Midland and required stockholders to apply in advance for a ticket to be admitted.<sup>117</sup> Only one protestor appeared outside the May meeting, which "was taken up mostly by a review of the company's antipollution efforts."<sup>118</sup> No one from Medical Committee attended.<sup>119</sup> Behind the scenes, however, Medical Committee's legal fight was just getting started.

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statement it sent to all of its stockholders. *Id.*

116. See Hobart Rowen, *Business Can't Ignore Protests*, WASH. POST, Apr. 12, 1970, at 11 (explaining that in addition to the New York City pension funds, "the University of Pennsylvania has announced it will vote all its shares pro-consumers"); Schwartz, *supra* note 109, at 430 ("The proposal for the shareholder committee received 6,361,299 votes, representing 2.73 percent of the votes cast, from 61,794 shareholders, representing 7.19 percent of the shareholders voting. The proposal to amend the bylaws was supported by 5,691,130 shares, or 2.44 percent of the votes cast, and 53,495, or 6.22 percent of the shareholders voting.") Although the proposals garnered few votes, General Motors chose to voluntarily adopt some of the proposed reforms. See Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1084 (2015).

117. See THE DOW CHEMICAL COMPANY, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 6, 1970 (Mar. 20, 1970) ("[A]dmission to the meeting will be by ticket only. For the convenience of stockholders a ticket application form is enclosed.") (on file with author). In previous years, Dow had held its annual meeting at a public middle school. See *supra* notes 58–61 and accompanying text (discussing Dow's previous annual meetings).

118. *Dow Chemical Sees Recession Lasting Until End of Year*, WALL ST. J., May 7, 1970, at 8 ("Unlike the last two annual meetings, which were dominated by large numbers of antiwar demonstrators protesting Dow's manufacture of napalm, only one picket was in view.")

119. Theodore Tapper, who attended Dow shareholder meetings on Medical Committee's behalf, attended meetings in 1969 and 1971, but not in 1970. Tapper Interview, *supra* note 77.

### III. Medical Committee in Court

*“It is obvious to the point of banality . . . that Congress intended by its enactment of section 14 of the Securities Exchange Act of 1934 to give true vitality to the concept of corporate democracy.”*<sup>120</sup>

Medical Committee’s fight to exercise its rights as a Dow shareholder led it to commence litigation on May 29, 1969 that did not conclude until the U.S. Supreme Court declared the case moot on January 10, 1972.<sup>121</sup> The litigation pitted Medical Committee solely against the U.S. Securities and Exchange Commission.<sup>122</sup> Dow never filed an appearance in the case and never submitted a brief to the D.C. Circuit Court of Appeals or to the U.S. Supreme Court. Nonetheless, Dow played a shadow role in the case, and its maneuvering behind the scenes ultimately determined the outcome.

#### A. A Victory in the U.S. Court of Appeals for the D.C. Circuit

Medical Committee’s lawsuit presented two issues. First, was the SEC’s no-action determination judicially reviewable under Section 25(a) of the 1934 Act?<sup>123</sup> Second, if it was, did the SEC violate the 1934 Act when it approved Dow’s decision to exclude the napalm proposal?<sup>124</sup> The first question was essentially a matter of administrative law, while the second cut to the heart of the corporate enterprise: did a shareholder have a right to pursue a social, environmental, or political reform to corporate policy through the procedures of corporate democracy?

The timing of the case must have worried Medical Committee’s lawyers. Coming on the heels of the turbulent 1970 proxy season, the case seemed to ask the D.C. Circuit to side with rock-throwing lawbreakers against a well-respected government

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120. *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972).

121. *Id.*

122. *Id.*

123. *Id.* at 665.

124. *Id.* at 676.

agency and the managerial class.<sup>125</sup> No doubt the business community was hoping that a decision in the SEC's favor by the federal appeals court would tamp down the surge of shareholder protests and restore the corporate annual meeting to full management control. They were in for a surprise.

On July 8, 1970, the D.C. Circuit Court of Appeals unanimously sided with Medical Committee.<sup>126</sup> It held that the SEC's no-action letter was judicially reviewable, and sent the matter back to the SEC for "more illuminating consideration and decision" on the merits—whether Medical Committee's proposal could properly be excluded on the grounds offered.<sup>127</sup> But it went further, expressing skepticism that the napalm proposal was excludable, and articulating an expansive view of corporate democracy. The following day, news of the decision ran prominently in the business section of the *New York Times*, which proclaimed that the court had decided that "[c]orporate

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125. See *supra* notes 97–108 and accompanying text (describing protests and confrontations).

126. *Med. Comm. for Human Rights*, 432 F.2d at 661.

127. *Id.* at 661. Separately, the SEC had argued that Medical Committee's appeal of the Commission's March 24, 1969 action on May 29—sixty-six days later—was not timely. The D.C. Circuit rejected this argument, on the ground that the Commission's decision was not communicated to Medical Committee in writing until April 2. See *id.* at 663–64. The D.C. Circuit's 1970 decision created a spate of law review notes and comments, many of which concluded that the court had reached the wrong result on the administrative law issue. See, e.g., Note, *Liberalizing SEC Rule 14a-8 Through the Use of Advisory Proposals*, 80 YALE L.J. 845, 846 (1971) (arguing that the "difficult line-drawing task" created by the ordinary business exclusion could be minimized "by permitting shareholders to include in management's proxy advisory proposals"); Comment, *Medical Committee for Human Rights v. SEC: Judicial Review of SEC No-Action Determinations Under the Proxy Rules*, 57 VA. L. REV. 331, 331 (1971) ("Although the immediate impact of *Medical Committee* will be felt in the field of federal corporation law, there are many difficulties with the decision concerning its treatment of administrative law questions."); Note, *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 Harv. L. Rev. 700, 721 (1971) (discussing the court's remand of the case). But see Note, *The SEC and "No-Action" Decisions Under Proxy Rule 14a-8: The Case for Direct Judicial Review*, 84 Harv. L. Rev. 835, 837 (1971) (concluding that direct judicial review of no-action determinations "is both proper and necessary"); Comment, *Medical Committee for Human Rights v. Securities and Exchange Commission*, 45 N.Y.U. L. Rev. 1098, 1110 (1970) (forecasting the importance of the case prior to the decision).

shareholders have broad rights to participate in corporate decisions that have social impact.”<sup>128</sup>

The opinion, written by Judge Edward Allen Tamm,<sup>129</sup> framed the case as presenting “novel and significant questions concerning the implementation of the concepts of corporate democracy” embodied in federal securities law.<sup>130</sup> Observing that, by approving the Division’s no-action letter, the Commission had “acted in accord with a very dubious legal theory,”<sup>131</sup> the court critiqued the SEC for “not deign[ing] to address itself to any possible grounds for allowing management to exclude this proposal” and confessed “puzzlement as to how the Commission reached the result which it did.”<sup>132</sup> It is “obvious to the point of banality,” the court wrote, that when Congress enacted section 14 of the Securities Exchange Act

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128. Eileen Shanahan, *U.S. Court Widens Rights of Holders*, N.Y. TIMES, July 10, 1970, at 47. The *Wall Street Journal* provided no coverage of the decision. In a 1970 law review article, Donald Chisum called the case “a pathbreaking decision” and asserted that it had “shatter[ed] past assumptions about the reviewability of informal SEC action and about the scope of the SEC shareholder proposal rule.” Chisum, *supra* note 7, at 463. Chisum believed the case exemplified “[i]nventive judicial craftsmanship.” *Id.* at 464.

129. Judge Tamm was confirmed as a federal judge after eighteen years with the Federal Bureau of Investigation, where he rose to serve as the “right hand man” of J. Edgar Hoover. George E. MacKinnon, *Tribute: Edward Allen Tamm*, 74 GEO. L.J. 1576, 1576 (1986). As an FBI official, Tamm supervised the Lindbergh kidnapping case and the capture of John Dillinger. *Id.* Though he was a conservative judge, *see, e.g.*, Daniel O. Conkle, *A ‘Conservative’ Judge and the First Amendment: Judicial Restraint and Freedom of Expression*, 74 GEO. L.J. 1585, 1585 (1986), Judge Tamm appears to have held some socially progressive views. *See, e.g., id.* at 1586 (describing Tamm’s “extremely speech-protective stance”); Edward Allen Tamm, *Books for Lawyers: Women and the Power to Change*, 62 A.B.A. J. 174, 180 (1976) (approving review of a book with clear feminist themes). Judge Tamm was particularly well-regarded by Chief Justice Warren E. Burger; the men shared a passion for efficient judicial administration. *See, e.g.*, Warren E. Burger, *Tribute: Edward Allen Tamm*, 74 GEO. L.J. 1571, 1571 (“In my seventeen year tenure as Chief Justice [of the United States Supreme Court], no single judge contributed more to improving our system of justice than Edward Tamm.”).

130. *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 661 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972). These words mark the first time the phrase “corporate democracy” was used in a decision by a federal court in the D.C. Circuit.

131. *Id.* at 674.

132. *Id.* at 676.

of 1934, it intended “to give true vitality to the concept of corporate democracy.”<sup>133</sup>

Judge Tamm wrote:

No reason has been advanced in the present proceedings which leads to the conclusion that management may properly place obstacles in the path of shareholders who wish to present to their co-owners, in accord with applicable state law, the question of whether they wish to have their assets used in a manner which they believe to be more socially responsible but possibly less profitable than that which is dictated by present company policy.<sup>134</sup>

In other words, all three judges believed that it was within the rights of shareholders to vote on whether to pursue socially responsible goals at the expense of profitability, and Dow was obligated to let the matter go to a vote.<sup>135</sup>

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133. *Id.* Over time, he wrote, it had become clear that:

The question of what constituted a “proper subject” for shareholder action was to be resolved by recourse to the law of the state in which the company had been incorporated; however, the paucity of applicable state law giving content to the concept of “proper subject” led the Commission to seek guidance from precedent existing in jurisdictions which had a highly developed commercial and corporate law and to develop its own “common law” relating to proper subjects for shareholder action.

*Id.* at 677. The court then recounted the history of the evolution of the exception for proposals “primarily for the purpose of promoting general economic, political, racial, religious, social or similar causes,” including a history of *Peck v. Greyhound Corp.*, 97 F. Supp. 679, 681 (S.D.N.Y. 1951), and pointed out that “the Commission’s interpretation or application of this rule has not been considered by the courts.” *Id.* at 678. The court noted that the Commission had “formally represented to Congress” that the ordinary business exception was “intended to make state law the governing authority in determining what matters are ordinary business operations immune from shareholder control,” and that Delaware’s corporate law specifically allowed a corporation’s Certificate of Incorporation to “change, substitute, enlarge or diminish the nature of [the corporation’s] business.” *Id.*; see DEL. CODE ANN. tit. 8, §§ 242(a)(2), 242(d) (1968 Cum. Supp.). The language remains the same today. DEL. CODE ANN. tit. 8, §§ 242(a)(2), 242(d) (2019).

134. *Id.*

135. A few years after he wrote these words in *Med. Comm. for Human Rights v. SEC*, Tamm wrote another important opinion—a dissent from the D.C. Circuit Court of Appeals’s decision in *Buckley v. Valeo*. See *Buckley v. Valeo*, 519 F.2d 821, 912 (D.C. Cir. 1975) (Tamm, J., concurring in part and dissenting in part). In that dissent, Judge Tamm wrote,

The case came down like a thunderclap in the business community, where some claimed that it had made a “major change” in the law.<sup>136</sup> As one put it, “the implications of the *Medical Committee* opinion are far-reaching and indicate that many more social questions will be the subject of shareholder proposals in the future.”<sup>137</sup> A few days after the D.C. Circuit issued

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I am inclined to conclude that campaign expenditures, at least, are so intertwined with direct political communication to be indistinguishable for first amendment purposes; for example, political advertising, through the media, bumper stickers, mailings, or pamphlets, clearly must be considered ‘pure speech.’ Political contributions, also in my mind, are connected with important speech and associational interests, although admittedly containing other, less constitutionally-valued components. However . . . I need not go beyond these conclusions and establish at this time a hierarchy of political speech to resolve the issues before us.

When the Supreme Court overturned the D.C. Circuit’s opinion in its now-iconic case, *Buckley v. Valeo*, it agreed with Judge Tamm: “In sum, although the Act’s contribution and expenditure limitations both implicate fundamental First Amendment interests, its expenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do its limitations on financial contributions.” 424 U.S. 1, 23 (1976); see also George E. MacKinnon, *Edward Allen Tamm*, 74 GEO. L.J. 1576, 1578 (1986) (describing Tamm’s “historic dissent” in *Buckley v. Valeo*).

136. See Patrick H. Allen, *The Proxy System and the Promotion of Social Goals*, 26 BUS. LAW. 481, 490 (1970) (explaining the D.C. Circuit’s substantive holding “indicate[s] a major change in the nature of the proposals which must be included in proxy statements under the shareholder proposal rule”); see also Henry G. Manne, *Shareholder Social Proposals Viewed by an Opponent*, 24 STAN. L. REV. 481, 489 (1972) (“[T]he Dow case, as it stands today, has unquestionably altered the received doctrine on ‘proper subject . . . .’”); Charles A. Bane, *Shareholder Proposals on Public Issues*, 26 BUS. LAW. 1017, 1021 (1971) (stating the D.C. Circuit’s opinion “demonstrates a concern that shareholders be permitted to guide the direction that the corporation is going to take on operations that involve political or social concerns”).

137. Allen, *supra* note 136, at 495. The management hysteria that greeted the D.C. Circuit Court’s decision in *Medical Committee*, was captured in an article published in *The Business Lawyer* in 1971. It provided advice to corporate managers about how to handle a shareholders’ meeting that had gotten out of hand, and included this text about shareholders’ “disruptive equipment”:

Attempts are often made by individuals to bring in their own bull horns or loudspeakers. Often there are placards. Attempts sometimes are made to carry or to wear equipment for slogan purposes such as gas masks (when environmental issues are involved), painted balloons and the like. It also is a common practice in these times for dissident groups to include a number of mothers or fathers holding infants who, of course, are noisy and distracting.

Bane, *supra* note 136, at 1026. Mr. Bane advised, “There is no question that the

its opinion, Courtney Whitney, Jr., the Chief Counsel of the Division of Finance, resigned his position.<sup>138</sup>

In the course of just a few months, America's corporate managers had endured the most turbulent proxy season in history and an adverse ruling by an important federal appeals court. Conservative business leaders were galvanized by these events. A few days after the D.C. Circuit's opinion made news, business lawyer Lewis F. Powell, Jr., delivered the keynote address at a meeting of Southern business leaders titled "The Attack on American Institutions," in which he argued that the "alleged excess profiteering of the military-industrial complex" was a "false idea."<sup>139</sup> In defense of companies like Dow and Honeywell, Powell quipped to his audience: "If anybody believes they're profiting, you oughta buy some stocks in 'em."<sup>140</sup> The joke sympathized with Dow's managers, who had long claimed that they were morally bound to produce napalm even though it produced little profit. Two months after the D.C. Circuit issued its decision, Milton Friedman

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physical equipment such as loudspeakers and placards can be excluded on the grounds of their disruptive effects on the meeting. It would not seem to be the better part of discretion to attempt to exclude the infants." *Id.*

138. It is not clear whether this was a coincidence, or a consequence of the SEC's loss in *Medical Committee*, which received a lot of attention from the news media and the academy. According to his obituary in the *Washington Post*, Whitney joined the SEC in 1963 and worked his way up to Chief Counsel of the Division; from 1971 to 1974 he was a partner in the D.C. firm of Morrison, Murphy, Abrahams & Haddock. See *Elizabeth Abernethy, Ex-Peace Corps Official, Dies*, WASH. POST, July 7, 1987 (discussing the life of Courtney Whitney, Jr.). Thus, he seems to have had a gap in his employment following his departure from the SEC. *Id.*

139. Lewis F. Powell, Jr., *The Attack on American Institutions*, Address at the Southern Industrial Relations Conference (July 15, 1970). About a year later, in 1971, Powell produced what has become known as the "Powell Memorandum," which developed many of the themes he discussed in his July 1970 address. See Lewis F. Powell, Jr., "The Memo" (1971). Powell Memorandum: Attack On American Free Enterprise System, at <https://scholarlycommons.law.wlu.edu/powellmemo/1>. Powell was nominated to the Supreme Court by President Nixon in December, 1971, while *SEC v. Medical Committee for Human Rights* was pending before the high court. Powell played no role in the case.

140. Powell's comment about the companies' profitability is not in the text of his speech, but can be heard in the audio recording of the address at 18:28–18:36. The recording, which can be found in the Powell Archives at Washington and Lee University School of Law, is available at <https://scholarlycommons.law.wlu.edu/powellspeeches/8/>.



published his famous essay in the *New York Times Magazine*, “The Social Responsibility of Business is to Increase Its Profits,” in which he argued that supporters of corporate social responsibility were “preaching pure and unadulterated socialism.”<sup>141</sup>

### *B. A Loss in the U.S. Supreme Court*

When the Supreme Court agreed to take up *SEC v. Medical Committee for Human Rights* in March 1971, the case “had been expected to result in an important decision concerning the flood of anti-war, environmental and other proxy-vote proposals that are being submitted to corporate managements.”<sup>142</sup> Yet this would not come to pass. The SEC, which had petitioned for certiorari and filed a brief on the merits in July, did a full reversal in November, on the eve of oral argument. Suddenly, the SEC argued that the case had become moot and, ultimately, the Supreme Court agreed.

After the Supreme Court granted the writ of certiorari in March, but before it heard oral argument in November, Dow held its 1971 shareholder meeting.<sup>143</sup> This was the company’s first

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141. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

142. *High Court to Decide if FCC Can Make Big CATV Systems Originate Programs*, WALL ST. J., Jan. 11, 1972, at 4; see also John P. MacKenzie, *Agonizing Term: Seven-Member Court Convenes Monday, Faces Tough Issues*, WASH. POST, Oct. 3, 1971 at A1, A17. MacKenzie described the “tough issues” facing the Supreme Court in the October 1971 term and specifically highlighted the Medical Committee case:

Reformers seeking to make the federal regulatory agencies work for them are locked in a battle with the Securities and Exchange Commission. The SEC contends that it needn’t explain or defend its failure to require corporations to put so-called “social issues” on the ballots of stockholders’ proxy statements. An angry Court of Appeals here suggested that the Dow Chemical Co., which refused to put the manufacture of napalm to a stockholder vote, was promoting its own management view of the social issue.

143. According to a typewritten note stapled to the papers of Justice William O. Douglas, the SEC’s cert petition was supported by Justices Blackmun, White, Harlan, and Burger. Typed Note, No. 70-61 (undated), in THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS (1971) (on file with the Washington and Lee Law Review). Justice Douglas did not participate in the decision to grant cert; a note from his clerk, RLJ, states that this was “because Covington was counsel for resp.” RLJ, Memorandum (November 10, 1971), in THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS, (1971) (on file with the Washington and Lee Law Review). The original filing date for the SEC’s merits

annual meeting since the decision of the D.C. Circuit Court of Appeals, and Dow put Medical Committee's napalm proposal in its proxy statement and on the ballot. Journalists reported that "no demonstrations" against napalm occurred at the meeting, and that a smaller number of stockholders attended than in previous years.<sup>144</sup> On the day before the meeting, Dow's stock price hit a new high for 1971 after management increased the quarterly dividend, which it declared a month early.<sup>145</sup> It is possible that Dow's management issued an early, especially large dividend to stockholders right before the meeting to help secure their support in the controversial and unprecedented napalm vote.

In its proxy statement, in response to Medical Committee's proposal, Dow asserted that it had not produced napalm since May 1969.<sup>146</sup> Nonetheless, Dow argued that its shareholders should reject the proposal, offering two reasons. One was a moral reason: "[S]o long as American soldiers are serving in armed conflict," Dow wrote, the company had "a moral obligation to provide the support the United States Government asks."<sup>147</sup> The other was the proposal's "doubtful validity."<sup>148</sup> Its validity was in question, Dow contended, because § 122(12) of the Delaware Corporation Law granted corporations the specific authority to transact "any lawful business which the corporation's board of directors shall find to be in aid of governmental authority."<sup>149</sup> Moreover, Dow argued the proposal "may be contrary to" federal law: the Defense Production

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brief was, by some coincidence, scheduled for the same date as Dow's May 5, 1971 annual shareholder's meeting. See Supreme Court Docket, *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403 (1972) (No. 1162) (listing the multiple deadlines for the SEC's merit brief) (on file with the Washington and Lee Law Review). Ultimately, the SEC received four extensions to its time to file its merits brief. *Id.*

144. See Gerd Wilcke, *Dow Chemical Announces a 3-for-2 Split of Its Stock*, N.Y. TIMES, May 6, 1971, at 63 (noting that 900 stockholders attended).

145. See *New 1971 Highs & Lows On N.Y. Stock Exchange: Wednesday, May 5, 1971*, WALL ST. J., May 6, 1971, at 31; *Quarterly Is Boosted to 67 ½ Cents from 65 Cents; Firm Sees Net Rising in Second Quarter, Year*, *supra* note 92, at 20 ("Carl A. Gerstacker, chairman, said the dividend was declared a month earlier than usual 'to avoid any speculation on what dividends might be on the new stock.'").

146. See THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 5, 1971 10 (1971).

147. *Id.* at 10.

148. *Id.*

149. DEL. CODE ANN. tit. 8, § 122(12) (2019).

Act of 1950.<sup>150</sup> Both of these arguments were strained; the precatory proposal did not constrain Dow's board in any way that would have put the company in violation of either law. Dow did not argue that Medical Committee's proposal encroached on management's authority to manage the company, nor that the outcome Medical Committee sought—that Dow's board “consider the advisability of” amending Dow's certificate of incorporation to prohibit the production of napalm—would have harmed the company or its shareholders in any way.<sup>151</sup>

Theodore Tapper, the pediatrician, presented the napalm proposal on Medical Committee's behalf at the meeting.<sup>152</sup> In his remarks, Tapper argued that “[s]hareholders are as fully knowledgeable as management on the moral questions raised by napalm and should now vote resoundingly against resuming napalm production.”<sup>153</sup> Tapper was joined by Roger S. Foster, a former general counsel of the SEC, in his criticism of Dow; the two also raised concerns about pollution at the company's Freeport, Texas factory and about the health risks of Dow's 2-4-5T herbicide.<sup>154</sup> Another stockholder activist spoke at the meeting to criticize Dow's plan to bring an atomic power plant to Midland.<sup>155</sup>

Medical Committee's proposal was soundly defeated at the ballot, garnering so few votes that, under the SEC's rules, it could

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150. *See generally*, The Defense Production Act of 1950, Pub. L. No. 81-774, 64 Stat. 798 (codified as amended at 50 U.S.C. §§ 4501 et seq.). The procedures of the Defense Production Act were not invoked for napalm production, so it is difficult to see how Medical Committee's proposal could have been “contrary” to the law. Dow's argument here was a stretch.

151. THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 5, 1971 10 (1971).

152. Tapper had responded to a request from Medical Committee's national organization for a volunteer to present the proposal; he flew to Detroit, where he was picked up by a medical student and driven to Midland for the meeting. Tapper Interview, *supra* note 77. Tapper recalled that he prepared his own remarks to present the proposal, without assistance from the national organization. *Id.*

153. Hugh McCann, *Dow Shareholders Reject Napalm Ban*, DETROIT FREE PRESS, May 6, 1971, at 3.

154. *Id.* Foster, a 70-year-old former general counsel for the SEC, would go on to file an amicus brief on behalf of the Project on Corporate Responsibility in the Supreme Court case.

155. *Id.* (noting that the stockholder, from St. Paul Minnesota, was identified as Stephen Gedler).

not be submitted again for three years. It would turn out to be a consequential vote.

Meanwhile, the SEC was working behind the scenes to change the shareholder proposal rules. In October 1971, shortly before the Supreme Court heard oral argument in *SEC v. Medical Committee for Human Rights*, the Chair of the SEC, William Casey, expressed skepticism about the corporate social responsibility movement and emphasized the SEC's role in "maintaining the cost and effectiveness of the procedures of corporate democracy" and "the need to keep operational authority and responsibility firmly on management."<sup>156</sup> Casey concluded that when "social goals have overriding public value," they should be pursued through "legislative or budgetary action."<sup>157</sup> The implication was that they should *not* be pursued through corporate governance mechanisms. Before the end of the year, the SEC would propose to amend one of the Rule 14a-8 exclusions that Dow had relied upon, Section 2, concerning proposals on "general economic, political, racial, religious, social or similar causes."<sup>158</sup> The refashioned Rule, which went into effect before the 1973 proxy season, removed such topics as grounds for exclusion, but added as a new ground for exclusion that a proposal "is not significantly related to the business of the issuer."<sup>159</sup> Since Dow's production of napalm was a minor part of

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156. Corporate Responsibility Seen From the SEC, An Address by William J. Casey, Chairman, Securities and Exchange Commission, Securities and Exchange Commission News, October 21, 1971, <https://www.sec.gov/news/speech/1971/102171casey.pdf> (reproducing a speech given at the American Bar Association National Institute).

157. *Id.*

158. Notice of Proposed Amendments to Rule 14-a5 and 14a-8 of the Commission's Proxy Rules, Exchange Act Release No. 9432, 1971 SEC LEXIS 252 (Dec. 22, 1971).

159. See Adoption of Amendments to Proxy Rules, Exchange Act Release No. 9,784, 1972 SEC LEXIS 155 (Sept. 22, 1972), 37 Fed. Reg. 23,178 (1972). Under the revision, management could omit a proposal if it "consists of a recommendation, request or mandate that action be taken with respect to any matter, including a general economic, political, racial, religious, social or similar cause, that is not significantly related to the business of the issuer or is not within the control of the issuer." *Id.* This was a change from the exclusion that was applied to Medical Committee's proposal by the SEC, which made a proposal excludable if it "clearly appears that the proposal is submitted by the security holder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the issuer or its management, or primarily for the purpose of promoting general economic, political, racial, religious, social or

its business,<sup>160</sup> the change likely would have foreclosed the Dow napalm proposal in future years, and it provided additional leverage to companies to exclude social proposals.<sup>161</sup>

The Supreme Court case moved slowly ahead, during a period of transition for the high court. When the Supreme Court had granted the SEC a writ of certiorari in March 1971, Justices Hugo Black and John Marshall Harlan had filled two of the nine positions on the Court. Before the case was heard, however, both would experience health crises and resign. Black's resignation was a blow to Medical Committee because he was a reliable vote in favor of civil rights and against corporate rights, and quite possibly would have voted to support Medical Committee's arguments in the case.<sup>162</sup> Harlan had voted to grant a writ of certiorari in the

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similar causes." *Id.*

160. See, e.g., Robert J. Samuelson, *Dow Chemical Company: Sales and Worries Are Up*, 158 SCI. 1031, 1032 (Nov. 24, 1967) ("Dow has constantly stressed the smallness of the napalm contract—less than ½ of 1 percent of total earnings.").

161. Although the wording of the amendment made the clause "not significantly related to the business of the issuer" applicable to any kind of proposal, not merely social and political proposals, the SEC made clear in its adopting release that the change would not foreclose "traditional shareholder proposals dealing with stockholder relationships with the management." Adoption of Amendments to Proxy Rules, Exchange Act Release No. 9,784, 1972 SEC LEXIS 155 (Sept. 22, 1972). Other changes in the 1972 amendments were designed to make it more difficult for shareholders to successfully submit proposals seeking social reforms. For example, the 1972 amendments increased the word limit on shareholders' supporting statements from 100 to 200 words, but clarified that any "whereas" preamble to the resolution itself would be included within the word limit. *Id.* "The purpose of the change is to curtail the growing tendency of security holders to evade the word limitation on supporting statements by submitting lengthy proposals which contain supporting argumentation within the text of the proposals themselves," the SEC explained. *Id.* The 1972 amendments also moved up the deadline for shareholders to submit proposals (to 70 days prior to the corresponding date for the previous year's annual meeting, from 60 days), and hinted that the SEC might go after shareholders who submitted proposals but failed to turn up at the meeting to present them. See *id.*

162. For a discussion of Justice Black's voting record in favor of civil rights and in opposition to corporate rights, see ADAM WINKLER, *WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS* 265–72 (2018); see also *Stern v. S. Chester Tube Co.*, 390 U.S. 606 (1968) (Black, J., unanimous opinion) (ordering the South Chester Tube Company to permit a minority stockholder to inspect its books and records pursuant to Pennsylvania corporate law).

case.<sup>163</sup> When the case was finally argued in November, both men's chairs sat empty.

In a significant reversal, in a reply brief filed just days before oral argument, the SEC changed its position in the case: it now argued that the case was moot because Medical Committee's napalm proposal had been submitted for a shareholder vote in 1971 and had lost.<sup>164</sup> Moreover, at oral argument, Solicitor General Erwin Griswold emphasized that Dow had ceased to manufacture napalm for the U.S. government and had no plans to resume production.<sup>165</sup> For these reasons, the SEC now urged the Court *not* to decide the case.

Roberts Owen, a prominent lawyer and a partner at Covington & Burling, argued the case on behalf of Medical Committee, and was essentially blindsided by the SEC's new position, which Medical Committee had had no time to address on the papers.<sup>166</sup> At oral argument, Chief Justice Burger specifically asked Owen to address the mootness issue "in the light of the action on the proxy statement doing just what you wanted and in light of the fact that they have stopped manufacturing Napalm."<sup>167</sup> Owen pushed back: Dow "immediately announced that they wanted to get that contract back again and resume supplying napalm to the government so that as far as that fact is concerned, I think [the mootness argument] is simply besides the point."<sup>168</sup>

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163. Typed Note, No. 70-61 (undated), in THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS (1971) (on file with the Washington and Lee Law Review).

164. See Brief of Petitioner at 1–8, SEC v. Med. Comm. for Human Rights, 404 U.S. 403 (1972) (No. 70-61) (arguing mootness).

165. Oral Argument at 16:00, SEC v. Med. Comm. for Human Rights, 404 U.S. 403 (1972) (No. 70-61), <https://www.oyez.org/cases/1971/70-61>.

166. See *id.* at 29:31 (Roberts Owen arguing on behalf of respondent).

167. *Id.* at 53:49.

168. See *id.* at 54:15. The Court's clerk eventually invited Owen to submit a memorandum on mootness and he did so, filing a 16-page brief which argued that Dow had only ceased manufacturing napalm because it lost the contract, and that the company's executives had announced that it would bid on the contract again in the future. See Correspondence Re: SEC v. Medical Committee for Human Rights, No. 70-61 from E. Robert Seaver, to Roberts B. Owen (Nov. 16, 1971) (on file with author) ("During the course of oral argument in this case the Court noted some suggestion on your part that the claim of mootness had been raised shortly before oral argument . . ."); Memorandum of Respondent, the Medical Committee for Human Rights, on the Question of Mootness (Dec. 13, 1971) at 5, SEC v. Med. Comm. for Human Rights, 404 U.S. 403 (1972) (No. 70-61). "[I]t

Two days later, at conference, Justice Douglas recorded the preliminary votes of the seven justices on the case.<sup>169</sup> The Chief Justice and Justices White and Blackmun believed the case was moot, but would have reversed on the merits. Justices Douglas and Brennan would have affirmed on the merits.<sup>170</sup> Justices Stewart and Marshall believed the case was moot, and their views on the merits were not recorded.<sup>171</sup> The SEC's mootness argument had won, without much of an opportunity for Medical Committee to refute it.

Justice Marshall wrote three drafts of his opinion in the case.<sup>172</sup> The evolution of these drafts establish that Marshall had wanted to rebuke the SEC for its maneuvering on the issue of mootness.<sup>173</sup> It also suggests that at least three of the seven

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continues to be Dow's position that Dow can legally exclude the proposal, whenever it is submitted, on precisely" the grounds it offered back in 1969, the brief argued. *Id.* at 11. "Since the controversy thus continues unabated, there is no basis for the Commission's after-thought that perhaps it can avoid a decision in this case by a belated claim of mootness." *Id.*

169. WILLIAM O. DOUGLAS, Handwritten Note, in THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS, (1971) [hereinafter, Douglas, Nov. 12 Conference Note] (stating: "Conference, November 12, 1971") (on file with the Washington and Lee Law Review).

170. *See id.* (noting that neither Douglas nor Brennan believed the case was moot).

171. *See id.* (noting, beside Potter Stewart's initials, "case is moot since Dow put this in its proxy & now they can't try again for 3 yrs"; a notation beside Thurgood Marshall's initials states "case is moot").

172. *See* 1st Draft, Supreme Court of the United States, No. 70-61, SEC v. Med. Comm. for Human Rights (undated), in THE PAPERS OF THURGOOD MARSHALL IN THE LIBRARY OF CONGRESS (Supreme Court File, 1967-1991) [hereinafter, "Marshall, 1st Draft"]; 2nd Draft, Supreme Court of the United States, No. 70-61, SEC v. Med. Comm. for Human Rights (undated), in THE PAPERS OF THURGOOD MARSHALL IN THE LIBRARY OF CONGRESS (Supreme Court File, 1967-1991); 3rd Draft, Supreme Court of the United States, No. 70-61, SEC v. Med. Comm. for Human Rights (undated), in THE PAPERS OF THURGOOD MARSHALL IN THE LIBRARY OF CONGRESS (Supreme Court File, 1967-1991).

173. In his first draft opinion, Justice Marshall criticized the SEC for changing its position on mootness. That language, which was ultimately deleted from the final opinion, stated:

We do not look with favor upon the Commission's conduct in urging upon the Court, in the course of petitioning for review, that the case is a live controversy, and then urging that the case be dismissed as moot shortly before the case was set for argument. But, our dismay at the actions of the Commission can have no bearing on our decision here.

Marshall, 1st Draft, *supra* note 172. In its brief on mootness, the Medical

Justices who decided the case believed that the D.C. Circuit had resolved the case correctly on the merits. That is, at least three of the seven Justices—Douglas, Brennan, and Marshall—were inclined to interpret the 1934 Act to require Dow to put the napalm resolution to a shareholder vote, had the case not been moot.

In a first draft, Justice Marshall made his approval of the lower court opinion clear:

We note in passing . . . that while the decision of the Court of Appeals is no longer binding upon the parties, the careful consideration it gave to the merits of the underlying dispute may prove to be instructive to the parties, Dow and any reviewing court in the event that this litigation is renewed at some future date.<sup>174</sup>

The carefully worded sentence suggests that Justice Marshall was looking for a way to tacitly endorse Judge Tamm's analysis, and that he believed there was sufficient support among the other Justices for this view. Yet this sentence provoked a quick response from both Justice Stewart and Justice Blackmun. Justice Stewart wrote to Justice Marshall that he could not join that language:

My reasons are two-fold. First, I think the Court of Appeals was probably wrong, both on the appealability of the SEC's "no action recommendation" and on the includability of the proxy material. Second, even if I agreed on the merits, I think it is inappropriate to express our views in a case that we are disposing of as moot.<sup>175</sup>

Justice Blackmun objected to the same part of the draft opinion and expressed the view that the D.C. Circuit had gotten the merits of the case wrong.<sup>176</sup> He wrote that he found it "hard to agree with"

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Committee vigorously contested the SEC's claim that Dow had permanently ceased to manufacture napalm for the U.S. government. See Memorandum of Respondent, the Medical Committee for Human Rights, on the Question of Mootness (Dec. 13, 1971), *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403 (1972) (No. 70-61).

174. *Id.* (citation omitted).

175. POTTER STEWART, Note from Justice Potter Stewart, to Justice Thurgood Marshall, in *THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS* (Dec. 21, 1971).

176. See HARRY A. BLACKMUN, Correspondence from Harry A. Blackmun, to Thurgood Marshall, in *THE PAPERS OF WILLIAM O. DOUGLAS IN THE LIBRARY OF CONGRESS* (Dec. 22, 1971) ("If your proposed opinion were to end with the 11th line on page 4 (plus, of course, the last three lines on page 5), I could join it.");



the D.C. Circuit's determination that the proposal did not fall within the rule's exclusion:

The particular issue here smacks, to me, of the kind of thing to which the exclusions apply, namely, a political issue and an issue affecting corporate management, to wit, the determination of what products to manufacture. Surely, if Dow tomorrow decided to make traveling bags, we could hardly expect formal court review of the SEC's decision not to force that kind of proposition into a proxy statement.<sup>177</sup>

Ultimately, Justice Marshall removed the language stating that the parties should consider the D.C. Circuit's analysis "instructive." In its final draft, the opinion merely said that the controversy had become moot.<sup>178</sup>

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HARRY A. BLACKMUN, Notes from Justice Harry Blackmun in *SEC v. Medical Committee for Human Rights* (undated) at 2, in *SECURITIES AND EXCHANGE COMMISSION HISTORICAL SOCIETY PAPERS* (1972) ("Somewhat to my surprise, Judge Tamm, on behalf of the panel, held that the matter was reviewable and remanded the case to the SEC for more formal and informative determinations.") (on file with the Washington and Lee Law Review).

177. BLACKMUN, Notes from Justice Harry Blackmun in *SEC v. Medical Committee for Human Rights*, *supra* note 176, at 2.

178. The case was moot, Justice Marshall wrote, because Dow had "acquiesced" in Medical Committee's submission of the same proposal in January 1971, had included the proposal in its 1971 proxy statement, and had allowed a vote of Dow's shareholders at the 1971 annual meeting, at which the proposal had received so few votes that it could now be excluded "for the next three years." *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 406 (1972). "We find that this series of events has mooted the controversy." *Id.* It is worth noting that Justice Marshall's explanation included a small error: he wrote that "[l]ess than 3% of all voting shareholders supported" the resolution, rendering it excludable under Rule 14a-8(c)(4)(i), but in fact the relevant inquiry under that rule was the percentage of shares that were voted in favor of the proposal, not the percentage of shareholders who so voted. *Id.* at 403. Since the majority treated the 1971 vote as dispositive of mootness, it is interesting that the opinion characterized that vote inaccurately. The Court acknowledged Medical Committee's argument that Dow was likely to refuse inclusion of its proposal in the future, but wrote that:

[w]hether or not the Committee will actually resubmit its proposal or a similar one in 1974 is purely a matter of conjecture at this point as is whether or not Dow will accept it. If Dow were likely to repeat its allegedly illegal conduct, the case would not be moot. However, in light of the meager support the proposal attracted, we can only speculate that Dow will continue to include the proposal when it again becomes eligible for inclusion, rather than to repeat this litigation. Thus, we find that "the allegedly wrongful behavior could not reasonably be expected to recur."

*Id.* (citation omitted).

Justice William O. Douglas produced the sole dissent.<sup>179</sup> Justice Douglas was the only one of the seven Justices who had experience as a securities lawyer and had, in fact, served as the SEC's Chair from 1937 to 1939.<sup>180</sup> While Chair of the SEC, Douglas had proposed the creation of "public" corporate directors, who would represent "not only the present but the potential stockholder," and "the general public as well."<sup>181</sup> Douglas was also well-known to have opposed the Vietnam War.<sup>182</sup>

Justice Douglas's dissent in *SEC v. Medical Committee for Human Rights* characterized the case as a private dispute between Medical Committee and Dow with "large public overtones."<sup>183</sup> It was not moot, he argued. "Dow has for the past four years fought

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179. See *id.* at 407–11 (Douglas, J., dissenting). Although Justice Douglas had recorded that Justice Brennan shared his views on mootness and substance a few weeks earlier, Justice Brennan did not join his dissent.

180. Notwithstanding this fact, Douglas's "uncharacteristically cautious pattern of recusing himself in cases involving [the SEC] meant that he rarely participated in securities cases." A. C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 846 (2009). Pritchard and Thompson wrote that most of Douglas's securities opinions "show up in the last four years of his tenure," a period that included *SEC v. Med. Comm. for Human Rights* in 1972, and the "string of dissents Douglas wrote in the 1970s after the Court's majority had taken a more restrictive turn in securities law" was not "significant": "The bottom line is that Douglas had little impact on the Court's securities jurisprudence for his entire career." *Id.* at 919. By 1972, Justice Douglas was near the end of his service on the nation's high court. He would retire three years later, in 1975, after 36 years on the Court. See *Justice Douglas Retires from the Supreme Court, Ending the Longest Tenure as an Active Justice*, 62 A.B.A. J. 87, 87 (1976) (noting Justice Douglas retired on November 12, 1975).

181. William O. Douglas, *Corporation Directors*, in DEMOCRACY AND FINANCE: THE ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS AS MEMBER AND CHAIRMAN OF THE SECURITIES AND EXCHANGE COMMISSION 53 (James Allen, ed., 1940) (reprint of an address delivered at Fort Worth, Texas, on January 8, 1939); see also Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1073 (2015) (describing more about Douglas's views about corporate governance); see also, generally, A. C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841 (2009); Roberta S. Karmel, *Realizing the Dream of William O. Douglas—the Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79 (2005).

182. See Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 90–94 (1998) (noting that Justices Black, Stewart, Brennan, and "probably" Marshall joined Justice Douglas in his opposition to the war).

183. *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 408 (1972) (Douglas, J., dissenting).

tooth and nail its obligation to include this shareholder proposal,” he wrote:<sup>184</sup>

The modern super-corporations, of which Dow is one, wield immense, virtually unchecked power. Some say that they are “private governments,” whose decisions affect the lives of us all. The philosophy of our times, I think, requires that such enterprises be held to a higher standard than of the “morals of the marketplace” which exalts a single-minded, myopic determination to maximize profits as the traditional be-all and end-all of corporate concern. The “public interest in having the legality of the practices settled, militates against a mootness conclusion.”<sup>185</sup>

Justice Douglas’s experience at securities enforcement was evidenced by his analysis. He noted the economic advantage Dow enjoyed over a shareholder like Medical Committee, observing that Dow might “decide its superior financial position makes continued litigation” preferable to inclusion in future years.<sup>186</sup> In a footnote, he also pointed out that the SEC had “recently proposed amendments to its proxy rules which might strengthen Dow’s hand.”<sup>187</sup> He also noted that “substantial sentiment” preferred “a more liberal approach to shareholder proxy proposals than is evidenced by the current, much less the proposed, rules.”<sup>188</sup> However, he stopped short of arguing that the SEC had erred by not forcing Dow to include the proposal in its proxy in 1969.

The Court’s decision, which declared the case moot and vacated the decision of the D.C. Circuit, was released on January 10, 1972.<sup>189</sup> Although it purported to make no decision, it was a win for Dow and, more broadly, for corporate managers.

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184. *Id.* at 409.

185. *Id.* at 409–10 (*quoting* U.S. v. W. T. Grant Co., 345 U.S. 629, 632 (1953)).

186. *Id.* at 410.

187. *Id.* at 410 n.6.

188. *Id.* The last line of his dissent criticized the majority for what he characterized as a string of recent cases in which the Supreme Court had “abdicat[ed] its constitutional responsibility” to decide cases. *Id.* at 410. These were: *Picard v. Connor*, 404 U.S. 270 (1971); *North Carolina v. Rice*, 404 U.S. 244 (1971); and *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971). None of these cases touched on the Vietnam War or shareholder democracy.

189. *See High Court to Decide if FCC Can Make Big CATV Systems Originate Programs*, WALL ST. J., Jan. 11, 1972, at 4 (reporting that “the dismissal leaves unresolved whether federal appeals courts can review Securities and Exchange Commission decisions on proxy material”).

Within a few days of the Supreme Court's decision, the SEC's Office of the General Counsel had recommended that the Division of Corporation Finance end altogether its practice of offering interpretive advice on Rule 14a-8. The staff of the Division opposed this idea and the SEC ultimately did not pursue it.<sup>190</sup> However, the SEC continued to make efforts to narrow shareholders' power to bring social or environmental proposals. In 1976, the SEC amended Rule 14a-8 to make it harder for shareholders to bring a successful proposal. The SEC advanced the deadline for a shareholder to submit a proposal from 70 to 90 days, for example, limited each proponent to a maximum of two proposals per meeting, and limited the length of the proposal itself to 300 words.<sup>191</sup>

Meanwhile, Dow received two shareholder proposals for its 1972 annual meeting and promptly excluded them.<sup>192</sup> It appears likely that the SEC played along by granting Dow no-action letters for both.<sup>193</sup> The substance of the two proposals is not known,

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190. In a memo, it argued that “[w]hile the Division shares the concern of the General Counsel’s Office about the prospects for future *Medical Committee* type litigation, it does not believe that the proposed release provides an appropriate answer to the problem.” Memorandum from The Div. of Corp. Fin. to the SEC (Jan. 15, 1972) (on file with author). It continued: “[i]f the Commission at a future time desires to review the staff comments on a shareholder proposal matter, consideration can then be given to *Medical Committee* problems in the light of the particular facts of the matter presented for review.” *Id.* It notes that “the factor that required most of the staff’s time during the last proxy season, i.e. Rodney Shields’ proposals, has been dealt with in a manner that will not require significant staff time in the future.” *Id.* It also narrowed the shareholder eligibility requirements, creating a contemporaneous holding requirement. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, at \*8–16 (Nov. 22, 1976).

191. Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, at \*8–16 (Nov. 22, 1976).

192. See THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 3, 1972 11 (Mar. 17, 1972) (“The company has received from two stockholders proposals which under the proxy rules of the Securities and Exchange Commission may be omitted from this proxy statement.”) (on file with author).

193. See *id.* This is the same language that Dow used in 1969 and 1970 in connection with its exclusion of Medical Committee’s proposal in those years, which suggests that Dow received no-action letters in 1972 as it had in those earlier years. See THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 7, 1969 (Mar. 25, 1969); THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 6, 1970 (Mar. 20, 1970) (on file with author).

though archival documents from Medical Committee's files suggest that Medical Committee tried to submit its napalm proposal again in 1972.<sup>194</sup> Dow's 1972 meeting was picketed by striking workers, according to news reports.<sup>195</sup>

In 1974, Dow's unionized workers announced a strike, and the company moved its annual meeting to Miami, Florida, likely to thwart protests.<sup>196</sup> The following year, it moved the meeting to Texas.<sup>197</sup> No shareholder proposals were submitted in advance of Dow's 1973, 1974, 1975, or 1976 meetings.<sup>198</sup> During this time, Dow was breaking records for profitability and, by 1976, Dow's two highest-ranked executives—its board chair and its president—were the second and fourth highest-paid executives in America.<sup>199</sup>

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194. The Supreme Court decided *SEC v. Medical Committee for Human Rights* on January 10, 1972, which gave Medical Committee a short window in which to re-submit its napalm proposal before the 1972 deadline.

195. See *Stockholder Meeting Briefs*, WALL ST. J., May 4, 1972, at 28 (meeting was picketed by about 75 workers).

196. See THE DOW CHEMICAL COMPANY, REVISED NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 8, 1974 (Mar. 26, 1974) ("Because of the unsettled conditions in Midland resulting from this strike [by the United Steelworkers of America, AFL-CIO-CLC and Local 12075], your Board of Directors has decided to change the place of the annual meeting . . .") (on file with author); *Dow Chemical Shift of Its Meeting Site Proves Successful*, WALL ST. J., May 9, 1974 (stating that Dow moved its annual meeting "to avoid possible disruption by striking worker" and this tactic "paid off" since "only two union members attended").

197. THE DOW CHEMICAL COMPANY, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 7, 1975 (Mar. 21, 1975) (noting the meeting for a high school in Freeport, Texas) (on file with author). The annual meeting was back in Midland in 1976. See THE DOW CHEMICAL COMPANY, NOTICE OF ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 5, 1976 (Mar. 19, 1976) (on file with author).

198. This assumes that Dow continued its practice of noting in its proxy when it had excluded a proposal. See THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 2, 1973 11 (no such notation) (on file with author); THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 8, 1974 11 (same) (on file with author); THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 7, 1975 11 (same); THE DOW CHEMICAL COMPANY, PROXY STATEMENT FOR ANNUAL MEETING OF STOCKHOLDERS TO BE HELD MAY 5, 1976 11 (same) (on file with author).

199. *Dow's 1974 Profit, Sales Set Records*, WASH. POST, Feb. 5, 1975, at E11; *Gray, United Technologies Chief, Led U.S. in Pay at \$1.66 Million*, N.Y. TIMES, May 13, 1977, at D5 (C. B. Branch was then Dow's board chair, while Zoltan

Medical Committee would never again engage in a campaign of shareholder activism. The civil rights organization quietly closed shop a few years after its defeat in *SEC v. Medical Committee for Human Rights*, and its Dow stock was presumably sold off.<sup>200</sup>

#### IV. Postscript

What key points can we take away from the battle that played out among Medical Committee, Dow, and the SEC between 1968 and 1972? Three important ones stand out.

First, the evidence suggests that, if it had been decided on the merits, *SEC v. Medical Committee for Human Rights* would have been a close case. The Justices' papers give away their initial positions on the underlying substantive issues and show that three of the seven Justices apparently found support for the D.C. Circuit's expansive view of corporate democracy.<sup>201</sup> This is itself significant. Today, the idea that the annual shareholders meeting should function as a referendum on a corporation's social policies and political activities is widely rejected by the corporate law academy. The very idea is considered ridiculous. But it was *not* considered ridiculous by the D.C. Circuit in 1970, nor was it considered ridiculous by Justices Brennan, Douglas, and Marshall in 1972.<sup>202</sup> Our historical reflection on *SEC v. Medical Committee for Human Rights* highlights how, even without an authoritative determination by the Supreme Court, widespread consensus on the meaning of "corporate democracy" has narrowed sharply since the 1970s. It invites us to rethink the scope and meaning of "corporate

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Merszei was president).

200. See John Dittmer, *The Medical Committee for Human Rights*, AMA J. OF ETHICS (Sept. 2014), <https://journalofethics.ama-assn.org/article/medical-committee-human-rights/2014-09> (last visited Sept. 6, 2019) (stating that the Medical Committee for Human Rights declined in the 1970s and did not survive through the Reagan administration) (on file with the Washington and Lee Law Review).

201. Of course, we cannot know how the case would have been resolved if the SEC had not prevailed with its last-minute claim of mootness. The successful mootness claim likely cut off the Justices' consideration of the merits of the dispute.

202. See *supra* notes 129–35 and accompanying text; see also *supra* notes 169–188 and accompanying text.

democracy” at a time when shareholders again are pushing boundaries and demanding reforms.

Second, conservative Judge Edward Allen Tamm authored both the unanimous decision of the D.C. Circuit in *Medical Committee for Human Rights v. SEC* and, a few years later, an important dissent in *Buckley v. Valeo*, which was endorsed by the Supreme Court in what has become an iconic case about money as speech.<sup>203</sup> In *Medical Committee*, Tamm suggested that federal law entitled shareholders to robust rights of corporate democracy, including the right to turn the annual meeting into a referendum on the corporation’s sale of a politically controversial product.<sup>204</sup> In his dissent in *Buckley*, Tamm argued that money should be treated as protected speech in some circumstances.<sup>205</sup> Soon after the Supreme Court decided *Buckley*, it extended political speech rights to corporations in *First National Bank v. Bellotti*.<sup>206</sup> The views that Tamm expressed in *Medical Committee* and *Buckley* can be read together, particularly in light of *Bellotti*’s extension of political speech rights to corporations, to present a cohesive take on corporate political spending. Tamm advocated both a robust voice for shareholders in a corporation’s political activity, and a speech-protective approach to political spending—strong shareholder voice within the firm, and strong speech rights for those who spend money to influence elections.<sup>207</sup> In the work of Judge Tamm, we can see the outline of a different—and perhaps a

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203. See *Buckley v. Valeo*, 424 U.S. 1, 253–54 (1976) (Burger, C.J., concurring in part and dissenting in part) (discussing Judge Tamm’s dissenting from the decision of the Court of Appeals).

204. See *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 676 (D.C. Cir. 1970), *vacated* 404 U.S. 403 (1972) (stating that section 14 of the Securities Exchange Act is intended to give shareholders the ability to engage in true corporate democracy).

205. See *Buckley v. Valeo*, 519 F.2d 821, 912 (D.C. Cir. 1975) (Tamm, J., dissenting) (concluding that campaign expenditures are intertwined with political communication and should be protected speech), *aff’d in part, rev’d in part*, 424 U.S. 1 (1976).

206. 435 U.S. 765 (1978). For a contemporary take on *Bellotti*, see Nikolas Bowie, *Corporate Democracy: How Corporations Justified Their Right to Speak in 1970s Boston*, 36 L. & HIST. REV. 943, 992 (2018) (arguing that “corporations are fundamentally representative institutions” in which “a vocal person purports to represent a silent group”).

207. See *supra* notes 204–05.

more satisfying—jurisprudence than the one we have ended up with.

Finally, it is significant that Dow stopped producing napalm around the time of its 1969 shareholders meeting—even before the D.C. Circuit ruled against it in the summer of 1970.<sup>208</sup> Although Dow’s managers never said they had stopped making napalm to placate the company’s dissenting shareholders, the timing of events suggests that Medical Committee prevailed. This part of the story hints at the power of shareholder activism, particularly when combined with boycotts and protests, to shape the choices of corporate managers. Medical Committee lost the litigation, but it won its demand that Dow stop producing napalm for use in the Vietnam War.

The next three subsections provide some additional thoughts on the case as civil rights history and corporate governance history.

#### A. *The Civil Rights Movement and SEC v. Medical Committee for Human Rights*

The Supreme Court’s landmark decision in *Brown v. Board of Education* ended segregation as a matter of constitutional law in 1954, but did not lead to desegregation.<sup>209</sup> As Christopher W. Schmidt has written, “[w]hat *Brown* did was raise expectations for change that failed to materialize. This, in turn, fueled skepticism, even antagonism, toward litigation as a pathway to racial justice” among civil rights activists.<sup>210</sup> Having learned from *Brown* that court victories did not translate into easy change, activists changed tactics. In the winter of 1960, the lunch counter sit-in movement took shape as “a break with the accepted tradition of change, of legislation and the courts.”<sup>211</sup> Of course, the targets of the movement were businesses, many of them publicly-held.

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208. *Dow Declares it has Stopped Production of Napalm for U.S.*, N.Y. TIMES, Nov. 15, 1969, at 34.

209. See CHRISTOPHER W. SCHMIDT, THE SIT-INS: PROTEST & LEGAL CHANGE IN THE CIVIL RIGHTS ERA 29 (2018) (“In the five states of the Deep South, there were 1.4 million black schoolchildren. Not one attended a racially mixed school in the years between 1954 and 1960. In the Upper South, the numbers were only marginally better, representing nothing more than token efforts at compliance.”).

210. *Id.* at 31.

211. *Id.* at 32 (quoting James Lawson, From a Lunch-Counter Stool, Speech



Direct shareholder activism—in which progressive stockholders of variety store companies demanded top-down desegregation from corporate managers—was part of the lunch counter sit-in movement. This shareholder activism reflected a choice by activists to move beyond public law reform and target powerful *private* institutions, on those institutions' own terms. The rules that governed this form of activism were federal securities law and state corporate law.

A few civil rights activists had been using shareholder tools to engage with companies since the late 1940s. James Peck, a white activist, had made early but unsuccessful efforts to use the shareholder proposal to desegregate seating on buses owned by the Greyhound bus company.<sup>212</sup> By the mid-1950s, Peck and other members of the Congress of Racial Equality (CORE) were using stock and proxies to gain admittance to the annual meetings of national chain stores to urge company leaders to desegregate their lunch counters.<sup>213</sup>

For activists discouraged by *Brown*, national businesses may have looked like promising targets for civil rights reform. Corporations were sensitive to negative press, and many southern variety stores—including the W. T. Grant Company, the S. H. Kress Company, and the F. W. Woolworth Company—were managed from the North.<sup>214</sup> At least in the beginning, the

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at Shaw University, Raleigh, North Carolina (Apr. 15, 1960), in AUGUST MEIER ET AL., *BLACK PROTEST THOUGHT IN THE TWENTIETH CENTURY* 308–15 (1971).

212. See Harwell Wells, *A Long View of Shareholder Power: From the Antebellum Corporation to the Twenty-First Century*, 67 FLA. L. REV. 1033, 1081–82 (2015) (describing Peck's activism); see also Lisa M. Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129 (2019).

213. See *Yearbook of Congress of Racial Equality 1942–1970*, U. WASH. MAPPING AM. SOC. MOVEMENTS (2015), [http://depts.washington.edu/moves/CORE\\_yearbook.shtml](http://depts.washington.edu/moves/CORE_yearbook.shtml) (last visited Sept. 6, 2019) (identifying instances where CORE attended annual stockholder meetings) (on file with the Washington and Lee Law Review).

214. See *W.T. Grant, Facing \$175-Million Loss to Close 126 Stores and Lay Off 12,600*, N.Y. TIMES, Jan. 17, 1975, at 45 (indicating W.T. Grant's home offices were located in New York); Charlotte C. Egerton, *More than a Matter of Nickels and Dimes: S.H. Kress Stores in the New South*, U.N.C. WILMINGTON DEP'T HISTORY 1, 16 (2012) (stating Kress had headquarters in New York City), <http://dl.uncw.edu/Etd/2012-1/egertonc/charlotteegerton.pdf>; Woolworth Co., ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/Woolworth-Co> (last

procedures followed at corporate annual meetings were generous to stockholders: once inside the meeting, a stockholder could usually get time at the microphone to give his or her views to corporate leaders.<sup>215</sup> Before the 1970 proxy season, when many companies began employing strategies to control attendance and silence stockholders, shareholders enjoyed significant freedom to express their views at the meeting—and so did individuals who came armed only with a stockholder’s proxy, which companies honored.<sup>216</sup> It did not hurt that companies’ annual meetings were often covered by major newspapers, which meant that stockholder questions and protests sometimes made the news.<sup>217</sup>

In 1954, Peck used a single share of stock in W. T. Grant to demand, successfully, that the company desegregate its lunch counters in Baltimore, but he was unsuccessful six years later, when he returned to W. T. Grant’s annual meeting to press the board to desegregate its stores in the South.<sup>218</sup> A young CORE member named Barbara Broxton used a shareholder’s proxy to gain admittance to Woolworth’s 1960 annual meeting.<sup>219</sup> She had just been released from forty-eight days in a Tallahassee jail after her arrest at a Woolworth lunch counter.<sup>220</sup> At the meeting, Broxton looked the company’s owners and managers in the eye and told them that she and other activists would not back down.<sup>221</sup>

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visited Sept. 6, 2019) (stating that Woolworth’s headquarters were in New York City) (on file with the Washington and Lee Law Review).

215. See, e.g., *infra* notes 218–219 and accompanying text; *infra* notes 224–233 and accompanying text.

216. See, e.g., *infra* notes 225–227.

217. See, e.g., *supra* note 195 (*Wall Street Journal* coverage of stockholder meetings).

218. See *W.T. Grant Defends Lunch Counter Racial Bar*, N.Y. TIMES, April 27, 1960, at 49.

219. See GLENDA ALICE RABBY, *THE PAIN AND THE PROMISE* 119 (1999) (describing Barbara Broxton’s attendance at Woolworth’s annual shareholders meeting).

220. See Letter from a Jailed Student, CORE-lator Newsletter, April 1960, at 1, <https://www.crmvet.org/docs/core/core6004.pdf> [hereinafter Letter from a Jailed Student] (stating that students were charged with “disturbing the peace, inciting to riot, and disrupting the peaceful tranquility of the community”; after they were released on bond pending trial, five more charges were added).

221. *Woolworth Posts Sales Gain, Defends Exclusion of Negroes*, N.Y. TIMES, May 19, 1960, at 55:

Miss Barbara Broxton, a 20-year-old Negro student of Florida A. and M. College in Tallahassee, who spent forty-eight days in jail on a

In 1967, a grass-roots Rochester organization, Freedom, Integration, God, Honor—Today (FIGHT), gathered proxies for Eastman Kodak Company’s annual meeting to protest the company’s policies on race and employment.<sup>222</sup> FIGHT staged a demonstration outside the meeting and sent proxy-wielding members inside to engage with the board and shareholders.<sup>223</sup> Its activism produced a compromise and may have helped set the stage for Medical Committee’s efforts the following year.<sup>224</sup>

As this history reveals, civil rights shareholder activism was evolving rapidly in sophistication, and Medical Committee’s efforts are a key part of that story. In a first step, civil rights activists moved beyond consumer protests and boycotts and began staging demonstrations outside companies’ annual meetings.<sup>225</sup> In a next

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trespassing charge involving a sit-in at a Woolworth lunch counter, told the stockholders that the ‘colored people will continue their fight and will continue to go to jail because we feel we are right.’ She is not a stockholder but had a proxy which allowed her into the meeting.

See also Letter from a Jailed Student, *supra* note 220, at 1.

222. In late 1966, an executive of Eastman Kodak Co. had signed an agreement with FIGHT that committed the company to hire 600 “unskilled” African-Americans in Rochester, New York. See *Kodak Directors Drop Executive*, N.Y. TIMES, May 19, 1967, at 24. The agreement was so controversial within the company that Eastman Kodak repudiated it two days later and the executive who signed on Eastman Kodak’s behalf was publicly demoted. *Id.* At the company’s shareholder meeting on April 25, 1967, 700 demonstrators picketed outside. *Id.* Inside, a “dramatic confrontation” occurred when an African-American cleric, Franklin D. R. Florence, spoke on behalf of several religious institutional investors, holding roughly \$7.5 million of Eastman Kodak’s stock, who had refused to sign management proxies in protest of the company’s actions. See William R. MacKaye, *Church Gains Noted in Kodak Meeting*, WASH. POST, Apr. 29, 1967, at E4; Nicholas van Hoffman, *Picture’s Fuzzy as Kodak Fights FIGHT*, WASH. POST, Jan. 9, 1967, at A3. Following the shareholder meeting, in late May, “with racial tensions on the rise in many cities across the country,” Eastman Kodak reached a compromise agreement with FIGHT. Earl C. Gottschalk Jr., *Kodak’s Ordeal: How a Firm That Meant Well Won a Bad Name For Its Race Relations*, WALL ST. J., June 30, 1967, at 1. For a description of the Rochester race riots which preceded FIGHT’s activism, see, e.g., Joseph Lelyveld, *Riots Viewed Against History of Clashes Almost as Old as U.S.*, N.Y. TIMES, Sept. 11, 1964, at 23 (noting the “deeper cause” of the “discontent” was “poverty, joblessness, discrimination, hopelessness”).

223. See *Kodak Directors Drop Executive*, *supra* note 222.

224. The founder of FIGHT, Saul O. Alinsky, told the *New York Times* that he felt that “shareholder action can be a powerful new weapon for promoting civil rights and advancing the war on poverty.” M. J. Rossant, *Finance: All You Need is One Share*, N.Y. TIMES, May 7, 1967, at E6.

225. See *supra* Part II.D (describing protests at annual stockholder meetings

step, activists gathered shareholder proxies—or bought one or two shares of stock—to gain admittance to the meeting.<sup>226</sup> Once inside the annual meeting, they could speak directly to company owners and managers and nominate candidates for the board. Indeed, beginning in the late 1960s, a number of civil rights leaders were nominated—unsuccessfully—to the boards of public companies,<sup>227</sup> and Jackie Robinson, then a national vice president of the NAACP, made headlines when he became the co-chair of the board of a major insurance company.<sup>228</sup>

Around the time that Medical Committee began to engage Dow's management about napalm, African-American shareholders were raising concerns at other companies during the annual meeting. For several successive years, for example, black shareholders of the Ford Motor Company spoke at the company's annual meeting to raise concerns related to the company's relationship with the black community, prompting Henry Ford II himself to respond.<sup>229</sup>

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of various companies).

226. See *supra* Part IV.A (discussing how shareholders used proxies and stock to gain admittance to meetings to discuss concerns with management).

227. For example, in 1968, a shareholder nominated Cora T. Walker, the civil rights activist, for a directorship at AT&T from the floor of the meeting. See *AT&T Earnings Climbed to Mark During March*, WALL ST. J., Apr. 18, 1968, at 3 (reporting that Wilma Soss nominated Cora T. Walker, "president of the Harlem Lawyers Association and a well-known civil rights leader"; Walker received 80,000 votes but did not win). In 1964, shareholders of the Communications Satellite Corp. booed an activist at the company's annual meeting who demanded to know why none of the company's officers or directors were black. *First Comsat Meeting has Helmeted Holder, a Horn—and Questions*, WALL ST. J., Sept. 18, 1964, at 12. The company's board chair retorted that it would have violated the Civil Rights Act—enacted months earlier—to choose directors on the basis of race. *Id.* In December, a black stockholder of Genesco Inc. nominated two black candidates for the board from the floor of a stockholder meeting. *Stockholder Meeting Briefs*, WALL ST. J., Dec. 8, 1970, at 29 ("Stockholders rejected an attempt by a Negro shareholder to have a Negro man and a Negro woman added to the board. The board remains all white and all male.").

228. *Jackie Robinson Joins Insurer as a Stockholder and Director*, N.Y. TIMES, June 23, 1966, at 70.

229. In 1968, one African-American stockholder asked when Ford would set up a dealership to serve black car buyers in Detroit, and another raised a concern about the company's employment practices regarding race. See *The Big Companies Venture Their to [sic] Help in the Civil Rights Effort*, WALL ST. J., June 14, 1968, at 20. The article also documented instances in the 1968 proxy season when corporate managers heard from white shareholders complaining about companies' progressive race policies and activities. *Id.* The following year,

Medical Committee participated in demonstrations outside Dow's annual meeting and sent chapter members inside to speak, but the group's decision to tee up a reform through a proposal to amend the company's charter—and to demand that its proposal be transmitted to all of Dow's shareholders well in advance of the meeting, under SEC Rule 14a-8—was a shot across the bow of corporate managers.<sup>230</sup> Though James Peck, acting in his individual capacity, had tried something similar in 1949, Medical Committee was a national organization with resources that eventually came to include a partner at one of the nation's most prestigious law firms and assistance from a former SEC general counsel.<sup>231</sup> Medical Committee also had some religious institutional investors on its side, although some of these chose to divest, which prevented them from supporting the napalm proposal with their votes.<sup>232</sup>

As activists learned post-*Medical Committee*, it was difficult to effect change through shareholder activism. The procedures of corporate democracy worked slowly: unless you could marshal the holders of a significant amount of stock, the process played out over a year-long cycle which offered a single opportunity for the expression of shareholder voice. A shareholder-proponent who missed the submission deadline was left to wait a full year before trying again. After the events of 1970, including the tumultuous proxy season and the D.C. Circuit's decision in *Medical Committee*, the business community was largely successful at making the shareholder proposal mechanism more difficult and costly.

Corporate democracy is not like political democracy. In political democracy, every voter is equal at the ballot box and has

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"Herbert Thompson, Detroit Negro owner of a shoe store and a Ford stockholder" asked again about the prospects of a Ford dealership in Detroit, prompting another response from Henry Ford II. *Stockholders Back Ford Management*, RICHMOND TIMES-DISPATCH, May 9, 1969, at 14.

230. See *supra* Part I.A (discussing Medical Committee's shareholder proposal to Dow).

231. See *Peck v. Greyhound Corp.*, 97 F. Supp. 679 (S.D.N.Y. 1951).

232. See, e.g., *Dow Stock is Sold by Union Seminary*, *supra* note 65 (reporting that Union Theological Seminary divested itself of 6,000 shares of Dow stock to protest Dow's manufacture of napalm); *Chemical Stock Sold as Protest*, *supra* note 65, at B-19 (reporting that Massachusetts Conference of the United Church of Christ took a \$15,000 loss to divest itself of Dow stock to protest Dow's manufacture of napalm).

one vote to cast. In corporate democracy, voting power is determined by investment; a stockholder can cast only as many votes as the number of shares she owns. Civil rights groups and their members were not likely to own much stock in the 1960s and 70s.<sup>233</sup> What is more, the trend in which institutional investors, like churches and universities, pursued socially responsible investment through divestment and screens, rather than by directly engaging management in an intra-corporate fight, meant that civil rights groups advancing social reforms through shareholder activism had even fewer votes to work with.

The D.C. Circuit's path-breaking opinion in July 1970 signaled that activists had found a promising new avenue for change. However, the early successes of groups like Medical Committee were almost immediately met by significant opposition from the business community. Ultimately, the business community was able to force a return to the previous status quo: tight control by management of corporate social and political decision-making.

### *B. SEC v. Medical Committee for Human Rights as Corporate Governance History*

*SEC v. Medical Committee for Human Rights* was taught in corporate law casebooks for a decade or more before fading into obscurity.<sup>234</sup> Yet the subject it explored—the scope and meaning of corporate democracy—could not be more relevant today.

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233. Medical Committee provides one example; it never owned more than five shares of Dow stock.

234. Like many other corporate law casebooks published in the 1970s and 1980s, the 1986 edition of the West corporate law casebook authored by Lewis D. Solomon, Donald E. Schwartz, and Jeffrey D. Bauman included a lengthy excerpt of *Medical Committee for Human Rights v. SEC* in its chapter on “Shareholder Action and Proxy Regulation.” See LEWIS D. SOLOMON, DONALD E. SCHWARTZ & JEFFREY D. BAUMAN, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 574–79 (2d ed. 1988) (excerpting the D.C. Circuit opinion). The next edition of the same casebook, published in 1994, mentioned the case only in the notes. See LEWIS D. SOLOMON, DONALD E. SCHWARTZ, JEFFREY D. BAUMAN & ELLIOTT J. WEISS, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 614, 631–33 (3d ed. 1994). For examples of other corporate law casebooks published in the 1970s and 1980s that included the case, see, e.g., LARRY D. SODERQUIST & A.A. SOMMER, JR., CORPORATIONS: A PROBLEM APPROACH 462–68 (2d ed. 1986) (excerpting the D.C. Circuit opinion); RICHARD W. JENNINGS & RICHARD M. BUXBAUM, CORPORATIONS: CASES AND MATERIALS 315–25 (5th ed. 1979) (excerpting both the D.C. Circuit and

### 1. The “Politicization” of the Firm

When the D.C. Circuit endorsed a broad view of corporate democracy in *Medical Committee for Human Rights v. SEC* in July 1970, commentators warned that the decision would lead to the “politicization” of the firm. Business leaders cautioned against the transformation of the annual shareholder meeting into a popular referendum on all of a company’s social, political, and environmental policies. Dow’s general counsel, Groening, told the *Wall Street Journal* that the SEC would face an “enormous task” in handling all the social and political proposals to come.<sup>235</sup> The D.C. Circuit hadn’t seemed particularly worried about this possibility, so long as the communications and debate were in accord with state law. Yet corporate managers strongly opposed the prospect of facing down dissenting shareholders in a quasi-democratic forum once a year.<sup>236</sup>

Shortly after the D.C. Circuit handed down its decision, the ABA’s Section on Business Law sponsored a meeting of securities law professors. The “danger” of the “greater politicization of corporate affairs” was a major subject of discussion.<sup>237</sup> Present at the meeting were two academics who would lead the discussion

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Supreme Court opinions); *but see* WILLIAM L. CARY & MELVIN ARON EISENBERG, CORPORATIONS: CASES AND MATERIALS (6th ed. 1988) (omitting mention of the case). Today, few of the major corporate law casebooks include the case. *See, e.g.*, MELVIN ARON EISENBERG & JAMES D. COX, BUSINESS ORGANIZATIONS: CASES AND MATERIALS (12th ed. 2019) (omitting any mention of the case).

235. SEC Reviewing Rules on Holder Proposals in Proxy Statements, WALL ST. J., Nov. 9, 1970, at 12 (“Mr. Groening said Dow feels there are ‘serious questions’ about the relationship of such proposals to ‘the spirit of the Securities and Exchange Act.’ He said the company considers the commission’s re-examination of the subject to be entirely appropriate’ at this time.”).

236. *See supra* Part IV.A (assessing how corporate managers were keen on making it more difficult for stockholders to present dissenting views at the company’s annual shareholder meeting).

237. Henry G. Manne, *The Myth of Corporate Responsibility or Will the Real Ralph Nader Please Stand Up*, 26 BUS. LAW. 533, 539 (1970). *The Business Lawyer* published the papers presented at the meeting, which was held in St. Louis on August 11, 1970, as well as a transcript of comments made on the panel by several notable scholars. *See generally* Wilbur G. Katz, *Introduction*, 26 BUS. LAW. 511 (1970); *Comments by Panelists*, 26 BUS. LAW. 549, 549–54 (1970). Phillip I. Blumberg echoed Professor Manne’s warning about the politicization of the firm. *See* Phillip I. Blumberg, *The Politicalization of the Corporation*, 26 BUS. LAW. 1551, 1551 (1971).

from opposite ends of the ideological spectrum: Henry Manne, at the time a professor in the political science department at the University of Rochester,<sup>238</sup> and Donald E. Schwartz, the Georgetown law professor who had helped to lead Campaign GM. Manne argued forcefully against the politicization of the firm.<sup>239</sup> “[T]he corporation *is* politicized,”<sup>240</sup> Schwartz retorted, pointing to Dow as an example. Dow, he explained, had:

objected to the effort to try to get them out of the napalm business, because they said they weren’t making a profit on napalm but they were doing this in spite of the fact that there was no profit. Now I think that’s an interesting fact. If Dow did not produce napalm to make money, why did it do it? To serve our country’s goals as management saw them. That is a political, not a business judgment, and shareholders have as much right, if not more, to make that kind of judgment as does management.<sup>241</sup>

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238. Manne, a founder of the law and economics field, published several works early in his academic career that challenged the corporate social responsibility movement. See, e.g., HENRY G. MANNE & HENRY CHRISTOPHER WALLICH, *THE MODERN CORPORATION AND SOCIAL RESPONSIBILITY* (1972). For a summary of his career achievements and influence, see *Henry G. Manne, ’52, 1928–2015*, THE U. OF CHI. SCH. OF L., <https://www.law.uchicago.edu/news/henry-g-manne-52-1928-2015> (last visited Sept. 5, 2019) (on file with the Washington and Lee Law Review).

239. See Manne, *The Myth of Corporate Responsibility*, *supra* note 237.

240. *Comments by Panelists*, 26 *BUS. LAW.* 549, 549–50 (1970) (emphasis added).

241. *Id.* Schwartz also stated:

One would not debate troop withdrawal from Vietnam at a shareholders meeting, but [one] could argue over whether to sell napalm to the military. The morality of racism is not for a shareholder forum, but hiring policy and support for low cost housing is within the company’s jurisdiction. It seems to me that all of these less general matters can and should be debated by the board of directors and the shareholders.

Donald E. Schwartz, *Corporate Responsibility in the Age of Aquarius*, 26 *BUS. LAW.* 513, 524 (Nov. 1970). Schwartz, who described himself in the same article as a conservative, wrote:

I believe the proxy machinery can and should assist in the process of bringing these issues before the corporate forum. The rules should be interpreted, as they were in the GM matter, to allow policy questions which have a social impact to come before the shareholder meeting, if the corporate body is empowered to take action on the question. I think that is also the thinking of the District of Columbia Court of Appeals, as seen from the dicta in the Dow case.



Indeed, Dow had never earned much profit from its production of napalm, and its executives justified their decision to make napalm on political and moral grounds. Manne, who authored a number of works critical of shareholder activism and corporate social responsibility in the 1960s and 1970s, never quite addressed Schwartz's point.<sup>242</sup> Where, in corporate democracy, is the line between the board's business judgment and its political judgment? And what, exactly, is at stake in answering this question?

With the benefit of nearly fifty subsequent proxy seasons, we can now say that concerns about the politicization of the firm turned out to be overwrought. The corporate annual meeting did *not* become a highly politicized circus after *Medical Committee*, and in the years that followed, the business press documented a return to the quiet, management-dominated annual meeting that had been the norm in the early 1960s.

The federal courts in the D.C. Circuit would not be asked to consider the scope of the shareholder proposal rule again for nearly fifteen years. Yet, when the court revisited the rule—and a substantially different Subsection (5), which had been revised by the SEC to make it harder for shareholder-proponents to prevail—a district court, citing *Medical Committee*, would again hold in favor of the shareholder-proponent. In that case, *Lovenheim v. Iroquois Brands, Ltd.*,<sup>243</sup> the district court held that the company had to include a shareholder proposal opposing the company's practice of force-feeding geese to make foie gras.<sup>244</sup>

## 2. Pushback from the Business Community and the SEC

Business leaders responded to *Medical Committee*, Campaign GM, and the 1970 proxy season by pushing back. In his essay, "The Social Responsibility of Business is to Increase Its Profits," Milton

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*Id.*

242. Manne produced a cottage industry's worth of articles decrying corporate social responsibility as ill-conceived. See his three-volume collected works, one whole volume of which is devoted to his writings that criticize corporate social responsibility, 1 HENRY G. MANNE, THE COLLECTED WORKS OF HENRY G. MANNE (Fred S. McChesney ed., 2009).

243. 618 F. Supp. 554 (D.C. 1985).

244. *Id.*

Friedman argued that the “newer phenomenon” of ESG shareholder activism involved “some stockholders trying to get other stockholders . . . to contribute against their will to ‘social’ causes favored by the activists.”<sup>245</sup> Friedman’s essay is routinely excerpted in corporate law casebooks today, while the passages in the D.C. Circuit’s opinion that endorsed a robust concept of corporate democracy generally are not.

After the Supreme Court’s decision in *Medical Committee*, the SEC began a series of revisions that narrowed shareholders’ rights to bring proposals.<sup>246</sup> The deadline for a shareholder to submit a proposal to the company was moved back from 60 days to 70 days (in 1972), to 90 days (in 1976) to 120 days (in 1983).<sup>247</sup> The number of proposals a shareholder could submit at a company was reduced from an unlimited number to two proposals (in 1976) to one

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245. Friedman, *supra* note 141.

246. The SEC set about to undercut the administrative law holding of the D.C. Circuit as well. In *Medical Committee for Human Rights v. SEC*, the full Commission had reviewed the no-action determination by the staff of the Division of Corporation Finance; it was the Commission’s approval of the no-action letter that the D.C. Circuit had held was reviewable as a final order. Shortly after that case was decided by the D.C. Circuit, however, the SEC established a work-around: the Commission refused to consider an appeal of a no-action letter. In a 1974 case, *Kixmiller v. SEC*, the D.C. Circuit held that without a final determination by the Commission, there was no final order subject to judicial review. 492 F.2d 641 (D.C. Cir. 1974). Thus, within just a few years, the D.C. Circuit had endorsed the SEC’s work-around, effectively cutting off the very avenue of judicial review that it had opened up for shareholders in 1970. Solomon, Schwartz, and Bauman noted in 1986 that after *Medical Committee*, the SEC made it a practice not to review staff no-action determinations. See LEWIS D. SOLOMON, DONALD E. SCHWARTZ & JEFFREY D. BAUMAN, CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 584 (2d ed. 1986). Today, when an investor seeks judicial review of a no-action letter on a shareholder proposal, it will seek declaratory or injunctive relief in federal district court. See, e.g., *Trinity Wall St. v. Wal-Mart Stores, Inc.*, 75 F. Supp. 3d 617, 622 (D. Del. 2014) (describing Trinity Wall Street’s lawsuit in federal district court seeking a declaratory judgment, preliminary injunction, and permanent injunction). As a result, there is no longer any real question that a shareholder can obtain judicial review of a company’s decision to exclude a social or environmental shareholder proposal from its proxy statement. *Id.*

247. Compare Rule 17 C.F.R. § 240.14a-8 (1969) (60 days) with Adoption of Amendments to Proxy Rules, Exchange Act Release No. 9784, 1972 SEC LEXIS 155, at \*5–6 (Sept. 22, 1972) (70 days), and Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, at \*8–16 (Nov. 22, 1976) (90 days), and Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34,20091, 1983 SEC LEXIS 1011, at \*11 (Aug. 16, 1983) (120 days).

proposal (in 1983).<sup>248</sup> Shareholder “eligibility” requirements were imposed for the first time in 1983.<sup>249</sup> Though it is difficult to quantify the effect of these incremental changes on shareholders’ activism, it is equally hard to imagine that they did not have an effect, particularly on the sort of investors most likely to demand social, environmental, and political reforms—those lacking economic resources and experience navigating the securities laws.

### 3. Corporate Democracy in the Twenty-First Century

Today, just as in the 1960s, progressive activists are dissatisfied with the responsiveness of democratic institutions to popular will and have turned to shareholder activism. The 2019 proxy season calls to mind the shareholder activism of Medical Committee and others fifty years ago: at Walmart’s 2019 annual meeting, Bernie Sanders, a candidate for the presidency, appeared to demand that the company give a board seat to a representative of its workers.<sup>250</sup> Alphabet, the parent company of Google, published thirteen shareholder proposals in its proxy statement, addressing the biggest issues facing Silicon Valley: election interference, sexual harassment, hate speech, gender pay gap, NDAs and mandatory arbitration, freedom of expression, Chinese

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248. Compare Rule 17 C.F.R. § 240.14a-8 (1969) (no limit) *with* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 12,999, 1976 SEC LEXIS 326, at \*15 (Nov. 22, 1976) (two proposals per corporation), *and* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34,20091, 1983 SEC LEXIS 1011, at \*12 (Aug. 16, 1983) (one proposal per corporation).

249. Compare Rule 17 C.F.R. § 240.14a-8 (1969) (no threshold), *with* Adoption of Amendments Relating to Proposals by Security Holders, Exchange Act Release No. 34,20091, 1983 SEC LEXIS 1011, at \*7–8 (Aug. 16, 1983) (stating that in order to submit a proposal “a proponent must own at least 1% or \$1000 in market value of a security entitled to be voted at the meeting on the proposal and have held such securities for no less than one year prior to the date on which he submits the proposal”). The eligibility threshold was increased to \$2,000 in 1998 to adjust for inflation. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 1998 SEC LEXIS 1001, at \*44 (May 21, 1998).

250. See Laura Litvan, Matthew Boyle, & Bloomberg, *Bernie Sanders Rips “Grotesque” Greed and “Starvation Wages” at Walmart Shareholder Meeting*, FORBES (June 5, 2019), <https://fortune.com/2019/06/05/bernie-sanders-walmart-shareholder-meeting> (last visited Sept. 11, 2019) (stating that Sanders called on Walmart to add employee representatives to its board of directors) (on file with the Washington and Lee Law Review).

ensorship, sustainability, antitrust, and the corporate governance that insulates Google's executives from shareholder accountability.<sup>251</sup> The company's management opposed all thirteen proposals and fought (unsuccessfully) to keep some of them off the ballot.<sup>252</sup> One review of the 2019 proxy season found that fewer environmental, social, and political proposals were submitted than in 2018, but that more went to a shareholder vote, where they received greater voting support, on average, than a year earlier.<sup>253</sup>

Fifty years after Medical Committee's path-breaking activism, corporate America is experiencing a second wave of pressure from shareholders for social reforms. In this second wave of activism, shareholders are significantly more sophisticated than they were in the 1960s and 1970s, and some changes to the capital markets and to the securities laws have cut in their favor. As a result, a small number of ESG shareholder proposals win a majority of votes each year, and many more are settled between the company and activists, yielding a policy reform.<sup>254</sup> Put simply, corporate democracy is shaping companies' social, environmental, and political policies, though it has never achieved the "true vitality" that the D.C. Circuit imagined in *Medical Committee for Human Rights v. SEC*.

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251. See ALPHABET INC., NOTICE OF 2019 ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT (Apr. 30, 2019), [https://abc.xyz/investor/static/pdf/2019\\_alphabet\\_proxy\\_statement.pdf?cache=3ed6a89](https://abc.xyz/investor/static/pdf/2019_alphabet_proxy_statement.pdf?cache=3ed6a89).

252. See *id.* at 11 (indicating that the company's board recommended voting against each proposal).

253. See *2019 Proxy Season Review: Part I Rule 14a-8 Shareholder Proposals*, SULLIVAN & CROMWELL LLP, July 12, 2019, at 1, <https://www.sullcrom.com/files/upload/SC-Publication-2019-Proxy-Season-Review-Part-1-Rule-14a-8-Shareholder-Proposals.pdf> (environmental, social, and political shareholder proposals dropped from 387 in 2018 to 323 in 2019, but more went to a vote, and average votes cast in favor rose from 26% to 28%). As I explained in a previous article, efforts to count shareholder proposals rely more on art than science, which explains why tallies of proposals differ from organization to organization. See Sarah C. Haan, *Shareholder Proposal Settlements and the Private Ordering of Public Elections*, 126 YALE L.J. 262, 277–78 (2016).

254. See *2019 Proxy Season Review*, *supra* note 253 (reporting that 9 proposals on environmental, social, and political topics passed a shareholder vote in 2019, and 8 passed in 2018); see also Haan, *supra* note 253, at 277–86 (describing the settlement of shareholder proposals).

At the same time, the Supreme Court has relied upon the existence of “corporate democracy” to justify the expansion of corporate political speech rights. A few years after declining to decide what corporate democracy meant in *Medical Committee*, the Supreme Court raised the subject of corporate democracy in 1978 in *First National Bank v. Bellotti*.<sup>255</sup> In that case, which focused on the First Amendment right of a corporation to spend money in support of a state ballot initiative unrelated to its business, the Supreme Court wrote that “[u]ltimately shareholders may decide, through the procedures of corporate democracy, whether their corporation should engage in debate on public issues.”<sup>256</sup> It is not clear what the Court meant by this, since there was (and is) no corporate governance mechanism to decide whether a corporation engages in political speech, and corporate managers are not accountable to shareholders for individual political expenditures. The Court’s suggestion that the existence of “corporate democracy” in any form was sufficient to justify unfettered speech rights for corporations was puzzling in light of its own recent history.

The Supreme Court made a similar move in *Citizens United v. FEC*,<sup>257</sup> decades later, referencing corporate democracy first with regard to corporate speech rights, and then in connection with the constitutionality of campaign finance disclosure laws.<sup>258</sup> With regard to corporate speech rights, the Court opined that there was “little evidence of abuse that cannot be corrected by shareholders ‘through the procedures of corporate democracy.’”<sup>259</sup> This assumption, it turned out, was predicated on the idea that shareholders have access to information about their company’s political spending, an assumption that was then and is now false.<sup>260</sup>

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255. 435 U.S. 765 (1978). For a contemporary take on *Bellotti*, see Bowie, *supra* note 206 (“[C]orporations are fundamentally representative institutions, ones in which a vocal person purports to represent a silent group.”).

256. *Id.* at 794.

257. 558 U.S. 310 (2010).

258. *See id.* at 362, 370 (describing shareholders utilizing corporate democracy in connection with corporate speech and campaign finance).

259. *Id.* at 361–62.

260. *See* Peter Overby, *Shareholders Want Political Spending Transparency*, NPR (Feb. 28, 2012), <https://www.npr.org/2012/02/28/147548228/shareholders-want-political-spending-transparency> (last visited Sept. 8, 2019) (reporting on the

The assumption became clear later in the opinion, when the Court wrote that “[s]hareholder objections raised through the procedures of corporate democracy can be more effective today because modern technology makes disclosures rapid and informative.”<sup>261</sup> It explained further that:

[w]ith the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters. Shareholders can determine whether their corporation’s political speech advances the corporation’s interest in making profits, and citizens can see whether elected officials are “in the pocket” of so-called moneyed interests.”<sup>262</sup>

The passage suggested that the Court viewed “the procedures of corporate democracy” as related only to “the corporation’s interest in making profits,” a crabbed view of corporate democracy that shareholder activists in the Medical Committee mold would never have endorsed.<sup>263</sup> Judge Tamm, who authored the D.C. Circuit’s opinion in *Medical Committee for Human Rights v. SEC*, would not have endorsed it either. He had found “[n]o reason” why federal law shouldn’t be interpreted to require a discussion at the annual meeting on social responsibility versus profitability, when a shareholder demanded it.<sup>264</sup> Fifty years after Medical Committee submitted its first qualifying proposal to Dow, there remains uncertainty about the rights of shareholders to shape companies’ social, political, and environmental policies, and about the very nature of corporate democracy itself.

### V. Conclusion

The story of Medical Committee’s battle with Dow over its production of napalm lies at the intersection of civil rights history

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debate regarding whether corporations should have to disclose spending on politics and lobbying) (on file with the Washington and Lee Law Review).

261. *Citizens United v. FEC*, 558 U.S. 310, 370.

262. *Id.* (quoting *McConnell v. FEC*, 540 U.S. 93, 259 (2003)).

263. *Id.* at 362, 370 (internal quotations omitted).

264. *Med. Comm. for Human Rights v. SEC*, 432 F.2d 659, 681 (D.C. Cir. 1970).

and corporate governance history. As civil rights history, the case is a curiosity. Medical Committee was a minor civil rights organization with major accomplishments, but in the final retelling of its history, its contributions to shareholder activism have been left out. Although Medical Committee lost its battle with Dow in the U.S. Supreme Court and even at the corporate ballot box, it catalyzed a broader movement of shareholder activism, one that has advanced over the decades in fits and starts but is now strong.<sup>265</sup> Medical Committee's victory in the D.C. Court of Appeals was a major shot across the bow of corporate managers, and the organization's efforts should be remembered as an important legacy of that group of doctors and nurses who pursued multiple avenues of reform: grass-roots activism, local health clinics, legislative advocacy, and, yes, shareholder activism. In this sense, Medical Committee responded uniquely to Martin Luther King Jr.'s call-to-arms, in his 1967 speech in Riverside Church, to seek out "every creative method of protest possible."<sup>266</sup>

As corporate governance history, Medical Committee's conflict with Dow marks a key point in fifty years of legal wrangling over the meaning of corporate democracy. It also revealed the final—and ultimately unsuccessful—efforts of a group of aging New Deal securities lawyers to impose greater accountability over corporations and their managers. These New Deal lawyers included Supreme Court Justice William O. Douglas, the former SEC chair, who had once proposed that corporate boards should have "public" directors, but who left little trace of his progressive corporate philosophy in the case law when he retired from the Court in 1975.

As a novice shareholder activist, Medical Committee came close to establishing, under federal law, that corporations must publish shareholders' proposals on so-called "social" (or "political") matters in the proxy and hold a vote. A unanimous three-judge panel of the D.C. Circuit Court of Appeals concluded that Medical Committee likely had that right as a Dow shareholder.<sup>267</sup> Due to vacancies on the U.S. Supreme Court, *SEC v. Medical Committee*

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265. See *supra* Part III.

266. Martin Luther King, Jr., Speech at Riverside Church, New York, New York: Beyond Vietnam (Apr. 4, 1967).

267. *Supra* note 8.

*for Human Rights* was decided by only seven Justices, and it appears that three of the seven were supportive of judicial review of no-action letters and expanded shareholder rights.<sup>268</sup> After the confirmation of Justices Powell and Rehnquist at the beginning of 1972, however, the Court's balance of power on these issues shifted. Just a few years later, "corporate democracy" was being cited not to empower shareholders, but to justify an expansion of corporate speech rights.<sup>269</sup>

It is impossible to say how the case might have come out if the SEC had not successfully pressed a last-minute mootness argument. What we can say is that an early opportunity for the Supreme Court to expound on corporate democracy was lost in 1972. In the nearly fifty years that have passed since the Supreme Court punted in *SEC v. Medical Committee for Human Rights*, the concept of corporate democracy has grown in importance and obscurity. If shareholder activism continues to surge, the Supreme Court may eventually get a chance to revisit the subject, and to rule on it for the first time.

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268. See *supra* notes 169–178 and accompanying text.

269. See *supra* Part IV.