

Models of shareholder democracy: A transnational approach

ABRAHAM SINGER

Department of Management, Quinlan School of Business, Loyola University Chicago, 820 North Michigan Avenue, Chicago, IL 60611

Email: asinger2@luc.edu

AMIT RON

School of Social and Behavioral Sciences, Arizona State University, West Campus, 4701 W Thunderbird Road, Glendale, AZ 85306

Email: amit.ron@asu.edu

Abstract: Existing discussions about shareholder control work with a state-centric and Westphalian conception of democracy. Therefore, they see the corporation as a state-analogue: shareholders (citizens) elect a board (legislature) charged with the responsibility to ensure that the executive follows their ‘collective interest’. We claim that state-centric models of democracy are not apt for an environment of corporate governance characterised by complex interdependence, porous boundaries, and criss-crossing relations of weak allegiances. Instead, we suggest that recent theories of transnational democracy provide us with better models for thinking about ‘popular’ control in such an environment. We look at shareholder democracy not as a system where a single body representing a ‘demos’ tries to control a single executive; instead, we view shareholders as constituting multiple *dêmoi* which must coordinate and collaborate to control multiple corporate executives. We emphasise deliberation and communicative power as a central mechanism for these *dêmoi* of shareholders to effectuate control.

Keywords: corporate governance; deliberative democracy; pension funds; shareholder democracy; transnational democracy

I. Introduction

Following the financial crisis of 2008, there is renewed interest among reformers in practices and institutions that are commonly described as ‘corporate’ or ‘shareholder’ democracy. While mainstream theories of corporate governance focus on what political scientists call the ‘exit’ strategy offered by securities markets as the most efficient way to control

corporate decision-making, advocates of shareholder democracy argue that shareholders should have ways to exert more direct control through ‘voice’ and voting. To put it in less technical and more political terms, mainstream economists argue shareholders who don’t like the way a corporation is managed can sell their shares – do the ‘Wall Street walk’ out of the corporation;¹ the threat of lower share price is the most efficient way to ensure that corporate executives will do their best to maximise shareholder value. Yet, the financial crisis of 2008 revealed (once again) the extent to which corporate executives artificially inflate their company’s value to get personal benefits under the control of ineffective or even complicit boards. Advocates of greater shareholder control argue that these market controls are insufficient and that regulations are needed to give shareholders greater control on the decision-making of corporate boards. As a result, in part, of these renewed policy debates, political theorists are becoming more interested in analysing the corporation as a political entity and exploring the relationship between corporate and democratic governance.

This has resulted in attempts to theorise means of bringing the corporation under more democratic control, including reviving older ways of understanding the connection between corporate business activity on the one hand, and the norms and institutions associated with the political system on the other. One strategy of doing this has been to view the corporation as an extension of government that transcends liberal categories of private and public.² From this perspective, because corporations are creatures of the government, not of the market, the manner in which corporations are structured is always a governmental and political decision. Extant political decisions, then, have resulted in our current regime of corporate law and governance, where directors and managers have large degrees of power, and the metric by which corporate success is measured is shareholder value.³ But this is, in principle, subject to change through the very government that constitutes the corporation. Democratic control, then, comes from without, through asserting the appropriateness for sovereign democratic governments to intervene in corporate affairs.

Other theories focus on control from *within* the corporation. Instead of emphasising the firm’s relationship to the state, these theorists focus on how the firm resembles a state itself, attempting to vindicate Robert Dahl’s

¹ AR Adamti and P Pfeleiderer, ‘The “Wall Street Walk” and Shareholder Activism: Exit as a Form of Voice’ (2009) 22(7) *The Review of Financial Studies* 2445.

² D Ciepley, ‘Beyond Public and Private: Toward a Political Theory of the Corporation’ (2013) 107(1) *American Political Science Review* 139.

³ S Bainbridge. ‘Director Primacy: The Means and Ends of Corporate Governance’ (2003) 97(2) *Northwestern University Law Review* 547.

famous claim that ‘if democracy is justified in governing the state, then it must also be justified in governing economic enterprises’.⁴ This approach, of course, raises the further question of who the relevant demos is in such a democratic state-analogue. Some have argued that employees would be the relevant group to exercise democratic control, leading to claims about the moral legitimacy and superiority of workplace democracy as a means of controlling economic enterprises.⁵

Without challenging these two strategies, which we find interesting and generally agreeable, this article follows a different path. Instead of arguing for a reconceptualisation of the corporation and its relationship to democratic constituencies, we begin with the more conventional assumption that the relevant group with regard to the governance of the corporation is the shareholders. We note here, however, that this conventional assumption contains an important ambiguity. Many think that because the corporation is conventionally understood to be about shareholder value, it also implies that shareholders are in control. However, despite the significance of ‘shareholder value’ for the corporation, the shareholders themselves are in fact very often not in control. We ask what it would look like to take shareholder control and shareholder interest seriously. Starting there, we aim to show that doing so carries within a more capacious and perhaps radical idea of corporate governance than is generally thought. Immanent to this status quo set of practices – where shareholders are understood as the demos to whom the corporate executive is responsible – is the possibility of a more democratic and open form of social control, and a more nuanced understanding of what corporate democracy would even look like.

To understand how this could be the case, it is worth noting that discussions about the relationship between corporations, government, and democratic control tend to work within a particular paradigm, namely the conventional state-centric and Westphalian conception of democracy. In this understanding, what makes a given democratic procedure legitimate is that the decisions it produces are the expression of the citizens’ collective will. This presupposes a pre-political demos – a ‘We the People’ – who express their political freedom by ruling themselves through an elected legislature. Corporations, looked at through this view, are analogised to governmental entities, and those who advocate corporate democracy want to make these entities function like democratic governments. In one model,

⁴ RA Dahl, *A Preface to Economic Democracy* (University of California Press, Berkeley, CA, 1985).

⁵ H Landemore and I Ferreras, ‘In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy’ (2016) 44(1) *Political Theory* 53; I González Ricoy, ‘Firms, States, and Democracy: A Qualified Defense of the Parallel Case Argument’ (2014) 2 *Law, Ethics and Philosophy* 32.

shareholders (citizens) elect a board (legislature) charged with the responsibility to ensure that the executive follows their 'collective interest'.⁶ In another model, the employees or other stakeholders are cast as the citizens.

Our central claim is that taking the idea of shareholder control seriously brings into stark relief just how inapt these state-centric models of democracy are for the environment of corporate governance. Citizens of a democratic state are, at least in theory, full and equal members of a political association to which they have undivided allegiance and by which their lives are significantly influenced. But membership in a corporation is different. Shareholders generally have a stake in multiple corporations and therefore complex and sometimes conflicting interests. Unlike citizens of a democratic state, shareholders can sell their share and renounce their membership and other people are free to become members.⁷ In each corporation, the shareholders are not equal; larger investors have more stake than smaller ones (Shleifer and Vishny argue that this inequality is actually crucial to efficient corporate governance).⁸

Furthermore, democracy in the corporate context is purely a mechanism of control. Corporations do not have a flag, a hymn, or national holidays, and their shareholders do not feel themselves as part of a demos with shared identity.⁹ Shareholder democracy is therefore not generally endorsed as something of intrinsic value.¹⁰ When people discuss or advocate a strengthened shareholder democracy, they do not do so with the goal of achieving some ideal of equality, flourishing, or even autonomy. Instead, shareholder democracy is generally considered of instrumental value. Extant mechanisms, and proposals for reform, of shareholder democracy

⁶ See, for example, DJH Greenwood, 'Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited' (1996) 69(3) *Southern California Law Review* 1024; CA Dunlavy, 'Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights' (2006) 63(4) *Washington & Lee Law Review* 1347.

⁷ TW Joo, 'The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence Table of Contents' (2001) 79(1) *Washington University Law Review* 1; U Rodrigues, 'The Seductive Comparison of Shareholder and Civic Democracy' (2006) 63(4) *Washington and Lee Law Review* 1389.

⁸ A Shleifer and RW Vishny, 'Large Shareholders and Corporate Control' (1986) 94(3) *Journal of Political Economy* 461.

⁹ DJ Greenwood, 'Markets and Democracy: The Illegitimacy of Corporate Law' (2005) 74(1) *University of Missouri-Kansas City Law Review* 84.

¹⁰ For the distinction, see J Bohman, 'Beyond the Democratic Peace: An Instrumental Justification of Transnational Democracy' (2006) 37(1) *Journal of Social Philosophy* 127; J Bohman, *Democracy Across Borders: From Dêmos to Dêmoi* (MIT Press, Cambridge, MA, 2007) 37; T Christiano, 'The Significance of Public Deliberation' in J Bohman and W Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, Cambridge, MA, 1997) 243.

are primarily intended to address the principal–agent problem of corporate governance.

For these reasons, the idea of shareholder democracy is often viewed with scepticism by those who believe in the power of market forces.¹¹ Furthermore, democratic theorists who are interested in democratising the economy often dismiss shareholder governance as a possible site of democratisation. Instead, the presumption is that democratising the firm entails worker-democracy or stakeholder control.¹² In contrast, we argue that a different understanding of democracy can provide better theoretical foundations for conceptualising democracy within constraints of conventional corporate governance. Particularly, we argue that theories of transnational democracy provide us with better models for thinking about ‘popular’ control in the corporate world. While this discussion centres on shareholder control of the corporation, we believe the conceptual framework we develop here can be used to rethink the meaning of democracy as it might relate to the other corporate stakeholders.

Theories of transnational democracy are a recent development in democratic theory that rethink the meaning of popular will and popular control in a political environment that is increasingly global, interconnected, and complex. Processes of globalisation, which make it difficult for communities to control their fate, pose challenges to conceptions of democracy that focus on self-governance. Yet, they also create a more dense system of interactions among people across national borders. Theories of transnational democracy focus on the question of how to make these cross-national interactions more democratic.¹³ To do this, they seek to understand democracy not only as a system of electoral accountability but also as a mode of communication that is based on exchange of reasons among equals. As such, democracy is characterised by its capacity for reflexivity; it provides people with sites and procedures where they can collectively reflect on the first-order norms that govern their relationship and modify them if necessary. In our society, this capacity for reflexivity is limited by institutions that protect powerful interests. In this sense, democratic theory takes part in the critical project of identifying and transforming oppressive power structures and relations.

We argue that an understanding of shareholder democracy through the lens of a theory of transnational democracy is useful because it better

¹¹ Rodrigues (n 7); SM Bainbridge, ‘The Case for Limited Shareholder Voting Rights’ (2006) 61 *UCLA Law Review* 602.

¹² For the former, e.g. T Malleon, *After Occupy: Economic Democracy in the 21st Century* (Oxford University Press, Oxford, 2014); for the latter, CC Gould, *Globalizing Democracy and Human Rights* (Cambridge University Press, Cambridge, 2004).

¹³ JS Dryzek, ‘Transnational Democracy’ (1999) 7(1) *Journal of Political Philosophy* 30.

captures the porousness of corporate boundaries, and the cross-cutting nature of shareholder loyalties and membership. Our world is one in which transnational corporations work and are an essential element of a global political and social network. In an analogous way, corporate governance is also composed of complex trans-corporate networks. As we will show, taking this transnational condition, so to speak, as a point of departure for the analysis provides a toolkit that brings a number of phenomena and practices into focus. First, it allows us to situate recent discussions about the role of norms in corporate governance in a democratic context. The basic norm of corporate governance in the business world is shareholder value maximisation.¹⁴ But the simplicity of this basic norm is deceptive; it turns out that there are different interpretive standards, or discourses, through which the business community comes to understand the norm of profit maximisation. For example, contemporary notions of corporate social responsibility (CSR), which are generally thought of as constraints on the corporate pursuit of profit, find their origins in nineteenth century industrial attempts to increase worker productivity¹⁵; from this we can see how maximising the value of enterprise can lead to widely different strategies or philosophies. The framework of transnational democracy, we argue, provides us with a theoretical and normative toolkit to examine the sites and the processes by which these norms are interpreted and contested in a public sphere of shareholders.

Second, the framework of transnational democracy allows for a different parallel to emerge; instead of the corporation being analogised to the state, we contend that it is more useful to think of pension funds and institutional investors as the ‘international organisations’ of the business world. In the same way that democratic reformers of global politics argue that international organisations must be democratised, some reformers who seek what Michael McCarthy describes as ‘democratic control of finance’ argue that the democratisation of pension funds governance can give shareholders a greater voice in corporate governance.¹⁶ We argue that the theoretical framework that we offer allows for a fruitful comparison of the two types of democratic reform.

By updating our theoretical understandings of shareholder democracy with those coming from the more aspirational theories of transnational

¹⁴ MC Jensen, ‘Value Maximization, Stakeholder Theory, and the Corporate Objective Function’ (2002) 12(2) *Business Ethics Quarterly* 235.

¹⁵ AB Carroll, ‘A History of Corporate Social Responsibility’ in A Crane *et al.* (eds), *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press, Oxford, 2008).

¹⁶ MA McCarthy, ‘Turning Labor into Capital: Pension Funds and the Corporate Control of Finance’ (2014) 42(4) *Politics & Society* 455.

democracy we do not deny or ignore the instrumental nature of shareholder democracy. In one sense, we are arguing that shareholders, because of the more ‘transnational’ nature of the corporate world, have actually developed other, less traditional, ways of mitigating principal–agent costs that the toolkit of transnational democracy helps us locate. For democracy to function, it needs to take place at different levels of society and in different ways. Therefore, our goal is not merely to enable shareholders to better monitor their investment, to make the process of investor earning more efficient. Rather it is to strengthen democratic practice where it exists and to show how the instrumental use of democracy can lead to an affirmation of the intrinsic value of democracy.

It should be emphasised that the path that we propose to follow is not without risk. It can be argued that in focusing on shareholder democracy, even if only for the purpose of an immanent critique, we end up reifying these particular relationship as democratic and disclose a discussion about the prospect of democratising other relationships within the firms – with workers, suppliers, and other stakeholders. According to this line of criticism, our line of inquiry distracts from more promising venues for democratising corporate governance. While we are sympathetic to the project of articulating a more radical or inclusive understanding of corporate governance, we restrict ourselves to shareholder democracy for three reasons. First, our main purpose in this article is to examine the normative and political structure of a discourse that is already existing, and which already structures corporate practice. Second, by focusing on shareholders, we are able to demonstrate the power and subtlety of transnational interpretation of corporate governance, which might then be applied to other stakeholder groups in future research. Third, while corporate governance can, and should, be made more inclusive with respect to non-shareholder stakeholders, there is reason to believe that shareholders will always be an especially important part of corporate governance. Thus, even a more radical vision of corporate governance will have to concern itself with the nature of shareholder inclusion and control. In this sense our argument here can supplement a more thoroughgoing critique of corporate governance as it is currently practised.

The approach that we apply here demonstrates how democratic theory can provide a toolkit that can help analysing processes of governance in institutions generally considered outside the purview of democratic theory. Therefore, for the most part our discussion is analytical and conceptual – we offer different categories for analysing corporate governance. In doing so, we show that concepts borrowed from the political realm need to be carefully examined. The complexities that democratic theorists discuss – the meaning of collective autonomy, the role of communication, and the

importance of reflexivity – are not merely philosophical concerns; they have real consequences for the way that we understand a practice like corporate governance. We move from a conceptual to a normative terrain only in the final section of the article where we use the conceptual apparatus that we offer to examine the possibilities of further democratisation of corporate governance.

II. Corporate governance: Voice as a form of control

Corporate governance is generally understood by scholars as a means to mitigate the principal–agent problem.¹⁷ As Tirole puts it, '[t]he dominant view in economics ... is that corporate governance relates to the ways in which the suppliers of finance to corporations assure themselves of getting a return on their investment'.¹⁸ The shareholders, who are the principals, expect their agent, the board of directors and executives, to act in their interest by realising returns on investment. However, since the agents hold the power to act on behalf of the principals, they can use their power to advance their own interest rather than the interest of the principals. They can do so by corner-cutting, extravagant investment, entrenchment strategies, self-dealing, and so forth. The problem that corporate governance is meant to address, in this view, is how best to prevent the abuse of this power in the myriad instances of divergent interests.¹⁹

¹⁷ It is important to note that the picture of corporate governance being presented here is the mainstream view of economic and legal scholarship. It does not represent a consensus. An alternative view differs from mainstream in two respects. First, shareholders are not given primacy in corporate governance but are seen as but one group of patrons from which the corporation attempts to secure asset-specific investments. The governing body is not seen as representing a particular group's interests, but is seen as attempting to secure the viability and sustainability of the corporate enterprise as a whole. Second, and as a result, this view differs from the mainstream view in that the key problem which corporate governance is meant to address is not a principal–agent problem, but a hold-up problem: preventing any one group from taking advantage of another patron group's vulnerable situation which results from their making an asset-specific investment. The role of corporate executive institutions is not to represent the interests of some one group (which requires governance structures to provide confidence and security), but rather as a 'mediating hierarchy' that locks in capital and secures team production (see JR Boatright, 'From Hired Hands to Co-Owners: Compensation, Team Production, and the Role of the CEO' (2009) 19(4) *Business Ethics Quarterly* 471; MM Blair and LA Stout, 'A Team Production Theory of Corporate Law' (1999) 85(2) *Virginia Law Review* 247). We start with the conventional view because it is the most influential and widespread justification of current practices. Because our enterprise is a reconstructive account of shareholder democracy, our sights are most appropriately set on the theory which informs the current regime of corporate governance.

¹⁸ J Tirole, *The Theory of Corporate Finance* (Princeton University Press, Princeton, NJ, 2006) 16.

¹⁹ Boatright (n 17); MC Jensen and WH Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) *Journal of Financial Economics* 305.

One of the main mechanisms of corporate governance that restrains agents is performed by the principals themselves. As was mentioned earlier, economists and advocates of the 'Wall Street Rule' contend that executive agents are best controlled by the shareholders' threat of exit or by threat of corporate takeover.²⁰ In this view, securities markets and the financial leverage they hold are the best and most efficient mechanism of corporate governance.²¹ Easterbrook and Fischel capture this logic most succinctly: 'Shareholders express views by buying and selling shares; they have no reason to hamstring their firms or impose other costs that make the firms less effective competitors.'²² This emphasis on securities markets has resulted in the well-known idea that the corporation's primary objective is to increase profit or, more specifically, the value of shares. The result is that in discussions of 'shareholder control', the 'shareholder' in question is not an actual flesh-and-blood shareholder, but a fiction with imputed ends and motives. The exit threat of this idealised fictitious shareholder turns out to be the justification for maximising the value of the corporation. As Greenwood puts it: 'The law and the legally created structure of corporation and market filter out all the complexity of conflicted, committed, particularly situated, deeply embedded and multi-faceted human beings, leaving only simple, one-sided monomaniacs.'²³ The result is a distinction between the people who actually hold shares in a corporation, and the 'shareholders' that figure in the decision-making of corporate executives.

However, real flesh-and-blood shareholders also have channels through which they can influence management without having to sell their shares. The laws that regulate corporate governance provide such channels by requiring annual shareholder meeting and by allowing shareholder resolutions and proxy voting in that meeting. Additionally, and perhaps most importantly, shareholders are charged with electing directors who, in turn, oversee and hire the executives of the corporation. Thus in addition to the exit option, there are institutionalised mechanisms of voice. This has been taken to imply the parliamentary analogy in which shareholders are to directors what citizens are to their legislative representatives (and directors are to corporate executives, what parliament is to executive government). Implicit to this is an analogy between the corporation and the Westphalian state, wherein both have a set and bounded constituency and influence.

²⁰ HG Manne, 'Mergers and the Market for Corporate Control' (1965) 73(2) *The Journal of Political Economy* 110.

²¹ AA Alchian and H Demsetz, 'Production, Information Costs, and Economic Organization' (1972) 62(5) *The American Economic Review* 777; see (n 14).

²² FH Easterbrook and DR Fischel, 'Voting in Corporate Law' (1983) 26(2) *The Journal of Law and Economics* 396.

²³ Greenwood (n 6) 1025.

There is no doubt that the mechanism of exit plays a key role in addressing the principal–agent problem. After all, this is what makes the securities market a market. However, given the significant monetary benefits that are at stake and the information asymmetries between shareholders and management, it is not clear that this market mechanism is sufficient for the task of corporate governance. There are numerous debates over just how effective securities markets are in this.²⁴ However, in what follows we do not try to address this debate. Our focus is exclusively on voice mechanisms, which we take as a significant and institutionalised component of corporate governance; as Lee puts it: ‘what the economic theorist strains to understand, perhaps the political theorist understands more easily’.²⁵ The question that we put forward is how these mechanisms can be understood as part of corporate or shareholder democracy? Is the state-centric, shareholders-are-to-citizens-what-directors-are-to-legislatures, approach to shareholder ‘voice’ the best way to capture the democratic impulse underlying these mechanisms?

It is important to emphasise that our approach is reconstructive. Our starting point is a set of practices, such as proxy voting and shareholder resolutions, and a certain discourse that label these practices as ‘democratic’. What we try to do is to identify the conception of democracy in which this labelling would be intelligible. The goal of the philosophical reconstruction is not the labelling itself – i.e. whether shareholder democracy is ‘really’ a democracy. Rather, it is the contention that the way that we understand the meaning of the term democracy can help in generating a meaningful conversation between democratic theory and theories of corporate governance and in discussing whether democratising corporate governance can be part of a strategy of deepening democracy.

III. From state-centric to transnational models of democracy

To restate our question: how can the various shareholder voice mechanisms of corporate governance be interpreted as a practice of shareholder democracy? To address this question, we need to delve into democratic theory; in particular we need to consider work that theorises the possible meaning of a ‘transnational democracy’, as it offers a vision of democracy more in fitting with the shareholder condition. In simple and slightly crude

²⁴ Fama issued the canonical argument for this ‘efficient market hypothesis’. EF Fama, ‘Efficient Capital Markets: A Review of Theory and Empirical Work’ (1970) 25(2) *The Journal of Finance* 383. For a review of the critical responses, see BG Malkiel, ‘The Efficient Market Hypothesis and Its Critics’ (2003) 17(1) *Journal of Economic Perspectives* 59.

²⁵ IB Lee, ‘Citizenship and the Corporation’ (2009) 34(1) *Law & Social Inquiry* 151.

terms, state-centric models of democracy understand democracy as a way for multiple principals, the ‘people’, to control a single agent – ‘government’. Transnational models of democracy understand it as a system where multiple ‘peoples’ engage in shaping decisions in an environment where there are multiple powerful agents – governments, international organisations, economic corporations, and so forth.²⁶

From a theoretical perspective, the main difference between state-centric and transnational conceptions of democracy is the centrality of the assumption that government should be controlled by an autonomous corporate agency, a ‘We the People’. In the state-centric model, democratic governments are characterised by collective autonomy. The people, that is, those who are subject to a system of law, are also seen as the authors of that law. They do so by electing representatives to serve as a legislature who collectively stand for the voice of the people. These representatives issue laws on behalf of the people that regulate how the executive manages their collective affairs. The executive and the representatives are held accountable to the people through periodic elections and other mechanisms.

The main characteristic of a transnational model of democracy, in contrast, is that the notion of an autonomous public is, as James Bohman describes it, ‘decentered’.²⁷ The terminology of decentering is important here. Those who work on theories of transnational democracy do not suggest that we need to do away with institutions of collective autonomy. They are still important for our thinking of democracy, but they cannot be the centre. Similarly, while people exercising collective autonomy over their communal affairs is still important to our understanding of democracy, it cannot be the very definition of democracy. Democratic procedures and practices do not reach their end at the boundaries of collective autonomy. Instead, transnational democracy invites us to conceptualise relationships between and across peoples as part of our understanding of democracy.

But what is the meaning of democratic control in such an environment? In the state-centric model, we can speak about democratic control or democratic accountability when the agent acts in the interest of the principals. The people, the principals, are viewed as those who author the laws and the agents articulate and execute the laws on their behalf. Models of transnational democracy understand democratic control in a different way that supplements collective autonomy. People can be said to control

²⁶ J Dryzek (n 13); Bohman (n 10); A McGrew, ‘Transnational Democracy’ in A Carter and G Stokes (eds), *Democratic Theory Today* (Polity, Cambridge, 2002) 269.

²⁷ J Bohman, ‘Decentering Democracy: Inclusion and Transformation in Complex Societies’ (2004) 13(2) *The Good Society* 49; Bohman (n 10) 31.

the agents not only when the agents operate in the interest of the people, but also when the people have the ability to shape the way their own interests are understood.

To see this point, it is useful to make a distinction between two types of interests that participants in the democratic process may have. They may have a first-order interest in regard to a preferred outcome and they may have a second-order interest in regard to the manner by which an outcome is achieved. While my first-order interest might be a certain outcome from which I benefit, I have a second-order preference for a process that is fair. Now, in some cases I care about my first-order interest far more than my second-order interest; I would prefer a certain outcome regardless of the process. However, when one is part of an ongoing and complex system of interactions where each singular outcome is only one among many, one's interest in the process becomes more significant. Furthermore, in complex environments where people might be wrong about their first-order interest, there is a second-order interest in a process that helps them to get their own first-order interest accurately. As we will see, this point becomes especially salient when assessing the claim that corporations ought to exist solely to maximise shareholder value.

For now, what is important to emphasise is that methods of aggregation such as voting are better suited for addressing disagreements about first-order interests than for resolving disagreements about second-order interests. The latter are better addressed, perhaps only addressed, through deliberation and exchange of reasons. If a group of us needs to spend the day together and some want to go to the beach and others wants to hike the mountains, it makes sense to vote and accept the preference of the majority. However, if we need to come up with a system of procedures to manage our monthly get-togethers, we are much more likely to engage in a discussion of the different ways competing interests can be reconciled. Deliberation and reasons are trans-contextual in their very nature since they are far less limited by physical boundaries or membership in a group; the validity of the reasons that are being exchanged are more likely to transcend the boundaries of that specific group. It is not likely that our decision about whether to hike a mountain or to go to the beach would have any bearing on other groups in a similar situation. But if we come up with procedures for making decisions in such situations, this procedure might be relevant in other contexts.

Thus, in transnational settings, voting becomes less central as a method of accountability; the actual process of mutual giving of account is the central mechanism through which people can exercise control. They do so not by having their agents doing what they want but by taking part in shaping the second-order rules that regulate social interactions.

Here we can see the parallels between the criticism directed against the state-centric model of democracy and the corporate model of shareholder democracy. Generally speaking, critics claim that the mechanism of voting is not strong enough to hold agents accountable to principals, be it citizens or shareholders. The reason is that the complex reality of modern governance, as well as the complex reality of modern corporate management, makes it difficult for principals, even if they try, to understand the issues at stake and the relationship between the choices that they make, the outcome of these choices, and their own welfare.²⁸ This makes them vulnerable to manipulation by the agents who already hold positions of power and have the knowledge, resources, and information needed to make effective decisions. We therefore argue in the next section that our understanding of shareholder democracy must follow the lead of transnational democratic theory, and take into account the processes of deliberation through which principals and agents come to understand their first- and second-order interests.

IV. The domain of shareholder democracy

As we have seen, in a Westphalian model of shareholder democracy, the emphasis is mostly on the capacity of shareholders to vote for board members. As we have also seen in the previous section, the shift to a transnational model of democracy allows us to examine processes of deliberation and exchange of reasons. But this perspective raises a further question: if we expect shareholders to take part in processes of deliberation, we need to ask what they can deliberate about. The shift to the deliberative dimensions of corporate governance raises the question of the domain of shareholder democracy.

In certain ways this question is already implied by the practices and laws that structure the corporate world. In line with our reconstructive approach, we begin with an examination of two sites where this question is articulated.²⁹ The first institutional practice that reflects on the domain of shareholder engagement is the ordinary business operation exception to shareholder proposal rules. The Security and Exchange Commission's

²⁸ FH Easterbrook and DR Fischel, *Economic Structure of Corporate Law* (Harvard University Press, Cambridge, MA, 1991) 72–3; SM Bainbridge, *The New Corporate Governance in Theory and Practice* (Oxford University Press, Oxford, 2008).

²⁹ Our reconstruction focuses on corporate governance as it is practised in the United States. We believe, however, that a similar argument can be made in regard to corporate law and corporate governance in other jurisdictions and contexts. Perhaps other systems of corporate governance, e.g. in Germany, China, or Japan, may entail different standards and therefore different analyses.

(SEC) shareholder proposal rule requires corporations to include shareholder proposals that meet certain requirements in the management's proxy material for the company's annual meeting. One of these requirements is that the shareholder proposal must not relate to the ordinary business operations of the issuer.³⁰ Additionally, a corporate board *cannot* exclude a proposal that raises substantial policy issues. Now, for our purpose here, we don't need to discuss the legal question of how to determine what is considered normal business operation or a substantial policy issue.³¹ What is important is the basic distinction between two levels of corporate decision-making: ordinary business and second-order decisions that shape the norms of ordinary business.

The second institutional practice that implies an understanding of the domain of shareholder democracy are proxy guidelines. Institutional investors, which we will discuss in the following section, articulate and publish guidelines that explain how they make decisions about proxy voting (in this context, proxies are votes that institutional players cast on behalf of the investors). They do so, in part because of the requirements of the Employment Retirement Income Security Act (1974) and SEC regulations (2003) that have construed proxies as plan assets, which implies a fiduciary duty to exercise them in line with plan holders' interests.³² This means that institutional players already exercise their voting rights in corporations that they have shares in, not only by an analysis of the concrete market situation of the corporation in question, but also by appealing to self-imposed rules, which apply across different situations.

We are now in a position to try to give a theoretical articulation of the possible domain of shareholder democracy. Existing institutional practices of corporate governance imply a domain of second-order norms of governance. We use the term 'norms' here in a descriptive sociological sense, as rules of behaviour that are accepted by and are expected from all participants. These norms can become the subject of exchange of reasons, and therefore can be the domain of democratic control. The current accepted norm of corporate governance is maximising shareholder value. But this basic norm requires an interpretation. At any given situation,

³⁰ KW Waite, 'The Ordinary Business Operations Exception to the Shareholder Proposal Rule: A Return to Predictability' (1995) 64(3) *Fordham Law Review* 1253.

³¹ MA Eisenberg, 'The Legal Roles of Shareholders and Management in Modern Corporate Decisionmaking' (1969) 57 *California Law Review* 1; D Vogel, *Lobbying the Corporation: Citizen Challenges to Business Authority* (Basic Books, New York, NY, 1978).

³² HA Nicholson, 'Securities Law: Proxies Pull Mutual Funds into the Sunlight: Mandatory Disclosure of Proxy Voting Records' (2004) 57 *Oklahoma Law Review* 687; PD Kinder, 'New Fiduciary Duties in a Changing Social Environment' (2005) 14(3) *The Journal of Investing* 24.

there are different ways to maximise shareholder value and corporate players need to decide which way to go: will we attempt to maximise profits immediately, or plan for more long-term growth? Some of these decisions are substantive and related to the details of the specific business – how much to produce, what prices to pay, and so forth. But the meaning of maximising shareholder value is also interpreted procedurally. Taking this idea seriously implies that we should not view the procedures of corporate governance – shareholder proxy voting, board oversight, etc. – as tools of decision-making on first-order issues; they are better understood as procedures necessary to determine a finite interpretation of what it means for a particular corporation to pursue shareholder maximisation. There is a process by which these decisions are made – through an interaction between management, boards, committees, and so forth. The process itself can be understood as a second-order norm that governs the interpretation of the first-order norm of profit maximisation.

In a sense, we are merely giving a normative gloss to Easterbrook and Fischel's influential account of corporate governance. They argue that the purpose of shareholder voting is to specify contractual terms that are otherwise vague or underdetermined; the purpose of shareholder voting is not to achieve a normative vision of shareholder democracy, but simply to reduce the agency costs resulting from vague contractual terms.³³ What we are arguing is that an overlooked aspect of corporate governance is about interpreting core corporate normative values, or what Freeman calls the 'normative core' of the corporation.³⁴ Procedures of shareholder governance do not merely specify underspecified contracts, but interpret inherently underdetermined second-order norms about how to approach such contracts.

To illustrate this claim, we can look at two areas where shareholders play an important role in corporate decision-making. The first area is the question of executive compensation. The debate on these corporate policies is often obfuscated by the fact that most Say on Pay protocols do not determine how pay scales will be implemented, or a 'just price' for executive compensation. Instead, following the classification of Ertimur *et al.*, we can understand these protocols as primarily addressing the 'rules of the game', 'pay design' and 'pay philosophy'.³⁵ Put differently, they institute procedures for determining how executive compensation should be determined.

³³ Easterbrook and Fischel (n 28) 66.

³⁴ RE Freeman, 'The Politics of Stakeholder Theory: Some Future Directions' (1994) 4(4) *Business Ethics Quarterly* 409.

³⁵ Y Ertimur, F Ferri and V Muslu, 'Shareholder Activism and CEO Pay' (2011) 24(2) *Review of Financial Studies* 535.

Shareholders don't decide on executive pay in these situations, but the norms that are used to decide on such decisions.

The second area where we see increased shareholder input is with shareholder resolutions on corporate social responsibility. Here it is useful to look at Vanguard's statement on social investment as an example:

Vanguard understands that people have a wide variety of deeply felt humanitarian, ethical, environmental, and social concerns, and that some may want to see their beliefs reflected in their investments.

As a fiduciary, Vanguard is required to manage our funds in the best interests of shareholders and obligated to maximize returns in order to help shareholders meet their financial goals. It would be exceedingly difficult, if not impossible, to fulfill these obligations while managing portfolios that reflect the social concerns of all of our shareholders.

We acknowledge, however, that there may be instances when it is appropriate to assess, and possibly address, certain social issues. To that end, we have established a formal procedure for all Vanguard funds for identifying and monitoring portfolio companies whose direct involvement in crimes against humanity or patterns of egregious abuses of human rights would warrant engagement or potential divestment. While ultimately our judgment on these issues and actions with respect to specific companies may differ from that of special interest groups and other institutions, we believe our approach strikes the appropriate balance between corporate responsibility and our fiduciary obligations.³⁶

What is important for us to emphasise is that at the third paragraph Vanguard acknowledges that in some instances (crimes against humanity), ethical and social concerns do have bearings on the question of how to interpret the norm of maximising social values. It also acknowledges that the normative terrain in which these issues are discussed is complex and changing. Now, Vanguard decided to set the line at crimes against humanity. Our point is that this is a normative decision, in the sense that we defined it, and can be the subject of reasonable disagreement (by which we mean disagreement that can be argued upon using reasons). By having a duty to make a policy regarding proxy votes on ethical questions, Vanguard (like other institutional shareholders) invites the possibility of normative debate surrounding corporate social responsibility.

³⁶ See 'Vanguard's View: Social Concerns and Investing' at <https://pcg.law.harvard.edu/wp-content/uploads/2016/09/6-Vanguard-on-social-concerns-and-investing_-_Vanguard.pdf> (accessed 27 May 2015).

V. The sites of normative debate

In the previous section, we argued that there is a domain of second-order norms of corporate governance and that these norms can be the subject of a reasonable debate. It is important to recognise that the reasons that justify second-order norms can have validity that transcends any specific context. For example, if one firm decides to pay living wage for their employees, the reasons that justify this norm, to the extent they are valid, have bearing on debates on similar issues in other firms. The reasons that are generated in the context of one corporation can have effects and bearing on other sites as well, thus transcending the local context in which they emerge. It is therefore important to identify the sites where this exchange of reasons take place and the institutions that allow these vetted reasons to be communicated across the entire system.

We therefore argue that it is possible to conceive of a civil society and a public sphere of shareholders, analogous to that of transnational civil society.³⁷ That is there are networks of institutions and organisations that facilitate association and the exchange of reasons amongst shareholders. And, just as the transnational civil society and public sphere are understood to exert a type of force and power over and/or against states and international governance bodies, the shareholder civil society and public sphere should be understood to exert influence over multiple corporate boards and executives.

The concept of shareholder civil society should not be thought of as implying the control of corporate activity by all citizens capable of deliberation; there is good reason to believe that those positioned as shareholders possess particular interests and information that make them the relevant participants in deliberation (or, at least, we are not challenging this conventional assumption). However, we are arguing that the shareholders of a particular corporation do not have a monopoly on democratic control of that corporation. The trans-corporate character of intersecting shareholders with diverse portfolios and cross-cutting loyalties and interests precludes this. Instead, it is shareholders as a class who deliberate on the nature of their interests and, in so doing, challenge and create second-order norms. As a result, corporate governance can be democratised not solely through shareholder elections, but also through the normative control of shareholder deliberations that occur free of the burdens of institutional decision-making.

The analogy to civil society also draws our attention to certain organisations. Transnational democratic theory highlights the role of transnational civil

³⁷ Compare with Dryzek (n 13).

society groups as norm-entrepreneurs that leverage opportunities for second-order norm creation.³⁸ Global environmental groups, to take one example, use the opportunity of national elections to orient national debate toward taking climate change or deforestation into account when deciding who makes future decisions and how they do it. When applied to corporate governance, this view highlights the significance of those organisations attempting to influence the normative orientation of shareholders. This shareholder civil society is a realm of action that is not altruistic, as it still couched in terms of material interest. Yet it is not particular in orientation; groups and participants in shareholder civil society are not concerned about any one particular shareholder or corporation. Instead, players here are concerned with influencing, changing, and applying overarching norms.

The distinction between shareholder civil society and civil society more generally is discursive, that is that the former is marked by a concern with the idea of shareholder values. The discursive terms through which such values are debated come from particular organs of what we might call a shareholder public sphere. Journals and magazines like the Harvard Business Review take for granted that the concern is shareholder value; however, the nature of that term – and the strategies for action it suggests – are precisely what these forums discuss. From this perspective, advocates of sustainable CSR, for instance, are not just claiming that it would be good if corporations concerned themselves with the sustainability of the communities in which they operate; they are making a claim that we ought to understand shareholders as not only having a particular kind of economic interest in common, but also social and political values.³⁹ If such values were to be widely affirmed it would result in a very different world of corporate action; the abstract fictional shareholder only concerned with wealth maximisation could not be used as a means of justifying a course of action. At the very least, a more nuanced understanding of shareholder ‘values’ would have to be used.

This emphasis on second-order norm deliberation also helps recast certain procedures in a new light. The role and purpose of shareholder resolutions, for example, has less to do with the implementation of a particular policy than is generally thought. If that were all shareholder resolutions were meant to do, they would be a very weak feature of shareholder democracy since they often do not pass and, when they do, are

³⁸ M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887.

³⁹ M van Marrewijk, ‘Concepts and Definitions of CSR and Corporate Sustainability: Between Agency and Communion’ (2003) 44(2) *Journal of Business Ethics* 95.

generally not binding. Instead, in this view, shareholder resolutions are a way for shareholders to bring ideas and values being deliberated in shareholder civil societies and public spheres to bear on a particular corporate institution.⁴⁰ To use Habermas's term, shareholder resolutions are one of the 'sluices' that bring the ideas of trans-corporate deliberation to bear on corporate action.

In Habermas's model, the public sphere is understood as more sensitive to normative changes that take place in society, but in itself, it has only the weak power of being able to communicate its views.⁴¹ The signals coming from the public sphere have to be picked up by a strong public (legislatures) that can translate these signals into binding decisions. One of the difficulties with the idea of a transnational public sphere is that there are few transnational bodies that respond to the information coming out of this public sphere.⁴² The case is somewhat different for the corporate world, in which transnational players, the institutional players that invest in multiple firms, are much more powerful. While the task of changing norms is always difficult, it is easier to imagine how shareholder resolutions can end up changing the proxy guidelines or the norms of operation in, say Vanguard, than to imagine how a local campaign can change the UN.

In fact, it might be the case that the intended audience of shareholder resolutions are not only the boards of the firms for which they are submitted, but, via the channels of the corporate public sphere, the institutional players and the proxy guidelines that they are using for investment. In this sense, the institutions of corporate governance are more 'transnational' than the institutions of global governance.

VI. Democratising trans-corporate governance

So far, our discussion has been conceptual and reconstructive. We have proposed an alternative toolkit for understanding the meaning of the way the concept of democracy is understood and practised in the realm

⁴⁰ Lee makes a comparable argument, contending that shareholder resolutions are better understood as ways of appealing to 'reasons potentially acceptable to the general body of shareholders' and less as plebiscites. However, Lee raises this point to bolster his argument that 'citizenship' is a helpful way to understand corporate governance and corporate law, which is to make recourse to the types of Westphalian concepts we are trying to distance ourselves from. Still, that analysis and ours overlap in the contention that politics, governance, and authority are crucial for understanding the corporation. See (n 25) 151.

⁴¹ J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, MA, 1996) ch 7.

⁴² N Fraser, 'Re-Framing Justice in a Globalizing World' in T Lovell (ed), *(Mis)recognition, Social Inequality, and Social Justice* (Routledge Press, London, 2007) 17–35.

of corporate governance. We now want to make the discussion more normative, and to examine how the conceptual toolkit cashes out in prescriptions about further democratisation of shareholder control, and helps us understand the relationship between shareholder democracy and democracy at large. Put simply, given the foregoing claims about the interconnection and porous nature of corporate boundaries, what would it mean for such a system to become more democratic?

The transnational perspective makes us focus on the role of exchange of reasons in corporate governance. But debate and exchange of reasons are preconditions for democracy, they are not in themselves inherently democratic. Aristocratic bodies can engage in intense exchange of reasons without being democratic; strong reasoned debate within the C-Suite doesn't imply that the corporation is somehow democratically controlled. Two additional conditions are required – that the participants understand and treat themselves as equal and that the exchange of reasons includes all those who are affected by a decision.⁴³ This means that further democratisation does not have to go through extending voting rights to shareholders, but in extending the range of participants and the range of topics that are discussed.

Given our focus on the discursive realm, we must acknowledge its basic presuppositions. First, as Milton Friedman famously said, the idea that 'the business of business is business' is the way capitalist corporate governance operates.⁴⁴ Thus, the very principle of maximising shareholder value excludes certain classes of reasons, namely those that are not related to shareholder value or wealth maximisation. For this reason, the range of topics that could be the subject of a democratic shareholder deliberation is structurally constrained. Second, corporate governance is not based on any commitment to the idea of an inherent worth of a person. The only sense of equality that is taken into account, and in a very loose sense, is that the power of investors is proportional to the size and type of their investment and thus investors that hold the same portfolio should have equal power. In place of the liberal idea of 'one citizen, one vote', we get

⁴³ We use the term 'all-affected' as a stand-in for wider democratic participation. Recent works in democratic theory offer a more complex understanding of logics of democratic inclusion and exclusion. The point that we make here is that exchange of reasons is not a sufficient condition for democracy. See R Bauböck, *Democratic Inclusion: Rainer Bauböck in Dialogue* (Manchester University Press, Manchester, 2017); V Bader, 'Democratic Inclusion in Politics and Governance Arrangements' (2017) *Constellations* 1 <<https://doi.org/10.1111/1467-8675.12317>>; A Ron, 'Affected Interests and Their Institutions' (2017) 4(2) *Democratic Theory* 66.

⁴⁴ M Friedman, 'The Social Responsibility of Business Is to Increase Its Profits' (1970) *The New York Times Magazine* (13 September 1970).

the idea of ‘one share, one vote’, and even that is only for shares of the same class.⁴⁵

Given these caveats, what are the possible frontiers of democratisation that can be opened by a trans-corporate perspective of shareholder democracy? The trans-corporate perspective allows us to conceptualise and analyse two dimensions of democratisation. The first dimension we can call vertical democratisation, that is, a democratisation of the relationship between shareholders and corporate management. In a sense, this is the traditional meaning of corporate governance. However, the trans-corporate perspective of the meaning of democratisation is different in two significant ways. First, it focuses on the relationship between shareholders and management across multiple corporations (that is, how shareholders as a class influence managers as a class), and, second, it seeks to democratise the deliberative process and not the formal process of voting. Vertical democratisation takes place when it opens the sluices that connect the ‘weak’ normative discussion that takes place among shareholders and the formal and informal processes of designing second-order norms for investment at the level of the ‘strong’ public of, for instance, institutional investors.⁴⁶

The second dimension can be called horizontal democratisation, by which we mean making deliberation about corporate governance issues more inclusive to a wider range of participants and points of view. What this means practically is the opening of the sluices that allow communication between the corporate public sphere and the public sphere at large. As we explained earlier, what distinguishes the corporate public sphere is that reasons are bounded by the basic principle of maximising shareholder values, and that participants are shareholders or are positioned as such. However, we have also suggested that the idea of ‘shareholder value’ is not determinate and is subject to multiple interpretations. By allowing a greater range of non-shareholder deliberants, this would enable a more democratically-informed meaning of shareholder value, which more closely tracks experiences and values of society at large. At the same time, it would also bring the social value of ‘shareholder value’ into broader public conversation in highlighting the social functions of the corporate structure.

Put together, vertical and horizontal dimensions of democratisation would enable corporate governance to be more effective in detecting

⁴⁵ See AC Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Irwin Law, Toronto, ON, 2005).

⁴⁶ Our distinction between weak and strong public sphere follows N Fraser, ‘Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy’ (1990) 25/26 *Social Text* 56.

normative changes that affect the meaning of shareholder value and to adjust corporate norms accordingly. For example, we mentioned earlier Vanguard's policy of divestment from firms that engage in 'crimes against humanity or patterns of egregious abuses of human rights'. Open sluices would allow those who put together, interpret, and carry out these policies to be more attuned to the changing understandings of what constitutes such crimes and to the emergence of broader social expectations of social justice.

In fact, perhaps the most interesting thing that the transnational approach unveils is the counterintuitive role that institutional investors can play in shareholder democracy. Generally, institutional investors are considered the bane of shareholder democracy. In controlling large portions of shares in a large number of corporations, they represent aristocratic consolidations of power that minimise the power of individual non-institutional shareholders. Furthermore, institutional investors tend not to exercise the proxy votes associated with their shares; because institutional investors tend to have large portfolios with investments in hundreds of firms, the discovery costs to do the research necessary to participate effectively in elections is prohibitive. As a result, not only do institutional investors render independent shareholders ineffective, they don't use their oversized power to monitor boards or executives, leaving them largely to act with impunity.

While we don't quarrel with this criticism of institutional investors, the transnational approach helps us understand a different democratic function they can play. Institutional investors, which we earlier described as the international organisation of the corporate world, provide platforms for shareholders to initiate both horizontal and vertical deliberation over second-order shareholder norms. Take pension funds as an example. Advocates for social control over the economy have long been attracted to the large percentage of corporate shares owned by pension funds; the thought has been that if these institutions could be democratised it would be a step toward a socially-controlled economy. Peter Drucker famously referred to the large ownership of corporate shares by pension funds as 'pension fund socialism'.⁴⁷ It might seem odd then that most proposals for reform accept managerial discretion of funds; pension fund democracy does not generally call for democratic election of fund directors, or plebiscitary mechanisms for directing fund policy. Instead, democratic reform of pension funds generally entails the reinterpretation of fiduciary obligations and trust law.⁴⁸ The most

⁴⁷ P Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (Harper Collins, New York, NY, 1976).

⁴⁸ See RB Davis, *Democratizing Pension Funds: Corporate Governance and Accountability* (University of British Columbia Press, Vancouver, BC, 2008).

important aspect of these proposals, however, is simply the demand that pension funds exercise their proxy votes in the corporations they hold shares in.

This might seem like a relatively weak proposal, with little-to-no democratic stakes. Yet the significance of this demand is the implication that pension fund involvement in corporate governance should not be subject to cost–benefit analysis; instead, pension funds are forced to decide on *how* they approach electorship of directors, executive compensation, and the like. While we don't deny that pension fund beneficiaries are concerned with maximising value, the requirement that pension funds exercise proxy votes requires that the meaning of 'value' be hashed out. This is a very practical example of bolstering the horizontal democratisation we discussed above. Will pension funds pursue corporate actors and strategies that emphasise long-run value or short-term value? What will the role of 'sustainability' be in these ideas of value? Pension fund democracy is not about the 'enfranchisement' of fund beneficiaries; it is about the platform and opportunity to deliberate over the nature of shareholder value, and how such an idea should be manifested. Such a role is hidden within the traditional conception of democracy, but is brought into relief through a transnational, or 'trans-corporate', lens.

VII. Conclusions

There are many economists who argue that investors do not need to care about democracy or their voting rights because there is very little evidence that their input will affect the decisions of management in any substantial way. Despite media attention and occasional sensationalist coverage, the annual meeting is not really important for how corporate policies and decisions will be made.⁴⁹ For this reason, the argument goes, the entire discussion about shareholder democracy is superfluous. But, once again, a comparison to political democracies might be instructive. There are similar arguments about the political system. The executive and the legislative branches make decisions in response to systemic pressures and to the influence of powerful groups; voters only have marginal effect, if any, on the process. Posner, for instance, claims that economists don't understand why people vote, whether they are shareholders or citizens.⁵⁰

We believe that the theoretical framework that we offer in this article can help us in understanding the limits of this perspective. First, although

⁴⁹ R Lenzner, 'The Farce of Shareholder Democracy' *Forbes* (24 December 2011).

⁵⁰ RA Posner, 'Free Speech in an Economic Perspective' (1986) 20(1) *Suffolk University Law Review* 1.

voting might be insignificant, democracy is not only about voting but also about deliberation. Citizens participate in shaping the discourses through which policymakers understand their political environment and respond to it. These are longer-term processes, which are harder to analyse than the visible processes of voting and holding representatives accountable. In a similar way, we need to be attentive to the ways by which shareholders participate in shaping the discourses and affect formal and informal norms of corporate governance. As we have argued, this shifts our attention away from mechanisms of shareholder voting and board elections, and toward the sites of shareholder deliberation and the channels through which their reasons are brought to bear on corporate decision-makers.

Second, democracy might not matter in practice. But it should. Effective processes of democratisation require a sound philosophical model of the meaning of democracy and the functions that it performs. The goal of reconstructive theory is neither to provide a duplicate of actual practices, nor to create a utopian theory to be foisted upon the world we live. Instead, the goal is to look at the practices as they exist, and attempt to articulate their underlying normative and theoretical bases. We have argued that Westphalian models of democracy have limited role in conceptualising the ‘transnational’ environment of corporate governance as it exists today. Therefore, it makes more sense to reconstruct practices of shareholder participation through the nascent theories of transnational democracy. With this theoretical reconstruction, we will be in a better position to assess the possibilities, strengths, and weakness of various reforms to corporate governance, and how they relate to our wider understandings of democracy and the economy.

It is also important for us to reiterate our claim that the study of corporate governance as a field of democratic potentialities goes beyond the domain of management studies and is, and should be, of interest to political science. To make this claim, we want to make a distinction between two ways to study processes of democratisation and corresponding strategies of social activism. Following Archon Fung, we can label them democracy after the revolution and democracy before the revolution. In the first approach, meaningful democracy is possible only under hospitable social conditions.⁵¹ The study of democratisation should focus on identifying the obstacles that prevent the realisation of these social conditions, which will pave the way for social activism that will remove these obstacles. The debate of whether the form of the corporation and the capitalist system of production in which it is situated are obstacles to

⁵¹ A Fung, ‘Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World’ (2005) 33(3) *Political Theory* 397.

democracy belongs to this approach. There are similar debates about the nation state, the party system, or constitutionalism.

We follow here a different approach. The question that we ask is not how to create conditions for democracy to function but how democracy can rehabilitate itself and create the conditions for its own functioning. In this view, democracy is a system in which the terms of social cooperation can become the subject of reflection and possible transformation, a reflection that must be taking place in a dialogic manner that is based on principles of equality and inclusiveness. Given the complexity of modern governance, these processes of reflection have to be understood as taking place not in limited number of 'command and control centres' but in multiple social spheres. These ongoing processes of reflection are disrupted when institutions impose unreflective limitations on the process of reasoning. Social activism on behalf of democracy can take place not only by ploughing the social terrain and removing unwanted social forms, but also by identifying emerging sites where ongoing processes of reasoning begin to examine the institutional boundaries that constrain reflection and look for ways to engender these processes. We view corporate democracy as one such site. We argue that by using the tools of democratic theory we can better understand why corporate democracy is not simply a form of management that regulates the relationship between shareholders and boards of directors but a site of dialogue that has the potential of reaching beyond the boundaries set by existing institutional structures.