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De-Democratization of Firms

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Abstract

One of the most widely used metaphors in corporate governance is "corporate democracy." This metaphor has been used by state legislatures, federal regulators, the judiciary, and academic discourse that has shaped U.S. corporate governance. In this Article, I challenge the validity and utility of this metaphor by using detailed case studies and market data to trace the erosion of democratic principles of inclusion, equality, protection, and mutuality in modern public corporations. This erosion of democratic principles in (or de-democratization of) firms has occurred by narrowing the segment of shareholders who enjoy extensive rights, by increasing the disparity among different classes of shareholders, by weakening the mechanisms used to hold fiduciaries accountable, and by relying on more unilateral decision making procedures.

This account of the de-democratization of firms yields several new insights about the relationship between firms and governments and prompts us to articulate why and how the metaphor of corporate democracy matters, if at all, in the first place. To the extent the corporate democracy concept has been used to legitimize or expand corporate powers, the de-democratization of firms prompts a rethinking of these expansions. To the extent the corporate democracy concept has been used to promote democratic principles in society more broadly, the de-democratization of firms may be a consequence of, or pre-curser to, erosions of democratic principles in other contexts. To the extent the corporate democracy concept has been used as one among many possible models for corporate governance, the de-democratization of firms suggests that now may be an opportune time to consider other alternatives. This Article takes a first step toward categorizing these various relationships between democratic principles in the corporate and political contexts, and suggesting tailored policy responses to the de-democratization of firms.

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I. Introduction

The metaphor of "corporate democracy" has been widely used in the rules, regulations, decisions, and discourse that shape U.S. corporate governance.[2] The concept stems from the governance similarity between the civic and corporate contexts, wherein citizens and shareholders, respectively, elect a governing body vested with control to make decisions on their behalf.[3] Democratic governance emerged in both the political and corporate contexts to address the collective action problems that commonly arise among individuals organized as large groups.[4] However, while there are noticeable parallels in the two contexts, there is evidence to suggest a growing divergence. Yet, the use of the "corporate democracy" construct persists, and is even expanding.

This Article documents this divergence between corporate governance and democratic principles by testing the "corporate democracy" concept against the data on the organization and governance of modern firms. Relying on detailed case studies and surveys of recent market and legal developments, I argue that democratic principles in corporate governance are eroding, and explore the implications of this de-democratization of firms.

Despite the widespread use of the "corporate democracy" metaphor, there is a notable absence of a satisfactory and consistent framework to accurately define, measure, or compare the extent to which corporate structures are democratic.[5] For example, in the landmark *Citizens United* case, the Supreme Court lifted a ban on corporations' independent expenditures on election speech, and relied on the procedures of corporate democracy to protect the interests of any adversely impacted shareholders.[6] This suggestion that the democratic procedures of corporate governance could appease shareholders who are dissatisfied with a corporation's

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[2] *See, e.g.*, John Pound, *Proxy Voting and the SEC: Investor Protection Versus Market Efficiency*, 29 J. FIN. ECON. 241, 262 (referring to the Securities and Exchange Commission's "democratic view of the voting process"). A long line of Delaware cases beginning with *Schnell* stand for the rule that board action which interferes with the exercise of the shareholder franchise invokes enhanced judicial scrutiny. Schnell v. Chris-Craft, Indus., Inc., 285 A.2d 437, 439 (Del. 1971) ("[I]mpeding and interfering with the efforts of the stockholders' power to effectively exercise their voting rights in a contested election for directors is contrary to established principles of corporate democracy . . . and may not be permitted to stand.").

[3] DAVID A. MOSS, DEMOCRACY: A CASE STUDY 1-2 (2017) (explaining that the essence of democratic governance is *E Pluribus Unum*—out of many states and peoples, one nation). Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503 (2006) (providing a historical account of shareholder democracy in the United States and the changing role of shareholders within corporations over time).

[4] MANCUR OLSON, JR., THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (describing organizational dynamics that impede efforts by large groups to pursue common interests); JONATHAN MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 8 (2008) ("Shareholders rely on the institutions of corporate governance to solve the problems inherent in the separation of share ownership and management of large public corporations").

[5] Cf. Paul Gompers, Joy Ishii, and Andrew Metrick, Corporate Governance and Equity Prices, 118 Quarterly Journal of Economics 107 (2003).

[6] Citizens United v. FEC, 558 U.S. 310 (2010). For a detailed survey of the broader trend of how corporations have displaced individuals as beneficiaries of the First Amendment, see John Coates, Corporate Speech and the First Amendment: History, Data, and Implications (unpublished manuscript). See also ADAM WINKLER, WE THE CORPORATIONS: HOW AMERICAN BUSINESSES WON THEIR CIVIL RIGHTS (2018).

expenditures on election speech relies on several presumptions that do not hold, as even noted by one of the justices.[7]

To fill this gap, I first develop a definitional and conceptual framework that can be used to measure the extent to which corporations are democratically organized. This definition merges the definitional criteria used by influential observers of political democracies together with how that term has been used in corporate law and regulation. I propose a definition of corporate democracy that encapsulates a regime that invites broad participation by shareholders,[8] treats shareholders equally, protects shareholders from misconduct, and subjects shareholders to mutually binding consultation. By the same token, de-democratization of firms refers to a migration to a regime that is less inclusive, less equal, less protective, and less mutually binding.

I build on my earlier work on publicly-listed private equity (PPE) firms to examine how the governance and organization of this segment of firms fit with the proposed definitional framework of corporate democracy.[9] PPE have been lauded by some as a step toward democratizing capital markets by making investment opportunities once exclusively available to wealthy investors more widely accessible. This case study reports on data from an extensive review of the charters and bylaws of 39 PPEs.[10] I focus my attention on mechanisms that are used to facilitate shareholders' participation in governance and to hold managers accountable to shareholders, and evaluate them on the dimensions of inclusion, equality, protection, and mutuality.

What I find from this review is evidence of de-democratization across all four dimensions of the proposed definition of corporate democracy. I observe: (1) a narrowing of the segment of the population that enjoys extensive shareholder rights; (2) an increase in the disparity among different classes of shareholders; (3) a weakening of the mechanisms designed to hold fiduciaries accountable; and (4) a movement from multilateral to unilateral decision making.

In addition to the case study of PPE, recent market, legal, and regulatory developments provide evidence of a broader trend of de-democratization across firms, particularly on the dimensions of inclusion and equality. While more than half of Americans say they currently have money in the stock market, this is the lowest ownership rate in Gallup's 19-year trend.[11] A further

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[7] See Citizens United v. FEC, 558 U.S. 310, 477 (2010) (Stevens, J., concurring in part and dissenting in part) ("[P]resumably the Court means [by corporate democracy] the rights of shareholders to vote and to bring derivative suits for breach of fiduciary duty . . . these rights are so limited as to be almost nonexistent.").

[8] Throughout this Article, I will refer to shareholders as the principal owners of the corporation, and thus the principal beneficiaries against whom the concepts of inclusiveness, equality, protectiveness, and mutuality will be measured. As an example, on the first pillar of inclusiveness, a corporate governance structure that invites more shareholders to participate will be viewed as more democratic on this dimension than one that invites fewer shareholders to participate (even though the latter may be more accommodating to other stakeholders, such as employees or creditors). For a summary of the shareholder-oriented model of corporate governance and its strengths compared to other proposed alternatives (such as the manager-oriented model, labor-oriented model, state-oriented model, and stakeholder model) see Henry Hansmann and Reinier Kraakman, The End of History for Corporate Law, 89 Geo. L. J. 439 (2000-2001). Lynn Stout, a proponent of the stakeholder model, critiques this view of shareholders as the sole owners or principals of the corporation, noting that this construct only works in the limited cases when a firm is being liquidated. Lynn Stout, The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public 37-38 (2012) (noting that while solvent, the legal entity is its own residual claimant, as it keeps and uses its profits as the directors deem fit).

[9] Sung Eun (Summer) Kim, Typology of Public-Private Equity, 44 Fla. St. U. L. Rev. 1435 (2017).

[10] See **Appendix A** for a list of firms in the sample.

[11] Justin McCarthy, Just Over Half of Americans Own Stocks, Matching Record Low, Gallup News (Apr. 20, 2016).

breakdown of the shareholder base shows that the modal shareholder is "old, white, and in the top 1% of the income distribution" and the top 10% owns 81% of shares, while the bottom 80% owns 9% of shares.[12]

Another example and evidence of de-democratization in firms are the growing popularity of dual-class stock offerings, where different classes of stock carry unequal voting rights, usually to give insiders disproportionately larger voting rights.[13] Increased hedge fund activism, voting by proxy, fiduciaries voting clients' shares, hedging, and borrowed shares, also lead to a greater inequality among different classes of shareholders, and may result in pivotal voters having interests that are apathetic or even adverse to the long-term interests of all shareholders.[14]

How closely or far does corporate governance mimic or deviate from democratic governance? To the extent there is evidence of a gap, and of one that may be growing, do we need to devote resources to reduce that gap? Or should we instead turn our attention to developing a new reference point for corporate governance? The prevalence of less democratic structures within a segment of firms, taken together with general trends toward de-democratization in the broader markets, suggest that these are important and timely questions. The search for answers to these questions also provides an opportunity to clearly state our presumptions and preferences regarding the relationship between firms and government, as well as why and how democratic principles matter, if at all, to corporate governance in the first place.

On the one end, the corporate democracy metaphor has at times been used to determine whether firms can and should perform public functions.[15] The basic idea driving this substitutionary account of firms and governments is that when firms adopt governance structures that are familiar to government (i.e., that are democratic), and can achieve the same goals as government (but with greater expertise and efficiency), firms may be relied upon to do some of the work of government.[16] Under this account, the de-democratization phenomenon suggests that some firms may not be well suited to perform public functions, and it prompts a rethinking and refinement of the standards that are used to determine the suitability of private firms as substitutes for public institutions.

On the other end, the corporate democracy metaphor has also been used to highlight the complementarities between political and corporate democracies.[17] The basic idea driving this complementary account of firms and government is that democratically governed firms contribute to a more robust and thriving democracy, and that, in turn, democratic institutions create a more

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[12] William W. Bratton & Michael L. Wachter, Shareholders and Social Welfare, 36 Seattle U. L. Rev. 489, 491 (2013).

[13] For a survey of the empirical literature on disproportionate ownership structures, see Renee Adams & Daniel Ferreira, One Share-One Vote: The Empirical Evidence, 12 Rev. Finance 51 (2008) (reporting that the evidence on the effect of disproportional ownership on social welfare, shareholder value, and capital allocation are mixed).

[14] Henry T. C. Hu & Bernard S. Black, The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership, 79 S. Cal. L. Rev. 811 (2006). David Yermack, Corporate Governance and Blockchains, 2017 Review of Finance 7, 24 ("Opponents [of empty voting] tend to label it as undemocratic, since it involves acquiring voting rights separate from the other antecedents of ownership and may potentially be used to vote for the "wrong" side of a ballot question in order to create adverse outcomes that somehow benefit the empty voter.").

[15] See infra V.A.

[16] See, e.g., John Stopford and Susan Strange, Rival States, Rival Firms (1991); Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000).

[17] See infra V.B.

robust and thriving market.[18] It is perhaps under this account that the evidence of de-democratization is a cause for greatest concern, as the move away from corporate democracy may be a consequence of, and a precursor to further, erosions of political democracy (where democratic ideals matter not just as a means but also as an ends).

Less concerning are the situations where the corporate democracy concept is used as one among many possible models for corporate governance.[19] The basic idea driving this modeling account of firms and government is that firms and governments are susceptible to similar challenges (e.g., collective action problems arising in large groups and the agency problems common to representative forms of governance), and thus, that firms can learn from governments and vice versa. Under this account, the de-democratization of firms suggests that now may be an opportune time to consider other alternatives against which to measure and model corporate governance, such as meritocracy, stewardship, or guardianship, among others.

The rest of the Article will proceed as follows: **Part II** begins with a brief overview of corporate governance and democratic governance, and their intersection. A precise definition of these two terms helps us understand the various dimensions of corporate democracy—defined here as a regime that is inclusive, equal, protective, and mutually binding. **Part III** examines the governance structure of publicly-listed private equity firms and funds and measures the extent of their 'democratization' using the definitional framework developed in Part II. More detailed information about these firms are provided in the Appendices. **Part IV** examines how recent legal and regulatory developments have contributed to, and also may be a signal of further, erosions of corporate democracy. **Part V** outlines the implications of this de-democratization trend by explicit reference to the specific goals that the corporate democracy metaphor intends to serve. **Part VI** concludes by previewing the future of corporate democracy.

II. Defining and Conceptualizing Corporate Democracy

A. Political Origins and Legal Adaptations of the Corporate Democracy Metaphor

PyeongChang, a county in the Gangwon province of South Korea, was the host of the 23rd Olympic Winter Games.[20] Hosting the Olympic Games is a unique opportunity to attract new investment and development for the county, but past games have also swamped some hosts with unbridled debt and negative public relations.[21] As the primary beneficiary and cost-bearers of the decision to host the 2018 Olympic Winter Games, should PyeongChang residents have the right to vote on the decision of whether or not to host?

Samsung was one of the official partners of the 2018 PyeongChang Olympic Winter Games. The partnership gave the company an opportunity to advertise the electronics brand to a global audience, but came at a price tag reported at 100 billion Korean Won (approximately $90 million),

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[18] See, e.g., Rafael La Porta et al., Law and Finance, 106 J. Pol. Econ. 1113 (1998) (pointing to improved corporate governance structures as a major driver of economic development, which in turn provides the resources that are needed to sustain a thriving democracy); Robert A. Dahl, On Democracy 166 (1997) (describing the relationship between democracy and market-capitalism as "two persons bound in a tempestuous marriage").

[19] See infra V.C.

[20] *The PyeongChang 2018 Olympic and Paralympic Winter Games*, PYEONGCHANG 2018, https://www.pyeongchang2018.com/en/index.

[21] Jeff Wallenfeldt, *7 Ways Hosting the Olympics Impacts a City*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/list/7-ways-hosting-the-olympics-impacts-a-city.

with uncertain payoffs.[22] As the residual claimants of the decision to sponsor the Olympic Games, should Samsung shareholders have the right to vote on this decision of whether or not to sponsor?

The answer to both questions is, and most will agree should be, no. Requiring the 43,000 residents of PyeongChang to approve each bid submission (PyeongChang was successful on its third attempt[23]) or requiring the holders of the more than 140 million shares of Samsung (53% of whom are not South Korean citizens[24]) to approve each sponsorship decision would not be practicable.[25] Instead, municipalities and firms rely on elected representatives to make these and myriad other decisions on residents' and shareholders' behalf.

The concept of "corporate democracy" (and "shareholder democracy") has been used to describe this similarity between representative democratic governance in the civic and political contexts, wherein citizens and shareholders elect a governing body vested with control to make decisions on their behalf.[26] In both contexts, representative democratic governance developed as a matter of necessity to address the coordination and collective action problems arising in large groups. And in both contexts, representative democratic governance creates its own set of costs, such as the threat of minority oppression and agency problems.[27] Achieving a balance between the promises and perils of representative democratic governance has been a subject of study among political scientists and corporate law scholars alike.

But what exactly does the term corporate democracy mean? To answer this question, we must first address the basic yet complex definitional question of what is a democracy. For this, I turn to the definitional criteria developed by influential observers of democracy and democratization.[28]

Charles Tilly surveyed the commonly used definitions of democracy and categorized them into four types—constitutional, substantive, procedural, and process-oriented. [29] The

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[22] *S. Korean firms pledge more than 894 bln won for PyeongChang Winter Olympics*, Yonhap News Agency (August 12, 2017) ("Samsung Group, South Korea's largest family-controlled conglomerate, has reached an agreement worth 100 billion won").
http://english.yonhapnews.co.kr/news/2017/08/11/0200000000AEN20170811009300320.html.

[23] Sang-Hun Choe, *Pyeongchang's Winding Path from Obscurity to Olympics Fame*, N.Y. Times (February 3, 2018) ("That first bid for the 2010 Games failed, as did a second bid to host in 2014, but the International Olympic Committee finally gave Pyeongchang, population 43,000, the nod for the 2018 Winter Games…").
https://www.nytimes.com/2018/02/03/world/asia/pyeongchang-winter-olympics-south-korea.html

[24] *Investor Relations*, SAMSUNG, http://www.samsung.com/global/ir/ (last visited Feb. 22, 2018).

[25] JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 55 (1861) ("But since all cannot . . . participate personally in any but some very minor portions of the public business, it follows that the ideal type of a perfect government must be representative.").

[26] Monks and Minow 2001 (looking at shareholders as voters, boards of directors as elected representatives, proxy solicitations as election campaigns, and corporate charters and bylaws as the Constitution).

[27] Returning to the vignette of the 2018 PyeongChang Winter Olympics, Samsung's former chairman Kun-Hee Lee's involvement came under scrutiny as a potential conflict-of-interest. Sang-Hun Choe, *Korean Leader Pardons Samsung's Ex-Chairman*, N.Y. Times (December 29, 2009) (reporting that former South Korean President Myung-bak Lee granted a special amnesty to Mr. Lee so that he could retain membership at the International Olympic Committee and lead the campaign by PyeongChang to host the games in 2018).
https://www.nytimes.com/2009/12/30/business/global/30samsung.html?mtrref=undefined

[28] I draw primarily from CRAIG T. BOROWIAK, ACCOUNTABILITY AND DEMOCRACY: THE PITFALLS AND PROMISE OF POPULAR CONTROL (2011), ROBERT A. DAHL, ON DEMOCRACY (1997), DAVID MOSS, DEMOCRACY: A CASE STUDY (2017), and CHARLES TILLY, DEMOCRACY (2007).

[29] Id., at 7.

constitutional approach emphasizes the laws enacted by each regime concerning political activity.[30] The substantive approach emphasizes the conditions that are promoted by each regime.[31] The procedural approach tends to single out a narrow range of procedures that are then used to determine whether a regime is democratic.[32] Lastly, the process-oriented approach identifies the set of processes that must be sustained in order for a regime to qualify as democratic.[33]

Tilly's own definition of a democratic regime is one where "political relations between the state and its citizens feature broad, equal, protected and mutually binding consultation" (a process-oriented approach).[34] Breadth refers to a large segment of the population enjoying extensive rights; equality refers to different categories of citizens enjoying equal rights; protection refers to protection from the state's arbitrary action; and mutually binding consultation refers to whether decisions are binding to all parties.[35]

Another example of the process-oriented approach is Robert Dahl's definition, which refers to a democracy as a regime that meets the following five criteria: effective participation, voting equality, enlightened understanding, control of the agenda, and inclusion.[36] Effective participation refers to members having equal and effective opportunities to make their views known to other members; voting equality refers to every member having an equal and effective opportunity to vote and each vote having equal weight; enlightened understanding refers to each member having equal and effective opportunity to learn about alternatives; control of the agenda refers to members have the opportunity to decide the matters placed on the meeting agenda; and inclusion refers to the principle that all adult permanent residents have full rights as citizens.[37]

Dahl's other writings on democracy offer a definition that is closer to a substantive approach, by identifying the six political institutions required by large-scale democracies.[38] The first is representative government, where control over policy decisions are vested in officials who are elected by citizens; the second is free, fair, and frequent elections; the third is freedom of expression; the fourth is access to alternative sources of information; the fifth is associational autonomy; and the sixth is inclusive citizenship.[39]

A number of legal scholars represent a constitutional approach by identifying the institutional and practical predicates of a democracy. Aziz Huq and Tom Ginsburg identify three—a democratic electoral system, free speech and association rights, and the rule of law.[40] And by a democratic electoral system, they refer to a periodic, fair, free election where the losing side cedes

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[30] Id. The key challenge to the constitutional approach to defining democracy are the differences between announced principles and daily practices.

[31] Id. The key challenge to the substantive approach to defining democracy are the tradeoffs among multiple conditions that are being promoted.

[32] Id., at 8. The key challenge to the procedural approach to defining democracy is the narrowness of these definitions ("despite their crisp convenience, they work with an extremely thin conception of the political processes involved")

[33] Id., at 9. The key challenge to the process-oriented approach to defining democracy is the difficulty of comparing regimes and following regimes over time.

[34] Id., at 13.

[35] Id., at 13-15.

[36] ROBERT A. DAHL, ON DEMOCRACY (1997).

[37] Id., at 37-38.

[38] Id., at 85-86 and 93-96.

[39] Tilly (2007), supra note [ ], at 9 (noting that this last factor excludes many historical models that were based on means of exclusion, notably of women, slaves, and paupers).

[40] Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 87 (2018).

power.[41] This definition presumes that elections have winners and losers—i.e., that there is a contest.[42]

Procedural approaches to defining democracy identify a particular feature that must (affirmative) or must not (negative) be present in order for the regime to qualify as democratic. One example of an affirmative view is Craig Borowiak's account, which views accountability as the central principle of a democracy.[43] Borowiak defines democratic accountability as "the principle that the governed should have opportunities to sanction and demand answers from the powers that govern them."[44] As one example of the negative view, Michael Klarman points to entrenchment as the antithesis of democratic principles.[45] Entrenchment in the political context refers to the "ways that incumbents preserve and insulate their power from the processes of democratic change."[46]

The foregoing definitions of democracy focus on *who* participates (the more who participate on a mutual and equal basis, the more democratic the regime) and *how* they participate (the more equal and protected their participation, the more democratic the regime). The remainder of this subpart focuses on how the foregoing conceptualizations of democracy carry over to the corporate context.

In the corporate context too, voting—and the questions of who gets to vote and how their vote is to be exercised and counted—has been the centerpiece of discussions about corporate democracy.[47]

And as in the political context, entrenchment (by managers, in the corporate context) is also seen as one of the major threats to corporate democracy. Lucian Bebchuk, Alma Cohen and Allen Ferrell's widely cited paper develops an index to measure the extent to which a board is entrenched.[48] Three of the six provisions that make up the index relate to voting (voting requirements for bylaw amendments, charter amendments, and mergers).[49]

There is a long line of cases in Delaware, starting with *Schnell v. Chris-Craft Industries, Inc.*, that stand for the proposition that any board actions that interfere with the exercise of the shareholder franchise will invoke enhanced judicial scrutiny.[50] In *Aronson v. Lewis*, the Delaware

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[41] Id.

[42] JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (1942)

[43] CRAIG T. BOROWIAK, ACCOUNTABILITY AND DEMOCRACY: THE PITFALLS AND PROMISE OF POPULAR CONTROL 3 (2011) ("Governance without accountability is tyranny. Few principles are as central to democracy as this…").

[44] ID.

[45] Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

[46] Daryl Levinson & Benjamin I. Sachs, *Political Entrenchment and Public Law*, 125 YALE L. J. 400, 400 (2015).

[47] Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347, 1350 (2006).

[48] Lucian Bebchuk, Alma Cohen and Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009).

[49] Id.

[50] *See* Schnell v. Chris-Craft, Indus., Inc., 285 A.2d 437, 439 (Del. 1971). In *Gilbert v. El Paso Co.*, the Delaware Supreme Court confirmed that the *Unocal* standard of review applies when board of directors have adopted a defensive measure "in response to some threat to corporate policy and effectiveness which touches upon issues of control." Gilbert v. El Paso Co., 575 A.2d 1131, 1144 (Del. 1990). In *Giuricich v. Emtrol Corp.*, the Delaware Supreme Court said it would "not allow the wrongful subversion of corporate

Supreme Court held that maintaining the proper balance in the allocation of power between stockholders and managers is dependent upon the stockholders' unimpeded right to vote effectively in the election of directors.[51] This view was echoed in *Blasius Industries, Inc. v. Atlas Corporation*, where Chancellor Allen ruled that judicial review under the traditional business judgment rule[52] is inappropriate when a board of directors is acting for the *primary*[53] purpose of interfering with the effectiveness of a vote.[54] The result is enhanced judicial scrutiny (within the *Unocal* standard of reasonableness and proportionality[55]) in these situations and the board of directors "bears the heavy burden of demonstrating a compelling justification for such action."[56] These cases can be synthesized to support the statement that challenges to shareholders' rights to vote present the "omnipresent specter" of a conflict-of-interest that invokes enhanced judicial scrutiny under Delaware corporate law.

The Delaware corporate code (largely regarded as U.S. corporate law) also emphasizes democratic principles in specifying the default and mandatory provisions that shape corporate governance.[57] The Delaware General Corporation Law (DGCL) directs how shareholders and directors will meet, discuss, and decide on corporate actions. §211 of DGCL ensures that shareholders are provided with advance notice of meetings and that they have the opportunity to participate in and to vote at meetings (to be held within 13 months of the last meeting).[58] §212 of DGCL provides that each share is entitled to one vote.[59] §216 of DGCL provides that a quorum (defined as holders of a majority of all of the shares entitled to vote, and in no event shall a quorum consist of less than one-third) must be present at a meeting in order to transaction business, and that the vote of the majority of shares present constitutes the vote of shareholders.[60] §231 of

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democracy by manipulation of the corporate machinery or by machinations under the cloak of Delaware law," and decided to give careful judicial scrutiny to cases where the vote of shareholders to elect directors had been "effectively frustrated and denied." Giuricich v. Emtrol Corp., 449 A.2d 232, 239 (Del. 1982). In *MM Companies, Inc. v. Liquid Audio, Inc.*, the Delaware Supreme Court reaffirmed the view that "[t]his Court and the Court of Chancery have remained assiduous in carefully reviewing any board actions designed to interfere with or impede the effective exercise of corporate democracy by shareholders, especially in an election of directors." MM Cos., Inc. v. Liquid Audio, Inc., 813 A.2d 1118, 1127 (Del. 2003).

[51] Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

[52] The business judgment rule refers to the presumption that in making a business judgment the directors of a corporation acted on an informed basis, in good faith, and in the honest belief that the action taken was in the best interests of the company. *Id.*

[53] *Cf.* Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361 (Del. 1995) (holding that the board's adoption of a repurchase program did not have the primary purpose of interfering with or impeding the shareholders' right to vote, and thus did not require the board to demonstrate a compelling justification for such action).

[54] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659-60 (Del. Ch. 1988).

[55] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) ("If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out"). Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 959 (Del. 1985).

[56] Blasius Indus., Inc., 564 A.2d at 661. Such burden would be met if the board can show that it knows better than shareholders what is best for the corporation. *Id.* at 663 ("The only justification that can be offered for the action taken is that the board knows better than do the shareholders what is in the corporation's best interest."). *Id.* at 659 ("[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.").

[57] The state corporate code provides the starting point from which parties can move away from (by specifying the procedures that they would prefer in their certificate of incorporation or bylaws) or at which they can stay put. Many view Delaware's strength as being able to offer a set of rules that most entities would prefer, minimizing the need for specifications, which can be costly.

[58] DEL. CODE ANN. tit. 8, § 211.

[59] DEL. CODE ANN. tit. 8, § 212.

[60] DEL. CODE ANN. tit. 8, § 216.

DGCL mandates the appointment of an impartial and competent inspector to oversee all elections of corporations whose securities are publicly-traded or with more than 2000 shareholders.[61]

DGCL also recognizes that shareholders, especially minority shareholders, need special protections. §220 of DGCL grants any shareholder a right to inspect the corporation's books, records, stock ledger, and stockholder list.[62] §102(b)(7) of DGCL provides that while a corporation's charter may limit a director's personal liability to its shareholders for breaches of fiduciary duty, it may not limit a director's liability for breaching the duty of loyalty, failing to act in good faith, engaging in intentional misconduct, knowingly violating a law, approving an unlawful dividend, or obtaining an improper personal benefit.[63] §262 of DGCL makes available appraisal rights (i.e., the right to "fair value") to stockholders who dissent to a merger.[64]

Federal regulation of corporations too has emphasized the principles of democracy in regulating the corporate voting process.[65] Recent examples include Sarbanes-Oxley Act[66] and the Dodd-Frank Act's say-on-pay,[67] prohibitions on broker discretionary voting and clawbacks.[68] In the specific context of investment funds, the Investment Company Act of 1940 promotes equal voting by providing in two separate subsections of Section 18 that:[69]

> (d) It shall be unlawful for any registered management company to issue any warrant or right to subscribe to or purchase a security of which such company is the issuer, except in the form of warrants or rights to subscribe … issued *exclusively and ratably* to a class or classes of such company's security holders;
>
> …
>
> (i) … every share of stock hereafter issued by a registered management company (except a common-law trust of the character described in section 16(c)) shall be a voting stock and have *equal* voting rights with every other outstanding voting stock.

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[61] DEL. CODE ANN. tit. 8, § 231.

[62] DEL. CODE ANN. tit. 8, § 220.

[63] DEL. CODE ANN. tit. 8, § 102(b)(7).

[64] DEL. CODE ANN. tit. 8, § 262.

[65] Pound, *supra* note [ ], at 262 (referring to SEC's "democratic view of the voting process"). As another example, SEC Rule 10b-5 was been invoked as a tool to keep corporate managers in check. 17 C.F.R. § 240.10b-5. For a review of both the rise and decline of Rule 10b-5 as a weapon against corporate mismanagement, see Harold S. Bloomenthal, *From Birnbaum to Schoenbaum: The Exchange Act and Self–Aggrandizement*, 15 N.Y.L.J. 332 (1969); John C. Coffee, Jr., *Beyond the Shut–Eyed Sentry*, 63 VA. L. REV. 1099 (1977); Boyd Kimball Dyer, *Essay on Federalism in Private Actions Under Rule 10b–5*, 7 UTAH L. REV. (1976); Arnold S. Jacobs, *Role of Securities Exchange Act Rule 10b–5 in the Regulation of Corporate Management*, 59 CORNELL L. REV. 27 (1973); Richard W. Jennings, *Federalization of Corporation Law: Part Way or All the Way?*, 31 BUS. LAW. 991 (1976); Thomas C. Roantree III, *Continuing Development of Rule 10b–5 as a Means of Enforcing the Fiduciary Duties of Directors and Controlling Shareholders*, 34 U. PITT. L. REV. 201 (1972); Thomas J. Sherrard, *Fiduciaries and Fairness Under Rule 10b–5*, 29 VAND. L. REV. 1385 (1976).

[66] Robert Charles Clark, *Corporate Governance Changes in the Wake of the Sarbanes-Oxley Act: A Morality Tale for Policymakers Too*, 22 GA. ST. U. L. REV. 251, 256 (2005).

[67] Section 953(b) of the Dodd-Frank Wall Street Reform and Consumer Protection Act requires public companies to disclose the pay of the average employee compared to the pay of the chief executive.

[68] Dodd-Frank Wall Street Reform and Consumer Protection Pub. L. No. 111-203, § 957 (2010) (codified at 15 U.S.C. § 78f(b)).

[69] Investment Company Act of 1940, as amended through Pub. L. No. 111-257, § 18(d) (2010).

In sum, the corporate democracy concept has been widely used in judicial decisions, state legislation, federal rules, and academic commentary that have influenced U.S. corporate governance. But is the metaphor consistent with the way firms are organized? This question is difficult to answer, I argue, in large part due to the absence of a satisfactory and consistent way to define and measure the extent to which corporate governance is "democratic." Relying on the political origins and corporate adaptations of the concept of democracy outlined above, the next subpart takes the first step toward building such a definition that can conceptualize and measure "corporate democracy."

B. Conceptualizing and Measuring Corporate Democracy

The common denominators of the various accounts of a democratic regime is one that is inclusive, equal, protected, and mutually binding.[70] And parlaying these concepts into corporate governance parlance, the term "corporate democracy" refers to a regime that invites broad participation by all shareholders, treats shareholders equally, protects shareholders (especially minority shareholders) from abuse, and provides mutually binding (rather than unilaterally binding) consultation. In the remainder of this section, I examine in greater detail how the common corporate governance mechanisms fit within each of these four dimensions.

i. Shareholder Meetings

Shareholder meetings provide shareholders with a forum and opportunity to voice their opinion on various corporate matters.[71] In addition to the annual meeting where directors are elected, special meetings may also be called from time to time.[72] Who may call a meeting? Who is invited? How is the meeting agenda set, and how will the meeting be conducted? The answers to these questions can be found in the laws of the state of the firm's organization and the governing documents of each firm.[73]

The most democratic option under our definition of corporate democracy (inclusive, equal, protective, and mutual) would be for *any* shareholder to have the right to call a meeting, attend a meeting, set the meeting agenda, and participate in the deliberative process (most inclusive), and for each shareholder to have the same rights (most equal). Permitting any shareholder to participate in the proceedings on an equal basis regardless of the size of their stake also ensures that the minority will have the opportunity to present their case (protective) and that any business decision made by directors will be subject to ex ante or ex post consultation with shareholders (mutuality). While this option fully upholds democratic principles, it is likely not practicable or even possible.[74]

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[70] *Id.* ("[A] regime is democratic to the degree that political relations between the state and its citizens feature broad, equal, protected and mutually binding consultation.").

[71] *See, e.g.*, DEL. CODE ANN. tit. 8, § 211 (Meetings of Stockholders) (allowing directors to authorize a person to call a special meeting by simply amending the bylaws).

[72] Id.

[73] In this way, state legislatures have the ability to set the upper or lower bounds of how democratic or undemocratic firms can be. Anything in between those two bounds are set by private ordering (i.e. specified in the charter or bylaws).

[74] Debra Jeter, Randall Thomas, and Harwell Wells working paper on Rural Electrical Cooperatives (REC) offers an example of why pure shareholder democracy may not be effective. See Debra C. Jeter, Randall S. Thomas, and Harwell Wells, Democracy and Dysfunction: Rural Electrical Cooperatives and the Surprising Persistence of the Separation of Ownership and Control (unpublished manuscript). On the other hand, the internal governance of blockchains – which resemble a true democracy – have been seriously considered by users, regulators and commentators. Yermack (2017), supra note [ ] at 8.

On the other end of the spectrum, the least democratic option under our definition of corporate democracy would be for the governing documents to provide that only the board of directors (and never shareholders) is able to call a meeting, set the meeting agenda, and decide the rules of conduct.[75] While this option may be cost-efficient, it is not compatible with the principles presumed in democratic governance.[76]

As a compromise between democratic ideals and reality, the governing documents of a firm may provide that meetings of shareholders may only be called by the holders of at least a specified percentage of shares entitled to vote at the proposed meeting.[77] In addition to these minimum holding requirements, information and advance notice requirements may be imposed upon proposing shareholders to ensure their participation is consistent with the common interests of all shareholders.

ii. Shareholder Voting

Section 141(a) of the Delaware General Corporation Law provides that the business and affairs of corporations shall be managed by directors."[78] However, there are certain actions ("extraordinary actions") that so fundamentally alter the nature of the entity that they must be affirmatively approved by shareholders.[79] Under Delaware law, extraordinary actions include

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[75] Even if shareholders "consent" to these rules, this result would not be compatible with the essential characteristics of a corporate democracy.

[76] Steven Davidoff Solomon, *Online Shareholders' Meetings Lower Costs, but Also Interaction*, N.Y. TIMES (May 31, 2016), https://www.nytimes.com/2016/06/01/business/dealbook/online-shareholder-meetings-lower-costs-but-also-interaction.html.

[77] Another proposal is time-phased voting where shares that have been held for a longer period of time are entitled to greater voting power. Lynne L. Dallas & Jordan M. Barry, *Long-term Shareholders and Time-Phased Voting*, 40 DEL. J. CORP. L. 541, 580 (2016). On March 29, 2014, the French Parliament passed the "Florange Law" which among other obligations, *requires* companies to give two votes to shares held for longer than two years. Loi 2014-384 du 29 mars 2014 visant à reconquérir l'économie réelle [Law 2014-384 of Mar. 29, 2014 Aiming to Reclaim the Real Economy (Florange law)]. Steven Davidoff Solomon, *France Answers Hostile Bids With the Two-Vote Share*, N.Y. TIMES (May 19, 2015) https://www.nytimes.com/2015/05/20/business/dealbook/france-answers-hostile-bids-with-the-two-vote-share.html. In Italy, multiple (up to double) voting shares are available upon approval by a supermajority vote. Decreto Legge 24 giugno 2014, n. 91, G.U. June 24, 2014 n. 144 (It.) *Analysis: Differentiated Voting Rights in Europe*, INSTITUTIONAL SHAREHOLDER SERVICES INC., https://www.issgovernance.com/analysis-differentiated-voting-rights-in-europe/ (last visited Feb. 25, 2018); *New Measures Aim to Support Listing and Capitalization of Italian Companies*, LATHAM & WATKINS (Oct. 13, 2004) https://www.lw.com/thoughtLeadership/LW-Italian-corporate-law-changes.

[78] DEL. CODE ANN. tit. 8, § 141(a).

[79] The default standard is usually majority approval, with greater levels of approval required for transactions involving related parties. *See, e.g.*, DEL. CODE ANN. tit. 8, § 251(c) ("If a majority of the outstanding stock of the corporation entitled to vote thereon shall be voted for the adoption of the agreement, that fact shall be certified on the agreement by the secretary or assistant secretary of the corporation . . . ."); *see also*, *id.* § 275(c) ("If a majority of the outstanding stock of the corporation entitled to vote thereon shall vote for the proposed dissolution, a certification of dissolution shall be filed with the Secretary of State pursuant to subsection (d) of this section."). *See, e.g.*, DEL. CODE ANN. tit. 8, § 204(1) (default rule for Delaware corporations is that a company is prohibited from engaging in any business combination with any interested stockholder for a period of three years after such stockholder becomes an interested stockholder unless approved by the holders of at least two-thirds of outstanding shares of the corporation, excluding the stock owned by the interested stockholder).

liquidations, dissolutions, mergers, consolidations, conversions, or sales or dispositions of all or substantially all of an entity's assets.[80]

The most democratic option under our definition of corporate democracy (inclusive, equal, protective, and mutual) would be to require the unanimous consent of shareholders for extraordinary actions. Unanimous consent ensures that every shareholder has a vote (inclusive), that the proposed action may not move forward without her vote (equal), that minority interests are protected (protective), and that the board may not proceed unilaterally without each shareholder's consent (mutuality). However, a unanimous standard is susceptible to holdout, and has even been critiqued by some as undemocratic.[81]

On the other end of the spectrum, the least democratic option under our definition of corporate democracy would be for the governing documents to provide that no shareholder consent is required even for extraordinary actions (except to the extent required by law).

Given the practical challenges of a unanimous standard and the legal limits to a standard less than majority approval, some number between those two standards will be chosen. In addition to the number of votes that are required, how narrowly or broadly "extraordinary actions" triggering shareholder approvals are defined will affect shareholders' ability to vote.

Shareholder appraisal rights offer a useful compromise to the unanimous consent requirement. Appraisal rights are designed to protect the interests of minority investors who object to an extraordinary action that has received enough votes to be approved.[82] As an example, § 262 of the Delaware General Corporation Law grants the right of appraisal for shareholders who dissent to a proposed merger.[83] Any dissenting shareholder that perfects her appraisal right in accordance with the procedures specified in the statute can demand an appraisal of the fair value of her shares in a court proceeding.[84]

iii. Election and Removal of Directors

As in a civic democracy, shareholders' ability to elect directors is an essential feature of a corporate democracy.[85] Unless otherwise specified in the charter, directors are to be elected at

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[80] *See, e.g.*, DEL. CODE ANN. tit. 8, § 275(b) (Dissolution); *Id.* § 251(c) (Mergers); *Id.* § 271(a) (Asset sales); *Id.* § 266(b) (Conversions).

[81] Henry M. Robert writes: "a requirement of unanimity or near unanimity can become a form of tyranny in itself. In an assembly that tries to make such a requirement the norm, a variety of misguided feelings—reluctance to be seen as opposing the leadership, a notion that causing controversy will be frowned upon, fear of seeming an obstacle to unity—can easily lead to decisions being taken with a pseudoconsensus which in reality implies elements of default, which satisfies no one, and for which no one really assumes responsibility." Henry M. Robert, Robert's Rules of Order XLIV-XLV (10th ed. 2000).

[82] *See, e.g.*, Alabama By-Products Corp. v. Cede & Co., 657 A.2d 254, 258 (Del. 1995) ("[Right of appraisal] is a limited legislative remedy developed initially as a means to compensate shareholders of Delaware corporations for the loss of their common law right to prevent a merger or consolidation by refusal to consent to such transactions.").

[83] DEL. CODE ANN. tit. 8, § 262(h).

[84] Id.

[85] For a discussion of the role of elections in the context of administrative law: SAMUEL P. HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 9 (1991) ("Elections, open, free, and fair, are the essence of democracy, the inescapable sine qua non."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 546 (2000) ("The American democratic system requires that the exercise of governmental or "public" power be politically accountable and subject to the rule of law. The basic notion is that citizens ought to be able to punish or reward decisionmakers by voting them in or out of office") and Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999) (outlining ways, including through elections, in which agencies are held democratically

an annual meeting of shareholders.[86] Who may nominate directors? What is the voting standard required to elect, remove, or replace a director? The answers to these questions can be found in the laws of the state of the firm's organization and the governing documents of each firm.

The most democratic option under our definition of corporate democracy (inclusive, equal, protective, and mutual) would be for any stockholder to have the ability to propose a director nominee (most inclusive and equal) and remove directors that do not serve their best interest (protective), in each case on the same basis as directors (mutuality). One mechanism that has been developed in the corporate context (that has been proposed for use in the political context[87]) to protect minority shareholders is cumulative voting.[88]

On the other end of the spectrum, the least democratic option under our definition of corporate democracy would be for directors to have the exclusive ability to nominate, approve, remove, and replace directors (again, to the extent permitted by law). The use of a standard lower than majority approval to elect directors could also result in election outcomes that do not reflect the majority will of shareholders. One mechanism that has been developed (but is less frequently used[89]) to entrench incumbents is a classified board.[90]

One compromise (intermediate) option would be to require at least a majority of shareholder approval to elect directors. And as to nominations, a compromise position would be to permit shareholders to propose a director nominee so long as they make a timely notice and follow the process outlined in the governing documents. In these cases, stockholders' nominees may be required to deliver a written questionnaire with respect to their background, qualifications, as well as a written representation and agreement that they will not become party to any arrangement that would limit or interfere with their ability to comply with fiduciary duties.[91] These rules are intended to ensure that any shareholder's nominee is not beholden to the interests of that particular shareholder,[92] but they also stray from democratic principles by chipping away at the mutuality between shareholder and director nominations since the same rules do not apply to the company's nominees.

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accountable). For a discussion of the role of elections in the context of corporate law: Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 402, 401-02 (1983) ("[V]oters may elect directors and give them discretionary powers over things voters otherwise could control."). On the distance between the two: see Eugene V. Rostow, *The Case Against Corporate "Democracy,"* in PRIVATE GOVERNMENT 69 (SANFORD A. LAKOFF ED. 1973) ("political elections often fall far short of the ideal, both in the motivation of voters, and in the level of discourse at which their franchise is solicited" whereas "the corporate election is frequently not a partial but a total farce.")

[86] *See, e.g.*, DEL. CODE ANN. tit. 8, § 211 (Meetings of Stockholders).

[87] *See, e.g.*, LANI GUINIER, TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (proposing an "interest representation approach" in political elections, which resembles cumulative voting in corporate elections, to encourage greater electoral participation and representation).

[88] DEL. CODE ANN. tit. 8, § 214; MD. CORPS. & ASS'NS §§ 2-104(b)(7), 2-404(c). "A minority group, by coordinating its efforts in voting for only one candidate…may be able to secure the election of that candidate as a minority member of the board. However, this method of voting, which permits a member to transfer votes, must be viewed with reservation since it violates a fundamental principle of parliamentary law." (Robert p.429).

[89] Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 989, 1007-1009 (2010) (documenting the decline of staggered boards). Cf. 26 of the 39 PPEs in the sample use a staggered board.

[90] *Id.* § 141(d); MD. CORPS. & ASS'NS § 3-803(a)(1).

[91] MD. CORPS. & ASS'NS §2-204(d); DEL. CODE ANN. tit. 8, § 216(3).

[92] This principle is important in the political context also. Moss (2017), at 19 (tracing back the origins of the principle that "each member of Parliament represented the entire empire, not only those who voted him into office" to Chancellor of the Exchequer George Grenville).

iv. Fiduciary Duties

General fiduciary principles provide that an agent has a fiduciary duty to act carefully and loyally for the principal's benefit in all matters connected with the agency relationship.[93] In the corporate context, these fiduciary duties are the duty of loyalty and the duty of care.[94] The duty of loyalty refers to the duty to: (1) account to and hold as trustee for the owners any property, profit, or benefit derived by the manager in the conduct and winding up of the business; (2) refrain from acting on behalf of a party having an interest adverse to the business; and (3) refrain from competing with the business.[95] The duty of care refers to the duty to refrain from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law.[96] Managers and owners may agree to modify these fiduciary duties in the governing documents with the informed consent of parties (subject to state law limitations). Equally important as the scope of fiduciary duties is who has standing to sue for breaches of fiduciary duty.

The most democratic option under our definition of corporate democracy (inclusive, equal, protective, and mutual) would be for each shareholder to have the right to bring an action for breach of fiduciary duties (equal and inclusive) and for fiduciary duties to be broadly defined without exceptions (maximum protection).[97]

The least democratic option under our definition of corporate democracy would be for fiduciary duties to be stripped down to the legally permissible minimum and for only the company itself (and not shareholders) to have standing to sue for breach of fiduciary duties.

As discussed above, some core fiduciary duties are not waivable under state corporate law. Pursuant to DGCL Section 102(b)(7), companies can amend their charter to provide that directors shall not be personally liable to the corporation or stockholders for monetary damages for breach of fiduciary duty but the charter may not eliminate director liability (a) for any breach of the director's duty of loyalty, (b) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law, (c) under Section 174 of the DGCL,[98] or (d) any transaction from which the director derived an improper personal benefit.[99]

On the question of who may bring a suit claiming breach of fiduciary duties, one recent development has been the emergence of a new bylaw provision that requires a minimum-stake-to sue requirement.[100] Emergent Capital (f/k/a Imperial Holdings) was reportedly the first public corporation to impose this provision, requiring shareholders to deliver a written consent from the owners of at least 3% of the company's outstanding shares in order to bring a class action or

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[93] Restatement (Third) of Agency § 8.01 (General Fiduciary Principle).

[94] William M. Lafferty, et al., *A Brief Introduction to the Fiduciary Duties of Directors Under Delaware Law*, 116 PENN. ST. L. REV. 837, 840 (2012); *see also*, Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 368 (Del. 1993) ("Duty of care and duty of loyalty are the traditional hallmarks of a fiduciary who endeavors to act in the service of a corporation and its stockholders.").

[95] Loft, Inc. v. Guth, 2 A.2d 225 (Del. 1938).

[96] *See* Smith v. Van Gorkom, 488 A.2d 858, 873 (Del. 1985); *see also*, DEL. CODE ANN. tit. 8, § 102(b)(7) (This is a provision waiving director's liability for money damages for breaches of duty of care "which involve intentional misconduct or a knowing violation of law . . . .").

[97] Since there are no fiduciary duties owed to directors, the mutuality dimension is less relevant in this context.

[98] DEL. CODE ANN. tit. 8, § 174.

[99] DEL. CODE ANN. tit. 8, § 102(b)(7).

[100] Kevin LaCroix, *Lawsuit Challenging Minimum Stake to Sue Bylaw Dismissed*, THE D&O DIARY (October 21, 2015) https://www.dandodiary.com/2015/10/articles/corporate-governance/lawsuit-challenging-minimum-stake-to-sue-bylaw-dismissed/

derivative suit.[101] The board claimed that the intent of the provision was to block frivolous suits, not insulation (as claimed by shareholders who challenged the legality of the provision), and as a compromise, the chairman put the bylaw amendment up for a shareholder advisory vote, stating that he would ask the board to rescind the amendment if shareholders did not support the provision.[102] This is an apt example of the legal and regulatory trend toward less democratic governance regimes, and the role that other agents of shareholders (e.g., plaintiff's lawyers) have to play in countering this trend.

v. Shareholder Information Rights (Access)

In order to properly exercise each of the aforementioned rights, shareholders need information. In the case of the previously discussed minimum-stake-to-sue provision, it is critical for shareholders to have the necessary information to bring together enough supporters to satisfy the requirement. Shareholder access and inspection rights can be found in the laws of the state of the firm's organization and the governing documents of each firm.

The most democratic option under our definition of corporate democracy (inclusive, equal, protective, and mutual) would be to provide every shareholder with access to any and all information that directors have access to. The least democratic option under our definition of corporate democracy would be for shareholders to have no access.

The more realistic and intermediate option between these two extremes would be for shareholders to have access, but subject to specified conditions. For example, shareholders may be required to state their purpose for requesting such information, and any shareholder that is found to have adverse interests to the entity will not be granted access. In these situations, how "proper purpose" or "adverse interests" is determined, and by whom, are going to be the important threshold questions that help facilitate or stand in the way of shareholders' democratic participation in corporate governance.

vi. Amendment of Charters and Bylaws

The common feature among all of the corporate governance mechanisms described in this subsection are that they can be found in the governing documents, which are the charter and/or bylaws (or their equivalents).[103] As such, the power to amend and consent to waivers from the governing documents is central to evaluating the extent to which a firm's governance structure is inclusive, equal, protective, and mutual.[104]

In the case of a Delaware corporation, the usual process by which charters are amended is by first, approval of such amendment by a board of directors.[105] That amendment must then be approved by the affirmative vote of the majority of the total votes eligible to be cast on such matter.[106] This default arrangement comports with each dimension of our definition of corporate democracy (inclusive, equal, protective, and mutual).

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[101] Alison Frankel, *Robbins Geller Files New Challenge to Minimum-Stake-to-Sue Bylaw*, REUTERS (April 21, 2015) http://blogs.reuters.com/alison-frankel/2015/04/21/robbins-geller-files-new-challenge-to-minimum-stake-to-sue-bylaw/.

[102] Id.

[103] Unless of course the governing documents are silent on the issue, in which case, default rules of the law of the state of the entity's organization apply).

[104] This principle that amendment the governing documents themselves requires a heightened standard of approval is a longstanding principle in the political context also. See, e.g., Moss (2017), at 23 (noting that unanimous consent was required to amend the Articles of Confederation (the original U.S. Constitution)).

[105] *See, e.g.*, DEL. CODE ANN. tit. 8, § 242.

[106] Id.

Bylaws are considered shareholder documents, which means that shareholders may amend them (unless the charter and bylaws provide otherwise).[107] The most democratic amendment process under our definition of corporate democracy would be one that requires bilateral deliberation among shareholders and managers before any bylaw amendments can be made. The least democratic amendment process would be one that permits directors to exclusively and unilaterally amend the bylaws (as permitted by law).[108] As a compromise between these two extremes, governing documents may provide that the power to amend bylaws will be shared between shareholders and directors.[109]

The below Table summarizes how each dimension of the proposed definition of corporate democracy looks like on a spectrum from most, intermediate, to least democratic using the examples of different type of governance mechanisms and arrangements used in firms.

Table 1 (What Corporate Democracy Looks Like)

	More democratic	**Intermediate**	**Less democratic**
Inclusive	• each shareholder may call a meeting, attend a meeting, set the meeting agenda, and participate in the deliberative process • unanimous consent for shareholder voting • any shareholder can nominate a board candidate	• some shareholders (e.g., larger shareholders) may call meetings, set the meeting agenda, and participate in meetings, or nominate a board candidate • majority/supermajority shareholder voting standards	• only directors and never shareholders may call a meeting, set the meeting agenda, and decide the rules of conduct • shareholder have no vote on extraordinary actions
Equal	• the above rights are available equally to all • any shareholder has standing to sue for breaches of fiduciary duty	• some shareholders have more rights than others	• some shareholders have rights that others do not enjoy at all • only select shareholders have standing to sue
Protective	• minority shareholders have the ability to present their case and persuade other shareholders • appraisal rights are available to minority shareholders • fiduciary duties are broadly defined	• some shareholders enjoy greater protections than others	• fiduciary duties are narrowly defined and waivers broadly defined
Mutually binding	• director decisions are subject to shareholder scrutiny • shareholders and directors have access to same information	• only a subset of decisions are subject to mutual consultation	• asymmetric information • asymmetric procedures (shareholders proposals subject to greater procedural hurdles)

[107] *See, e.g.*, DEL. CODE ANN. tit. 8.

[108] For example, in Maryland, the charter may include a provision that confers the power to adopt, amend, or repeal the bylaws upon the directors, divesting the stockholders of the same power. §2-109(b).

[109] *See, e.g.*, Fifth Street Finance Corp. (FSC), Restated Certificate of Incorporation, Article V (Board of Directors) (incorporated by reference to Exhibit 3.1 filed with Form 8-A filed on Jan. 2, 2008).

	• both shareholder and director consent required to amend governing documents		• governing documents can be amended unilaterally by board of directors

C. Limitations

It is likely obvious to readers that there are fundamental differences between civic and corporate democracies which creates challenges for any effort to compare the two. To begin, consider the corporate objective and compare it to the goal of a political democracy. Most introductory Corporations classes begin with a discussion of the shareholder primacy norm.[110] We use *Dodge v. Ford* to teach students that the baseline normative goal of corporate law is to facilitate arrangements which maximize shareholder value.[111] There is no analogous metric that elected representatives are called upon to maximize in the political context.[112]

While there is wide (but far from universal[113]) acceptance that maximization of shareholder value should be the foundational goal of the business corporation, there remains a debate about how that value should be measured and whether that goal is best achieved by empowering shareholders or managers.[114] The notion of corporate democracy has proven remarkably pliable,

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[110] D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES 384 (3rd ed. 2012) ("Despite the implication that 'the corporation' is something more than just 'the shareholders,' courts have often concluded that 'the shareholders' are the primary beneficiaries of the duty of care. This aspect of the duty of care is often called the 'shareholder primacy norm.'"); *see also*, CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 273 (8th ed. 2017) (discussing the Dodge v. Ford case, as one "generally cited and understood to stand for the proposition that directors' prime obligation is to maximize shareholder wealth.").

[111] Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919) ("A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.").

[112] Of course unemployment, GDP, or the Dow are important metrics used to report and evaluate the performance of politicians. However, these metrics are just a few among many others, whereas under the shareholder primacy norm, shareholder value is the *singular* objective to be maximized by managers.

[113] While the shareholder primacy norm is not unproblematic (and has an impressive list of critics), these problems and critiques are not the subject of this Article. For a critical account of the shareholder primacy norm, see, e.g., E. Merrick Dodd, *For Whom are Corporate Managers Trustees?,* 45 HARV. L. REV. 1145, 1147-48 (1932) ("Public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of a view of the business corporation as an economic institution which has a social service as well as a profit-making function . . . ."). In the case where shareholders are prosocial and externalities are not perfectly separable, Oliver Hart and Luigi Zingales suggest that the appropriate objective function for a firm should be maximization of shareholder welfare. Oliver Hart and Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J. L. FIN. ACCT. 247 (2017). Note however that the corporate democracy concept has been used to promote the interests of non-shareholder stakeholders, notably, workers. As a prominent example, Paul W. Litchfield, long-time President of Goodyear Tire, believed that equality and cooperation between workers and capitalists were fundamental to the survival of the corporate form. He created a workers' Senate and House of Representatives that would have jurisdiction over issues concerning employees. JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 19 (2004) (citing JEFFREY L. RODENGEN, THE LEGEND OF GOODYEAR: THE FIRST 100 YEARS (1997)).

[114] On the side of shareholder empowerment: Lucian Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833, 843-51 (2005); Eugene V. Rostow, *The Case Against Corporate "Democracy,"* in PRIVATE GOVERNMENT 68 (Sanford A. Lakoff ed. 1973) ("The critics of managerial autonomy have long preached democracy as the manifest remedy for feudalism: if only shareholders could be more

as it has been invoked by both sides of this debate. On the one hand, the corporate democracy metaphor has been used to invigorate the discussion of how to expand shareholder rights.[115] On the other hand, the metaphor has also been used as a basis to legitimize the power and control given to managers elected through purportedly democratic procedures.[116]

Another key difference between corporate and political democracies is that vote buying is almost always illegal in political elections, whereas in corporate elections the only way to obtain a vote is by buying one.[117] On this basis, Donald Smythe has suggested that democratic voting structures are not compatible with the model of the large corporation.[118] Colleen Dunlavy's careful historical account challenges this suggestion by showing that the norm in early nineteenth century corporations was to give one vote to each *shareholder* (rather than each share).[119] Modern partnerships still retain this rule, where the default rule is one partner one vote (unless the partnership agreement specifies otherwise).[120] In any event, the possibility of deviating from the one person one vote norm is a key distinction between corporate and civic democracies.

Notably absent from the corporate context are the instruments that support a democracy, such as competition between multiple parties. The fact that there is no real contest in corporate elections has been well-documented.[121] In the Myth of the Shareholder Franchise, Lucian Bebchuk reports that during the proxy seasons of the 1996-2005 decade, incumbents faced challenges from rivals in only 118 cases.[122] Among companies with market capitalizations exceeding $200 million, there were only 24 cases, and of those, the rival slate won in only eight of them. Bebchuk concludes that "for directors of public companies, the incidence of replacement by a rival slate seeking to manage the company better as a stand-alone entity is *negligible*"

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fully informed, protected by better proxy rules, and given cumulative voting and easier access to stockholders' lists, they urge, the stockholders' annual meeting would become a meaningful source of authority for the directors, and a meaningful procedure for reviewing their stewardship."). On the side of manager empowerment: Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735, 1751 (2006).

[115] MACEY, *supra* note [ ], at 11 ("[M]uch of the recent talk among legal scholars and regulators has focused heavily on the question of how to 'improve' shareholder democracy by expanding shareholders' voting rights.").

[116] Dalia Tsuk Mitchell, *Shareholders as Proxies: The Contours of Shareholder Democracy*, 63 WASH. & LEE L. REV. 1503, 1506 (2006) ("History shows that attempts that appeared to foster shareholder democracy, independent of financial demands, were never really about promoting the shareholders' active involvement in managing the affairs of their corporations. Rather, reformers used the rhetoric of shareholder democracy to promote broader goals and visions."). Dahl, supra note [ ], at 112 ("democratic ceremonials and codes help to clothe the decisions of the leaders with legitimacy").

[117] Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323 (2000). In Colleen A. Dunlavy, *Social Conceptions of the Corporation: Insights from the History of Shareholder Voting Rights*, 63 WASH. & LEE L. REV. 1347 (2006), Dunlavy critiques the plutocratic nature of voting in corporations – i.e., that people with more shares (i.e., wealth) have more votes.

[118] Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE L. REV. 1407, 1418-19 (2006) ("The common law rule of one-vote-per-shareholder clearly would have impeded the growth of these new mass-production industries, and so it is no surprise that it had faded long before the end of the nineteenth century.").

[119] Dunlavy, supra note [ ].

[120] See REVISED UNIF. P'SHIP ACT (1997) § 401(f). The case study in Part III includes partnerships and limited liability companies (in addition to corporations).

[121] For empirical work documenting how rare contested elections are in the corporate context, see Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007).

[122] Id.

(emphasis added).[123] It may be worth noting that Bebchuk does not view "shareholder voice" and "corporate democracy" as ends in themselves[124] but rather, "a valuable instrument for enhancing shareholder value by making boards more accountable and more attentive to shareholder interests."[125]

Loizos Heracleous and Luh Luh Lan present their findings from a study of the incidence of lawsuits attempting to unseat directors.[126] In The Myth of Shareholder Capitalism, Heracleous and Lan report that shareholders attempted to unseat directors through lawsuits only 24 times in the last 20 years and of those 24 attempts, only eight have succeeded.[127] They observe that "directors are to a great extent *autonomous*" (emphasis added)[128] The wide discretion given to directors under the Delaware General Corporation code and the business judgment rule provide further evidence of this autonomy.[129]

It should however be noted that the option to exit is more readily available in the corporate context. As noted by Usha Rodriguez, shareholder votes are generally an empty exercise[130] but shareholders have the power of easy exit (referred to also as the "Wall Street Rule").[131]

In light of the above noted differences, together with tradeoffs that must be made between fairness and efficiency, it would be naïve to assume that identity between civic and corporate democracies are feasible or even desirable. The point made here is not that firms should be democratically organized, but that the further they deviate from democratic principles of governance, the greater an error it would be to refer to these firms as democratic.

Despite its many flaws and limitations, the metaphor of corporate democracy has endured, and could even be said to be expanding. Developing a uniform conceptual framework as I have done here is helpful to understanding the extent to which corporate governance deviates from democratic principles of governance and exploring the implications of any gaps.[132]

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[123] Id., at [ ]

[124] Bebchuk cites to Matthias Benz & Bruno S. Frey's working paper (Towards a Constitutional Theory of Corporate Governance) and Stephen Deane's white paper (From the Symbolic to the Democratic) as examples of such view.

[125] Bebchuk, supra note [ ] at, ___.

[126] Loizos Heracleous and Luh Luh Lan, The Myth of Shareholder Capitalism, Harvard Business Review (April 2010)

[127] Id.

[128] Id.

[129] See Del. Code Ann. tit. 8 §141(a)(2001).

[130] cf. Frank Easterbrook and Daniel Fischel argue that shareholder voting matters presenting data on higher voting shares trading at a premium as evidence of their argument. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 261. J. L. & ECON. 395, 402 (1983)

[131] Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy*, 63 WASH. & LEE L. REV. 1389, 1397-1404 (2006). In other words, voting will matter when exiting is expensive. See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 33 (1970) ("The voice option is the only way in which dissatisfied customers or members can react whenever the exit option is unavailable. "). See also A. Admati and P. Pfleiderer, *The "Wall Street Walk" and Shareholder Activism: Exit as a Form of Voice*, 22 REV. FIN. STUD. 2445 (2009).

[132] Mancur Olson, *Dictatorship, Democracy, and Development*, 87 AM. POL. SCI. REV. 567, 570 (1993) (noting that while "[d]emocracies vary so much that no one conclusion can cover all cases .... many practical insights can be obtained by thinking first about one of the simplest democratic situations"). ROBERT A. DAHL, WHO GOVERNS? DEMOCRACY AND POWER IN AN AMERICAN CITY 163 (Second Edition, 2005) ("Because of widespread belief in the democratic creed, however, overt relationships of influence are frequently

III. Case Study of Public-Private Equity (PPE)

It was established in Part II that a democratic regime refers to one that is inclusive, equal, protected, and mutual, and conversely, that de-democratization refers to a migration to a regime that is less inclusive, less equal, less protected, and less mutually-binding. Part II also examined how the mechanisms used to empower shareholders (e.g., shareholder meetings, shareholder voting, information rights) and to hold managers accountable (e.g., director elections, fiduciary duties, and appraisal rights) fall along the four dimensions that make up our definition of corporate democracy.

In this part of the Article, I use a case study of public-private equity (PPE) firms to put the definitional and conceptual framework of corporate democracy developed in Part II to work.[133] I examine the governance structures of a sample of 39 PPEs at the time of their initial public offering (IPO) to evaluate the extent of democratization within this segment of firms.[134]

Private equity firms and funds pool the capital of individual and institutional investors for investment in other businesses. Unlike mutual funds, private equity traditionally drew funds from wealthy investors and were structured as private limited partnerships. In recent years however, more and more private equity structures have made the decision to go public. I present here the findings from a review of the governing documents of PPE across the key areas of corporate governance which were discussed in Part II and evaluate the extent of their democratization.

PPE are an appropriate subject for this case study as these are entities that have adjusted their once highly private and sophisticated governance structures to accommodate and market themselves to public shareholders. The organizational and contractual features that are chosen by these firms reveal the balance that has been struck between shareholder and managerial power within these newly public institutions.

A. Shareholder Meetings

The governing documents of 35 (of 39) PPEs include provisions relating to shareholder meetings.[135] **4 PPEs' (1 Maryland entity, 1 Texas entity, and 2 Delaware entities)** governing documents are silent on the issue, which means that default rules apply. The default rule in Maryland is that a special meeting of shareholders may be called by the president, the board, or anyone authorized in the charter or bylaws.[136] In addition, a Maryland corporation must call a special meeting upon the written request of shareholders holding at least 25% (this percentage may be varied in the governing documents, but may not exceed a majority[137]) of the votes entitled to be cast.[138] The default rule in Texas is the same as Maryland's except that a special meeting of the shareholders may be called by the holders of at least 10% of all of the shares of the corporation entitled to vote.[139] In this regard, Texas' rules are more democratic than Maryland's. The default rule in Delaware is that a special meeting of shareholders may be called by the board

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accompanied by democratic ceremonials, which, though ceremonial, are not devoid of consequences for the distribution of influence.").

[133] PPE includes firms that employ a private equity (leveraged buyout) strategy and are publicly-listed on the U.S. national stock exchanges. For more details about the PPE sample see Kim, *supra* note [ ].

[134] See **Appendix A** for a list of the firms that comprise this case study and their ticker symbol. An online version of this manuscript also includes hyperlinks to the initial charter and bylaws for each PPE.

[135] See **Appendix B** (Calling Shareholder Meetings) for a detailed breakdown.

[136] MD. CORPS. & ASS'NS § 2-502(a).

[137] MD. CORPS. & ASS'NS § 2-502(d).

[138] MD. CORPS. & ASS'NS § 2-502(b)(1).

[139] TEX. BUS. ORGS. CODE ANN. §21.352 (Special Meetings)

and anyone authorized in the charter or bylaws.[140] In this regard, Delaware's rules are the least democratic among the three jurisdictions.

13 PPEs limit the power to call shareholder meetings to directors or managers (identical to Delaware's default rule). **22 PPEs** permit shareholders to call a meeting, but specify some minimum amount of ownership interests (that range from 10% to a majority) that must be met in order for a shareholder to call a special meeting.[141] Unsurprisingly, no PPE provides that any shareholder may call a special meeting.

In the 22 cases where shareholders have the power to call a shareholder meeting, the requesting shareholders are responsible for related expenses.[142] The standard process is for the corporate secretary to first inform the stockholders of the reasonably estimated costs of sending the notice for the meeting, and the secretary is required to call such meeting only after receiving payment of such costs.[143] Also, the corporation has the power to set the record date for determining whether stockholders are entitled to call a meeting. A group of shareholders that meet the specified ownership requirement on one day may well fail to meet it on another. Not only that, the corporation sets the record dates for determining the shareholder who will receive notice of and will be able to vote at the meeting.

Supposing a shareholder has the requisite number of shares and the means and willingness to pay for all related costs, how does this shareholder call a meeting? The governing documents will specify the applicable time limits and procedural requirements (usually implemented by the corporate secretary).[144] At a minimum, a proposing shareholder is required to describe the business proposed (including in some cases the complete text of the proposal).[145] In some cases, the proposing shareholder must provide the reason for requesting such business and disclose any material interests the shareholder has in connection with such proposal, as well as provide the name, address, class, and number of shares beneficially owned by each shareholder supporting the proposal.[146] More onerous requirements include disclosure of any short interest,[147] derivative instruments,[148] dividends, and performance-related fees on securities owned by such

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[140] DEL. CODE ANN. tit. 8, § 211(d).

[141] For a further breakdown, 13 firms require majority, four firms require 50%, one firm requires 25%, two firms require 20% and two firms require 10%.

[142] See, e.g., MD. CORPS. & ASS'NS § 2-502(b)(3) (requiring shareholders requesting a special meeting to pay related costs).

[143] *See, e.g.*, Triangle Capital Corporation (TCAP), Amended and Restated Bylaws, Section 2.3(b)(3) (Special Meetings) (Dec. 29, 2006):

"The Secretary shall inform such stockholders of the reasonably estimated cost of preparing and mailing the notice of the meeting (including the Corporation's proxy materials). The Secretary shall not be required to call a special meeting upon a stockholder request and such meeting shall not be held unless, in addition to the documents required by subsection (b)(2) of this Section 2.3, the Secretary receives payment of such reasonably estimated cost prior to the mailing of any notice of the meeting."

[144] These provisions will not affect rights of stockholders to request that their proposals or nominations be included in the corporation's proxy statement pursuant to rules and regulations under the Securities and Exchange Act.

[145] *See, e.g.*, Affiliated Managers Group, Inc. (AMG), Amended and Restated By-Laws, Article I Section 2 (Matters to be Considered at Annual Meetings) (Nov. 7, 2016).

[146] *Id*.

[147] Short interests include hedging and other transactions the effect or intent of which is to mitigate loss or to manage risk or to benefit from share changes prices with respect to the Corporation's capital stock.

[148] Derivative instruments include options, warrants, convertibles, etc., that are designed to produce economic benefits and risks that correspond substantially to the ownership of any class or series of shares of the Corporation.

shareholders (including their affiliates and associates) with respect to not only the corporation but also its principal competitors.[149]

Table 2 (PPE Review: Who May Call a Meeting?)

Most democratic <----------> Least democratic

Any SH	10% SH (TX)	20% SH	25% SH (MD)	50% SH	Majority SH	Directors only (DE)
0	**3**[150]	**2**	**2**[151]	**4**	**13**	**15**[152]

Relatedly, may shareholder decisions be made without a meeting? **26 PPEs**' (**14 Delaware entities, 11 Maryland entities, and 1 Texas entity**) governing documents are silent on this issue, which means that default rules apply. [153] Under Delaware law, any action required to be taken at a shareholder meeting may be effected by written consent by stockholders not having less than the minimum number of votes necessary to take the action in question at a meeting of shareholders.[154] Under Maryland law, stockholders may act without a meeting only if there is unanimous written (or electronically transmitted) consent on the issue.[155] The default rule in Texas is the same as in Maryland.[156]

6 PPEs explicitly provide in their charter that shareholder decisions may be made by written consent. However, a number of these firms impose a requirement of **pre-approval by directors (2 PPEs), unanimous approval by shareholders (2 PPEs)**, or **either unanimous consent or director approval (1 PPE)** which create challenges to shareholder decisionmaking through written consents. Only **1 PPE** provides that a majority of shareholders' consent will be sufficient.

7 PPEs prohibit the use of written consents altogether, meaning that any action required to be taken by shareholders (unlike actions required to be taken by directors) may be effected only at a duly called in person meeting.

Table 3 (PPE Review: May Shareholder Decisions be Made by Written Consent?)

Most democratic <----------> Least democratic

Majority consent	Same standard as meeting (DE)	Unanimous Consent or director approval	Unanimous consent (MD/TX)	With Director Approval	No such option available
1	**14**	**1**	**14**[157]	**2**	**7**

[149] *See, e.g.*, Affiliated Managers Group, Inc. (AMG), Amended and Restated By-Laws, Article I, Section 2 (Matters to be Considered at Annual Meetings) (Nov. 7, 2016).

[150] 2 PPEs expressly provide so in their charter and 1 PPE is a Texas entity.

[151] 1 PPE expressly provides so in its charter and 1 PPE is a Maryland entity.

[152] 13 PPEs expressly provide so in their charter and 2 PPEs are Delaware entities.

[153] See **Appendix C** (Written Consents) for a detailed breakdown.

[154] DEL. CODE ANN. tit. 8, § 228 (Consent of Stockholders or Members in Lieu of Meeting) (allowing corporation to limit the right of shareholders to act by written consent without a meeting).

[155] MD. CORPS. & ASS'NS § 2-505(a).

[156] TEX. BUS. ORGS. CODE ANN. §6.201 (Unanimous Written Consent to Action).

[157] 3 PPEs expressly provide so in the charter, 11 PPEs are Maryland entities, and 1 PPE is a Texas entity.

B. Shareholder Voting

What are the extraordinary actions that require shareholder consent? **16 PPEs** (**all are Delaware entities)** are silent on this issue, which means the default rules apply.[158] Under Delaware law, in the case of mergers, the board must first approve the merger agreement and declare it advisable, and the merger agreement must then be approved by the majority vote of the outstanding shares entitled to vote on the matter.[159] In the case of conversions, Delaware law does not require a shareholder vote if no shares of stock have been issued prior to the adoption of the board resolution approving the conversion.[160] In case of voluntary dissolutions, Delaware law provides that directors must first approve the dissolution and declare it advisable, then submit it to shareholder and majority shareholder approval is required.[161] In the case of involuntary dissolutions, Delaware law provides that any shareholder may make an application to the Court of Chancery to appoint a custodian or receiver under exceptional circumstances.[162]

As for the **23 PPEs** that include the relevant provisions in their governing documents, their policies on shareholder voting fall under the below four variations (listed below in the order of most to least democratic according to the proposed definition):

- **Variation 1** (supermajority) – approval by shareholders holding a supermajority (higher standard than majority – e.g., two-thirds, three-fourths, 80%) of shares is required to approve extraordinary actions **(1 PPE)**

- **Variation 2** (majority / supermajority combination) – approval by shareholders holding a supermajority of shares is required for some extraordinary actions (e.g., conversion to an open ended fund, liquidations, dissolutions, merger resulting in substantially different anti-takeover provisions), otherwise, majority shareholder approval will suffice. **(15 PPEs)**

- **Variation 3** (majority/Delaware default)**:** approval by shareholders holding a majority of shares is required for extraordinary actions. **(2 PPEs)**

- **Variation 4** (no shareholder approval under specified conditions) (**5 PPEs**):
    - **2 PPEs** have what is called a "control condition," which gives the manager discretion over all significant corporate actions during any period that the insiders hold greater than a specified amount of total shares (this amount is 10% in the case of Apollo Global Management[163] and 40% in the case of Fortress Investment Group[164]).

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[158] **Appendix D** (Voting Standards) provides a detailed breakdown.

[159] DEL. CODE ANN. tit. 8, § 251. A shareholder vote is not required if the charter and shares remain the same (251(f)), the company is merging with or into a wholly-owned subsidiary (251(g)), or "short form" mergers (253, 267).

[160] DEL. CODE ANN. tit. 8, § 266.

[161] DEL. CODE ANN. tit. 8, § 275.

[162] DEL. CODE ANN. tit. 8, § 226. These exceptional circumstances are: (1) if a division among stockholders has resulted in their failing to elect successors to directors whose terms have expired, (2) if deadlock among directors has resulted in irreparable injury of the corporation, or (3) if the corporation has abandoned its business without liquidating or distributing its assets.

[163] Apollo Global Management, Registration Statement (Form N-2) (March 21, 2011).

[164] Fortress Investment Group, Registration Statement (Form S-1) (Nov. 8, 2006).

- In **1 PPE**, the shareholder vote can be avoided if specified conditions (price, type of consideration, verification that no financial assistance is provided to the buyer by the corporation, and mailing of proxy statement) are met.[165]
- **1 PPE** opts out of Section 203 of the DGCL if the business combination has been approved by disinterested members of the board.[166]
- In **1 PPE**, the shareholder vote can be avoided if the company receives a legal opinion that the transaction will not result in the loss of limited liability, the sole purpose is a change in legal form, and the members and managers have substantially the same rights and obligations thereafter.[167]

Table 4 (PPE Review: What is the Voting Standard for Extraordinary Actions?)
Most democratic <----------> Least democratic

Variation1	Variation 2	Variation 3	Variation 4
1	**15**	**18**[168]	**5**

What protections are available to minority investors who oppose an extraordinary action? So long as they are given advance notice of such action, they have the option to vote with their feet, by selling their shares in the public markets. In addition, appraisal rights may provide another avenue for protection. However, appraisal rights are not available in **4 PPEs**, and are available only by express permission of directors in **8 PPEs**.[169] For the **27 PPEs (22 are Delaware entities, 4 are Maryland entities, and 1 is a Texas entity)** whose governing documents are silent on this issue, default rules apply. In Delaware, appraisal rights are available only in a merger and only to shareholders who have not voted in favor of such merger, among other requirements that are specified in the statute.[170] In Maryland, appraisal rights are available to shareholders in a merger, exchange, conversion transfer of assets, charter amendment altering the contractual rights of outstanding stock, and business combinations, and only to shareholders who have not voted in favor of the transaction and have also satisfied the other requirements specified in the statute.[171] In Texas, appraisal rights are available to shareholders in a merger, exchange, conversion, and sale of all or substantially all assets.[172] In the context of appraisal rights, Maryland's rules are most democratic (more inclusive and protective), followed by Texas, then Delaware.

[165] Capital Southwest Corp., Articles of Incorporation, Article Twelve (June 25, 1969).

[166] Golub Capital BDC, Registration Statement (Form N-2) (Nov. 20, 2009) (the stated rationale being that "Section 203 of the DGCL may discourage third parties from trying to acquire control of us and increase the difficulty of consummating such an offer").

[167] Oaktree Capital Group, Third Amended and Restated Operating Agreement, Section 11.3 (June 10, 2011).

[168] 2 PPEs expressly provide so in their governing documents, 16 PPEs are Delaware entities.

[169] See **Appendix E** (Appraisal Rights) for a detailed breakdown.

[170] DEL. CODE ANN. tit. 8, § 262.

[171] MD. CORPS. & ASS'NS § 3-202(a).

[172] TEX. BUS. ORGS. CODE ANN. § 10.351–10.368 (West 2015).

Table 5 (PPE Review: When are Appraisal Rights Available?)
Most democratic <----------> Least democratic

All EAs (MD)	Some EAs (TX)	Mergers only (DE)	Only with director approval	Never
4	**1**	**22**	**8**	**4**

C. Election and Removal of Directors

In **21 PPEs**, a plurality of the votes cast is sufficient to elect a director.[173] This means that just a single vote cast in favor of a director will be sufficient for their election in cases where there are an equal number of candidates and open seats.[174] **2 PPEs** permit cumulative voting, except the provisions are designed to protect insiders (rather than minority holders as originally intended). **26 PPEs** adopt a staggered board structure.

One feature observed in **12 PPEs** that is of note is the bifurcation of the board of directors between continuing directors and ordinary directors.[175] The term "continuing directors" is used to refer to the initial directors named in the charter as well as the directors whose nomination for election have been approved by such initial directors.[176] Some PPE include additional eligibility requirements such as service as a director for at least 12 months or a requirement that the director is not an affiliate of any person who is proposing to enter into a business combination with the entity.

While there are a number of different ways in which the term is defined, the intent for creating this separate tier of directors is one and the same. It is to confer outsized decisionmaking power to these continuing directors, which in the case of PPE are often going to be the founders of the PPE's predecessor entity.

Notably, matters that have been approved by a majority of continuing directors bypass (or undergo a lighter) review by ordinary directors (and by shareholders). For instance, an extraordinary action that would otherwise require the approval of at least 80% of shareholders may require the approval of only 50% of shareholders if such matter has been pre-approved by the majority of continuing directors (which in the case there is one continuing director, is satisfied

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[173] **Appendix F** (Director Elections; Cumulative Voting; Classified and Continuing Boards) provides a detailed breakdown.

[174] MD. CORPS. & ASS'NS §2-204(d); DEL. CODE ANN. tit. 8, § 216(3) ("Directors shall be elected by a plurality of the votes of the shares present in person or represented by proxy at the meeting and entitled to vote on the election of directors . . ."); Stephen Choi et al., *Does Majority Voting Improve Board Accountability?*, 83 U. CHI. L. REV. 1119 (2016) (Proponents of "shareholder democracy" have advocated a shift to a majority voting rule in which a candidate must receive a majority of the votes cast to be elected); *Majority Voting As a Potential Entrenchment Device*, INSTITUTIONAL SHAREHOLDER SERVICES INC., Jan. 15, 2016, https://www.issgovernance.com/majority-voting-potential-entrenchment-device/ ("In a contested election [with a majority voting requirement to elect a candidate for the board of directors], some or all of the nominees getting the highest shareholder support may still not win a majority of votes cast.").

[175] The last column of **Appendix F** (Director Elections; Cumulative Voting; Classified and Continuing Boards) provides a detailed breakdown.

[176] *See, e.g.*, Blackrock Capital Investment Corporation (BKCC), Certificate of Incorporation, Section 11.1 (Apr. 13, 2005) (filed with BKCC's Form 10, as amended, originally filed on May 24, 2005).

the approval of that single director).[177] There is no quorum requirement for an approval by continuing directors. This feature has the effect of narrowing the segment of directors who enjoy extensive power over the internal affairs of these firms.

There is quite a bit of variation among PPEs as to whether a director may be removed without cause, and also with respect to the number of votes required for such removal.[178] **8 PPEs** permit removal with or without cause by a majority vote of shareholders. **23 PPEs** permit removal for cause only (4 require a majority vote, 12 two-thirds vote, and 7 three-fourths vote). **3 PPEs** do not provide shareholders with the right to remove directors (even for cause and even if there is unanimous consent). **5 PPEs'** (**all Maryland entities**) governing documents are silent on the issue which means that default rules apply. The default rule in Maryland is that directors may be removed, with or without cause, by a majority shareholder vote.[179]

Table 6 (PPE Review: How Are Directors Elected and Removed?)

	More democratic	**Intermediate**	**Less democratic**
Voting standard	Majority of SH (**14**)	Plurality of SH **(21)**	Managers only **(4)**
Staggered board	No **(13)**		Yes **(26)**
Continuing board	No **(27)**		Yes **(12)**
Removal	With or without cause (majority) **(13)**[180]	With cause (majority) **(4)** With cause (two-thirds) **(12)** With cause (three-fourths) **(7)**	Managers only **(3)**

D. Fiduciary Duties[181]

8 PPEs (5 are Delaware LLCs, 1 is a Delaware corporation, 1 is a Texas corporation, and 1 is a Maryland corporation) charters (or its equivalent) are silent about fiduciary duties, which means default rules apply. As limitations of liability are opt-in provisions (i.e., a charter must affirmatively include language which limits liability in order for the limitations to be valid), if a PPE has a charter that is silent on the issue, directors remain liable without any limitations.

With respect to the **5 PPEs** that are organized as Delaware limited liability companies, Section 18-1101(c) of the Delaware Limited Liability Company Act provides that the limited liability company agreement may expand or restrict a member's or manager's duty, but that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.[182] The DGCL provides that the charter may restrict a director's duty, but that the charter may not eliminate liability for breaches of certain duties listed under DGCL Section 102(b)(7) (discussed below).

Under Maryland law, the charter may restrict a director's (as well as officer's) personal liability to the corporation and its stockholders for monetary damages, except that the charter may not eliminate liability for breaches of certain duties listed under Section 5-418 of Courts and Judicial Proceedings (discussed below).[183]

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[177] *See, e.g.*, Fidus Investment Corp. (FDUS).
[178] **Appendix G** (Removal of Directors) provides a detailed breakdown.
[179] MD. CORPS. & ASS'NS §2-406(a).
[180] 8 expressly provide so in their charter and 5 are Maryland entities.
[181] **Appendix H** (Fiduciary Duties) provides a detailed breakdown.
[182] DE LLCA 18-1101(c)
[183] CJP Section 5-418.

Under Texas law, the charter may restrict a governing person's liability for monetary damages, except that the charter may not eliminate liability for a breach of the person's duty of liability, an act or omission not in good faith that constitutes a breach of duty or involves intentional misconduct or a knowing violation of law, or a transaction from which the person received an improper benefit.[184]

12 PPEs include the DGCL 102(b)(7) provision in their charters. This means that directors will not be personally liable to shareholders for breaches of fiduciary duty, except for breaches of the duty of loyalty, failing to act in good faith, engaging in intentional misconduct, knowingly violating a law, approving an unlawful dividend, or obtaining an improper personal benefit.[185]

If the Delaware legislature were to amend Section 102(b)(7) to further broaden the scope of fiduciary duties for which directors may be exculpated, the directors of a number of these PPE would retrospectively receive the benefit of this expansion. This is because several PPE charters include language that automatically incorporates those additional protections. Below is an example of such language:

> *If the DGCL is hereafter amended to permit further elimination or limitation of the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL, as so amended.*

The charters of **8 PPEs** that are organized in Delaware includes open-ended language to achieve the same effect by limiting the liability of agents to the maximum extent permitted by Delaware law. The charters of **11 PPEs** that are organized in Maryland includes open-ended language to achieve the same effect by limiting the liability of agents to the maximum extent permitted by Maryland law. Under current Maryland law, directors (and officers also) will not be personally liable for breaches of fiduciary duty, except for (a) actual receipts of an improper benefit or profit in money, property or services and (b) active and deliberate dishonesty established by a final judgment.[186]

Note that each of these provisions mirror the code only to the extent that the code permits broader director protection rights than permitted previously. If the code is amended to repeal or reduce the permitted waiver of liabilities, such changes do not adversely affect any event occurring before such amendment. This one-way ratchet ensures that the scope of fiduciary duties and liability from their breach will continue or constrict throughout the life of these PPE.

E. Information Rights[187]

10 PPEs' (6 are Delaware entities, 3 are Maryland entities, and 1 is a Texas entity) governing documents are silent on this issue, which means that default rules apply. In Delaware, the books and records of any Delaware corporation must be maintained in a form that is reproducible within a reasonable time upon the request of any person entitled to inspect them.[188] Any shareholder of a Delaware corporation may, upon written demand under oath stating a proper purpose, inspect and copy the books, records, stock ledger, and stockholder list during normal business hours.[189]

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[184] TEX. BUS. ORGS. CODE ANN. §7.001(c).
[185] DEL. CODE ANN. tit. 8, § 102(b)(7)
[186] MD. CORPS. & ASS'NS § 2-405.2(a).
[187] **Appendix I** (Inspection Rights) provides a detailed breakdown.
[188] DEL. CODE ANN. tit. 8, § 224.
[189] DEL. CODE ANN. tit. 8, § 220.

In Maryland, any shareholder may, upon written request, inspect and copy the bylaws, minutes, annual reports or voting trust agreements located in the corporation's principal office during normal business hours.[190] In addition, shareholders holding at least 5% of the outstanding stock of any class of a Maryland corporation may, upon written request, inspect and copy the books of account and stock ledger during normal business hours.[191]

In Texas, any shareholder that has held shares for at least six months or holds at least 5% of the outstanding stock of any class may, upon written request stating a proper purpose, examine and copy the corporation's books, records of account, minutes, and share transfer records.[192] In this context, the Delaware rule is the most democratic (most inclusive) under our definition of corporate democracy, followed by Texas then Maryland.

13 PPEs expressly permit shareholder to examine lists of shareholders for purposes that are germane to that meeting. Even if shareholders have a proper purpose for requesting an inspection, **14 PPEs** prohibit shareholders from making an inspection if the board of directors determines that the shareholder may have any improper purpose for requesting such inspection. In some cases, any shareholder that seeks to gather information to determine whether to pursue litigation or assist in pending litigation against the company (except pursuant to the applicable rules of discovery relating to litigation) is deemed to be acting in connection with an improper purpose, which strips such shareholder of all information rights.[193]

6 PPEs have appointed an individual to oversee all shareholder information and inspection requests. Most companies will also require the stockholder to bear the expenses of such inspection (and any copies or extractions made) and also to make a written demand under oath stating the purpose and that the stockholder has the right to inspect the books and records. [194]

F. Amendment of Charters/Bylaws[195]

How are charters amended in PPE? **10 PPEs** (**9 are Delaware entities and 1 is a Maryland entity**) charters are silent on this issue, which means default rules apply. In Maryland, a corporation may amend its charter by the affirmative vote of two-thirds of outstanding stock of each class entitled to vote.[196] In Delaware, a corporation may amend its charter by the affirmative vote of a majority of the outstanding stock entitled to vote.[197] In this context, Maryland's rule is more democratic (more inclusive) than the corresponding Delaware provision under our definition of corporate democracy.

15 PPEs' charters require shareholder approval of charter amendments, and **14 of these 15 PPEs** require supermajority vote to amend or repeal certain sections of the charter.[198] **14 PPEs'** charters provide that the corporation reserves the exclusive right to amend the charter.

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[190] MD. CORPS. & ASS'NS §2-512

[191] MD. CORPS. & ASS'NS §2-513.

[192] TEX. BUS. ORGS. CODE ANN. §21.218.

[193] *E.g.*, Ares Management, L.P. (ARES), Bylaws (May 7, 2014), Section 3.4 (Rights of Limited Partners).

[194] *E.g.*, Fifth Street Finance Corp. (FSC), Third Amended and Restated Bylaws (Incorporated by reference to Exhibit 3.1 filed with Form 8-K filed on Sep. 2, 2016) Article VIII (General Provisions).

[195] **Appendix J** (Charter and Bylaw Amendments) provides a detailed breakdown.

[196] MD. CORPS. & ASS'NS §§ 2-601, 604(e), 506(b).

[197] DEL. CODE ANN. tit. 8, § 242(b)(1).

[198] *See, e.g.*, Solar Capital Ltd. (SLRC), Amended and Restated Bylaws, Article VI Section 6.2 (Jan. 7, 2010) ("The affirmative vote of the holders of shares entitled to cast at least 80 percent of the votes entitled to be case on the matter, each voting as a separate class, shall be necessary to effect: Any amendment to

How are bylaws amended in PPE? **2 PPEs** (**both are Delaware entities**) are silent on this issue, which means default rules apply. In Delaware, the default rule is that the power to adopt, amend, or repeal bylaws rest with the shareholders.[199] **4 PPEs** follow this approach, providing that only shareholders have the power to alter bylaw provisions. **4 PPEs** provide that joint approval by *both* managers and shareholders is required to amend bylaws. **11 PPEs** provide that bylaws may be amended by the approval of *either* managers or shareholders. **18 PPEs** allow bylaws to be amended *only* by managers. In the case of these PPE, midstream changes to bylaw provisions can be effectuated without approval by or prior notice to shareholders.

Table 7 (PPE Review: Who May Amend Bylaws?)

Most democratic <----------> Least democratic

SH only	Both SH and managers	Either SH or managers	Managers only
6[200]	**4**	**11**	**18**

* * *

Summarizing the findings from the review of shareholder meeting procedures, one-third of PPEs deny shareholders the right to call a meeting (even if 100% of them desire it), and in nearly half of PPE, half or more shareholders must come together before they can initiate a meeting. It should be noted that the board of directors has the sole power to set the record date for determining which stockholders are entitled to request a special meeting.[201]

In the realm of shareholder voting, more than 40% of PPE follow the default rule in Delaware which requires majority approval of shareholders for most extraordinary actions. Transactions that involve related parties require greater levels of shareholder approval.[202] The balance of PPE require some range between no approval or supermajority approval for extraordinary actions.

In the election and removal of directors, the ease with which incumbents retain power, in contrast to the relative difficulty of removing directors, together with the use of entrenchment mechanisms such as staggered boards and continuing boards create barriers to achieving a democratic ideal in PPE.

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the charter of the Corporation to make the Corporation's Common Stock a 'redeemable security' or the conversion of the Corporation . . . from a 'closed-end company' to an 'open-end company.'").

[199] DEL. CODE ANN. tit. 8, § 109(a).

[200] 2 PPEs expressly provide so in their governing documents, 4 PPEs are Delaware entities, where this is the default rule.

[201] Section 2-502(e).

[202] *See, e.g.*, DEL. CODE ANN. tit. 8, § 204(1) (default rule for Delaware corporations is that a company is prohibited from engaging in any business combination with any interested stockholder for a period of three years after such stockholder becomes an interested stockholder unless approved by the holders of at least two-thirds of outstanding shares of the corporation, excluding the stock owned by the interested stockholder). DEL. CODE ANN. tit. 8, § 203 (business combinations with interested stockholders) (requiring two-thirds vote of the outstanding stock (stock that is not held by the interested holder [stockholders that beneficially own 15% or more]) to approve transactions/business combinations with an interested stockholder).

With respect to director and officer liability for breaches of duties owed to the entity and to the shareholders, there are only two PPE (i.e., 5% of all PPE) that place no limitations on the scope of such liability.

As for shareholder inspection rights, there are usually two commonly applied conditions to shareholders' inspection rights, as discussed above in II.B.v. One is proper purpose and the other is confidentiality. Ultimately, the board of directors or the corporate secretary has the right to determine whether a shareholder's purpose is proper or improper and whether the requested information relates to information that is confidential.[203] Given the wide discretion enjoyed by the board (or secretary, who is appointed by the board) in making such determinations as well as how broadly "improper purpose" is defined in PPE governing documents, the inspection rights of shareholders, while useful, may be unavailable or limited when they are most needed. What is perhaps most problematic for democratic governance is that each of the aforementioned provisions may be unilaterally amended by the managers.

My general finding from this review of the governing documents of PPE is that these firms provide evidence of a de-democratization in corporate governance. This trend has occurred across four dimensions: (1) by narrowing the segment of the shareholder population that enjoys extensive rights (reduced breadth), (2) by increasing the disparity among different classes of shareholders (increased inequality), (3) by limiting the mechanisms designed to hold fiduciaries accountable to shareholders (reduced protection), and (4) by moving away from bilateral deliberation to unilateral decision making (unilateral decision making). Each of these trends goes against the fundamental presumptions of democratic corporate governance and challenges the conclusions that rest upon its existence and continuation.[204]

It is worth reiterating here that there are good reasons for firms to organize themselves this way. The point here is not that every shareholder should have the power to propose a meeting, or be entitled to make demands to inspect company books and records at any time, or that these endeavors should be costless to the requesting shareholder, but rather that it would be a mistake to call these firms "democratic" in light of the barriers that exist (often justifiably) to each shareholder's participation in corporate governance.

IV. Catalysts of De-Democratization

Part III documented how a subset of firms (PPE) have adopted governance structures that stray from the democratic ideals of inclusion, equality, protection, and mutuality. The case study, though informative, is limited to 39 firms. What, if any, broader trends can we observe about the relationship between corporate and civic democracies? This part of the paper documents recent market, legal, and regulatory developments that have facilitated the de-democratization of corporate governance more broadly across all segments of firms.

First, how inclusive is corporate governance? While more than half of Americans say they currently have money in the stock market, this is the lowest ownership rate in Gallup's 19-year trend.[205] William Bratton and Michael Wachter provide a further breakdown by explaining that the

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[203] E.g., Apollo Global Management, LLC (APO) Amended and Restated Limited Liability Company Agreement, Section 3.9 (Rights of Members) (July 13, 2007).

[204] Charles Tilly, *Inequality, Democratization, and De-Democratization*, 21 SOC. THEORY 37, 37 (2003).

[205] In 2007, nearly two in three American adults (65%) reported investing in the stock market. Nearly three in four middle-class Americans, with annual household incomes ranging from $30,000 to $74,999, said they invested money in the stock market in 2007. Today, only half of this group reports having stock investments. Justin McCarthy, *Just Over Half of Americans Own Stocks, Matching Record Low*, GALLUP

model shareholder is "old, white, and in the top 1% of the income distribution"[206] and "the top 10% owns 81% of the stock, while the bottom 80% accounts for only 9% of shares."[207] These statistics evidence a narrowing of the segment of shareholders that comprise the United States' "shareholder culture."[208]

Another example of de-democratization – on the dimension of equality – that has attracted quite a bit of recent attention is dual class stock offerings. The effect of a dual class structure is to provide certain shareholders voting rights that are greater than their economic stake. All of the U.S. stock exchanges allow companies to issue different classes of stock with unequal voting rights in an initial public offering (IPO).[209] Facebook, Alphabet, LinkedIn, and Groupon have all gone public with dual class stock that give insiders greater voting power.[210] Returning to the case study for a moment, **11 of 39 PPEs** (ACAS[211], APO[212], ARES[213], CG[214], CODI[215], FIG[216], FNFV[217], FSAM[218], KKR[219], OAK[220], and PJT[221]) also use a dual class structure.

This is not distinctly a U.S. phenomenon. The Association of British Insurers (ABI) commissioned a study of corporate voting rights in the companies making up the FTSE Eurofirst 300 index (as of July 1, 2004). The ABI study reports that more than 1/3 of these corporations do not have a one-vote-per-share voting rule.[222]

In addition to dual class stock offerings, other developments have had the effect of giving certain shareholders voting rights that are *less* than their economic stake. Control share acquisition statutes that have been adopted in a growing number of states allow firms to limit the

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NEWS (Apr. 20, 2016), http://news.gallup.com/poll/190883/half-americans-own-stocks-matching-record-low.aspx.

[206] William W. Bratton & Michael L. Wachter, *Shareholders and Social Welfare*, 36 SEATTLE U. L. REV. 489, 491 (2013).

[207] *Id.* at 518.

[208] MACEY, *supra* note [ ], at 4 (referring to the U.S. "shareholder culture").

[209] These mechanisms include dual-class equity structures, stock pyramids, cross-ownership, voting agreements, voting rules. Lucian Bebchuk et al., *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Creation and Agency Costs of Separating Control from Cash Flow Rights*, *in* CONCENTRATED CORPORATE OWNERSHIP 445-60 (Randall Morck ed., 2000).

[210] For a survey of the empirical literature on disproportional ownership, see Renee Adams & Daniel Ferreira, *One Share-One Vote: The Empirical Evidence*, 12 REV. FINANCE 51 (2008). The authors find that the evidence on the effect of disproportional ownership on social welfare, shareholder value, and capital allocation is mixed. An earlier study by DeAngelo and DeAngelo views disproportional ownership as an efficient arrangement between controlling shareholders and non-controlling shareholders. Harry DeAngelo & Linda DeAngelo, *Managerial Ownership of Voting Rights: A Study of Public Corporations with Dual Classes of Common Stock*, 14 J. FIN. ECON. 33 (1985). [Lund.]

[211] American Capital Ltd., Registration Statement (Form N-2) (June 24, 1997).

[212] Apollo Global Management, Registration Statement (Form S-1) (March 30, 2011).

[213] Ares Management, LP, Registration Statement (Form S-1) (May 2, 2014)

[214] The Carlyle Group, LP, Registration Statement (Form S-1) (May 3, 2012)

[215] Compass Diversified Holdings, Registration Statement (Form S-1) (May 11, 2006)

[216] Fortress Investment Group, Registration Statement (Form S-1) (Feb. 9, 2007)

[217] FNFV Group, Registration Statement (Form S-1) (June 23, 2014)

[218] Fifth Street Asset Management, Inc., Registration Statement (Form S-1) (Oct. 30, 2014)

[219] KKR LP, Registration Statement (Form S-1) (July 15, 2010)

[220] Oaktree Capital Group, Registration Statement (Form S-1) (April 12, 2012)

[221] PJT Partners, Bylaws (Form S-1, ex. 3.2) (Oct. 5, 2015)

[222] ASS'N OF BRITISH INSURERS, DEMINOR RATING, APPLICATION OF THE ONE-SHARE-ONE-VOTE PRINCIPLE IN EUROPE (Mar. 2005).

voting power of potential acquirers.[223] An acquirer who purchases shares beyond a certain threshold percentage may not vote any shares in excess of that percentage. Shareholder rights plans (poison pills), if triggered, also disproportionately reduce the voting power of a hostile bidder.

These recent developments go against what was once the bedrock principle in corporate governance—the one share-one vote rule—which was first introduced by the New York Stock Exchange (NYSE) in 1926.[224] The NYSE later retired the rule in 1986.[225] Two years later in 1988, the Securities and Exchange Commission (SEC) adopted Rule 19c-4 to prohibit issuers from issuing any class of shares with the effect of nullifying, restricting, or disparately reducing the voting rights of existing holders of common stock.[226] Eventually, the D.C. Circuit Court invalidated Rule 19c-4 by holding that the SEC did not have the authority to adopt corporate governance rules that encroached upon state corporate governance standards.[227]

The development of proxy access follows a similar storyline to shareholder voting.[228] Proxy access, which refers to the ability of shareholders to place alternative board candidates on the company's proxy card at the annual shareholder meeting, has the goal of making boards more responsive to shareholder interests.[229] The Dodd-Frank Wall Street Reform and Consumer Protection Act affirmed the SEC's authority to issue a proxy access rule,[230] and the SEC approved Rule 14a-11 which made it easier for shareholders to nominate candidates for corporate boards.[231] The D.C. Circuit Court however invalidated Rule 14a-11 by holding that the SEC had acted arbitrarily and capriciously by failing to consider the rule's effect on efficiency, competition, and capital formation.[232]

In this way, market, legal, and regulatory forces have worked together to facilitate a voting structure that is less inclusive and less equal among modern firms. Yet, the one-vote-one-share

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[223] Lucian Arye Bebchuk, *The Case Against Veto Power in Corporate Takeovers*, 69 U. CHI. L. REV. 973, 976 (2002) (citing GRANT GARTMAN, STATE TAKEOVER LAWS §§ A-2 to A-3 (Investor Responsibility Research Center 2000).

[224] Joel Seligman, *Stock Exchange Rules Affecting Takeovers and Control Transactions*, *in* KNIGHTS, RAIDERS & TARGETS: THE IMPACT OF THE HOSTILE TAKEOVER 465, 468-73 (John C. Coffee, Jr. et al. eds., 1988); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 73 (1991); Stephen Bainbridge, *Revisiting the One-Share/One-Vote Controversy: The Exchanges' Uniform Voting Rights Policy,* 22 SEC. REG. L. J. 175 (1994).

[225] MACEY, *supra* note [ ], at 113 (discussing how the NYSE retired its one-share, one-vote listing requirement to avoid losing two of its most valuable listings—GM and Dow Jones).

[226] Listing Standards on Shareholder Voting Rights, Exchange Act Release No. 25,891, [1987-1988 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,248 (July 7, 1988).

[227] Bus. Roundtable v. SEC, 905 F.2d 406, 407 (D.C. Cir. 1990).

[228] SEC, Senate Comm. On Banking, House. & Urban Affairs, 96th Con., Staff Report on Corporate Accountability: A Re-examination of Rules Relating to Shareholder Communications, Shareholder Participation in the Corporate Electoral Process and Corporate Governance Generally 19 (1980).

[229] Jill Fisch, *From Legitimacy to Logic: Reconstructing Proxy Regulation*, 46 VAND. L. REV. 1129 (1993); Lucian A. Bebchuk & Scott Hirst, *Private Ordering and the Proxy Access Debate*, 65 BUS. LAW. 329 (2010).

[230] Dodd-Frank Wall Street Reform and Consumer Protection Pub. L. No. 111-203, § 971(a)(b).

[231] Exchange Act Rule 14a-11.

[232] Bus. Roundtable v. SEC, No. 10-1305, 2011 WL 2936808 (D.C. Cir 2011).

rule and proxy access have persisted. Since 1994, the NYSE[233] and NASDAQ[234] both prohibit dual class recapitalizations without shareholder approval.[235] And, in the case of proxy access, it has been reported in 2016 that "[m]ore than 35% of S&P 500 companies have adopted proxy access."[236]

Of course, the changes have not all been unidirectional. There is evidence that corporate governance has become *more* democratic in some respects. John Coffee and Darius Palia have surveyed the changing structure of shareholder ownership and discussed how hedge funds have emerged as new and temporary shareholder majorities.[237] Coffee and Palia explain that hedge fund activism has increased because costs of activism have declined due to the development of a new tactic (the "wolf pack") that enables hedge funds to take collective action without legally forming a "group" that would trigger corporate defenses and federal securities regulation.[238]

Ed Rock and Marcel Kahan have also documented how CEOs of publicly-held corporations in the U.S. are losing power to directors and shareholders.[239] They identify a "new era" of corporate governance where "power over the U.S. corporate enterprise is more evenly distributed between various participants—inside managers, outside directors, and shareholders—rather than concentrated in the hands of the CEO."[240]

* * *

Each of these developments provide a new lens through which the democratization or de-democratization of firms should be observed. Who does the shareholder in "shareholder democracy" refer to? Also, the agency theory of firms views shareholders as principals, who elect managers, their agents, to manage the firms on their behalf.[241] Under this framework where every shareholder is deemed a principal, but where some own greater pieces than others, some are individuals and others are institutions, some are domestic and others are foreign, some have more information, knowledge, wealth, status, access, and other resources than others (with reports that this gap is growing) --- who is the principal? On whose behalf are firms governed, to whom are fiduciary duties owed[242], and whose welfare are managers to maximize? And when

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[233] NYSE 303.00(A) (Voting Rights Policy) ("Voting rights of existing shareholders of publicly traded common stock registered under Section 12 of the Exchange Act cannot be disparately reduced or restricted through any corporate action or issuance. Examples of such corporate action or issuance include, but are not limited to, the adoption of time phased voting plans, the adoption of capped voting rights plans, the issuance of super voting stock, or the issuance of stock with voting rights less than the per share voting rights of the existing common stock through an exchange offer.").

[234] NASDAQ Listing Rule 5640 (Voting Rights) ("Under the voting rights rules, a Company cannot create a new class of security that votes at a higher rate than an existing class of securities or take any other action that has the effect of restricting or reducing the voting rights of an existing class of securities.").

[235] Companies are permitted to issue dual classes of stock in an IPO based on the rationale that there are no existing public shareholders that would be adversely affected by such a transaction.

[236] Peter Clapman & Richard Koppes, *Time to Rethink 'One Share, One Vote'?*, THE WALL ST. JOURNAL (June 23, 2016) https://www.wsj.com/articles/time-to-rethink-one-share-one-vote-1466722733.

[237] John C. Coffee, Jr. and Darius Palia, *The Wolf at the Door: The Impact of Hedgefund Activism on Corporate Governance*, 41 J. CORP. L. 545 (2016).

[238] Id.

[239] Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 989 (2010).

[240] Id., at 989.

[241] This view of corporations as representing the collective interest/identity of underlying shareholders is what supported the idea that corporations are people too and thus have constitutional rights.

[242] This inquiry is further complicated by the fact that there are again multiple layers of agents here. Managers owe fiduciary duties to shareholders (state common law – e.g. DE case law) who in the case of institutions owe fiduciary duties to their underlying directors (federal regulations – e.g., ERISA).

different shareholders have different preferences about core business decisions, whose preference prevails? A partial answer to these important questions and the implications for the relationship between firms and governments are addressed in the following Part V.

V. Implications of the De-Democratization Trend

Discussions about the misfit of democratic principles with corporate governance, and even doubts that a corporate democracy ever existed,[243] are hardly new.[244] This Article provides further evidence of de-democratization and contrasts it with the widespread use and reach of the corporate democracy metaphor in U.S. corporate governance. This last Part of the Article explores the implications of this gap between myth and reality.

I survey the relevant literature and identify three main accounts of the relationship between firms and government—as substitutes, complements, and models—and discuss how de-democratization impacts each of these accounts. The guiding principle of this Part is that an examination of implications of de-democratization must be connected to why and how the corporate democracy metaphor is being used in the first place.

A. Substitutionary Account

One account of firms and government is looking to the former as a substitute for the latter (i.e. relying on corporations to do the work of government).[245] In this context, the corporate democracy

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[243] Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 WASH. & LEE L. REV. 1407, 1419 (2006) ("it is doubtful whether the corporation was ever truly democratic in any important sense.").

[244] See supra II.C.

[245] This account of firms has been used to support the performance of core public functions by corporations and other private entities. *See e.g.*, Gregory C. Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 150 (2009) (describing businesses' influence on foreign law and policy decisions of the United States); Louis Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 232-34 (1937) (describing cases where "an admittedly private body is entrusted with the power of administering law."); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 581 (2000) (noting that in reality there are many examples suggesting that "federal government thus retains considerable flexibility to make substantial delegations of its responsibilities, and even of functions closely associated with core sovereign powers, to private parties") (citing Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1978)); Grant McConnell, *Public and Private Government*, in PRIVATE GOVERNMENT 23 (Sanford A. Lakoff ed. 1973) (referring to the corporation as "probably the most important form of private government in America today."); *see also* Mariana Pargendler, *Corporate Governance Obsession*, 42 J. CORP. L. 359, 400 (2016) ("A distinctive feature of corporate governance, and a major source of its appeal, is its role as a substitute for free markets and government action."); Harold I Abramson, A Fifth Branch of Government: The Private Regulators and Their Constitutionality, 16 Hastings Cons. L. Q. 165 (1989) (discussing the privatization of core governmental responsibilities such as the making of laws and adjudications of disputes); Nicola Jägers, *Will Transnational Private Regulation Close the Governance Gap?*, *in* S. DEVA & D. BILCHITZ (EDS.), HUMAN RIGHTS OBLIGATIONS OF BUSINESS: BEYOND THE CORPORATE RESPONSIBILITY TO RESPECT? 295 (2013) (explaining how the United Nations includes corporations in the discussion of regulation to enhance their effectiveness); John D. Donahue & Richard J. Zeckhauser, COLLABORATIVE GOVERNANCE (2011). *But see* Julian Arato, *Corporations as Lawmakers*, 56 HARV. INT'L L.J. 229 (2015) (arguing that "[I]nternational legal doctrine has gone too far in empowering multinationals against the state, while remaining too hesitant to demand any form of corporate accountability"); June Carbone and Nancy Levit, *The Death of the Firm*, 101 MINN. L. REV. 963 (2017) (arguing that the "death of the firm" (i.e., the disappearance of the firm as an entity as a unit of legal analysis) has created challenges for business entities serving as appropriate partners for the government in advancing public purposes).

metaphor has been used to determine whether firms may be an appropriate substitute for governments.[246]

The basic idea driving this substitutionary account of firms and governments is that when firms adopt governance structures that are familiar to government, and can achieve the same goals as government, but with more efficiency, firms may be entrusted to do some of the work of government.[247] One example of this account is the observation that franchise corporations that historically had a more public purpose (many franchise corporations had been formed to provide local public goods such as turnpikes and bridges) had more democratic governance provisions.[248]

Consistent with this basic idea, we have seen increased participation by businesses even on matters once considered to be the *grande politique*, such as foreign law and policy.[249] John Stopford and Susan Strange have documented this shift of power from political institutions to markets.[250] Tarun Khanna and Yishay Yafeh explain how business groups may also be suitable substitutes for economic institutions.[251] And as a result of this substitutability, business entities have grown to match government in terms of their economic and political might.[252]

To be clear, the substitution of government functions by private firms does not automatically release governments from their obligation to perform the same.[253] However, the substitutionary

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[246] *See, e.g.*, Frank Camm, *Using Public-Private Partnerships Successfully in the Federal Setting*, *in* HIGH-PERFORMANCE GOVERNMENT (Robert Klitgaard & Paul C. Light eds., 2005) ("Effective use of public-private partnerships (PPPs) . . . provides a proven way to (1) get agencies out of the day-to-day business of providing services so that they can stay mission-focused on what the American public wants from its government, and (2) simultaneously assure or even improve the cost and quality of the services the government provides to the American public.").

[247] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 586 (2000) ("Many emergent arrangements deputize nongovernmental actors in the pursuit of public ends because they offer expertise, information, and monitoring capacity that the state lacks.").

[248] Donald J. Smythe, *Shareholder Democracy and the Economic Purpose of the Corporation*, 63 Wash. & Lee L. Rev. 1407, 1417 (2006) ("Given the public purpose of the franchise corporations it is hardly surprising that they typically featured more democratic governance provisions.").

[249] Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264 (2016) (demonstrating increased business influence in international treaty-making).

[250] JOHN STOPFORD AND SUSAN STRANGE, RIVAL STATES, RIVAL FIRMS (1991).

[251] Tarun Khanna & Yishay Yafeh, *Business Groups in Emerging Markets: Paragons or Parasites?*, 45 J. ECON. LIT. 331 (2007).

[252] MARK GREEN & ROBERT MASSIE, JR. EDS., THE BIG BUSINESS READER: ESSAYS ON CORPORATE AMERICA 1 (1980) ("Many multinational corporation's general revenues today draw the GNPs of dozens of foreign nations."); Carl Kaysen, *The Corporation: How Much Power? What Scope? in The Corporation in Modern Society* (Edward S. Mason, ed. 1959) ("The market power which large absolute and relative size gives to the giant corporation is the basis not only of economic power but also of considerable political and social power of a broader sort…"); Earl Latham, *The Body Politic of the Corporation*, in PRIVATE GOVERNMENT 44 (Sanford A. Lakoff ed. 1973) ("One of America's most important political problems is a long-needed and now-urgent redefinition of the relation between giant corporations and the commonwealth, for the growth of the corporation has produced a tension of power in which giant enterprises have at points come to rival the sovereignty of the state itself."). The considerable political and social power enjoyed by public corporations have not gone unrecognized by securities regulators. Donald C. Langevoort & Robert B. Thompson, *"Publicness" in Contemporary Securities Regulation after the JOBS Act*, 101 GEO. L. J. 337, 372-73 (2013).

[253] San Francisco Arts & Athletics, Inc. v. United States Olympic Comm., 107 S. Ct. 2971, 2993 (1987) (Brennan, J., dissenting, Marshall, J., joining) ("[While] [t]he Government is free... to 'privatize' some functions it would otherwise perform... such privatization ought not automatically release those who perform government functions from constitutional obligation.").

account may subject private entities to the same regulations that are applicable to public agencies.[254] Mariana Pargendler explains that the same formulas that have been used to control and legitimize power in the political sphere have been transposed upon the corporate form "in the hope of tackling numerous economic and social problems."[255]

The de-democratization phenomenon suggests however that firms may not be well adapted to perform this substitutionary role. To the extent democratic governance is an important prerequisite for corporations to serve as government substitutes,[256] de-democratization requires a rethinking of the suitability of firms as a meaningful substitute for political and economic institutions.[257]

Another version of this substitutionary account is one that paints firms and governments as in tension with one another.[258] This account acknowledges that firms are not and cannot be democratically organized, and thus cannot be trusted to perform public functions. In particular, the shareholder primacy norm has at times been used to discredit firms' ability to perform government functions.[259] The shareholder primacy norm, and the governance structures that have been built around this norm, are seen as incompatible with the government's broader pursuit of the public interest. Jody Freeman writes:[260]

> Private actors exacerbate all of the concerns that make the exercise of agency discretion so problematic. They are one step further removed from direct accountability to the electorate . . . Private entities escape most of the procedural controls and budgetary constraints that apply to agencies. As nonstate actors, they remain relatively insulated from the legislative, executive, and judicial oversight to which agencies must submit. Driven by profit, ideology, or group allegiance, most private organizations may not develop the institutional norms of professionalism and public service that characterize many public bureaucracies.

De-democratization bolsters these accounts of firms as incompatible with public functions. If firms are deemed incapable of performing public functions because of their narrow orientation

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[254] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 575-79 (2000) (describing the state action doctrine which treats private parties as "state actors" for purposes of imposing constitutional requirements).

[255] Pargendler, *supra* note [ ], at 366.

[256] CHRISTOPHER MCMAHON, PUBLIC CAPITALISM: THE POLITICAL AUTHORITY OF CORPORATE EXECUTIVES 4 (2013) ("To be legitimate, the authority exercised by corporate executives must constitute a subordinate form of political—that is, public—authority.").

[257] Grant McConnell, *Public and Private Government*, in PRIVATE GOVERNMENT 24 (Sanford A. Lakoff ed. 1973) ("Concepts such as legitimacy, authority, power, and constitutionalism have now entered deeply into the discussion of the modern business corporation.").

[258] As argued by Justice Louis Brandeis: "We must make our choice. We may have democracy, or we may have wealth concentrated in the hands of a few, but we can't have both." RAYMOND LONERGAN, MR. JUSTICE BRANDEIS, GREAT AMERICAN 42 (1941). *See also*, *e.g.*, ROBERT A. DAHL, ON DEMOCRACY 166 (1997) ("Democracy and market-capitalism are like two persons bound in a tempestuous marriage that is riven by conflict and yet endures because neither partner wishes to separate from the other.").

[259] *See e.g.,* Michael Taggart, *The Province of Administrative Law Determined?*, in THE PROVINCE OF ADMINISTRATIVE LAW (MICHAEL TAGGART ED., 1997) (noting that self-regarding behavior is the starting point for private law whereas public-regarding behavior is the starting point for administrative law). Others are more optimistic: Charles E. Merriam, *The Study of Private Government*, in PRIVATE GOVERNMENT 15 (Sanford A. Lakoff ed. 1973) ("…in a democratic system, the rivalry sometimes arising between public and private organizations may most readily be reconciled. In a democracy all agencies and authorities are, or profess to be, servants of the common good").

[260] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 574 (2000)

toward shareholders, the further narrowing of this orientation and the erosion of democratic principles in corporate governance suggest raise doubts as to whether firms can serve as government substitutes.

Consistent with this view, there is greater urgency to existing calls to constrain or remove private influence on public functions. One alternative would be to require democratic governance – along the dimensions of inclusiveness, equality, protectiveness, and mutuality, as proposed in this article – as a prerequisite to private firms' provision of public functions. Another alternative would be to more explicitly extend the usual mechanisms used to curb private influence (e.g., state action doctrine,[261] the non-delegation doctrine,[262] extending procedural controls[263] and infusing private law with public law norms) to firms that have a more "public" status in our society.[264]

B. Complementary Account

Another account views firms and governments as complements or in symbiosis (i.e., viewing the development of democratic corporate governance and democratic politic governance as mutually advantageous).[265] The mirror image of this account is that what is harmful to corporate democracy is also harmful to political democracies.[266]

The influential "law and finance" literature points to corporate governance reforms as a major determinant of economic development, which in turn provides the resources needed to sustain a thriving democracy.[267] These accounts suggest that the development of democratic corporate governance and democratic political governance are mutually reinforcing. Democratic firms contribute to a more robust and thriving democracy, and democratic institutions create a more robust and thriving market. Specifically, the representative form of governance within firms has helped to sustain the separation of ownership and control,[268] which in turn has facilitated the democratization of capital.[269]

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[261] *See e.g.*, Lebron v. National R.R. Passenger Corp., 513 U.S. 374 (1995) (requiring Amtrak to recognize free speech as it was performing a government function).

[262] *See e.g.*, Hampton & Co. v. United States, 276 U.S. 384, 411 (1928) (upholding delegation to President of responsibility to revise tariff duties).

[263] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 586-88 (2000) ("…proceduralizing private relationships could be an increasingly popular option in the era of widespread contracting out."). Freeman acknowledges however that "[c]omplying with the bureaucratic requirements typically imposed on agencies—following detailed procedures, providing hearings, defending decisions to review boards and courts—could frustrate the benefits of private participation in governance by imposing significance burdens." *Id.* at 588

[264] Id. at 574 (2000)

[265] Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998). See also Adam Winkler, We the Corporations: How American Businesses Won Their Civil Rights (2018) ("It was a corporation, after all, that planted the first seeds of democracy in the colonies, and the goal was to secure profit, not promote liberty.").

[266] Entrenchment is one example. DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 84 (2012) (viewing entrenchment by elites as the greatest impediment to economic growth).

[267] Rafael La Porta et al., *supra* note [ ], at 1113.

[268] MACEY, *supra* note [ ], at 3 ("In the United States, more than in any other country, the modern publicly held corporation is characterized by the separation of share ownership and managerial control of the corporation itself.").

[269] *Id.* at 3-4 ("The ability to raise vast sums of money from widely disparate investors permits the democratization of capital . . . . Without an ownership structure characterized by the separation of share

In this context, the corporate democracy metaphor has been used to determine the features of markets that make them favorable for democratic institutions. Robert Dahl has identified four such features. First, markets coordinate and control decisions of economic entities and produce goods and services with greater efficiency and orderliness. Second, economic growth tends to reduce the social and political conflicts that create challenges for democratic institutions. Third, economic growth provides surplus resources to support education. And fourth, economic growth creates owners who seek greater education, autonomy, freedom, property rights, rule of law, and participation in government.[270]

Relatedly, Charles E. Merriam viewed private enterprise and public enterprise to be not in opposition but in *apposition*—stating that free industrial and free political societies are both "in the course of becoming the realization of the common good.[271] Jody Freeman has suggested that private actors' participation in public functions may enhance government accountability.[272] Grant McConnell echoes this view, singling out the "[m]assive endorsement of the private association as an essential of democracy" as one of the most striking features of American political thinking.[273]

Approaching the same question but from the other direction, what are the features of democratic institutions that make them favorable for markets? Jonathan Macey explains that there is a "growing consensus around the globe that large, well-capitalized corporations can only exist in stable democracies with robust middle-class populations."[274]

The de-democratization of firms is perhaps of greatest concern under this complementary account, as this trend suggests a failure of both democratic and corporate governance, which will trigger a vicious cycle.[275] Under this account, the de-democratization of firms may be a consequence of de-democratization of our society, which will in turn result in a further de-democratization of firms, and so forth. Thus, to avoid this bleak future for both corporate and

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ownership and corporate management, it would not be possible to have both a robust middle class and a large number of powerful, multinational corporations.").

[270] *See* DAHL, *supra* note [ ], at 177-78 (citing Aristotle who was the first to point out that the middle classes are "the natural allies of democratic ideas and institutions.").

[271] Charles E. Merriam, *The Study of Private Government*, in PRIVATE GOVERNMENT 16 (Sanford A. Lakoff ed. 1973) ("The democratic forms of free association respect most fully the dignity of man, his possibilities for growth, the unfolding of the human personality in its widest forms. Under these conditions private enterprise and public enterprise, private rights and public rights are not in opposition but in apposition—free industrial and free political society—in the course of becoming the realization of the common good.").

[272] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 672 (2000) (showing that "private actors are integrated into decision-making structures" and "Although they might at times be dangerous, they are something more, and may, under the right conditions, produce accountability."). *Id.* at 665 ("Even in the absence of tight control, a public-private regime characterized by multiple and overlapping checks might produce enough aggregate accountability to assure us of its legitimacy").

[273] Grant McConnell, *Public and Private Government*, in PRIVATE GOVERNMENT 17 (Sanford A. Lakoff ed. 1973). *See also Id.* at 35 ("The voluntary aspect of private associations has repeatedly been held to place them in a very special relationship to democracy, one often so special that it is described as a *necessary condition* of democracy." (emphasis added))

[274] MACEY, *supra* note at [ ].

[275] *See, e.g.*, THOMAS PICKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 334 (2014) (pointing to highly unequal pay as proof of the failure of corporate governance). Paul Drucker has famously said that exceeding a 20-to-1 salary ratio between the average worker and CEO will lead to falling morale and resentment (especially among mid-level management).

political democracy, a recalibration of democratic principles in both firms and governments is urgently needed.[276]

C. Model for "Good" Governance

The corporate democracy metaphor is at other times used as a way to provide one path forward, or a model, for corporate governance. This account recognizes that there are similarities between the practical challenges faced by firms and governments, and democratic governance is offered as one helpful reference point for corporate governance.[277] James Madison recognized that representative democracies are inherently fragile, facing two foundational challenges.[278] The first is capture by special interest (elected representatives being influenced by special interests rather than their constituents' interests) and the second is perversion by "passions of the majority" (where the majority standard used in representative democracies oppress minorities and violate their rights).[279] Such subversions and perversions require proper checks and balances, such as a free, fair, and frequent election process and mechanisms to hold elected officials accountable.[280]

Corporate governance too is concerned with monitoring disloyal agents and combatting minority oppressions.[281] In the corporate context, periodic meetings, elections, and fiduciary duties are used to hold directors accountable to the shareholders who (sometimes) have the power to elect, remove, or reprimand them.[282] Recognizing that the challenges faced by a republic of many states and peoples are similar to the challenges faced by a corporation of many owners,

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[276] This prescription is not without its critiques. In his review of the American Law Institute's recommendations for a proposal for corporate governance reforms, economist Steve Pejovich is critical of the effort as "a substitution of legislative rules and institutions for the freedom of business firms to choose organizational forms in accordance with their own judgment of their own needs." Steve Pejovich, Corporate Democracy: An Economist's Critique of Proposals for Corporate Governance and Structure 6 (1984); Tom C.W. Lin, *CEO and Presidents*, 47 U.C. Davis L. Rev. 1351, 1398-99 (2014) (cautioning that "[t]houghtless, wholesale attempts to 'democratize' corporations can cause serious harms to corporations, shareholders, and society.").

[277] Grant McConnell, *Public and Private Government*, in PRIVATE GOVERNMENT 41 (Sanford A. Lakoff ed. 1973) ("The remarkable fact about private government, then, is . . . . that it generally lacks the limitations that guard against tyranny and injustice to minorities and individuals. This lack, in turn, seems to be related to a deep and widespread illusion about the nature of politics in private associations.").

[278] Vices of the Political System of the United States § 11 (Apr. 1787), *in* 9 THE PAPERS OF JAMES MADISON 348, 356-57 (Robert A. Rutlands et al. eds., 1975).

[279] James Madison suggests that this problem of the tyranny of the majority is more acute in small republics, where there is less competition among political groups. On the other hand, when there is a greater variety of political groups, they will act as checks on one another and there are fewer opportunities for those with shared political views to communicate and act in concert with one another. *Id.*

[280] DAHL, *supra* note [ ], at 93-95 (1998) ("How can citizens participate effectively when the number of citizens become too numerous or too widely dispersed geographically . . . ? The only feasible solution, though it is highly imperfect, is for citizens to elect their top officials and hold them more or less accountable through elections by dismissing them . . . in subsequent elections."). Craig Borowiak views accountability as the central principle of a democracy. He defines democratic accountability as "the principle that the governed should have opportunities to sanction and demand answers from the powers that govern them." CRAIG T. BOROWIAK, ACCOUNTABILITY AND DEMOCRACY: THE PITFALLS AND PROMISE OF POPULAR CONTROL 3 (2011) ("Governance without accountability is tyranny. Few principles are as central to democracy as this…").

[281] MACEY, *supra* note [ ], at 1 ("The purpose of corporate governance is to persuade, induce, compel, and otherwise motivate corporate managers to keep the promises they make to investors.").

[282] Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV., 445, 450 (2008) ("voting is the sine qua non of democratic decision-making").

the analogy of corporate governance to democratic governance has been one that is productive and thus often invoked to invite the two regimes to learn from one another.[283]

The basic question driving this account of firms and governments is: what can private firms learn from public administrations? In this context, the corporate democracy metaphor may be used to confer legitimacy on the corporate form, but is not a necessary condition for a firm's success. As such, requiring firms to take affirmative steps to conform to democratic ideals may be too narrow of a response to the de-democratization phenomenon. Instead, a broader view would to use this opportunity to make space for alternative constructs. Many are available, including, a donor-donee construct, meritocracy, "holacracy," [284] autocracy, monarchy, oligarchy[285], aristocracy, stewardship, or guardianship, among other alternatives.

Exploring the last of these examples as an alternative reference point for firms, could corporations be better characterized as guardianships rather than democracies? Guardians have long been the major rival to democracies.[286] Guardians refer to experts who are seen to have superior knowledge about the general good and the best means to achieve it.[287] The key difference between guardianships and democracies is that in the former, the experts have the final say and control over how to govern.[288] Robert Dahl articulates a "host of formidable practical problems" of guardianships, starting with the practical questions of how successors will be chosen and how incompetent guardians will be discharged, all of which suggest that a new ideal for corporate governance will come with its own set of misgivings.[289]

Another possible construct is a pluralist theory of corporations, which has also been proposed as an ideal for civic democracies.[290] Pluralist governance envisions a small group of people that have direct influence on a particular issue, with an important caveat being that the people that have influence over one issue are not the same as the ones that have influence over others. In the corporate context, the requirement that certain decisions be made by committee and/or

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[283] Richard L. Hasen, *The "Political Market" Metaphor and Election Law: A Comment on Issacharoff and Pildes,* 50 STAN. L. REV. 719, 719 (1998) (noting it "is unsurprising that public choice theorists and other scholars have borrowed economists' descriptions of economic markets to describe the world of politics.").

[284] HOLACRACYONE, LLC https://www.holacracy.org/ (last visited Feb. 25, 2018) (refers to a method of governance in which authority and decision-making are distributed throughout self-organizing teams.)

[285] ADOLF BERLE & GARDINER MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932) (cautioned that elected officials would become a self-reproducing oligarchy who would not be accountable to the owners they represent). Berle continued this critique in his later writings, writing for example in 1957: "Whenever there is a question of power there is a question of legitimacy. As things stand now, these instrumentalities of tremendous power have the slenderest claim of legitimacy." ADOLF A. BERLE, ECONOMIC POWER AND THE FREE SOCIETY (1957). *See also* Grant McConnell, *Public and Private Government*, in PRIVATE GOVERNMENT 27 (Sanford A. Lakoff ed. 1973) ("The Michelsian theory of oligarchy in organization seems all too well substantiated by the corporation…the reality is so plain that to dispute the thesis of oligarchy is scarcely worth undertaking.").

[286] DAHL, *supra* note [ ], at 69.

[287] *Id.* at 70. Delaware case law already embraces the guardianship construct, providing that directors can encumber the shareholder franchise if they are able to show that they know better than shareholders what is good for them.

[288] *Id.* at 71 ("The fundamental issue in the debate over guardianship versus democracy is not whether as individuals we must sometimes put our trust in experts. The issue is who or what group should have the final say in decisions made by the government of a state.").

[289] *Id.* at 74.

[290] *Id.*

independent directors, and foreign examples of bringing in workers[291] and creditors[292] to corporate governance and decision making are evidence of this trend toward pluralism.

Which reference point is chosen depends on the particularities of each firm. However, as a general matter, the de-democratization of firms reported in this Article suggests that now may be a good time to reconsider the perils of adhering too strongly to the democratic ideal. Democratic governance relies heavily on the principal-agent construct, which does not carry over neatly to corporate governance.[293] In addition, a singular focus on a democratic relationship between owners and managers comes at the expense of more broadly considering the relationships among owners and among managers, and at the exclusion of other stakeholders. Relatedly, a strict adherence to corporate democracy may bind us to owners' existing preferences without considering their capacity to imagine and adopt new preferences, which goes against the normative goals of the corporate democracy metaphor.

VI. Conclusion: The Future of Corporate Democracy

As many times as the metaphor of "corporate democracy" has been used to shape the way corporations are governed and regulated, the concept has been reinvented. While corporate governance and democratic governance can be weaved together to offer a productive analogy, the analogy is not perfect, and some of its flaws may have serious consequences. In this Article, I develop a conceptual and definitional framework for "corporate democracy" to measure the extent to which firms are democratically organized, and study the implications of any misfits.

I am not suggesting here that all firms should be more democratically organized, or that regulations should incentivize this convergence. Rather, this Article aims to correct the misperceptions of corporate governance that have resulted from the misuse of the corporate democracy metaphor. But should firms wish to become more democratically organized, the development of new technologies such as blockchains make this a more likely and less costly reality.

Blockchains, first developed as a method to validate ownership of virtual currencies with speed, accuracy, and transparency, have been reimagined for use in other contexts.[294] David Yermack surveys how blockchains could be used to improve corporate governance, and suggests four immediate improvements. First, posting business transactions and books and records on a public blockchain can help reduce information asymmetry.[295] Second, using blockchain to keep records of who owns shares can help increase transparency, reduce rent-seeking by insiders, and eliminate empty voting by allowing all shareholders to view ownership changes (in their own firms as well as other firms' shares) instantly.[296] Third, using blockchain to keep voting records means that votes can be quickly, precisely and securely recorded, and both managers and

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[291] German co-determination example.

[292] Japanese zaibatsu example.

[293] Deborah A. DeMott, *Shareholders as Principals*, *in* KEY DEVELOPMENTS IN CORPORATE LAW AND EQUITY: ESSAYS IN HONOUR OF PROFESSOR HAROLD FORD 105-29 (2002) ("[T]he metaphorical association with common-law agency is generally not helpful, given the structure of contemporary corporation statutes, and may be affirmatively misleading . . . .").

[294] Nakamoto, Bitcoin: A Peer-to-Peer Electronic Cash System, Unpublished manuscript (2008)

[295] David Yermack, Corporate Governance and Blockchains, 2017 Review of Finance 7.

[296] Id.

shareholders will have equal access to voting outcomes.[297] And fourth, using blockchain as a voting platform could reduce the cost of and increase the reliability of shareholder voting.[298]

This promise of blockchain to motivate greater shareholder participation in corporate governance has not gone unnoticed by market participants and regulators.[299] It remains to be seen how much private actors will avail themselves of these technological developments to catch up with the rhetoric of corporate democracy.

[297] Id., at 9 ("Corporate voting could become more accurate, and strategies such as "empty voting" that are designed to separate voting rights from other aspects of share ownership could become more difficult to execute secretly….dramatically affect the balance of power between directors, managers, and shareholders").

[298] Id., at 23 ("Blockchain technology has been proposed as a platform for voting in all types of elections, and it appears to be a viable substitute for the archaic corporate proxy voting system that has endured for hundreds of years with surprisingly few concessions to modern technology" (citation omitted)).

[299] Id., at 9. (reporting that the Australian Securities Exchange intends to redesign clearing and settlement systems using blockchain, the Estonian stock exchange conducts shareholder voting on blockchain platform, and Overstock.com issued equity rights over a private blockchain).

Appendix A (Active PPE Firms (U.S.) (as of January 1, 2018))

	Company Name	Ticker	Initial Charter	Initial Bylaws
1	American Capital Ltd	**ACAS**	ACAS Initial Charter	ACAS Initial Bylaws
2	Apollo Investment Corp	**AINV**	AINV Initial Charter	AINV Initial Bylaws
3	Affiliated Managers Group, Inc.	**AMG**	AMG Initial Charter	AMG Initial Bylaws
4	Apollo Global Management	**APO**	APO Initial Charter	APO Initial Bylaws
5	Ares Capital Corp	**ARCC**	ARCC Initial Charter	ARCC Initial Bylaws
6	Ares Management, L.P.	**ARES**	ARES Initial Charter	ARES Initial Bylaws
7	Blackrock Capital Investment Corporation	**BKCC**	BKCC Initial Charter	BKCC Initial Bylaws
8	The Blackstone Group LP	**BX**	BX Initial Charter	BX Initial Bylaws
9	The Carlyle Group LP	**CG**	CG Initial Charter	CG Initial Bylaws
10	Compass Diversified Holdings	**CODI**	CODI Initial Charter	CODI Initial Bylaws
11	Capitala Finance Corp	**CPTA**	CPTA Initial Charter	CPTA Initial Bylaws
12	Capital Southwest Corp	**CSWC**	CSWC Initial Charter	(on file with author)
13	Fidus Investment Corp	**FDUS**	FDUS Initial Charter	FDUS Initial Bylaws
14	FORM Holdings Corp.	**FH**	FH Initial Charter	FH Initial Bylaws
15	Fortress Investment Grp - Cl A	**FIG**	FIG Initial Charter	FIG Initial Bylaws
16	FNFV Group	**FNFV**	FNFV Initial Charter	FNFV Initial Bylaws
17	Fifth Street Asset Management Inc.	**FSAM**	FSAM Initial Charter	FSAM Initial Bylaws
18	FS Investment Corp	**FSIC**	FSIC Initial Charter	FSIC Initial Bylaws
19	Gladstone Investment Corp	**GAIN**	GAIN Initial Charter	GAIN Initial Bylaws
20	Garrison Capital Inc	**GARS**	GARS Initial Charter	GARS Initial Bylaws
21	Golub Capital BDC Inc.	**GBDC**	GBDC Initial Charter	GBDC Initial Bylaws
22	Goldman Sachs BDC Inc	**GSBD**	GSBD Initial Charter	GSBD Initial Bylaws
23	GSV Capital Corp	**GSVC**	GSVC Initial Charter	GSVC Initial Bylaws
24	Hercules Capital Inc	**HTGC**	HTGC Initial Charter	HTGC Initial Bylaws
25	KCAP Financial Inc.	**KCAP**	KCAP Initial Charter	KCAP Initial Bylaws
26	KKR LP	**KKR**	KKR LPA	KKR LLC OA
27	Main Street Capital Corp	**MAIN**	MAIN Initial Charter	MAIN Initial Bylaws
28	Medley Capital Corp.	**MCC**	MCC Initial Charter	MCC Bylaws
29	MVC Capital Inc	**MVC**	MVC Initial Charter	MVC Initial Bylaws
30	New Mountain Finance Corp	**NMFC**	NMFC Initial Charter	NMFC Initial Bylaws
31	Oaktree Capital Group LLC	**OAK**	OAK Initial Charter	OAK Initial Bylaws
32	Och-Ziff Capital Management Group LLC	**OZM**	OZM Initial Charter	OZM Initial Bylaws
33	PJT Partners Inc.	**PJT**	PJT Initial Charter	PJT Initial Bylaws
34	Pennantpark Investment Corp	**PNNT**	PNNT Initial Charter	PNNT Initial Bylaws
35	Prospect Capital Corp	**PSEC**	PSEC Initial Charter	PSEC Initial Bylaws
36	Solar Capital Ltd	**SLRC**	SLRC Initial Charter	SLRC Initial Bylaws
37	Triangle Capital Corp	**TCAP**	TCAP Initial Charter	TCAP Initial Bylaws
38	TCP Capital Corp	**TCPC**	TCP Initial Charter	TCP Initial Bylaws
39	THL Credit, Inc.	**TCRD**	TCRD Initial Charter	TCRD Initial Bylaws

Appendix B (Calling Shareholder Meetings)

Directors only (13)		Directors or Shareholders (22)		Unspecified (4)
AMG	GSBD	AINV (majority)	BX (50%)	CODI [DE]
ARES	KCAP	APO (majority)	FSAM (50%)	CSWC [TX]
BKCC	MVC	ARCC (majority)	KKR (50%)	PNNT [MD]
FIG	OAK	CPTA (majority)	MAIN (50%)	GAIN [DE]
FNFV	PJT	CG (majority)	--	
GARS	TCRD	FDUS (majority)	ACAS (25%)	
GBDC		GSVC (majority)	--	
		HTGC (majority)	MCC (20%)	
		NMFC (majority)	TCPC (20%)	
		OZM (majority)	--	
		PSEC (majority)	FH (10%)	
		SLRC (majority)	FSIC (10%)	
		TCAP (majority)		

Appendix C (Written Consents)

Silent (Default Rules Govern) (26)			Expressly Prohibited (7)	Permitted, but modified or specified threshold (6)
AINV [MD]	FH [DE]	NMFC [DE]	ACAS	CG (majority)
APO [DE]	FIG [DE]	OAK [DE]	AMG	--
ARCC [MD]	FSIC [MD]	OZM [DE]	FSAM	ARES (set by general partner)
BKCC [DE]	GAIN [DE]	PNNT [MD]	GBDC	--
BX [DE]	GSVC [MD]	PSEC [MD]	GSBD	PJT (director permission)
CODI [DE]	HTGC [MD]	SLRC [MD]	FNFV	--
CPTA [MD]	KCAP [DE]	TCPC [DE]	KKR	GARS (unanimous consent)
CSWC [TX]	MAIN [MD]	TCRD [DE]		MCC (unanimous consent)
FDUS [MD]	MVC [DE]			TCAP (unanimous consent or director permission)

Appendix D (Voting Standards; Dual Class Capital Structure)

FIRM	Summary of Voting Standards Provided in the Governing Documents
16 firms' (ACAS; AMG; BX; CG; CODI; FH; FNFV; FSAM; GAIN; GARS; GSBD; MCC; MVC; NMFC; OZM; PJT) governing documents are **silent** on voting standards (all are Delaware entities).	
AINV	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain charter amendments and any proposal for conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80 percent of the votes entitled to be cast • However, if such amendment or proposal is approved by at least two-thirds of continuing directors (in addition to approval by board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast
APO	• So long as the Apollo Group beneficially owns at least 10% of the aggregate number of votes that may be cast by holders of outstanding voting shares (the 'Apollo control condition'), the manager will conduct, direct and manage all activities of APO, LLC • So long as the Apollo control condition is satisfied, the manager will manage all operations and activities and will have discretion over significant corporate actions, such as the issuance of securities, payment of distributions, sales of assets, making certain amendments to our operating agreement and other matters, and the board of directors will have no authority other than that which our manager chooses to delegate to it
ARCC	• Certain charter amendments and any proposal for our conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for our liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80 percent of the votes entitled to be cast on such matter. • However, if such amendment or proposal is approved by at least two-thirds of continuing directors (in addition to approval by board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast
ARES	• Majority of Outstanding Voting Units required to approve a merger, consolidation, or conversion of the partnership into another limited liability entity.

BKCC	• The conversion from a business development company to an open-end investment company, liquidation and dissolution, the merger or consolidation with any entity in a transaction as a result of which the governing documents of the surviving entity do not contain substantially the same anti-takeover provisions or the amendment of any of the provisions discussed herein shall require the approval of
	  • (i) the holders of at least 80% of the then outstanding shares, voting together as a single class, or
	  • (ii) at least (A) a majority of the "continuing directors" and (B) the holders of at least 75% of the then outstanding shares entitled to vote generally in the election of directors, voting together as a single class

CPTA	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain charter amendments, any proposal for our conversion, whether by charter amendment, merger or otherwise, from a closed-end company to an open-end company and any proposal for our liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80% of the votes entitled to be cast

	• However, if such amendment or proposal is approved by a majority of continuing directors (in addition to approval by our Board of Directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast • Any amendment or proposal that would have the effect of changing the nature of business so as to cause CPTA to cease to be, or to withdraw its election as, a BDC would be required to be approved by a majority of outstanding voting securities
CSWC	• The affirmative vote of the holders (other than Related Persons with whom the Business Combination is proposed) of not less than two-thirds of the outstanding shares of voting stock not owned, directly or indirectly, by the Related Person or Related Persons with whom the Business Combination is proposed shall be required for the approval or authorization of any Business Combination • provided, however, that the requirement referred to above shall not be applicable if: the Business Combination is solely between the corporation and another corporation, fifty percent (50%) or more of the Voting Stock of which is owned, directly or indirectly, by the corporation and none of the Voting Stock of which is owned, directly or indirectly, by a Related Person with whom the Business Combination is proposed; or • All of the following conditions have been met: ▪ the consideration to be received per share by holders of common stock of the corporation in the Business Combination is not less than the higher of (i) the highest price per share paid by the Related Person with whom the Business Combination is proposed in acquiring any of its holdings of the corporation's common stock or (ii) the highest per share market price of the common stock of the corporation during the three-month period immediately preceding the date of the proxy statement; ▪ the consideration to be received by such holders is either cash or, if the Related Person with whom the Business Combination is proposed shall have acquired the majority of its holdings of the corporation's common stock for a form of consideration other than cash, in the same form of consideration as such Related Person acquired such majority; ▪ the Related Person shall not have received the benefit, directly or indirectly (except proportionately as a shareholder), of any loans, advances, guarantees, pledges or other financial assistance or any tax credits or other tax advantages provided by the corporation; and ▪ a proxy statement shall be mailed to all shareholders of record at least forty (40) days prior to the date of a meeting for the purpose of soliciting shareholder approval and shall contain at the front thereof, in a prominent place, any recommendations as to the advisability (or inadvisability) of the Business Combination and, if deemed advisable by a majority of the Continuing Directors, an opinion of a reputable investment banking firm as to the fairness (or unfairness) of the terms of such Business Combination from the point of view of the remaining shareholders of the corporation
FDUS	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast on the matter. • Certain charter amendments, any proposal for conversion, whether by charter amendment, merger or otherwise, from a closed-end company to an open-end company and any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80.0% of the votes entitled to be cast • However, if such amendment or proposal is approved by a majority of continuing directors (in addition to approval by our board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast

FIG	• Principals will have approval rights with respect to certain extraordinary transactions so long as they and their permitted transferees continue to hold more than 40% of the total voting power of our outstanding shares."
FSIC	• Provided that directors then in office have approved and declared the action advisable and submitted such action to the stockholders, action that requires stockholder approval, including dissolution, a merger or a sale of all or substantially all assets or a similar transaction outside the ordinary course of business must be approved by the affirmative vote of stockholders entitled to cast at least a majority of all the votes entitled to be cast • The affirmative vote of the holders of shares entitled to cast at least 80% of all the votes entitled to be cast on the matter, with each class that is entitled to vote on the matter voting as a separate class, shall be required to effect any amendment to the charter to make the common stock a "redeemable security" or convert FSC, whether by merger or otherwise, from a "closed-end company" to an "open-end company" (as such terms are defined in the 1940 Act), to cause its liquidation or dissolution or any amendment to its charter to effect any such liquidation or dissolution, or to amend certain charter provisions • provided that, if the Continuing Directors, by a vote of at least two-thirds of such Continuing Directors, in addition to approval by the board of directors, approve such amendment, the affirmative vote of only the holders of stock entitled to cast a majority of all the votes entitled to be cast shall be required
GBDC	• Board of directors adopted a resolution exempting from Section 203 of the DGCL any business combination between GBDC and any other person, subject to prior approval of such business combination by the board of directors, including approval by a majority of directors who are not "interested persons" • Otherwise Section 203 of the DGCL and applicable requirements of the 1940 Act apply.
GSVC	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain charter amendments, any proposal for conversion, whether by charter amendment, merger or otherwise, from a closed-end company to an open-end company and any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80% of the votes entitled to be cast on such matter • However, if such amendment or proposal is approved by a majority of continuing directors (in addition to approval by our board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast
HTGC	• Provided that at least 75% of directors then in office have approved and declared the action advisable and submitted such action to the stockholders, any dissolution, any amendment to the charter that requires stockholder approval, a merger, a sale of all or substantially all assets or a similar transaction outside the ordinary course of business must be approved by the affirmative vote of stockholders entitled to cast at least a majority of the votes entitled to be cast • If an extraordinary matter submitted to stockholders by the board of directors is approved by less than 75% of our directors, such matter will require approval by the affirmative vote of stockholders entitled to cast at least two-thirds of the votes entitled to be cast
KCAP	• The affirmative vote of the holders of at least 75% of the shares of the corporation's capital stock then outstanding and entitled to vote in the election of directors, voting together as a single class shall be required to (1) amend or repeal any provision of Articles V, VI, VII, VIII or IX of the Certificate of Incorporation , (2) effect the liquidation or dissolution of the corporation and any amendment to the Certificate of Incorporation to effect any such liquidation or dissolution, or (3) a conversion of the corporation from a "closed-end company" to an "open-end company"

	• provided, however, that, if the Continuing Directors (as defined herein), by a vote of at least 75% of such Continuing Directors, in addition to approval of the Board of Directors, approve such proposal or amendment, the affirmative vote of the holders of the majority of the votes entitled to be cast shall be sufficient
KKR	• The board shall not authorize, approve or ratify any of the following actions or any plan with respect thereto without the prior approval of a majority of Class A Members: • entry into a debt financing arrangement in an amount in excess of 10% of the then existing long-term indebtedness of the Issuer; • the issuance of any securities that would (i) represent at least 5% of any class of equity securities or (ii) have designations, preferences, rights, priorities or powers that are more favorable than those of the common units; • the adoption of a shareholder rights plan; • the amendment of the Issuer Limited Partnership Agreement or the Group Partnership Agreements; • the exchange or disposition of all or substantially all of the assets, taken as a whole, of the Issuer or any Group Partnership; • the merger, sale or other combination of the Issuer or any Group Partnership with or into any other person; • the transfer, mortgage, pledge, hypothecation or grant of a security interest in all or substantially all of the assets of the Group Partnerships; • the appointment or removal of a Chief Executive Officer or a Co-Chief Executive Officer of the Company or the Issuer; • the termination of the employment of any Officer of the Issuer or a Subsidiary of the Issuer or the termination of the association of a partner with any Subsidiary of the Issuer, in each case, without cause; and • liquidation or dissolution; and • the withdrawal, removal or substitution of the Company as the general partner of the Issuer or any person as the general partner of a Group Partnership, or the direct or indirect transfer of beneficial ownership of all or any part of a general partner interest in the Issuer or a Group Partnership
MAIN	• Approval of amendments to articles of incorporation and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain amendments and any proposal for conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 75.0% of the votes entitled to be cast • However, if such amendment or proposal is approved by at least 75.0% of continuing directors (in addition to approval by the board of directors), such amendment or proposal may be approved by the stockholders entitled to cast a majority of the votes entitled to be cast
OAK	• The board of directors may, without member approval, (i) convert into a new limited liability entity or (ii) merge into, or convey all of the company's assets to, another limited liability entity, which entity shall be newly formed and shall have no assets, liabilities or operations at the time of such conversion, merger or conveyance; provided, that (A) the company has received an Opinion of Counsel that the merger or conveyance, as the case may be, will not result in the loss of the limited liability of any member, (B) the sole purpose of such conversion, merger or conveyance is to effect a mere change in the legal form of the company into another limited liability entity and (C) the governing instruments of the new entity provide the members and the board of directors with substantially the same rights and obligations as are herein contained. • Note: so long as its sponsors (or their successors or affiliated entities) collectively hold, directly or indirectly, at least 20% of the aggregate outstanding Oaktree

	Operating Group units (referred to as the "Oaktree control condition") the manager entity, which is 100% owned and controlled by its sponsors will be entitled to designate all the members of Oaktree's board of directors
PNNT	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain charter amendments and any proposal for conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80 percent of the votes entitled to be cast • However, if such amendment or proposal is approved by at least two-thirds of continuing directors (in addition to approval by our board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast
PSEC	• Approval of charter amendments and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain charter amendments and any proposal for conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 80 percent of the votes entitled to be cast • However, if such amendment or proposal is approved by at least two-thirds of continuing directors (in addition to approval by our board of directors), such amendment or proposal may be approved by a majority of the votes entitled to be cast
SLRC	• Provided that at least 75% of directors then in office have approved and declared the action advisable and submitted such action to the stockholders, any dissolution, any amendment to the charter that requires stockholder approval, a merger, or a sale of all or substantially all assets or a similar transaction outside the ordinary course of business, must be approved by the affirmative vote of stockholders entitled to cast at least a majority of the votes entitled to be cast • If an extraordinary matter submitted to stockholders by the board of directors is approved by less than 75% of our directors, such matter will require approval by the affirmative vote of stockholders entitled to cast at least two-thirds of the votes entitled to be cast
TCAP	• Approval of amendments to articles of incorporation and extraordinary transactions by the stockholders entitled to cast at least a majority of the votes entitled to be cast • Certain amendments and any proposal for conversion, whether by merger or otherwise, from a closed-end company to an open-end company or any proposal for liquidation or dissolution requires the approval of the stockholders entitled to cast at least 75.0% of the votes entitled to be cast • However, if such amendment or proposal is approved by at least 75.0% of continuing directors (in addition to approval by our board of directors), such amendment or proposal may be approved by the stockholders entitled to cast a majority of the votes entitled to be cast on such a matter
TCPC	• Company may merge or consolidate with any other entity, or sell, lease or exchange all or substantially all of the assets upon approval by two-thirds of the directors then in office and the affirmative vote of not less than two-thirds of the outstanding Shares
TCRD	• Conversion from a business development company to a closed-end investment company or an open-end investment company, liquidation and dissolution, merger or consolidation with any entity in a transaction as a result of which the governing documents of the surviving entity do not contain substantially the same provisions as described in Sections

	5.1, 5.4, 5.5, 5.6, 7.1, 7.2, 8.1, 8.2, 9.1 and 10.1 of TCRD's Certificate of Incorporation or the amendment of any of the provisions discussed therein shall require the approval of • (i) the holders of at least 80% of the then outstanding shares of the corporation's capital stock, voting together as a single class, or • (ii) at least (A) a majority of the "continuing directors" and (B) the holders of at least 75% of the then outstanding shares of the corporation's capital stock entitled to vote generally in the election of directors, voting together as a single class

Appendix E (Appraisal Rights)

Appraisal Rights Only if Permitted by the Board (8)	**No Appraisal Rights (4)**	**No Mention of Appraisal Rights (27)**		
CPTA	APO	ACAS [DE]	CSWC [TX]	KCAP [DE]
FDUS	FIG	AINV [MD]	FH [DE]	KKR [DE]
GSVC	MAIN	AMG [DE]	FNFV [DE]	MCC [DE]
HTGC	OAK	ARCC [MD]	FSAM [DE]	MVC [DE]
PNNT		ARES [DE]	FSIC [MD]	NMFC [DE]
PSEC		BKCC [DE]	GAIN [DE]	OZM [DE]
SLRC		BX [DE]	GARS [DE]	PJT [DE]
TCPC		CG [DE]	GBDC [DE]	TCAP [MD]
		CODI [DE]	GSBD [DE]	TCRD [DE]

Appendix F (Director Elections; Cumulative Voting; Classified and Continuing Boards)

	Standard	Cumulative Voting (2)	Classified (26)	Continuing (12)
ACAS	Plurality	No	**Yes**	No
AINV	Plurality	No	**Yes**	No
AMG	Plurality	No	No	No
APO	Plurality	No	No	No
ARCC	Majority	No	**Yes**	No
ARES	Plurality	No	**Yes**	No
BKCC	Majority	No	**Yes**	**Yes**
BX	n/a	n/a	n/a	No
CG	n/a	n/a	n/a	No
CODI	Plurality	No	**Yes**	No
CPTA	Plurality	No	**Yes**	**Yes**
CSWC	Plurality	No	No	**Yes**
FDUS	Plurality	No	**Yes**	**Yes**
FH	Plurality	No	No	No
FIG	Plurality	No	**Yes**	No
FNFV	Majority	No	**Yes**	No
FSAM	Plurality	**Yes** (for class B only—for principals)	No	No
FSIC	Plurality	No	No	No
GAIN	Majority	No	**Yes**	No
GARS	Majority	No	**Yes**	No
GBDC	Majority	No	**Yes**	No
GSBD	Plurality	No	**Yes**	No
GSVC	Plurality	No	**Yes**	**Yes**
HTGC	Majority	No	**Yes**	**Yes**
KCAP	Majority	No	**Yes**	**Yes**
KKR	N/A	N/A	N/A	No
MAIN	Plurality	No	No	No
MCC	Majority	No	**Yes**	No
MVC	Plurality	No	**Yes**	**Yes**
NMFC	Majority	No	**Yes**	No
OAK	Plurality	**Yes** (for class B only—for principals)	No	No
OZM	Plurality	No	**Yes**	No
PJT	Plurality	No	**Yes**	No
PNNT	Majority	No	**Yes**	**Yes**
PSEC	Majority	No	**Yes**	**Yes**
SLRC	Majority	No	**Yes**	**Yes**
TCAP	Plurality	No	No	No
TCPC	N/A	N/A	N/A	No
TCRD	Majority	No	**Yes**	**Yes**

Appendix G (Removal of Directors)

Standard for Removal	Firms		
Removal with or without cause by a majority vote by shareholders (8)	ACAS ARES CG	FH FIG FSAM	KKR OZM
Removal for cause only with a majority vote by shareholders (4)	CODI FNFV	GARS	GBDC
Removal for cause only with two-thirds vote by shareholders (12)	AMG BX CPTA CSWC	FDUS GAIN GSBD GSVC	HTGC PNNT PSEC SLRC
Removal for cause only with three-quarters vote by shareholders (7)	BKCC KCAP MCC	MVC NMFC	PJT TCRD
Removal only by managers or other directors (3)	APO (manager)	OAK (manager)	TCPC (directors)
Governing Documents are silent on the issue of director removal (5)	AINV FSIC	TCAP ARCC	MAIN

Appendix H (Fiduciary Duties)

PPE Ticker (Jurisdiction)	Relevant Section of Charter (or equivalent)	Limitation of Liability
ACAS (DE)	Article VIII	Mirrors 102(b)(7)
AINV (MD)	Section 7.1	To the maximum extent permitted by Maryland law
AMG (DE)	Article VII	Mirrors 102(b)(7)
APO (DE)	-	Default Delaware LLCA rules apply
ARCC (MD)	Tenth	To the maximum extent permitted by Maryland law
ARES (DE)	Section 3.1	No liability (except as required by DE LPA)
BKCC (DE)	Section 8.2	Mirrors 102(b)(7)
BX (DE)	-	Default Delaware LLCA rules apply
CG (DE)	-	Default Delaware LLCA rules apply
CODI (DE)	Section 9.	No liability (except liability arising from trustee's own gross negligence or willful misconduct as determined by a court of competent jurisdiction)
CPTA (MD)	Section 7.1	To the maximum extent permitted by Maryland law
CSWC (TX)	-	Default Texas rules apply
FDUS (MD)	Section 7.1	To the maximum extent permitted by Maryland law
FH (DE)	Ninth	Mirrors 102(b)(7)
FIG (DE)	-	Default Delaware LLCA rules apply
FNFV (DE)	Article XII	Mirrors 102(b)(7)
FSAM (DE)	Article VIII	To the maximum extent permitted by the DGCL
FSIC (MD)	-	Default Maryland rules apply
GAIN (DE)	Article VI	To the maximum extent permitted by the DGCL
GARS (DE)	Section 7.1	Mirrors 102(b)(7)
GBDC (DE)	Section 7.1	Mirrors 102(b)(7)

GSBD (DE)	Article VII	Mirrors 102(b)(7)
GSVC (MD)	Section 7.1	To the maximum extent permitted by Maryland law
HTGC (MD)	Section 7.1	To the maximum extent permitted by Maryland law
KCAP (DE)	Article VI	Mirrors 102(b)(7)
KKR (DE)	Section 3.1	No liability (except as required by DE LPA)
MAIN (MD)	Section 7.1	To the maximum extent permitted by Maryland law
MCC (DE)	Section 7.1	Mirrors 102(b)(7)
MVC (DE)	Article XII	To the maximum extent permitted by the DGCL
NMFC (DE)	-	Default DGCL rules apply
OAK (DE)	-	Default Delaware LLCA rules apply
OZM (DE)	Sixth(4)	Mirrors 102(b)(7)
PJT (DE)	Section 8.1	To the maximum extent permitted by the DGCL
PNNT (MD)	Section 1.18	To the maximum extent permitted by Maryland law
PSEC (MD)	Section 7.1	To the maximum extent permitted by Maryland law
SLRC (MD)	Section 7.1	To the maximum extent permitted by Maryland law
TCAP (MD)	Tenth	To the maximum extent permitted by Maryland law
TCPC (DE)	Section 9.7	No liability (except as required by DE law)
TCRD (DE)	Section 6.2	Mirrors 102(b)(7)

Appendix I (Inspection Rights)

Information Rights (more than one might apply to some firms)	**Firms**		
Governing documents are silent on this issue (10)	AINV [MD] BX [DE] CG [DE] CODI [DE]	CSWC [TX] GSVC [MD] KKR [DE]	NMFC [DE] OAK [DE] SLRC [MD]
Shareholders can examine lists of shareholders for purposes germane to that meeting (13)	ACAS AMG BKCC FIG FNFV	FSAM FSIC GAIN MVC	OZM PJT TCPC TCRD
Shareholders lose right if inspection is for an "improper purpose" (14)	ARCC CPTA FDUS FSIC	HTGC KCAP MAIN MCC	PNNT PSEC TCAP
Manager appointee oversees shareholder inspections (6)	APO ARES	FH GARS	GBDC GSBD

Appendix J (Charter and Bylaw Amendments)

Firm	Charter Amendments	Bylaw Amendments
ACAS	Majority of board and majority of shareholders	Majority of board or 75% of shareholders
AINV	Corporation has the exclusive power to amend	Board has exclusive power to amend
AMG	First approved by the Board of Directors and thereafter approved by majority of shareholders (specified amendments require **80%** shareholder approval)	Majority of board or two-thirds of shareholders (amendments approved by board require only majority shareholder approval)
APO	-	Approval by manager and majority of members (specified amendments require 90% shareholder approval or the consent of adversely affected member or class)
ARCC	Corporation has the exclusive power to amend	Board has exclusive power to amend
ARES	-	General partner has exclusive power to amend (specified amendments require 90% unitholder approval or the consent of adversely affected unitholder or class)
BKCC	**75%** shareholder approval required to amend Article VI (Board of Directors) and Article IX (Special Meetings) of the charter	Board has exclusive power to amend
BX	-	Approval by the partnership and the Demand Committee
CG	-	Majority of shareholders
CODI	-	Amendable by members by an executed written instrument
CPTA	Corporation has the exclusive power to amend	Board has exclusive power to amend
CSWC	**Two-thirds** shareholder (other than related persons) approval for amendment of related person provisions	Board has exclusive power to amend
FDUS	Specified amendments require up to **80%** shareholder approval	Board has exclusive power to amend
FH	Corporation has the exclusive power to amend	Majority of shareholders
FIG	-	First approved by the Board of Directors and thereafter approved by majority of shareholders by written consent
FNFV	Majority of board and **two-thirds** of shareholders	Majority of board or two-thirds of shareholders
FSAM	Specified amendments require up to **two-thirds** shareholder approval	Same as charter
FSIC	-	Board has exclusive power to amend
GAIN	Corporation has the exclusive power to amend	Majority of board or two-thirds of shareholders
GARS	Corporation has the exclusive power to amend	Board and shareholders have shared power to amend
GBDC	Corporation has the exclusive power to amend	Board has exclusive power to amend
GSBD	Approval of **two-thirds** of shareholders	Approval by board or two-thirds of shareholders
GSVC	Corporation has the exclusive power to amend	Board has exclusive power to amend
HTGC	Corporation has the exclusive power to amend	Board has exclusive power to amend
KCAP	Specified amendments require up to **three-fourths** shareholder approval	Majority of board or 75% of shareholders

KKR	N/A	N/A
MAIN	Majority of the board may approve amendments to the number of authorized shares (**two-thirds** shareholder approval required to amend this provision)	Board has exclusive power to amend
MCC	Corporation has the exclusive power to amend	Two-thirds of board or two-thirds of shareholders (amendments relating to the size of board or relating to certain actions requiring approval by the board requires 75% board approval)
MVC	Board has the exclusive power to amend	Two-thirds of board or two-thirds of shareholders
NMFC	-	-
OAK	-	First proposed by the board and thereafter approved by majority of shareholders (specified changes may be amended by board without shareholder approval)
OZM	Corporation has the exclusive power to amend	Directors and shareholders have concurrent power
PJT	Specified amendments require **75%** shareholder approval	Majority of board or 75% of shareholders
PNNT	Corporation has the exclusive power to amend	Board has exclusive power to amend
PSEC	Board has the right to amend (other than extraordinary actions that require up to **80%** shareholder approval)	Board has exclusive power to amend
SLRC	Corporation reserves the right to amend (up to **80%** shareholder approval for specified amendments)	Board has exclusive power to amend
TCAP	Corporation has the exclusive power to amend	Board has exclusive power to amend
TCPC	First approved by the Board of Directors and thereafter approved by **75%** of shareholders (specified amendments require **100%** approval by affected shareholders)	Majority of board or majority of shareholders (80% shareholder approval for specified amendments)
TCRD	Specified provisions require up to **80%** shareholder approval (or a lower standard, if continuing directors approve such amendment)	Board has exclusive power to amend