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The High Price of Control: Elon Musk, Delaware's Judiciary, and the State's Corporate Future

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To Professor Matera, for believing in me and for his invaluable guidance.

To my beloved family, for their unwavering love and support throughout my academic journey.

To my boyfriend, Simone, for being a profound source of inspiration and motivation.

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I. Introduction

This thesis explores the evolving landscape of corporate governance, with a particular focus on the concept of "controlling shareholders" within Delaware corporate law, the implications of recent judicial decisions, such as *Tornetta v. Musk*, and the potential shifts in the balance of power between corporate boards and judicial oversight. It examines the increasing complexities and uncertainties arising from Delaware's current approach and investigates proposed course corrections. Furthermore, the analysis extends beyond Delaware to consider emerging players, notably Texas, and its bid to challenge Delaware's long-standing dominance in corporate incorporations. Ultimately, the thesis examines the future of Delaware's corporate law, considering the impact of interest groups, the tension between statutory language and market practice, and judicial perspectives on the state's competitive position.

Part II lays the groundwork by exploring the foundational concept of control and fiduciary duties. It outlines how Delaware courts have broadened the definition of a controlling shareholder and the rigorous entire fairness standard applied to transactions involving them. This section also discusses the historical understanding of control as an economic asset and the differing views on its ownership and benefits. The discussion encompasses the complexities of control, including opportunities for expropriatory gain and the legal mechanisms designed to manage these risks. It further contrasts the traditional distinctions made between shareholders and management regarding fiduciary duties, highlighting circumstances in which even controlling shareholders are free to act in their self-interest. The chapter then details the extension of controlling shareholder fiduciary duties, examining how the concept has evolved from a focus on majority stock ownership to include shareholders who exercise effective or actual control, even with a stake of less than a majority. It also examines the impact of dual-class structures and the courts' growing tendency to base control on voting power rather than economic ownership. The chapter outlines the recent broadening of the control definition to include "soft control" mechanisms beyond voting power, such as contractual rights and managerial influence.

Part III scrutinizes the landmark case of *Tornetta v. Musk*. It first defines the "Superstar CEO," a concept central to the *Tornetta* ruling, exploring how such individuals are perceived to make unique contributions to company value and the potential governance challenges they pose due to their considerable power over boards and shareholders. The chapter explains how Chancellor McCormick in *Tornetta v. Musk* supported categorizing superstar CEOs as controllers, noting this as a novel step in Delaware jurisprudence, where the belief in a CEO's singular importance shifts power dynamics and can create a "distortion field" that interferes with board oversight. This part details the court's

2024 decision to rescind Elon Musk's $55.8 billion compensation package, outlining the performance-based plan and the subsequent derivative suit. The court's findings of conflicts of interest, Musk's outsized influence (despite owning 21.9% of voting power), his "Superstar CEO" status, close relationships with board members, and the lack of adversarial negotiations are discussed as reasons for applying the entire fairness standard and ultimately voiding the grant due to uninformed stockholder consent and failure to demonstrate fair dealing and fair price.

Part IV explores the broader consequences of these evolving doctrines. The chapter discusses concerns such as heightened legal uncertainty, subjecting shareholders with minimal holdings to fiduciary liability without clear guidelines, and increased litigation. It highlights the trend of considering individuals with influence as controlling shareholders, even when they hold less than a majority voting power, and the expansion of fiduciary duties to encompass personal shareholder rights, creating tension with the business judgment rule. The shift from objective control criteria to concepts such as domination and soft power, which may vary by context, is examined, along with the role of contractual rights in conferring control. This section further discusses the conflict between increased judicial scrutiny of controlled companies and Delaware's traditional deference to corporate decisions, alongside the market acceptance of controlling shareholders and arrangements that support such control. This part underscores the importance of certainty and predictability in corporate law for informed decision-making and investment, arguing that Delaware's current ambiguity regarding control falls short. The challenges posed by the superstar CEO model due to its vague standards are also noted. Potential negative impacts include deterring risk-taking and investment, affecting complex ownership structures in startups, discouraging investor activism, and blurring lines between shareholders and management, thereby conflicting with the Delaware General Corporation Law (DGCL) framework. The chapter concludes by outlining suggestions for reform, emphasizing a strict definition of control based on true domination, requiring substantial stock ownership, and aiming for clarity and predictability. This section further details Senate Bill 21, introduced in February 2025, which aims to amend DGCL § 144 to include controlling stockholder transactions within its safe harbor. The proposed evolution of the *Sinclair Oil* Evolution standard is discussed, arguing against the recent trend of applying entire fairness whenever a controller extracts a non-ratable benefit, even if not to the minority's detriment. The discussion critiques the automatic application of entire fairness to all freeze-out mergers, arguing that it can deter beneficial transactions and that the coercion argument is not always convincing. The chapter evaluates the imprecise, fact-specific inquiry into director independence, advocating for more explicit rules, potentially aligning with stock exchange listing standards or creating presumptions of independence for directors meeting specific criteria, as also addressed in Senate Bill 21.

Part V shifts the focus to potential competitors. It discusses Tesla's reincorporation from Delaware to Texas following the *Tornetta* decision, noting significant support from non-controlling and institutional investors. The chapter examines the reasons behind Tesla's move, suggesting that while Texas lacks extensive case law for large public companies, it presents a "blank canvas" for influential figures to shape legal frameworks in favor of "controller primacy." Then, it compares Texas and Delaware corporate law, highlighting similarities while noting that Delaware has an extensive body of case law compared to Texas's limited precedent for public companies. This part details the establishment of specialized courts in September 2024, designed for complex business disputes exceeding $5 million, with judges appointed by the governor serving two-year terms and appeals to the new Fifteenth Court of Appeals. This is contrasted with Delaware's system of Senate-confirmed judges serving twelve-year terms, which features a bipartisan balance and no jury trials, whereas Texas allows jury trials. The section questions whether appointed judges appealing to elected judges will be effective and whether the Texas Business Organizations Code (TBOC) can replicate Delaware's outputs, such as written opinions and specialized expertise, without a high volume of corporate governance cases. Paradoxically, some Texas legislative proposals appear to contradict Tesla's rationale for relocating and could increase litigation. Additionally, this chapter presents scholarly views on Tesla's move to Texas, with critics seeing it as futile or motivated by entrenchment. At the same time, supporters argue Delaware has strayed, and Texas offers a fresh start. Ultimately, this section addresses the overarching threat of federal intervention in corporate law, which Musk invoked, noting that federal preemption poses a significant concern for revenue-dependent states like Delaware and that Congress has historically intervened in areas such as shareholder voting rights.

Part VI considers the sustainability of Delaware's preeminence, noting the recent serious discussions about Delaware's status as the preferred state of incorporation, even among prominent practitioners. Delaware's "product" (a responsive legislature, an esteemed judiciary, and an efficient Secretary of State) is described, alongside concerns that some judges are adopting a "suspicious or negative" attitude towards business, which contrasts with their deference to the plaintiffs' bar. Despite these concerns, Delaware is deemed unlikely to lose its standing due to isolated incidents and the lack of a superior alternative. The chapter argues that Delaware law, particularly concerning controllers, may have become overly complex, and that recent controversial rulings offer "protections" to minority shareholders that they may not value or desire, as exemplified by Tesla shareholders ratifying Musk's pay package after its invalidation. There are concerns that Delaware may attempt to discourage corporations from relocating. The difference between smaller enterprises and larger, innovation-driven firms is acknowledged, with the latter still likely preferring Delaware as the benchmark for corporate governance.

II. Controlling Shareholders In Delaware Corporate Law

A. Concept of Control and Fiduciary Duties

Delaware courts have steadily expanded the definition of who qualifies as a "controlling shareholder" and imposed rigorous "entire fairness" standards on transactions involving controllers.[1] When entire fairness serves as the standard of review, the burden of proof lies with the defendant to demonstrate the transaction's fairness.[2] Fairness, within this framework, encompasses two critical components: fair dealing and fair price.[3] The former pertains to the procedural aspects through which the transaction was proposed, approved, and executed.[4] In contrast, the latter addresses the economic implications of the transaction.[5] The review process is not distinctly divided; instead, all elements of the transaction must be assessed collectively.[6] Fairness review also entails "close scrutiny by the court" of the defendant's actions, a degree "of scrutiny that is inappropriate when the business judgment rule's presumption attaches to a decision."[7] Recently, Delaware's approach has become overly restrictive, stifling beneficial transactions and increasing legal uncertainty.[8]

Historically, commentators and corporate participants have understood control as an economic concept for ordering the corporation and directing its endeavors.[9] More specifically, control over a corporation is a definable asset that can be transferred and regulated.[10] On the one hand, some authors describe control as an asset and argue that the asset belongs to the corporation.[11] On the other

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[1] Stephen M. Bainbridge, *A Course of Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. (forthcoming 2025) (manuscript at 4, rev. Mar. 26, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5022685. The concept of a controlling shareholder will be discussed in greater detail *infra* Part IV.

[2] *Id.* at 33 n.155.

[3] Kahn v. Lynch Commun. Sys., Inc., 638 A.2d at 1115 (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983)). Delaware courts use the terms entire fairness, intrinsic fairness, and fairness interchangeably. *See, e.g.*, Tanzer v. Intl. Gen. Industries, Inc., 402 A.2d 382, 386 (Del. Ch. 1979) ("The words 'entire fairness' are synonymous with the words 'intrinsic fairness.'") (cited in *Id.* at 33 n.156).

[4] Kahn, 638 A.2d at 1115 (quoting *Weinberger* to the effect that fair dealing "embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained") (cited in *Id.* at 33 n.157).

[5] *Id.*

[6] *Id.*

[7] Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 901 (Del. Ch. 1999). The Delaware Supreme Court has described the business judgment rule as "a presumption that in making a business decision 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." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (cited in *Id.* at 33 n.160).

[8] *Id.*

[9] Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, U. PA. L. REV. (forthcoming 2024) (manuscript at 109, rev. Feb. 6, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4968645.

[10] *Id.*

[11] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 244 (1933).

hand, instead, cases such as *Zetlin v. Hanson Holdings*[12] recognize that control is an economic asset owned by the controlling shareholder and that the right to benefit from that control belongs to the shareholder rather than the corporation.[13]

Modern courts and commentators regard the controlling shareholder as entitled to treat control as a private asset and defend the economic efficiency of doing so.[14] Indeed, recognizing and protecting the right of an owner to benefit from control also provides theoretical advantages to minority shareholders.[15] Zohar Goshen and Assaf Hamdani explored this theory,[16] explaining that control allows entrepreneurs to pursue business strategies they believe will yield above-market returns by ensuring the ability to implement their vision as they see fit. They also argue that concentrated ownership is not "unalloyed evil"[17] but rather "creates value for controlling and minority shareholders alike."[18] The theory of economic control and its value thus recognize that the existence of a majority stockholder does not present an inherent corporate governance problem.[19]

Similarly, Ron Gilson and Alan Schwartz argue that majority shareholders can effectively monitor management, and permitting controllers to receive private control benefits incentivizes them to engage in such monitoring.[20] Furthermore, the economic stake of the majority shareholder is likely to align its interests regarding operational decisions with those of the minority shareholders.[21]

However, the presence of control creates opportunities for the controller's private expropriatory gain. In other words, while control can offer economic benefits, it can also lead to undue and excessive gains for the controller at the expense of other shareholders. Corporate law, market forces, and regulation work to reconcile the advantages of control while managing its negative aspects.[22]

The issue of controlling shareholders' stance has always been discussed from various perspectives. Some argue that controlling shareholders differ from corporate officers and directors in

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[12] 397 N.E. 2d 387 (N.Y. 1979).
[13] *See also* Cheff v. Mathes, Del. Supr., 41 Del. Ch. 494, 199 A.2d 548 (1964); Levy v. American Beverage Corp., 265 App. Div. 208, 38 N.Y.S.2d 517 (1st Dep't 1942) ("Control might have lawful advantages. We see no reason why the value of control would not be a lawful property right of the controlling stockholders…"). *See generally* Alfred Hill, *The Sale of Controlling Shares*, 70 HARV LAW REV. 986 (1957) (setting forth authority that control is a value accruing to the controller) (cited in Fisch & Solomon, *supra* note 9, at 109 n.26).
[14] Fisch & Solomon, *supra* note 9, at 110.
[15] *Id.*
[16] Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE LAW J 560 (2016).
[17] *Id.* at 560.
[18] *Id.*
[19] Fisch & Solomon, *supra* note 9, at 111.
[20] Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment* 4, 5, 13, 35, 36 (Columbia Law & Econ. Rsch. Paper No. 436; Stanford Law & Econ. Olin Rsch. Paper No. 438; Yale Law & Econ. Rsch. Paper No. 461; ECGI - Law Working Paper No. 216, Nov. 19, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182781.
[21] *Id.* at 19, 32, 35.
[22] Fisch & Solomon, *supra* note 9, at 111.

two ways.[23] First, they do not, as shareholders, have the right to act for the corporation or make decisions on its behalf. Second, shareholders are principals, not agents, which gives them the right to act in their own best interests rather than those of the corporation.[24]

As a result, Delaware and other courts historically distinguished between shareholders and management.[25] Generally, shareholders are not regarded as fiduciaries and do not owe duties to the corporation. As the Delaware courts have emphasized, in the absence of demonstrated control, there is no fiduciary obligation, and a shareholder is free to act solely in their self-interest.[26] Even controlling shareholders owe fiduciary duties to the corporation and other shareholders only in limited circumstances.[27]

Historically, and absent those circumstances, courts have held mainly that controlling shareholders are not subject to fiduciary duties and are legally entitled to accrue the benefits of control.[28] The Delaware Supreme Court outlined this principle in *Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling*.[29] The court stated that "[g]enerally speaking, a shareholder may exercise wide liberality of judgment in the matter of voting, and it is not objectionable that his motives may be for personal profit, or determined by whims or caprice, so long as he violates no duty owed his fellow shareholders."[30] Therefore, shareholders, including those who control, may vote in their own interest.

Likewise, the Delaware courts have determined that controlling stockholders who exercise their right to block shareholder action are not subject to fiduciary review.[31] In *Frantz Mfg. Co. v. EAC Industries*,[32] the Delaware Supreme Court upheld a controlling shareholder's adoption by written consent of a bylaw that required director unanimity to protect its interests.[33] The court specifically

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[23] *Id.* at 113.
[24] Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 DEL. J. CORP. L. 27, 34 (1999) ("[B]ecause shareholders can act in their own self-interest, courts should expect shareholders to assume fiduciary responsibilities only when they exercise power not as shareholders but as managers, negotiating or dictating both sides of a transaction.") (cited in *Id.* at 113. n.49).
[25] *Id.*
[26] *See* Ivanhoe Partners v. Newmont Min. Corp., 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.") (cited in Bainbridge, *supra* note 1, at 11 n.40).
[27] *Id.* at 113, 114.
[28] *See, e.g.*, Jeffrey N. Gordon, Systematic Stewardship, 47 DEL. J. CORP. L. 627, 666–67 (2022) ("[E]ven for a controlling shareholder, there are no shareholder duties, except in frank self-dealing."); *see also* Adolf Berle, Jr., "Control" In Corporate Law, 58 COLUM L. REV. 1212 (1958) (arguing that "[t]he control-function wherever and however held in the corporation is a responsible, not an irresponsible function. It must be used for the benefit and advantage of the corporation, and, where used to benefit holders of control (for example, electing one of them to a salaried office in the corporation or contracting with interests allied to the control-holders), it must not damage the corporation or be unfair or inequitable to it.") (cited in Fisch & Solomon, *supra* note 9, at 114 n.52).
[29] Ringling Bros.-Barnum & Bailey Combined Shows v. Ringling, 53 A.2d 441, 447 (Del. 1947) (cited in *Id.* at 114).
[30] *Id.* at 662.
[31] Fisch & Solomon, *supra* note 9, at 115.
[32] Frantz Manufacturing Co. v. EAC Industries, 501 A.2d 401 (Del. 1985).
[33] *Id.*

held that although it would review the transaction for its equitable nature (a review that did not speak of entire fairness), the controller was justified in its "attempt to avoid its disenfranchisement as a majority shareholder."[34] These precedents demonstrate that Delaware law has historically offered significant latitude to shareholders, including controlling shareholders, to assert their rights without being bound by fiduciary duties or the imposition of entire fairness review.[35] In addition, the traditional controlling shareholder cases primarily relied on objective control measures.[36]

B. Extending Controlling Shareholder Fiduciary Duties

Indeed, early cases referred to "majority stockholder" instead of "controlling shareholder" and focused on situations where a shareholder held a majority or near majority of the corporation's voting stock.[37] To be fair, courts have extended the concept of a majority shareholder not only to those who held mathematical control—that is, more than 50%—but also to those who owned a significant percentage of stock and exercised effective control.[38] As the Delaware Supreme Court explained, "a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."[39]

> [A] stockholder that owns less than half of a corporation's shares will generally not be deemed to be a controlling stockholder, with concomitant fiduciary responsibilities. For a stockholder that owns less than a numerical majority of a corporation's voting shares to be deemed a controlling stockholder for purposes of imposing fiduciary obligations, the plaintiff must establish the actual exercise of control over the corporation's conduct by that otherwise minority stockholder.[40]

Subsequent cases expanded on *Kahn*[41] to acknowledge that a significant shareholder could exert control without possessing an absolute majority of the corporation's shares. However, they generally applied the fiduciary duties associated with majority shareholder status only to those shareholders if they exercised actual control over corporate conduct in the specific transaction being

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[34] *Id.* (cited in Fisch & Solomon, *supra* note 9, at 115 n.62).
[35] Fisch & Solomon, *supra* note 9, at 116.
[36] *Id.*
[37] Kahn, 638 A.2d 1110, 1113.
[38] *See, e.g.*, Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977); Tanzer v. International Gen. Indus., Inc., 379 A.2d 1121 (Del. 1977) (cited in Fisch & Solomon, *supra* note 9, at 116 n.68).
[39] Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987), quoted in Kahn, 638 A.2d 1110, 1114 (Del. 1994) (cited in *Id.* at 117 n.70).
[40] Weinstein Enterprises, Inc. v. Orloff, 870 A.2d 499, 507 (Del. 2005) (cited in Bainbridge, *supra* note 1, at 12 n.44).
[41] Kahn, 638 A.2d 1110, 1113.

examined.[42] In this regard, as Hamermesh, Jacobs, and Strine explain, "[u]nder Delaware law, it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder."[43]

In the absence of majority voting power, the historical standard required proof of "actual domination and control."[44] In the 1988 *Sea-Land* decision, for example, allegations of "significant 'leverage,' (i.e., a superior bargaining position)" because the alleged controlling shareholder owned 39.5% of the corporation's stock were not enough because "'leverage' is not actual domination and control."[45] A 2000 Chancery Court decision thus held that a shareholder owning 46% of the stock but contractually limited to electing a quarter of the board was not a controlling shareholder.[46] In 2013, then-Chancellor Leo Strine held in *Morton's Restaurant Group* that, "under our law, a minority blockholder is not considered to be a controlling stockholder unless it exercises 'such formidable voting and managerial power that [it], as a practical matter, [is] no differently situated than if [it] had majority voting control.'"[47]

Until recently, the application of fiduciary duties and principles of entire fairness to controlling shareholder actions has primarily centered on the freeze-out context. Outside these transactions, the courts generally ruled that transactions involving controlling shareholders were not subject to an entire fairness review.[48]

However, in *In re EZCORP Inc.*,[49] Vice Chancellor Laster adopted a broad perspective on control, investigating "who wields control in substance."[50] He dismissed the notion that controlling shareholders owe fiduciary duties solely to the corporation during freeze-out transactions. Instead, he

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[42] *See* Gilbert v. El Paso Company, Del. Ch., 490 A.2d 1050, 1055 (1984) ("[A] shareholder who owns less than 50% of a corporation's outstanding stocks does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status.") (cited in Fisch & Solomon, *supra* note 9, at 117 n.72).

[43] Lawrence A. Hamermesh, Jack B. Jacobs & Leo E., Jr. Strine, *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 72 BUS. LAW. 321, 35 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3954998 .

[44] *See* In re Sea-Land Corp. Shareholders Litig., No. CIV.A. 8453, 1988 WL 49126, at 3 (Del. Ch. May 13, 1988). *See also* Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989) (requiring a showing of "domination by a minority shareholder through actual control of corporation conduct"); In re Morton's Rest. Group, Inc. Shareholders Litig., 74 A.3d 656, 664–65 (Del. Ch. 2013) (holding that "the Complaint must contain well-pled facts showing that the minority stockholder 'exercised actual domination and control over ... [the] directors.'") (cited in Bainbridge, *supra* note 1, at 13 n.47).

[45] Sea-Land, 1988 WL 49126, at 3 (cited in *Id.* at 13 n.48).

[46] In re W. Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192, at 6 (Del. Ch. May 22, 2000) (cited in *Id.* at 13 n.49).

[47] Morton's Rest. Group, 74 A.3d at 665 (cited in *Id.* at 13 n.50).

[48] Fisch & Solomon, *supra* note 9, at 122.

[49] In re EZCORP Inc. Consulting Agreement Derivative Litigation, No. CV 9962-VCL, 2016 WL 301245 (Del Ch. Jan. 25, 2016) (cited in *Id.* at 122 n.100).

[50] *See id*. at 28 ("Delaware corporate decisions consistently have looked to who wields control in substance and have imposed the risk of fiduciary liability on that person.") (cited in *Id.* at 123 n.102).

determined that these duties extend to any situation where a controller obtains a non-ratable benefit, regardless of whether control was apparent in that transaction.[51]

While Delaware courts applied fiduciary duties and entire fairness to a broader array of transactions, they also broadened the definition of a controlling shareholder to include aspects of a more extensive definition of control. For instance, the rise of dual-class structures has created a new category of controlling shareholders who do not possess a majority economic interest. These structures are designed to give a shareholder voting control even without a majority economic stake. Consequently, dual-class structures present unique risks for opportunistic behavior. At the same time, market trends indicate that investors willingly invest in companies with dual-class structures and see some advantages in doing so. The ability to exercise control through high-vote stock allows a controlling shareholder to influence various corporate decisions, from electing directors to adopting bylaws, solely in their role as a shareholder.[52] Based on the analysis of *EZCORP*, Delaware doctrine can readily accommodate the idea that control should be based on a shareholder's voting power instead of their economic ownership. Consequently, the courts have easily labeled such shareholders as controlling without extensive analysis.[53]

In a similar manner, after reviewing various cases concerning allegations that a minority blockholder should be regarded as controlling, the court in 2014, in *Crimson Explorations*, clarified that "the scatter-plot nature of the holdings highlights the importance and fact-intensive nature of the actual control factor."[54] The court then clarified that previous cases required a plaintiff to demonstrate actual domination by a significant blockholder for the court to recognize the designation as a controlling shareholder.[55] Indeed, "[a]bsent a significant showing [of domination] such as was made in these prior cases, the courts have been reluctant to apply the label of controlling stockholder—potentially triggering fiduciary duties—to large, but minority, blockholders."[56]

As a result of the evolution of the concepts of control and controlling shareholders, corporate law today polices controlling shareholders by subjecting them to unique legal treatment in three crucial respects.[57] First, controlling shareholders—unlike minority shareholders—have fiduciary duties to the corporation.[58]

> A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders. Their powers are powers in trust. Their dealings with the corporation

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[51] *See id*. at 36 ("The entire fairness framework clearly governs squeeze-out mergers, but Delaware courts also have applied it more broadly to transactions in which a controller extracts a non-ratable benefit.") (cited in *Id.* at 123 n.103).
[52] Fisch & Solomon, *supra* note 9, at 130, 131.
[53] *Id.* at 131.
[54] In re Crimson Exploration Inc. Stockholder Litig., 2014 Del. Ch. LEXIS 213 (2014), at 34 (cited in *Id.* at 132 n.152).
[55] *Id.* at 39 (cited in *Id.* at 132 n.153).
[56] *Id.* at 39-40 (cited in *Id.* at 132 n.154).
[57] Ann M. Lipton, *The Three Faces of Control*, 77 BUS. LAW. 801, 803 (2022).
[58] *Id.*, citing Brookfield Asset Mgmt., Inc. v. Rosson, 261 A.3d 1251, 1274 (Del. 2021) (en banc).

> are subjected to rigorous scrutiny, and where any of their contracts or engagements with the corporation is challenged, the burden is on the director or stockholder not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein.[59]

Second, interested transactions with controlling shareholders—unlike interested transactions with other fiduciaries—are subject to a unique cleansing regime to win business judgment deference from reviewing courts.[60] Third, when certain transactions involving sales of control are challenged in court, they may be treated as direct rather than derivative actions, even when similar transactions that do not include control sales would be treated as purely derivative.[61]

The issue with a policing-centered system is that intrusive policing can vex those under its authority. Yet, controlling shareholders have a distinct advantage in determining the laws applicable to them and the judges overseeing these matters. Their authority stems from their capacity to influence the controlled entity's choice of incorporation state.

Recent cases have broadened the definition of control by lowering the required level of stock ownership needed to infer actual control and by highlighting control mechanisms beyond voting power. These trends have significantly increased the likelihood that holders of considerably less than a majority of the corporation's voting power will be considered to hold control.[62] Recent decisions thus have relied "heavily on a shareholder's potential ability to influence corporate decisions—so-called inherent coercion—rather than allegations of actual domination."[63] Under this standard, actual domination is not required.[64] Instead, it suffices if the shareholder "possesses a combination of stock voting power and managerial authority" as would enable the shareholder "to control the corporation, if he so wishes."[65]

Recent rulings also reflect a reduced focus on voting control, particularly concerning what is termed soft control.[66] In *Voigt v. Metcalf*,[67] for example, Vice Chancellor Laster opined that control could be based on factors such as "the exercise of contractual rights to channel the corporation into a particular outcome" or "the existence of commercial relationships that provide the defendant with leverage over the corporation, such as status as a key customer or supplier."[68] Similarly, *Moelis*[69] demonstrated a comparable emphasis on exerting control through contractual rights and analogous

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[59] Pepper v. Litton, 308 U.S. 295, 306 (1939) (cited in Bainbridge, *supra* note 1, at 5 n.18).
[60] Lipton, *supra* note 57.
[61] Brookfield Asset Mgmt., Inc., 261 A.3d at 1266-67 (cited in *Id.* at 803 n.8).
[62] Bainbridge, *supra* note 1, at 12, 13.
[63] Fisch & Solomon, *supra* note 9, at 136 (cited in *Id.* at 14 n.54).
[64] *Id.* at 14.
[65] In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 552 (Del. Ch. 2003), at 553 (cited in *Id.* at 14 n.57).
[66] Bainbridge, *supra* note 1, at 16.
[67] Voigt v. Metcalf, No. CV 2018-0828-JTL, 2020 WL 614999 (Del. Ch. Feb. 10, 2020) (cited in *Id.* at 16 n.70).
[68] *Id.* at 12 (cited in *Id.* at 16 n.71).
[69] W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (cited in *Id.* at 16 n.72).

forms of soft power. This case, for instance, involved an agreement between a company and several of its shareholders, including the founder, CEO, and chairman of the board. This agreement required the board of directors to obtain approval from these shareholders before making many significant decisions. The agreement also granted these shareholders considerable influence over the board, including the power to select most of the board members.[70] As a result, they held substantial control over the company's management, even though they were not necessarily majority owners. Vice Chancellor Laster ruled that this agreement was legally invalid, believing it interfered excessively with the board's legal right to run the company.[71] The Delaware legislature subsequently amended the law to permit such agreements by adopting new Delaware General Corporation Law § 122(18), effectively overturning the court's ruling with new legislation.[72]

Nonetheless, the ruling remains significant as it presents a critical inquiry: do such agreements transform shareholders into actual "controllers" of the company despite their lack of majority share ownership?[73] If agreements of this nature can confer control upon an individual, then it is conceivable that one could be regarded as a company's controller without possessing any stock solely by having contractual authority over decision-making. If control over a company can be established solely through contractual agreements, as seen in *Moelis*, then one could be considered a controller without owning any stock. This challenges the traditional view that corporate control is inherently tied to equity ownership, instead highlighting the influence of legal agreements in shaping decision-making authority. Thus, the *Moelis* case suggests that control can arise from soft power mechanisms rather than formal ownership.[74]

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[70] *Id*. at 818 (cited in *Id*. at 16 n.74).
[71] *See id*. at 821 (summarizing the court's holdings on various provisions of the agreement) (cited in *Id.* at 16 n.77).
[72] Del. Code Ann., tit. 8, § 122(18) (2025) (cited in *Id.* at 16 n.78).
[73] Bainbridge, *supra* note 1, at 17.
[74] *Id*.

III. *Tornetta v. Musk*: Delaware's Judicial Scrutiny of Executive Compensation

A. What Is a Superstar CEO?

The term "Superstar CEO" first notably appeared in a 2002 article that examined the potential drawbacks of highly charismatic corporate leaders.[75] The concept was rarely discussed until its key academic introduction in a 2023 article titled "Superstar CEOs and Corporate Law," authored by Assaf Hamdani and Kobi Kastiel.[76] Chancellor McCormick referenced the ideas from this article in her analysis of Superstar CEOs in the case of *Tornetta v. Musk*.[77] The article particularly highlights Elon Musk as a prime example of a Superstar CEO.[78]

Superstar CEOs are "individuals who directors, investors, and markets believe make a unique contribution to company value."[79] Superstar CEOs frequently, though not exclusively, serve as both the founders and the holders of substantial equity stakes in the company.[80] Professors Hamdani and Kastiel observe that there exists no straightforward method to differentiate a Superstar CEO from a talented CEO who contributes significant value to their organization. They further assert that the judicial acceptance of this notion would necessitate the development of "inevitably vague standards that will create uncertainty and encourage litigation."[81]

Superstar CEOs could exert a detrimental influence on a corporation's governance structure, as the prevailing perception of their unique contributions to company value grants them considerable power over both boards and shareholders.[82] If board members believe that their CEO possesses exceptional abilities critical to the firm's prosperity, the board's capacity to oversee the CEO effectively may be compromised by an undue deference to the CEO's decisions.[83] This tendency to defer may be exacerbated if directors perceive that shareholders hold the CEO's exceptional

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[75] Rakesh Khurana, *The Curse of the Superstar CEO*, HARV. BUS. REV. (Sept. 2002), at 60 (cited in Dominic P. Keilty, *Starstruck: The Superstar CEO Concept in Delaware Corporate Jurisprudence*, 33 U. MIA. BUS. L. REV. 263 (2025), at 264 n.4, available at https://repository.law.miami.edu/umblrhttps://repository.law.miami.edu/umblr/vol33/iss2/5).
[76] Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. UNIV. L. REV. 1353 (2023).
[77] Tornetta v. Musk, 310 A.3d 430, 507 (Del. Ch. 2024).
[78] Hamdani & Kastiel, *supra* note 76, at 1354-56; *see also* Tornetta*,* 310 A.3d at 446.
[79] *Id*. at 1367 (cited in Keilty, *supra* note 75, at 265 n.8).
[80] *Id*. at 1375-77 (cited in *Id.* at 265 n.10).
[81] *Id*. at 1358, 1400-01 (cited in *Id.* at 265 n.11).
[82] *Id*. at 1377 (cited in *Id.* at 265 n.12).
[83] *Id*. at 1378-79 (cited in *Id.* at 265 n.13).

capabilities in high regard, as shareholders may penalize directors who challenge the CEO's authority by opting not to re-elect them.[84]

Likewise, shareholders may find themselves constrained in their ability to hold a prominent CEO accountable, given their hesitance to advocate for or endorse actions aimed at removing a CEO perceived as vital to the organization's success.[85] Superstar CEOs are accorded considerable influence and autonomy by both the board of directors and shareholders; however, this leniency is subject to certain constraints.[86] Such privileges may be rescinded when investors doubt the CEO's exceptional vision or distinguished attributes.[87] Furthermore, the authority of the Superstar CEO is constrained by the extent of their perceived contribution to the company's value: the greater the perceived value added, the more latitude is afforded to them to operate.[88]

As discussed in the previous part, recent cases have expanded the definition of control by lowering the level of stock ownership required to infer actual control and by highlighting control mechanisms beyond voting power. These trends have made it much more likely for holders of significantly less than a majority of the corporation's voting power to have influence.[89]

This change in focus from voting control is exemplified by Chancellor McCormick's ruling in *Tornetta v. Musk*,[90] where she supported an academic proposal to categorize superstar CEOs as controllers.[91] By doing so, Chancellor McCormick recognized the decision "to 'boldly go where no man has gone before,' or at least where no Delaware court has tread."[92] However, she argued that:

> CEO superstardom is relevant to controller status because the belief in the CEO's singular importance shifts the balance of power between management, the board, and the stockholders. When directors believe a CEO is uniquely critical to the corporation's mission, even independent actors are likely to be unduly deferential. They believe that "letting the CEO go would be harmful to the company and that alienating the CEO might have a similar effect." They "doubt their own judgment and hesitate to question the decisions of their superstar CEO." They view CEO self-dealing as the trade-off for the CEO's value. In essence, Superstar CEO status creates a "distortion field" that interferes with board oversight. As discussed later in this analysis, the distortion field can weaken mechanisms by which stockholders hold fiduciaries accountable, a risk that becomes more severe when the Superstar CEO owns a large block of shares.[93]

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[84] *Id*. at 1379 (cited in *Id.* at 265 n.14).
[85] *Id*. at 1382 (cited in *Id.* at 265 n.15).
[86] Keilty, *supra* note 75, at 265.
[87] Hamdani & Kastiel, *supra* note 76, at 1386 (cited in *Id.* at 266 n.16).
[88] *Id*. (cited in *Id.* at 266 n.17).
[89] Bainbridge, *supra* note 1, at 12, 13.
[90] C.A. No. 2018-0408-KSJM, 2024 WL 343699 (Del. Ch. Jan. 30, 2024).
[91] *See* Tornetta 310 A.3d at 446, citing Hamdani & Kastiel, *supra* note 76 (cited in Bainbridge, *supra* note 1, at 15 n.64).
[92] Tornetta, 310 A.3d at 446 (cited in *Id.* at 15 n.65).
[93] *Id*. at 507 (cited in *Id.* at 15 n.66).

Chancellor McCormick implicitly shifts the inquiry from whether the alleged controller has de facto voting control to whether the controller's involvement in the transaction is inherently coercive.[94] While she does mention "a large block of shares," the focus is more on management than on voting power. This illustrates that she has adopted the leverage-oriented approach that *Sea-Land* rejected.[95] Therefore, a reasonable conclusion drawn from the superstar CEO notion is that simply having that status can confer control.[96]

B. The *Tornetta v. Musk* Case

On January 30, 2024, the Delaware Chancery Court issued a post-trial opinion in the case *Tornetta v. Musk*,[97] ordering the complete rescission of CEO Elon Musk's $55.8 billion "moonshot"[98] equity compensation package (the "Grant") awarded by Tesla's board in 2018.

On January 21, 2018, Tesla's Board of Directors awarded its founder and CEO, Elon Musk, a ten-year performance-based equity compensation plan, which constituted the largest equity grant ever awarded to an executive of a public company. The award was conditional on 12 equal performance-based vesting tranches, each of which entailed an increment in the company's market capitalization of $50 billion, and fulfillment of certain revenue or EBITDA targets. Had the feasible performance metrics been satisfied, which would have boosted Tesla's market capitalization by $600 billion, the estimated value of the Grant would have amounted to $55.8 billion.

In June 2018, stockholder Tornetta filed a derivative suit against Tesla's several former and current board members, as well as Musk himself, for breaches of fiduciary duty, unjust enrichment, and waste, among other allegations. The litigation commenced in November 2022, and in January 2024, Chancellor McCormick issued a 201-page post-trial opinion ordering the complete rescission of Elon Musk's $55.8 billion Tesla compensation package. The court found that the approval process was tainted by conflicts of interest and lacked sufficient safeguards to ensure fairness to minority shareholders. Chancellor McCormick determined that Musk exercised outsized influence over Tesla's

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[94] *See* Fisch & Solomon, *supra* note 9, at 135, ("Tornetta and the cases on which it relies shift the analysis from voting control to domination, soft power, or even the capacity to influence.") (cited in *Id.* at 15 n.67).
[95] Bainbridge, *supra* note 1, at 15, 16.
[96] *See* Fisch & Solomon, *supra* note 9, at 137. Professors Hamdani and Kastiel, who brought forward the superstar CEO concept McCormick adopted in Tornetta emphasized "that significant share ownership is not a necessary condition of superstar status." Hamdani & Kastiel, *supra* note 76, at 1376 (cited in *Id.* at 16 n.69).
[97] *Id.* (cited in *Id.* at 15 n.65).
[98] David A. Bell et al., *Delaware Chancery Court Orders Recission of Elon Musk Moonshot Grant in Important Case on Transactions with Potential Corporate Controllers*, JD SUPRA (Feb. 9, 2024), https://www.jdsupra.com/legalnews/delaware-chancery-court-orders-4315539/.

board, leading to a process that did not meet the entire fairness standard[99] required under Delaware law. Consequently, the court declared the compensation grant a "conflict-controlled transaction"[100] and voided it.

Among the court's findings was the assertion that "makes it undeniable that, with respect to the Grant, Musk controlled Tesla."[101] Although the court acknowledged that Musk's 21.9% voting power did not constitute a mathematical majority, it nevertheless determined that he exercised control over Tesla's business affairs. Under Delaware law, a controlling shareholder is defined as one who either "owns a majority interest in or *exercises control* over the business affairs of the corporation."[102] Given Musk's extensive authority over Tesla's strategic direction, board composition, and key decision-making, the court applied the highest judicial scrutiny for transactions involving a controlling shareholder.

Further, Musk's paradigmatic status of "Superstar CEO"[103] with positional authority as founder, president, and CEO made him mostly untied from board oversight. In this regard, the court established that Musk exercised "unusually expansive managerial authority[.]"[104] This evidence was supported by several factual findings: firstly, it was established that "Tesla and Musk are intertwined."[105] Secondly, Musk had previously admitted that he has "the power to direct operational decisions at Tesla."[106] Thirdly, "Musk has made up positions and titles for himself. In 2021, without first consulting with the Board,[107] Musk appointed himself "Technoking"—a position he compared

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[99] *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983) ("The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts."); N.J. Carpenters Pension Fund v. infoGROUP, Inc., No. Civ.A 5334, 2011 WL 4825888, at 8, 11 (Del. Ch. Oct. 6, 2011) (applying entire fairness review to a transaction when a majority of the board lacked independence from an interested party); In re Tyson Foods, Inc. Consol. S'holder Litig., 919 A.2d 563, 596 (Del. Ch. 2007) ("As the majority of the Tyson board can be considered interested at all relevant times, transactions not sterilized by independent review receive no protection from the business judgment rule, and plaintiffs must only allege that the transactions were in some way unfair to shift the burden upon the defendants to prove their entire fairness.").

[100] Tornetta v. Musk, No. 2018-0408-KSJM, slip op. at 1, 2, 98, 102, 104 (Del. Ch. Jan. 30, 2024).

[101] *Id.* at 112.

[102] Kahn, 638 A.2d 1110, 1113 (Del. 1994) (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. Supr. 1987)).

[103] Tornetta v. Musk, No. 2018-0408-KSJM, slip op. at 2, 120, 121, 122 (quoting Hamdani & Kastiel, *supra* note 76).

[104] *Id.* at 120.

[105] *Id.* at 117 (quoting Trial Tr. at 1085:11–24 (Kimbal) ("Tesla created Elon Musk's persona and Elon Musk's persona is attached to Tesla."); *see also id.* at 644:11–15 (Musk) (Musk agreeing that, as of May 2017, he was "heavily invested in Tesla, both financially and emotionally and . . . viewed Tesla as part of [his] family").

[106] *Id.* (quoting Trial Tr. at 601:6–10 (Musk).

[107] *Id.* at 118 (quoting Trial Tr. at 1085:1–7 (Kimbal) ("Question: Have you heard the word 'Technoking' before? Answer: Yes, I have. Question: When did you first hear that word? Answer: I heard it over Twitter, when Elon changed his Twitter account."); *id.* at 854:21–855:3 (Murdoch) ("Q. Now, you're aware that Elon Musk has added Technoking to his Tesla title. Correct? A. Yes, I am aware of that. Q. And you believe you likely first learned about that development via a tweet. Is that correct? A. I might have. I think so. Yeah."); Musk Dep. Tr. at 25:13–25 ("Q . . . Did you consult with the board about the new title before -- before filing it on 8-K? A. No, but it was communicated to the board."); *but see* Trial Tr. at 599:4–10 (Musk) (stating that he was "wrong" in his deposition when he stated he did not consult the Board before giving himself the title of Technoking).

to being a monarch."[108] Moreover, the court determined that "Musk makes the hiring, compensation, and firing decisions for high-level positions […] on a whim."[109] Finally, the court found that "Musk has ignored specific Board directives"[110] and that "Musk regularly uses Tesla resources to address projects at other companies he owns."[111]

Subsequently, a substantial portion of the post-trial opinion scrutinized the board members, including the compensation committee, leading Chancellor McCormick to conclude that most of the board was not independent of Musk. As evidence of that finding, the court conducted a thorough examination of Musk's close relationships with his board members, among whom emerged his brother, longtime business associates, and personal friends, some of whom vacationed "with Musk's family on a regular basis."[112] Some other members acknowledged having acquired "life-changing"[113] and "dynastic or generational wealth" from investing in Musk's companies.[114]

To underscore Musk's established influence, Chancellor McCormick highlighted "the absence of any evidence of adversarial negotiations between the Board and Musk concerning the size of the Grant"[115] and noted that "there was no meaningful negotiation over the other terms of the grant."[116] In essence, the court stated that "one of the biggest purported concerns expressed by the Board was their desire to keep Musk engaged in Tesla despite his significant time commitments at his other companies, which included SpaceX, The Boring Company, Neuralink, and later, Twitter,"[117] hence, "[t]he Grant could have addressed this issue."[118] To put it differently, because "[t]here is no greater evidence of Musk's status as a transaction-specific controller than the Board's posture toward Musk during the process that led to the Grant,"[119] the entire fairness standard was the standard of review.

According to the court, although "[t]he stockholders approved the Grant at a special stockholder meeting on March 21, 2018, with 73% of votes cast at the meeting […] in favor,"[120] the

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108 *Id.* (quoting Musk Dep. Tr. at 22:24–23:1).
109 *Id.*
110 *Id.* at 119.
111 *Id.*
112 *Id.* at 3.
113 *Id.* at 25 (quoting Trial Tr. at 397:6–12 (Denholm)).
114 *Id.* (quoting Trial Tr. at 774:22–24 (Gracias)).
115 *Id.* at 133
116 *Id.* at 138.
117 *Id.* at 139 (quoting Trial Tr. at 328:9–24 (Denholm) ("Elon had other business interests that competed for his time."); JX-612 at 2 ("How can the comp comm/board/shareholders be assured that [Musk] will devote adequate time to Tesla given his other commitments/businesses/. Should some type of commitment be included as part of comp structure?"); Murdoch Dep. Tr. at 292:1–293:20 ("But obviously as [SpaceX] grew and depending on … where Elon thinks his time is going to be most useful in terms of both … his own incentives as an executive, apropos of this plan, and also … where he can make the biggest impact, … we wanted to make sure that … Tesla was top of mind."); Ehrenpreis Dep. Tr. at 51:6–13 ("And so my thinking and the goal was how do we find a way to make sure that Elon still stays in this seat, number one.").
118 *Id.* at 139.
119 *Id.* at 128.
120 *Id.* at 88 (quoting JX-979 at 3 (3/21/18 Form 8-K dated March 21, 2018)).

stockholder consent was not fully informed due to inaccurate disclosure materials; therefore, the defendants were not granted the shift of the burden of proof to the plaintiffs.[121] In evaluating the entire fairness of the transaction, Tesla failed to demonstrate that both "fair dealing" and "fair price" were present concerning the Grant, given the aforementioned factors.

In *Solar* City, a previous case involving Musk, Vice Chancellor Slights concluded that the issue "whether a large blockholder is so powerful as to have obtained the status of a 'controlling stockholder' is intensely factual [and] it is a difficult [question] to resolve on the pleadings."[122] The court noted that plaintiffs identified several factors in addition to Musk's stock ownership, including (1) Musk's ability to influence the stockholder vote to effect significant change at Tesla, including the removal of Board members; (2) Musk's influence over the Board as Tesla's visionary, CEO, and Chairman of the Board; (3) Musk's strong connections with members of the Tesla Board and the fact that a majority of the Tesla Board was "interested," as that term is defined in our law, in the Acquisition; and (4) Tesla's and Musk's acknowledgment of Musk's control in its public filings.[123] It concluded that these allegations were sufficient to survive a motion to dismiss. Ultimately, the court never resolved the question of whether Musk was a controlling shareholder at trial, deciding instead that the transaction was entirely fair.[124]

Similar to *Solar City*, the *Tornetta* case involved allegations against Elon Musk in his role as the controlling shareholder of Tesla.[125] Chancellor McCormick observed that Musk's status as a controlling shareholder had been *raised* but not decided in the *Solar City* litigation.[126] The Chancellor concluded that it was the right moment to address the issue, noting that "[t]his question of whether Musk controls Tesla has thus proven evasive. It is as good a time as any to run it to ground."[127]

The Chancellor elucidated that the examination of control was pragmatic and necessitated a plaintiff to demonstrate that a controlling shareholder was comparably positioned to one possessing majority voting authority.[128] She then explained that this inquiry required an analysis of whether a stockholder could exercise what she termed "effective control" based on factors that include: (1) ownership of a "significant equity stake" (albeit less than a majority), (2) the right to "designate directors" (albeit less than a majority), (3) "decisional rules in governing documents that enhance the

[121] Kahn, 638 A.2d 1110, 1113, at 1117.
[122] *See* In re Tesla Motors, Inc. S'holder Litig., 2018 Del. Ch. LEXIS 102, at 13 (cited in Fisch & Solomon, *supra* note 9, at 132 n.158).
[123] *Id*. at 13 (cited in *Id.* at 133 n.159).
[124] *See* In re Tesla Motors, Inc. Stockholder Litig. 2022 Del. Ch. LEXIS 94 (2022), *aff'd* In re Tesla Motors Stockholder Litig., 2023 Del. LEXIS 178 (Del., June 6, 2023) (cited in *Id.* at 133 n.160).
[125] Fisch & Solomon, *supra* note 9, at 133.
[126] Tornetta, 310 A.3d at 501 (cited in *Id.* at 133 n.161).
[127] *Id*. at 502 (cited in *Id.* at 133 n.162).
[128] Fisch & Solomon, *supra* note 9, at 133.

power of a minority stockholder or board-level position," and (4) the ability to "exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder."[129]

Chancellor McCormick also distinguished between general control and transactional control, arguing that control could be operational within a specific transaction.[130] She stated:

> To establish transaction-specific control, a plaintiff must show that the stockholder "exercise[d] actual control over the board of directors during the course of a particular transaction[.]" This analysis often focuses on relationships "with key managers or advisors who play a critical role in presenting options, providing information, and making recommendations[.]" It can also address "the exercise of contractual rights to channel the corporation into a particular outcome by blocking or restricting other paths," and "commercial relationships," although those factors are less relevant here. Ultimately, "[i]t is impossible to identify or foresee all of the possible sources of influence that could contribute to a finding of actual control over a particular decision."[131]

The Chancellor indicated that this inquiry is fact-specific, saying "[b]oth general control and transaction-specific control call for a holistic evaluation of sources of influence."[132] In conducting this holistic evaluation, the *Tornetta* opinion drew heavily on the concept of a "Superstar CEO."[133] The court explained that "CEO superstardom is relevant to controller status because the belief in the CEO's singular importance shifts the balance of power between management, the board, and the stockholders."[134] Based on a thorough analysis of Musk's connections, the court determined he had transactional control, stating:

> The collection of features characterizing Musk's relationship with Tesla and its directors gave him enormous influence over Tesla. In addition to his 21.9% equity stake, Musk was the paradigmatic "Superstar CEO," who held some of the most influential corporate positions (CEO, Chair, and founder), enjoyed thick ties with the directors tasked with negotiating on behalf of Tesla, and dominated the process that led to board approval of his compensation plan. At least as to this transaction, Musk controlled Tesla.[135]

Chancellor McCormick then determined that Tesla had not satisfied the cleansing mechanism of *MFW*[136] because (1) the compensation package was not approved by truly disinterested directors, and (2) the shareholder vote was not fully informed. Consequently, the Chancellor concluded that she

[129] Tornetta, 310 A.3d at 500 (cited in *Id.* at 133 n.163).
[130] Fisch & Solomon, *supra* note 9, at 133 n.164.
[131] Tornetta, 310 A.3d at 500 (cited in *Id.* at 134 n.165).
[132] *Id.* (cited in *Id.* at 134 n.166).
[133] *See* Fisch & Solomon, *supra* note 9, at 134 n.167 (The court cited a law review article, Hamdani & Kastiel, *supra* note 76, which developed the concept of a Superstar CEO to explain why such CEOs enjoy substantial influence over corporate decisions but warned that "turning the elusive notion of a superstar CEO into a legal test for control will be costly.").
[134] Tornetta, 310 A.3d at 507 (cited in *Id.* at 134 n.168).
[135] *Id*. at 446 (cited in *Id.* at 135 n.169).
[136] Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

was required to apply an entire fairness review to Musk's compensation package.[137] Regarding the process, the court emphasized that, in her words, the option grant was not the result of arm's-length negotiations. Drawing from the freeze-out cases, the court stated that "[t]he lack of arm's-length negotiations can overshadow positive aspects of a process."[138] Fair processes in a conflicted merger are intended to mimic the negotiations that would occur between independent third parties. In contrast, no negotiation regarding CEO pay can accurately be characterized as an arms-length process, especially when it involves a sitting CEO.[139]

The court also stressed the considerable magnitude of the compensation package. As the court explained:

> There is no absolute limit on the magnitude of a compensation grant that could be considered fair. But "[p]rocess can infect price." And "where the pricing terms of a transaction that is the product of an unfair process cannot be justified by reference to reliable markets or by comparison to substantial and dependable precedent transactions, the burden of persuading the court of the fairness of the terms will be exceptionally difficult."[140]

Because the court determined that the defendants did not meet their burden of proving that the compensation package was entirely fair, she ordered the package's complete rescission.[141] Nevertheless, courts and commentators note that assessing the reasonableness of an executive pay package is a challenging task, and previous judicial doubts regarding the size of pay packages have not lasted long.[142]

Tornetta marks a significant advancement in the application of controlling shareholder status, following a comprehensive trial, for someone possessing much less than a near-majority of voting power. The analysis within the opinion indicates that its principles might extend to imposing fiduciary duties on various individuals with limited stockholdings, where their potential influence over a corporation isn't derived from their voting power.[143] In other words, the definition of controlling shareholder status can broaden to include individuals exerting influence over a corporation, referred to as "soft control," even if they do not hold any shares.

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[137] Fisch & Solomon, *supra* note 9, at 135.
[138] *Id*. at 529, 530 (cited in *Id.* at 135 n.170).
[139] LUCIAN A. BEBCHUK & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).
[140] Tornetta, 310 A.3d at 533 (cited in Fisch & Solomon, *supra* note 9, at 135 n.173).
[141] *See id*. at 544 ("The court orders rescission of the Grant as a remedy for Defendants' fiduciary breaches.") (cited in *Id.* at 136 n.174).
[142] *See, e.g.,* Harwell Wells, *"No Man Can be Worth $1,000,000 a Year": The Fight Over Executive Compensation* in 1930s America, 44 U. RICH. L. REV. 689, 730 (2010) (describing judicial retreat from the approach taken in Rogers v. Hill and explaining that this retreat can be explained, in part, by "judges' growing doubts about their ability to determine what constituted reasonable compensation"); Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 339–40 (2009) ("The epic Disney litigation reflects this judicial reluctance to second guess executive compensation despite significant board dysfunction.") (cited in *Id.* 136 n.175).
[143] Fisch & Solomon, *supra* note 9, at 136.

C. Analysis

1. Judicial Application and the Effects on the Court's Analysis

Chancellor McCormick discussed Musk as a Superstar CEO in a subsection called "Boardroom And Managerial Supremacy," which falls under the broader section "The Entire Fairness Standard Applies Because Musk Is A Controller."[144] Chancellor McCormick appears to establish the foundation for the Superstar CEO concept as a novel doctrine within Delaware corporate law.[145] By articulating that the concept "should not be deployed far and wide," Chancellor McCormick seems to underscore her application of the concept specifically to the case at hand, suggesting that its "deployment" bears significance for the case; otherwise, there would be no necessity to advise against its broader application.[146]

The influence of the Superstar CEO concept on McCormick's analysis is somewhat ambiguous; however, she clearly indicates that its most significant effect lies in the independence of the directors.[147] The phenomenon called the "field of distortion" generated by the Superstar CEO mandates that independent directors be "staunchly independent."[148] This suggests the existence of an elevated standard for director independence in the context of a Superstar CEO.[149] Subsequently, the Chancellor conducted a thorough examination of Musk's personal affiliations with his independent directors, concluding that numerous directors were beholden to the CEO owing to their longstanding and close relationships with him.[150]

She evaluated the "outsized" compensation awarded to two members of the compensation committee as a consideration against them in her assessment that the grant was not negotiated at arm's length.[151] Additionally, she examined the process undertaken by the directors in awarding the grant and concluded that they succumbed to a "controlled mindset" and "work[ed] alongside [Musk], almost as an advisory body," engaging in negotiations with him.[152] The Chancellor utilized this as additional evidence of Musk's influence over the Tesla board and its consequent failure to exercise effective oversight over him.[153]

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144 *Tornetta*, 310 A.3d at 497, 503, 507 (cited in Keilty, *supra* note 75, at 268 n.31).
145 Keilty, *supra* note 75, at 269.
146 Tornetta, 310 A.3d at 508 n.632 (cited in *Id.* at 269 n.45).
147 *Id*. at 507-08 (cited in *Id.* at 269 n.46).
148 *Id*. at 507-08 (cited in *Id.* at 269 n.47).
149 Keilty, *supra* note 75, at 269.
150 *Id*. at 508-10 (cited in *Id.* at 269 n.48).
151 *Id*. at 509-10 (cited in *Id.* at 270 n.49).
152 Tornetta, 310 A.3d at 510-11 (cited in *Id.* at 270 n.50).
153 Keilty, *supra* note 75, at 270.

In conclusion, Chancellor McCormick determined that Musk's attributes as a Superstar CEO enabled him to impose a "distortion field" over the board, thereby hindering the Tesla directors' capability to oversee his actions adequately. She substantiated this perspective by meticulously enumerating instances demonstrating Musk disregarding the board's authority. Furthermore, she critically evaluated his personal and financial relationships with individual board members, as well as the negotiation process concerning grants, to illustrate that numerous directors did not exhibit the level of independence that she argues is requisite for effectively monitoring a distinguished Chief Executive Officer.[154]

2. Future Implications

Chancellor McCormick does not explicitly specify the extent to which her analysis depends on the existence of a Superstar CEO, leading to various interpretations of the concept's implications. A comprehensive understanding of the Superstar CEO doctrine may regard it as fundamentally altering the entire controller analysis for individuals classified as Superstar CEOs by elevating the criteria for director independence within their respective organizations. Within this framework, directors who maintain substantial social connections with a Superstar CEO or who receive disproportionately high compensation for their positions would be less likely to be deemed independent. This circumstance would increase the probability that a court would determine that the disclosure of director independence to investors was insufficient and that the CEO exerted transaction-specific control over the decisions made by these directors. Furthermore, this perspective implies that the characterization of Musk as a Superstar CEO was pivotal to Chancellor McCormick's ruling, as it raised the standard for director independence, thereby contributing to the conclusion that he exerted control over the relevant decisions transaction.[155]

A narrow interpretation of this doctrine may regard the Superstar CEO concept as merely one of several elements in the comprehensive assessment of a CEO's influence on the corporation, aimed at establishing an individual as a controller. This perspective suggests that the enumerated actions of Musk prior to McCormick's introduction of the Superstar CEO concept merely illustrate Musk's substantial influence over the board, which represents only a single component considered within a holistic evaluation of control. Consequently, under this limited interpretation, the court's determination of a Superstar CEO may have a diminished direct impact on establishing controller

[154] *Id.*
[155] *Id.*

status compared to a broader understanding. Nevertheless, embracing the narrow perspective would likely imply that the Chancellor's appraisal of director independence concerning Tesla's board members would carry broader precedential significance, as the "staunchly independent" standard would apply to all directors, rather than solely to those at organizations with a Superstar CEO. This development would have considerable implications for Delaware jurisprudence overall, contributing to the trend of increasingly rigorous standards for director independence.[156]

Both potential interpretations would broaden the scope of the controlling shareholder doctrine. A broad interpretation would create a new classification that modifies the controller analysis for those affected. In contrast, the narrow interpretation would introduce another factor for consideration in the comprehensive assessment of a potential controller's influence, thus further elevating the Delaware standard for director independence. The narrow interpretation would likely have a more significant overall impact due to its broader applicability. Chancellor McCormick's analysis suggests that she favors the broad understanding of the potential Superstar CEO doctrine.[157]

Although it is conceivable that such a test may involve a fact-specific inquiry, which was addressed by Chancellor McCormick's enumerated list and comprehensive examination of Musk's actions, the opinion lacks clarification on this matter. Furthermore, the Chancellor does not explicitly outline how this concept influences her analysis. To enable the extensive interpretation of the Superstar CEO concept to function as a viable common law doctrine, the parameters of the concept must be explicitly defined.[158]

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[156] *See* Roger A. Cooper & Mark E. McDonald, *The Delaware Courts' Evolving View of Director Independence*, Clearly Gottlieb Steen & Hamilton, LLP (Jan. 11, 2022), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-delaware-courts-evolving-view-of-director-independence (explaining that the Delaware Court of Chancery has been gradually heightening the standard for director independence) (cited in Keilty, *supra* note 75, at 271 n.51).

[157] Perhaps most convincingly, Chancellor McCormick's recommendation that the concept "should not be deployed far and wide" is most congruent with the broad view of the Superstar CEO concept since it accords more power to the doctrine, thus making the Chancellor's call for limitations on its use more fitting. Tornetta, 310 A.3d, at 508 n.632 (cited in Keilty, *supra* note 75, at 271 n.52).

[158] Keilty, *supra* note 75, at 271.

IV. Bench vs. Boardroom: Delaware's New Era of Judicial Interventionism

A. The Implications of the Current Approach

The expanding definition of controller raises several concerns. First, it has heightened legal uncertainty. Additionally, it subjects shareholders with minimal holdings to fiduciary liability without definitive guidelines on how and when they qualify as controllers. This situation may lead to more litigation as different parties challenge whether a specific shareholder's influence amounts to "control." The expenses associated with this litigation—both in terms of time and resources—will impose additional burdens on companies and shareholders, diverting attention from essential objectives such as wealth creation and business operations.[159]

Tornetta illustrates a trend among courts to consider individuals who influence corporate decisions as controlling shareholders, even if they possess significantly less than a majority of the voting power in the corporation.

Sears Homeland[160] signifies a significant shift: applying fiduciary duties to controlling shareholders when they exercise their personal shareholder rights.[161] Thus, *Sears Hometown* expands the range of corporate dealings where courts use fiduciary principles to examine the influence of a controlling shareholder. The ensuing judicial examination of various corporate decisions presents a notable tension with the conventional deference afforded by the business judgment rule.[162]

Historically, identifying a controlling shareholder relied on clear, objective criteria. Besides possessing a majority or a near majority of the voting power within the corporation, the situation was binary: a shareholder was either a controlling shareholder or not—there was no ambiguity in which they could be seen as controlling in some instances but not in others.[163] This straightforward rule enabled companies to plan proactively, knowing beforehand the legal procedures they needed to adhere to. In contrast, if the regulations were ambiguous or adaptable, businesses might face difficulties in determining the applicable legal obligations.[164]

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[159] Bainbridge, *supra* note 1, at 17.
[160] Sears Hometown, 309 A.3d 474 (Del. Ch. 2024) (cited in Fisch & Solomon, *supra* note 9, at 127 n.126).
[161] *See* Hamermesh et al., *supra* note 43. While it is not clear from the decision itself, Sears Hometown implies that these fiduciary duties apply to any exercise of a controller's voting control even if there is no disagreement with the board (cited in *Id.* at 128 n.130).
[162] Fisch & Solomon, *supra* note 9, at 137.
[163] Mary Siegel, *The Erosion of the Law of Controlling Shareholders*, 24 DEL. J. CORP. L. (1999) (cited in *Id.* at 137).
[164] Fisch & Solomon, *supra* note 9, at 137.

Tornetta and the associated cases shift the focus from voting control to concepts such as domination, soft power, and the ability to influence. They indicate that control may vary based on context or transaction, implying that a shareholder's level of influence is contingent upon their ability to exert power in a given situation.[165] *Tornetta* provides an example of soft control through a significant minority stake. While this alone does not grant a shareholder the authority to influence voting results, it is combined with various other forms of soft power. The *Tornetta* court elucidated that soft power may derive from the multiple roles held by the shareholder within the company, including positions such as founder, Chief Executive Officer (CEO), or Chairman.[166] More precisely, Vice Chancellor Laster stated in *Voigt v. Metcalf*:[167]

> Examples [of the sorts of influence that could lead to a finding of actual control] include, but are not limited to, (i) relationships with particular directors, (ii) relationships with key managers or advisors, (iii) the exercise of contractual rights to channel the corporation into a particular outcome, and (iv) the existence of commercial relationships that provide the defendant with leverage over the corporation, such as status as a key customer or supplier.[168]

Dominance remains a significant factor in contemporary control cases; however, the courts differ in the degree to which they necessitate actual dominance. For instance, according to the *Oracle* court[169], "[a] plaintiff must show that the alleged controlling stockholder in actuality dominated the corporate conduct, either generally or with respect to the transaction in question, to hold the stockholder to duties as a fiduciary."[170] Nonetheless, *Oracle*'s stipulation of actual domination appears to be the outlier, as more recent cases have adopted a different stance. They focus significantly on a shareholder's potential to sway corporate decisions—inherent coercion—rather than on claims of actual domination.[171]

In their law working paper, *Control and Its Discontents*, Fisch and Solomon explain the judiciary's extensive approach to control. They assert that this explanation is grounded in the increasing protection afforded to directors and officers from liability with respect to these transactions. DGCL Section 102(b)(7) permits corporations to protect directors and officers from liability for decisions that do not breach the duty of loyalty or fail to act in good faith.[172] Moreover,

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[165] *Id*.
[166] *Id*.
[167] Voigt v. Metcalf, C.A. No. 2018-0828-JTL (Del. Ch. Feb. 10, 2020) (cited in *Id.* at 138).
[168] *Id*. (cited in *Id.* at 138 n.178).
[169] *See* In re Oracle Corp. Derivative Litig., 2023 Del. Ch. LEXIS 114 (Del. Ch. May 12, 2023) (cited in *Id.* at 138 n.180).
[170] *Id*. at 46 (cited in *Id.* at 138 n.181).
[171] Fisch & Solomon, *supra* note 9, at 138.
[172] *See* Del. Code Ann. tit. 8, § 102(b)(7) (2024) (cited in *Id.* at 139 n.185).

Cornerstone[173] authorizes courts to dismiss exculpated directors at the pleading stage. Even in instances where directors or officers are purportedly acting in a manner that conflicts with their interests, their liability may be mitigated by a single action of an independent board committee or the approval of minority shareholders. Consequently, minority shareholders alleging misconduct are increasingly attempting to hold individuals referred to as controlling shareholders liable. Indeed, it appears that, in recognition of the potential broadening of control concepts suggested by their allegations, plaintiffs in several of the aforementioned cases have contended that shareholders are not directly liable for a breach of fiduciary duty, but rather for assisting and encouraging the board's breach of fiduciary duty.[174]

In the case of *Corwin*,[175] the Delaware Supreme Court determined that owning less than one percent of a company's shares, even when paired with financial and contractual influence, is insufficient to demonstrate control over the company. Nonetheless, individuals can wield considerable influence over corporate decisions through alternative soft power mechanisms that are not directly related to share ownership. The rationale provided by the courts appears to expand the definition of control by suggesting that significant influence, rather than mere stock ownership, may be sufficient to invoke the status of a controlling shareholder.[176]

For instance, as elucidated in *Tornetta*, a Chief Executive Officer (CEO) with an exceptional status or reputation—a "Superstar CEO"—may be perceived as exerting control based solely on their positional authority.[177] Historically, corporate law has differentiated between officers and controlling shareholders. Officers are frequently protected by exculpatory provisions according to Delaware General Corporation Law (DGCL) § 102(b)(7), and their conflicts may be mitigated through shareholder approval.[178] Conversely, controlling shareholders are subjected to more stringent fiduciary obligations due to their presumed capacity to influence outcomes. As the concept of control increasingly correlates with an individual's status as an officer, this distinction risks becoming obscure, thereby prompting inquiries into whether the existing legal framework continues to delineate a significant boundary between officers and controlling shareholders.[179]

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[173] *See* In re Cornerstone Therapeutics Inc., Stockholder Litig., 115 A.3d 1173, 1187 (Del. 2015) ("[W]hen the plaintiffs have pled no facts to support an inference that any of the independent directors breached their duty of loyalty, fidelity to the purpose of Section 102(b)(7) requires dismissal of the complaint against those directors.") (cited in *Id.* at 139 n.186).
[174] Fisch & Solomon, *supra* note 9, at 139.
[175] *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 306–07 (Del. 2015) (cited in *Id.* at 140 n.188).
[176] Fisch & Solomon, *supra* note 9, at 140.
[177] *See, e.g.*, Hamdani & Kastiel, *supra* note 76 (cited in *Id.* at 140 n.189).
[178] *See* MFW, 88 A3d at 648-49 (explaining traditional reluctance to defer to process protections of independent board and shareholder approval in controlling shareholder mergers) (cited in *Id.* at 140 n.190).
[179] Fisch & Solomon, *supra* note 9, at 140.

Professors Fisch and Solomon further assert that it is reasonable to infer that a defendant possesses adequate influence over corporate actions based solely on contractual rights.[180] Contracts can confer control over a corporation to parties in various ways. Minority shareholders may elect to act collectively by casting their votes in accordance with a voting agreement.[181] Shareholders, as well as non-shareholders, have the capacity to enter into agreements that grant them rights typically associated with a majority voting power, such as the authority to appoint or remove director candidates or the power to veto governance modifications, including amendments to the bylaws. In conclusion, shareholder agreements possess the capacity to empower designated signatories to execute functions customarily reserved for the board, including the authority to propose or veto operational decisions, appoint officers, or establish executive compensation.[182]

Professors Fisch and Solomon articulate an additional argument that further contests the conventional perspective on control. Notably, if contractual rights can afford individuals as much—if not more—control over corporate decisions as majority shareholders, it raises the question of whether possessing any shares is genuinely necessary to be considered a controlling shareholder.[183] In the case of *Skye Mineral*,[184] for instance, the plaintiffs initiated claims against defendants who held no stock in the company. While the court ultimately concluded that these individuals did not possess actual control, it did not dismiss the possibility that an individual without stock ownership could still be regarded as a controller.[185] This matter is becoming increasingly pertinent with the enactment of Delaware General Corporation Law § 122(18), which facilitates the more extensive utilization of agreements that confer control rights to individuals or entities lacking majority voting power. Consequently, we may observe a rising number of cases wherein control is predicated on contractual agreements rather than ownership.[186]

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[180] *See, e.g.*, In re Pattern Energy Grp. Inc. S'holders Litig., No. CV 2020-0357-MTZ, 2021 WL 1812674, at 1 (Del. Ch. May 6, 2021) ("Recognizing that neither the investor nor the supplier owned Company stock, I leave open the possibility that the plaintiff may establish the investor, supplier, and management stockholders formed a control group, given the investor's consent right and other pervasive sources of soft power over the Company and its sales process.") (cited in *Id.* at 140 n.191).

[181] *See* Hamermesh et al., *supra* note 43, at 38-39 (discussing judicial analysis of whether such arrangements should result in a group of shareholders being treated as a control group) (cited in *Id.* at 140 n.192).

[182] *See, e.g.*, W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (discussing and invalidating several such provisions); Del. Gen. Corp. L. § 122(18) (explicitly authorizing shareholder agreements that grant shareholders the power to exercise what would otherwise be within the board's statutory authority under Del. Gen. Corp. L. § 141(a) (cited in *Id.* at 141 n.194).

[183] Fisch & Solomon, *supra* note 9, at 141.

[184] Skye Mineral Investors, LLC v. DXS Capital (U.S.) Limited, 2020 Del. Ch. LEXIS 72, quoted in *Id.*, at 141 n.195.

[185] *See id.* at 62 ("Noronha, Michael Riady, Stephen Riady, and LCR owned no SMP units, appointed none of SMP's Board members and held no contractual blocking rights.") (cited in *Id.* at 141 n.196).

[186] 8 Del. C. § 122(18). Significantly, the statute does not require the recipient of contractual control rights to be a current shareholder (cited in *Id.* at 141 n.197).

B. Entire Fairness And Transactional Uncertainty

As demonstrated by the preceding examples, the expanded definition of a controlling shareholder encompasses a broader array of transactions, thereby subjecting them to the rigorous entire fairness review. Although the *MFW* framework may be proposed as a protective measure, scholars express concerns about its potential reliance as a universal solution, which presents inherent issues. The claim that *MFW* compliance guarantees transactional certainty is overstated.[187]

MFW requires that a corporate decision to undergo business judgment review be contingent upon the prior approval of a disinterested independent committee that meets its duty of care and receives an uncoerced, informed vote from a majority of the minority shareholders.[188] However, adhering to *MFW* is more complex than it might appear at first glance. The uncertainty surrounding a court's evaluation of whether a corporation has adequately complied with and utilized the safe harbor likely contributes to the hesitation of many corporations in leveraging *MFW*. They seem to expect that their efforts to comply will not significantly reduce their risk of litigation.[189] In this regard, consider the necessity of establishing *MFW* procedures from the outset—the *ab initio* prong. Identifying when negotiations begin is relatively straightforward in the case of a freeze-out transaction, but determining the start of other corporate decisions presents more challenges. Additionally, it is initially uncertain whether a specific decision will grant a controller a nonratable benefit.[190]

Second, *Match*[191] stipulates that a transaction will not enjoy *MFW* protection unless every member of the special committee is independent.[192] The assessment of director independence, similar to determining controlling shareholder status, involves a complex, fact-sensitive analysis. Even if a

[187] Fisch & Solomon, *supra* note 9, at 144.
[188] *See* Olenik v. Lodzinski, 208 A.3d 704, 715 (Del. 2019). Some commentary has described MFW as imposing six requirements. *See, e.g.*, Christopher B. Chuff, Joanna J. Cline & Matthew M. Greenberg, *MFW Pitfalls: Bypassing the Special Committee and Pursuing Detrimental Alternatives*, HARV. L. SCH. FORUM ON CORP. GOV. (June 30, 2020), https://corpgov.law.harvard.edu/2020/06/30/mfw-pitfalls-bypassing-the-special-committee-and-pursuing-detrimental alternatives/ (cited in *Id.* at 141 n.212).
[189] *See, e.g.*, Meredith Kotler, Ethan Klingsberg & Marques Tracy, *Maybe Entire Fairness Review Isn't So Bad After All: Lessons from BGC Partners and Other Recent Controlling Shareholder Transactions*, FRESHFIELDS (Sept. 9, 2022), https://blog.freshfields.us/post/102hwqh/maybe-entire-fairness-review-isnt-so-bad-after-all-lessons-from-bgc-partners-a ("While the business judgment rule undoubtedly remains appealing to many controlling stockholders, there may be reasons why some may choose not to go down the MFW path and instead embrace entire fairness review."). In addition to uncertainty about whether the safe harbor will be available, corporations may wish to retain greater flexibility in negotiating or fear the uncertainty of a majority of the minority vote (cited in *Id.* at 141 n.213).
[190] Fisch & Solomon, *supra* note 9, at 145.
[191] In re Match Group, Inc. Derivative Litigation, 315 A.3d 446 (Del. 2024).
[192] This reflects a change from prior law. *See* City Pension Fund for Firefighters and Police Officers v. Trade Desk, Inc., 2022 Del. Ch. LEXIS 183, at 29–30 (Del. Ch. 2022) (rejecting plaintiff's challenge to the independence of the special committee where plaintiff did not "meaningfully challenge" the independence of two of the three committee members) (cited in *Id.* at 145 n.215).

corporation establishes an independent committee, later judicial reviews may disclose that one or more directors lack sufficient independence. *Tornetta* exemplifies a significant level of judicial scrutiny, setting new precedents regarding factors that might indicate conflicts for some challenged directors. Importantly, even a director's anticipation of future rewards could create a disabling conflict.[193] However, a rigorous standard for independence is likely to lead to extensive ex post facto litigation concerning directors' independence in almost every controller case.[194] If Delaware adopts a broad interpretation of independence, it raises doubts about whether any director in a controlled company can be considered independent.[195] Moreover, a court's determination of even one conflict within a committee significantly undermines the process and hinders the application of *MFW*. The informed shareholder vote raises comparable concerns. Commentators on corporate law recognize that plaintiffs commonly contest almost any corporate disclosure as insufficient, and there's no indication that the disclosures tied to the *MFW* shareholder vote will escape such challenges.[196]

Uncertainty arises from the ambiguous definition of a controlling shareholder, the transactions subject to entire fairness analysis, and a corporation's reliance on *MFW* compliance. The courts' tendency to apply stricter scrutiny to controlled corporations effectively imposes an operating cost on these companies. These expenses become particularly significant when a controlled company participates in transactions that offer clear benefits to the controller. The justification for the control premium is that controllers are likely to engage in such transactions, as well as those that benefit both the controller and minority shareholders, which are advantageous for society. However, moving forward, these transactions are likely to encounter expensive litigation challenges.[197] The law lacks a straightforward method to assess the fairness of transactions that yield positive but unequal benefits for both the controller and minority shareholders. Indeed, the *Tornetta* decision underscores the longstanding challenge courts and commentators face in evaluating the fairness of executive compensation packages.[198]

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[193] Da Lin, *Beyond Beholden*, 44 IOWA J. CORP. L. 515 (2019).
[194] Fisch & Solomon, *supra* note 9, at 145.
[195] Giovanni Strampelli, *How to Enhance Directors' Independence at Controlled Companies*, 44 IOWA J. CORP. L. 103 (2018).
[196] *Id*.
[197] *Id*.
[198] Rogers v. Guaranty Trust Co., 288 U.S. 123 (1933) (cited in Fisch & Solomon, *supra* note 9, at 148 n.228).

C. Judicial Oversight, Growing Skepticism, And "Reflexive Suspicion"

The concerns discussed so far raise additional questions about the shift toward increased judicial scrutiny of decisions made by controlled companies. Commentators observe that enhanced judicial oversight of transactions involving controlling shareholders conflicts with Delaware's overall tendency to respect corporate decisions, a stance based on the belief that judges lack the proper qualifications to assess the reasonableness of those decisions. The initial rationale for the business judgment rule was an aversion to judicially second-guessing corporate choices.[199]

The authors found that minority shareholders appear willing to accept the costs tied to a controlling shareholder, and they may even benefit from that influence in some instances. When a court restricts the controller's ability to assert control, it effectively denies the controller its negotiated right. From this perspective, rather than the common belief in recent cases that controlling shareholders tend to engage in excessive self-dealing, the market appears to be showing a growing acceptance of controlling shareholders and an increase in arrangements that support such control. This growing acceptance is evident in the increasing market approval of dual-class structures, the widespread use of shareholder agreements that grant control rights outside the dual-class framework, and the ongoing willingness of shareholders to endorse transactions that offer varying value to controlling shareholders.[200]

A controlling shareholder's power is unlikely to endure if it does not benefit minority shareholders. Professors Hamdani and Kastiel highlight that a Superstar CEO's influence is "limited in scope and duration," lasting only as long as investors perceive them as generating exceptional value.[201] The board is more inclined to question such CEOs if they lose their star aura or if the negative impact of self-dealing surpasses the value they uniquely add to the company.[202] Correspondingly, an activist shareholder cannot secure board representation without backing from other shareholders, who, along with directors, limit the activist's capacity to leverage that representation to shape corporate decisions.[203] Even if institutional investors wield enough voting power to potentially compromise firm-specific economic value for broader societal goals, their capacity to act on this is limited by the market influence of their beneficiaries.[204] Simultaneously, market dynamics can often counterbalance structural power; a founder-CEO or a shareholder with "old control" might be

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199 Fisch & Solomon, *supra* note 9, at 148.
200 *Id*. at 149.
201 Hamdani & Kastiel, *supra* note 76 (cited in *Id.* at 150 n.237).
202 *Id*.
203 *See, e.g.*, Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48 (Del. Ch. 2011) (cited in *Id.* at 150 n.239).
204 Fisch & Solomon, *supra* note 9, at 150.

removed if they cease to act effectively for the corporation.[205] Research indicates that even controlled companies are not immune to successful shareholder activism.[206] Indeed, while these companies are generally more shielded from activism than widely held corporations, they are not entirely protected.[207]

The authors have identified several essential implications that seem to conflict with Delaware law's fundamental approach to controlling shareholders. Recent cases are expected to compel the Delaware courts to invest considerable judicial resources in both applying the existing framework and clarifying its boundaries and constraints.[208] The main issue lies in several recent cases where the Chancery Court has demonstrated a "reflexive suspicion" towards transactions involving a controlling shareholder.[209] As discussed above, this skepticism has been operationalized by the court, significantly expanding the criteria for who is deemed a controlling shareholder. Additionally, as exemplified by *Tornetta*, the court has shown a growing readiness to assert that shareholders holding less than a majority of the voting power can still be considered in control. This concept extends to notions that control can exist without stock ownership. The court's terminology reflects this shift, as it often uses the term "controller" instead of "controlling shareholder."[210]

The court's increasing skepticism towards controlling shareholders is evident in its stricter standards for their conduct.[211] In this context, the court has broadened the spectrum of conflicted

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[205] Yifat Aran & Elizabeth Pollman, *Ousted*, 25 THEORETICAL INQ. L., 231 (2024) (cited in *Id.* at 150 n.240).
[206] Kobi Kastiel, *Against All Odds: Hedge Fund Activism in Controlled Companies*, COLUM. BUS. L. REV. 61 (2016).
[207] *Id*. at 67 (cited in Fisch & Solomon, *supra* note 9, at 150 n.242).
[208] *Id*.
[209] *See, e.g.*, Tornetta v. Musk, 250 A.3d 793, 812 (Del. Ch. 2019) (acknowledging "the Court's reflexive suspicion of Musk's coercive influence over the outcome"); *see also* Fisch & Solomon, *supra* note 9 (noting the "Delaware courts' growing skepticism toward corporate actions in controlled companies"). It might be more accurate to say that these developments are being driven not by the whole court but by Chancellor McCormick and Vice Chancellor Laster, who have heard many of the pertinent cases. *See, e.g.*, W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024) (Laster, V.C.); Palkon v. Maffei, 311 A.3d 255 (Del. Ch. 2024) (Laster, V.C.), *rev'd*, 2025 WL 384054 (Del. 2025); Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024) (McCormick, Ch.); In re Sears Hometown and Outlet Stores, Inc. Stockholder Litig., 309 A.3d 474 (Del. Ch. 2024) (Laster, V.C.). Off-the-Record Interview with New York-based Corporate Lawyer (May 7, 2024); Off-the-Record Interview with Delaware-based Corporate Lawyer (May 9, 2024). *See* Jonathan R. Macey, *Delaware Law Mid-Century: Far From Perfect but Probably Not Leaving for Las Vegas* 14 (Yale Law & Econ. Rsch. Paper, Dec. 2, 2024), https://ssrn.com/abstract=5043887 ("The two judges whose decisions are the focus of all the controversy over the future of Delaware corporate law are J. Travis Laster and Kathaleen St. J. McCormick.") (cited in Bainbridge, *supra* note 1, at 7 n.30).
[210] *See, e.g.*, Tornetta v. Musk, 310 A.3d 430, 498 (Del. Ch. 2024) ("When a controller displaces or neutralizes a board's power to direct corporate action, then the controller assumes fiduciary obligations."); In re Sears Hometown and Outlet Stores, Inc. Stockholder Litig., 309 A.3d 474, 504 (Del. Ch. 2024) ("The plaintiffs contend that Lampert breached his fiduciary duties as a controller by engaging in the Controller Intervention.") (cited in *Id.* at 8 n.31).
[211] *See* Mike Leonard, *Crackdown on Corporate Insiders Collides With New Era of Control*, BLOOMBERG L. (Apr. 23, 2024) (arguing that, in cases "involving Tesla Inc., TripAdvisor Inc., Moelis & Co., and Sears Hometown and Outlet Stores Inc.," the court has "sought to tighten the standards for conduct by controlling stockholders"), https://news.bloomberglaw.com/esg/crackdown-on-corporate-insiders-collides-with-new-era-of-control (cited in *Id.* at 8 n.34).

transactions that require cleansing and has intensified the scrutiny applied to these cleansing standards, especially concerning the qualifications for independent directors.[212]

D. The Impact On The Business Environment

Recent developments in Delaware case law have frustrated many controlling shareholders and their advisors. As discussed throughout this thesis, one of the most prominent cases involves Tesla CEO Elon Musk.

A less recognized yet even more outspoken example is Phil Shawe, CEO of TransPerfect, a translation and language services company based in New York City. Founded by NYU students in their dormitory in 1992, TransPerfect has grown into a company with revenues exceeding $1 billion and more than 7,000 employees, all while remaining privately held.[213] Between 2015 and 2018, TransPerfect faced litigation in Delaware courts, culminating in a court order that required the company to be sold to one of its founders, thereby resolving a protracted dispute among them.[214] Ultimately, to settle this disagreement, the Court of Chancery ruled that the company would be auctioned off to a third party.[215] Shawe ultimately became the successful bidder in the 2017 public auction, resulting in a payment of $385 million for the other founder's shares and his status as the sole owner.[216]

The Chancery Court decision was highly uncommon, to the extent that even New York Mayor Rudolph Giuliani remarked it might damage Delaware's reputation and standing.[217] Additionally, there were concerns regarding the court's interpretation of Delaware law.

Phil Shawe subsequently relocated the company to Nevada and launched an outspoken campaign against the Delaware Judiciary in general and Chancellor Bouchard, the author of the original opinion, in particular.[218] He created a website named "Dexit, Exit from Delaware," where he accused the Court of Chancery of corruption. Following the company's relocation to Nevada, TransPerfect's CEO wrote an article titled "Dexit to the Desert, Why I Left Delaware for Nevada."[219]

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[212] *See* Off-the-Record Interview with Delaware Academic (May 9, 2024) (cited in *Id.* at 8 n.35).
[213] *See* Steven Davidoff Solomon, *TransPerfect is Threatened by Owners' Petulance*, N.Y. TIMES (Nov. 15, 2016), https://shorturl.at/bzAR7 (cited in Michal Barzuza, *Nevada v. Delaware: The New Market for Corporate Law* 14 n.78 (ECGI Law Working Paper No. 761/2024, July 2024), http://ssrn.com/abstract_id=4746878).
[214] *Id*.
[215] *Id*.
[216] Phil Shaw, *Dexit: Why I Left Delaware for Nevada*, NEV. IND. (Sept. 15, 2023), https://shorturl.at/qBQ17 (cited in Barzuza, *supra* note 213, at n.80).
[217] Solomon, *supra* note 213.
[218] Barzuza, *supra* note 213.
[219] *Id*.

He presented Nevada as "the future home of business incorporation," referencing recent relocations by Twitter and DraftKings to support his argument.

After years of legal battles and involvement in litigation in Delaware, mainly over attorneys' fees (at an estimated cost of $260 million), he urged to "get out of the tentacles of Delaware jurisdiction," as its "greedy" lawyers profit significantly from litigations.[220] Shawe continued his criticism of Chancellor McCormick regarding the Musk case in the following terms: "[t]he only thing I can think of that is more irrational and unpredictable for business law than a court voiding an otherwise binding contract for executive compensation—that was ratified by both the board and shareholders—would be for that same court to turn around and reward the attorneys with a fee based on a percentage of the value of the voided contract."[221] Further, "[t]his is a terrible precedent for CEOs and companies across the country."[222] In an additional argument, Shawe refuted the prevailing notion that Delaware's extensive case law gives clear direction on necessary actions and decisions. He stated that this substantial body of case law actually grants chancellors broad discretion "to do whatever they want."[223]

Finally, Shawe criticized the system for remaining unchallenged for an extended period, allowing for increased tolerance of court abuses. Nonetheless, he continues his anti-Delaware campaign. In 2024, for example, Shawe financed a $2 million attack ad campaign criticizing the Delaware judiciary and bar.[224]

Corporate law ensures certainty and predictability, fulfilling several key policy functions.[225] Businesses depend on clear and stable legal regulations to make informed long-term choices regarding investments, contracts, and risk management. When legal outcomes are predictable, corporations can make decisions and allocate resources more confidently, without the ongoing worry of unforeseen legal repercussions.[226]

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[220] Lydia Moynihan, *Blame Delaware: CEO Defends Elon Musk, Takes out $2M Ad Campaign Hit on 'Anti-Business' State*, N.Y. POST (Apr. 8, 2024).
[221] *Id*.
[222] *Id*.
[223] *Id*.
[224] *Id*. (cited in Bainbridge, *supra* note 1, at 7 n.26).
[225] *See* Harff v. Kerkorian, 324 A.2d 215, 220 (Del. Ch. 1974), *aff'd* in part, *rev'd* in part, 347 A.2d 133 (Del. 1975) ("It is obviously important that the Delaware corporate law have stability and predictability."). The extent to which Delaware law actually provides determinate legal rules has been the subject of some debate. *See, e.g.*, William J. Carney & George B. Shepherd, *The Mystery of Delaware Law's Continuing Success*, 2009 U. ILL. L. REV. 1, 17 (2009) (claiming that Delaware law is sufficiently indeterminate that it causes "delayed transactions and increased litigation costs"); William Chandler III & Anthony A. Rickey, *Manufacturing Mystery: A Response to Professors Carney and Shepherd's "The Mystery of Delaware Law's Continuing Success,"* 2009 U. ILL. L. REV. 95 (arguing that Carney and Shepherd overstate the extent of Delaware law's indeterminacy); Mohsen Manesh, *Delaware and the Market for LLC Law: A Theory of Contractibility and Legal Indeterminacy*, 52 B.C. L. REV. 189, 223 (2011) ("Delaware corporate law is highly indeterminate.") (cited in *Id.* at 17 n.83).
[226] *See* Eliakim v. State, 884 So. 2d 57, 65 (Fla. 4th Dist. App. 2004) (Farmer, C.J., dissenting) ("There are many things about the law that should be determinate and thus predictable, so that people may order their affairs and make decisions about the commitments of families and businesses and their resources.") (cited in *Id.* at 18 n.84).

Clarity in corporate law minimizes litigation by offering explicit guidelines on commonly disputed matters, including corporate governance, contracts, and fiduciary responsibilities. Ambiguous legal standards increase the likelihood that companies will resort to court to settle disagreements.[227]

Certainty and predictability also encourage investment. Investors favor jurisdictions with stable and clear legal frameworks, as these frameworks clarify the rules protecting their investments.[228] Furthermore, investors view certainty and predictability as integral to upholding the rule of law and minimizing the risk of arbitrary or unequal treatment.[229] This leads to a more equitable marketplace where choices are guided by established legal standards rather than inconsistent interpretations, thereby fostering capital inflow and market expansion.[230]

While certainty and predictability are integral to the Delaware brand, the existing Delaware caselaw regarding control falls short in this regard.[231] In fact, the precise definition of control under Delaware law remains ambiguous. On one side, cases reference *In re Cyvise*'s "if he so wishes" standard. Conversely, there are still cases that invoke the "actual domination" standard.[232]

There exists a degree of uncertainty regarding whether the determination of a minority shareholder's control status is contingent upon the procedural posture of the case. A considerable number of the reported opinions concerning controlling shareholders were issued at the motion to dismiss stage rather than after a trial, thereby leaving open the possibility that courts in Delaware apply a more lenient standard at the motion stage compared to what would be employed after a comprehensive factual record has been established.[233] Such a dichotomy contributes to increased litigation costs, as more cases progress beyond the motion-to-dismiss stage.[234] Although most

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[227] Edward Greene & Olivia Schmid, *Duty-Free Insider Trading?*, COLUM. BUS. L. REV. 369, 424 (2013) (arguing that "ambiguity and uncertainty" in the law leads to "more litigation") (cited in *Id.* at 18 n.85).

[228] *See* Peter A. Gourevitch, *The Politics of Corporate Governance Regulation*, 112 YALE L. J. 1829, 1848 (2003) ("Investors, managers, workers, and other individuals making decisions prefer some degree of predictability; without it, economies operate at a lower level.") (cited in *Id.* at 18 n.86).

[229] *See* Rohit Sachdev, *Comparing the Legal Foundations of Foreign Direct Investment in India and China: Law and the Rule of Law in the Indian Foreign Direct Investment Context*, 2006 COLUM. BUS. L. REV. 167, 182 (2006) (positing that "rules of 'principled predictability' or 'fair certainty'" are an element of the rule of law) (cited in *Id.* at 18 n.87).

[230] Bainbridge, *supra* note 1, at 18.

[231] *Id.*

[232] *See, e.g.*, Sciannella v. AstraZeneca UK Ltd., No. 2023-0125-PAF, 2024 WL 3327765, at 19 (Del. Ch. July 8, 2024) (holding that "conclusory allegations do not support a reasonable inference that AstraZeneca 'exercised actual domination and control'"); Lockton v. Rogers, No. CV 2021-0058-SG, 2022 WL 604011, at 14 (Del. Ch. Mar. 1, 2022) (holding that "the Amended Complaint must plead facts showing that the minority stockholder 'exercised actual domination and control over ... [the] directors'") (cited in *Id.* at 19 n.89).

[233] Fisch & Solomon, *supra* note 9, at 136.

[234] *Id.*

controlling shareholder cases likely settle prior to achieving a final post-trial judgment, the ability to survive a motion to dismiss undoubtedly enhances the settlement value of these cases.[235]

An additional source of uncertainty arises from the increasing incorporation of various factors within the applicable case law, irrespective of the specific standard being referenced.[236] In the case of *Tornetta*, for example, Chancellor McCormick delineated four overarching categories of factors relevant to the examination of a minority shareholder's control over the enterprise: "ownership of a substantial equity stake (albeit less than a majority)"; "the right to designate directors (albeit less than a majority)"; "decisional rules in governing documents that enhance the power of a minority stockholder or board-level position"; and "the capacity to exert disproportionate influence within the boardroom, such as through prestigious roles including CEO, Chairman, or founder."[237] Unfortunately, she reached the conclusion that "[b]oth general control and transaction-specific control call for a holistic evaluation of sources of influence."[238] As she acknowledged, it is now "impossible to identify or foresee all of the possible sources of influence that could contribute to a finding of actual control over a particular decision."[239] Transactional lawyers faced unacknowledged, if not unmentioned, challenges in advising their clients.[240]

The superstar CEO model presents notable challenges due to uncertainty and ambiguity. Professors Hamdani and Kastiel, credited by Chancellor McCormick with the introduction of the superstar CEO idea, do not clearly define the criteria for this status.[241] They suggest that superstar CEOs are merely "individuals who directors, investors, and markets believe make a unique contribution to company value," while stating that "the precise factors that could make certain individuals uniquely valuable are less important."[242] They acknowledge that this approach could lead to "vague standards" that "create uncertainty and encourage litigation."[243] Therefore, even though clients are likely to inquire about whether a specific person qualifies as a superstar CEO, definitive answers are lacking.

Beyond adding significant uncertainty to legal interpretations, the numerous factors courts now weigh in determining control have expanded the scope of the minority shareholder test,

[235] Leo E. Strine, Jr., *Minutes Are Worth the Minutes: Good Documentation Practices Improve Board Deliberations and Reduce Regulatory and Litigation Risk*, 29 FORDHAM J. CORP. & FIN. L. 561, 570 (2024) (noting that "cases that pass the motion to dismiss stage typically have seven figure settlement value") (cited in Bainbridge, *supra* note 1, n.93).
[236] Bainbridge, *supra* note 1, at 20.
[237] Tornetta, 310 A.3d 430, 500 (Del. Ch. 2024) (cited in *Id.* at 20 n.95).
[238] *Id*.
[239] *Id*.
[240] Bainbridge, *supra* note 1, at 20.
[241] *Id*.
[242] Hamdani & Kastiel, *supra* note 76, at 1367-68. As Hamermesh, Jacobs, and Strine observe, "the Superstar CEO designation lacks definitional precision." Hamermesh et al., supra note 43, at 346 (cited in *Id.* at 20 n.99).
[243] *Id.* at 1400-02 (cited in *Id.* at 20 n.100).

encompassing a broader range of participants. Consequently, this has a significant impact on the business landscape.[244]

First, vague fiduciary duty standards might deter risk-taking, and uncertainty could discourage investment in controlled companies.[245] Professor Ann Lipton observes that modern startups remain private for extended periods, securing funding through multiple rounds from various investors, including venture capital funds, sovereign wealth funds, and mutual funds. These investors often negotiate particular control rights, such as board seats or veto powers, which complicate ownership structures. Consequently, identifying the "controlling shareholder" involves more than simply holding a majority ownership stake. Such complex control arrangements are now also seen in public companies, featuring multi-class stock structures (such as dual or triple-class shares) and shareholder agreements that reflect the preferential rights typical in private markets. Hence, expanding the definition of a controlling shareholder to encompass those with minor ownership shares may discourage investors from obtaining even small company stakes.[246]

The widening standard will require market participants, particularly those buying shares for financial reasons rather than management, to navigate potential liabilities. Investors may hesitate to invest if they worry about being burdened by fiduciary responsibilities, including strict fairness standards, even with a small percentage of shares. This may decrease market participation and hinder capital formation, particularly for companies that rely on minority shareholders. Such risk aversion could impact market liquidity and impede capital allocation efficiency in the broader economy.[247]

Second, advocates of investor activism should be particularly cautious of the risk that investors with relatively small holdings may be perceived as exerting undue control. Commentators argue that professional investors with minor stakes play crucial roles in oversight by providing constructive influence, strategic guidance, or acting as a counterbalance to management.[248] If these shareholders face fiduciary obligations typically reserved for true controllers, they might be discouraged from engaging with the company. If the supporters of investor activism are correct, this situation could lead to diminished oversight of corporate management and a decline in the entrepreneurial energy that often accompanies active shareholder participation.[249]

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[244] Lipton, *supra* note 57, at 802 ("The most notable feature of the test for minority control is its elasticity: It includes so many factors and considerations that it allows for a great variety of actors to be designated as controllers.") (cited in *Id.* at 21 n.101).
[245] Bainbridge, *supra* note 1, at 21.
[246] Lipton, *supra* note 57, at 803 (cited in *Id.* at 21 n.104).
[247] Bainbridge, *supra* note 1, at 21-22.
[248] Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 867 (1993) (contending that activist investors are an effective means of reinvigorating board oversight). *See also* Stephen M. Bainbridge, *Shareholder Activism in the Obama Era* (UCLA Sch. of Law, Law-Econ Rsch. Paper No. 09-14, July 22, 2009) (questioning both the efficacy and desirability of shareholder activism) (cited in *Id.* at 22 n.105).
[249] Bainbridge, *supra* note 1, at 22.

Third, directors and officers hold the legal authority and responsibility for managing the company's affairs.[250] If shareholders, particularly those with small stakes, are viewed as "controlling," it may jeopardize the established roles of these corporate fiduciaries. This shift could lead courts to examine typical shareholder actions, such as voting or expressing views on corporate policy, as potential breaches of fiduciary duty. Thus, by blurring the distinctions between shareholders and management, corporate governance becomes less effective, as it distorts the allocation of responsibility.[251] This broad definition of control, which includes factors related to managerial authority, conflicts with the framework established by the Delaware legislature. The DGCL offers various statutory protections for directors and officers that do not extend to controlling shareholders. Directors who act in good faith based on reports and data from officers and certain third parties are "fully protected."[252] Directors and officers may be exculpated for breaches of the duty of care[253] and are entitled to indemnification.[254] Conflicts of interest involving directors and officers undergo a single-step cleansing process.[255] These statutory protections could be undermined if the "superstar" status of an officer or director allows them to be deemed a controller, even with little or no stock ownership. Therefore, this determination should rest with the legislature, not the courts.[256]

Moreover, Professor Bainbridge argues that the current laws in Delaware pose the wrong questions. For instance, he raises the issue of superstar CEOs. Whether an individual meets the criteria of a controller is particularly significant for prominent Silicon Valley CEOs. However, even if one can differentiate between a CEO who adds value and a superstar CEO whose value is exceptional, this distinction doesn't address the core issue. The focus should not be on value but rather on control.[257] In the paradigmatic case of Musk, the statement that "Musk was so talented and visionary that the company could not succeed without him" does not logically imply that he was a controlling shareholder.[258]

The courts frequently ask the wrong questions about soft control as well.[259] The mere presence of control rights should not be decisive since Delaware law requires proof of actual control.[260] In *Voigt*, Vice Chancellor Laster noted that these rights remain pertinent, as they demonstrate the

[250] Del. Code Ann., tit. 8, § 141(a) (2025) ("The business and affairs of every corporation organized under this chapter shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation.") (cited in *Id.* at 22 n.106).
[251] Bainbridge, *supra* note 1, at 22-23.
[252] Del. Code Ann., tit. 8, § 141(e) (2025) (cited in *Id.* at 23 n.107).
[253] Del. Code Ann., tit. 8, § 102(b)(7) (2025) (cited in *Id.* at 23 n.108).
[254] Del. Code Ann., tit. 8, § 145 (2025) (cited in *Id.* at 23 n.109).
[255] Del. Code Ann., tit. 8, § 144(a) (2025) (cited in *Id.* at 23 n.110).
[256] Bainbridge, *supra* note 1, at 23.
[257] *Id*.
[258] Hamermesh et al, *supra* note 43, at 346 (cited in *Id.* at 23 n.111).
[259] Bainbridge, *supra* note 1, at 23.
[260] Voigt v. Metcalf, No. CV 2018-0828-JTL, 2020 WL 614999, at 11 (Del. Ch. Feb. 10, 2020) (cited in *Id.* at 23 n.112).

exercise of contractual rights that guide the corporation toward a specific outcome.[261] However, as Hamermesh, Jacobs, and Strine highlight, such rights frequently represent typical commercial transactions.[262]

E. A Course Correction: Expert Proposals

Leo Strine, former Chief Justice of Delaware, stated that recent cases raise important doctrinal questions needing clarification, "such as what constitutes control and who is a controller under Delaware's entire fairness doctrine."[263] While uncertainty about this issue is a common concern, the problem extends beyond that.[264] Practitioners argue that the law itself poses issues, as it is increasingly becoming unduly restrictive on controllers.[265] This raises the question: What direction should the new course pursue?

This section will revisit several fundamental guiding principles. To start, the definition must focus strictly on true domination and control. Elements like leverage, various bargaining inequalities, or the potential to exert control should not influence the analysis. Next, the definition needs to avoid being so broad that it includes individuals who primarily gain power through their roles as officers or directors. Additionally, substantial stock ownership must be a prerequisite. Lastly, the standard should aim for maximum clarity, certainty, and predictability.[266]

Professor Bainbridge posits that the legislature might consider amending the new Delaware General Corporation Law (DGCL) § 122(18) to clarify that the contractual provisions authorized therein do not establish or imply any fiduciary relationship. As previously discussed, there exists a substantial risk that courts may interpret such provisions as conferring controller status upon their holder, an outcome that the proposed amendment seeks to prevent.[267]

The legislature may also implement a provision stating that an individual shall not be deemed a controlling shareholder solely due to their role as an officer, director, or employee of the corporation. This measure would prevent the courts from broadening the definition to include officers and directors who do not hold stock or whose influence primarily stems from their status as corporate

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261 *Id*. at 12 (cited in *Id.* at 24 n.113).
262 Hamermesh et al., supra note 43, at 348 (cited in *Id.* at 24 n.114).
263 *See* Rose Krebs, *Delaware's Corp. Law Dominance A Hot Topic At Tulane Conference*, LAW360 (Mar. 7, 2024), https://www.law360.com/articles/1811403/del-s-corp-law-dominance-a-hot-topic-at-tulane-conference (cited in *Id.* at 24 n.115).
264 Off-the-Record Interview with Delaware Practitioner (May 9, 2024) (cited in *Id.* at 24 n.117).
265 *Id*.
266 Bainbridge, *supra* note 1, at 24.
267 *Id*. at 25.

officers or directors, rather than through stock ownership. Consequently, this should convey a message of legislative disapproval regarding the classification of outstanding CEOs as controllers. Instead, it would subject such individuals to the laws governing directors and officers.[268]

One alternative is for the legislature to establish a statutory definition for controlling shareholders. For instance, the Delaware business combination statute defines "interested stockholder" specifically for that provision, detailing it as "any person (other than the corporation and any direct or indirect majority-owned subsidiary) that (i) is the owner of 15% or more of the outstanding voting stock, or (ii) is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder, and the affiliates and associates of such person."[269] However, Professor Bainbridge acknowledges that a 15% threshold may be excessively wide. The business combination statute aims to prevent an interested stockholder from gaining complete control over the corporation's assets without adhering to the statutory requirements.[270]

Additionally, Professor Bainbridge proposes a standard for assessing whether a shareholder has enough control to trigger fiduciary duties. If a shareholder holds a majority of the voting power, they are considered a controlling shareholder. If a shareholder possesses less than a majority, there is a presumption that they do not exert control. This presumption can only be challenged by demonstrating that the shareholder's stock holdings amount to majority control. Evidence supporting this could include proving that the shareholder holds enough stock to virtually guarantee their ability to elect a majority of the board of directors.[271] His proposal is therefore slightly more limiting than that of Hamermesh, Jacobs, and Strine, who "propose limiting the concept of 'controlling stockholder' to the situation where a stockholder's voting power gives it at least negative power over the company's future, in the sense of acting as a practical impediment to any change of control."[272]

It's essential to note that the proposal focuses on overall control of the corporation, rather than just in relation to a specific transaction. A commonly referenced reason for imposing fiduciary duties on a controller is their potential to retaliate against minority shareholders by leveraging their authority over the board of directors to enforce "onerous and oppressive policy."[273] Similarly, Delaware courts

[268] *Id.*
[269] Del. Code. Ann., tit. 8, § 203(c)(5) (cited in *Id.* at 25 n.120).
[270] *See* Fred Axley & Roberta Blum Andrew, *Control Share Statutes*, 8 N. ILL. U. L. REV. 237, 241 (1988) (discussing purpose of business combination statutes) (cited in *Id.* at 25 n.120).
[271] Bainbridge, *supra* note 1, at 26-27.
[272] *See* Hamermesh et al., supra note 43, at 326.
[273] *See* In re W. Nat. Corp. Shareholders Litig., No. 15927, 2000 WL 710192, at 26 (Del. Ch. May 22, 2000) (noting that "the absence of a controlling shareholder removes the prospect of retaliation"). *See also* Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990) (noting that "shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder"); Franklin A. Gevurtz, *The*

have suggested that controllers should assume fiduciary responsibilities due to concerns that directors may "perceive that disapproval may result in retaliation by the controlling shareholder."[274] In both scenarios, a controller with ongoing authority over the corporation is likely better positioned to retaliate than a shareholder who exercises control only in the context of a specific transaction.[275]

Another factor against applying fiduciary duties on a transaction-by-transaction basis is that it is likely to lead to more significant uncertainty than evaluating a shareholder's continuous control over the company. Issues relating to a shareholder's connections with important managers or contractual entitlements are considerably more subjective than counting the number of shares the supposed controller owns. Additionally, these factors pertain to aspects such as soft control, leverage, and influence, rather than actual control and authority.[276]

One might argue that a practical certainty test is inherently underinclusive, notably if it omits instances of control over specific transactions. However, it is crucial to recognize that a controlling shareholder's authority is constrained by statutory limitations on shareholder rights. In publicly traded corporations, shareholders possess significantly restricted powers to initiate corporate actions.[277] Instead, corporate authority is exercised by the board of directors along with the managers to whom the board delegates its power.[278] The board of directors is "a legally accountable fiduciary obliged by law to advance the interests of the corporation and its shareholders."[279] Therefore, a board that simply endorses a controlling shareholder's wishes, whether or not they hold control, risks facing liability for violating its fiduciary duties. Courts concerned that some instances involving a controller may be overlooked without a broad definition of control should instead focus on the obligations of directors in controlled companies, rather than resorting to ambiguous attempts to identify controllers.[280]

A practical certainty test fundamentally relies on standards instead of strict rules. While standards inherently offer less certainty than rules, this test presents notable advantages over the

Shareholder Approval Conundrum, 60 B.C. L. REV. 1831, 1875 (2019) (stating that "the explanation Delaware courts have given for not invoking the business judgment rule upon approval of a transaction with a controlling shareholder by a majority of the minority shareholders focused on the fear of retaliation") (cited in *Id.* at 27 n.131).

[274] In re Viacom Inc. Stockholders Litig., No. CV 2019-0948-JRS, 2020 WL 7711128, at 24 (Del. Ch. Dec. 29, 2020) (cited in *Id.* at 27 n.132).

[275] Bainbridge, *supra* note 1, at 27.

[276] *Id*. at 27-28.

[277] *See* Fisch & Solomon, *supra* note 3, at 146 ("The power of shareholders, even controlling shareholders to participate in corporate decisions, is starkly limited by Delaware law."); Theodore N. Mirvis, Paul K. Rowe, & William Savitt, *Bebchuk's "Case for Increasing Shareholder Power": An Opposition*, 120 HARV. L. REV. F. 43, 44 (2007) ("In the context of charter amendments and certain extraordinary corporate events, shareholders are asked to react to board recommendations, but have very limited power to initiate corporate action.") (cited in *Id.* at 28 n.133).

[278] *See* Mirvis et al., supra note 277, at 44 ("Significant corporate action (including the 'rules of the road' and 'game ending' decisions at issue in Bebchuk's proposed reforms) may be undertaken under existing law only with the informed and deliberate assent of the board of directors . . .") (cited in *Id.* at 28 n.134).

[279] *Id*.

[280] Bainbridge, *supra* note 1, at 28.

existing complexities.[281] Firstly, it recognizes that control might exist even when a person possesses less than a majority of voting power,[282] redirecting the focus back to the traditional connection between voting power and control. This shift helps prevent the confusion between conflicts of interest involving directors and officers and those involving controlling shareholders. It also alleviates the concern that exercising contractual rights could inadvertently trigger fiduciary duties. Secondly, it aligns with legal precedents that require not just ownership of stock but sufficient control to amount to actual domination. Thirdly, reinstating the presumption that minority shareholders lack control would revive the historical challenges faced by plaintiffs in proving necessary control. Fourthly, prioritizing control rather than leverage or influence prompts the proper inquiries. Ultimately, by narrowing the focus of the investigation and discarding irrelevant factors, it aims to deliver greater certainty and predictability compared to the current standard.[283]

1. Senate Bill 21

In February 2025, legislators in Delaware addressed criticism concerning the treatment of controlling shareholders by the Court of Chancery through the introduction of Senate Bill No. 21. This legislation signifies a significant departure from shareholder primacy to the prioritization of controllers. S.B. 21 aims to strengthen the protections surrounding Delaware's legal framework through several measures: (1) the approval of transactions involving controlling shareholders; (2) an explicit definition of "controlling shareholder"; (3) a clear definition of "independent" director; (4) limitations on liability for controlling shareholders; and (5) provisions for shareholder access to corporate books and records.[284]

Initially, S.B. 21 endeavors to amend DGCL § 144, which establishes a procedure for interested directors and officers to validate interested transactions by obtaining approval either through a vote of disinterested directors or through a vote of disinterested shareholders.[285] However, without such a vote, an interested transaction shall not be deemed void or voidable if it is determined

[281] *Id*. at 29.
[282] *See* In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 552 (Del. Ch. 2003) (noting that a sub-50 percent shareholder whose block is large enough to prevail "without having to attract much, if any, support from public stockholders" can be deemed to have de facto control") (cited in *Id.* at 29 n.138).
[283] Bainbridge, *supra* note 1, at 29.
[284] SB. 21, 152nd Gen. Ass., 1 Leg. Sess. (2025), quoted in Christine Hurt, *Texas, Delaware, and the New Controller Primacy* 49 n.314 (SMU Dedman Sch. of Law Legal Stud. Rsch. Paper No. 680, rev. May 21, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5156667, 67 ARIZ. L. REV. (forthcoming 2025).
[285] Hurt, *supra* note 284, at 49.

to be "fair to the corporation."[286] Delaware case law has established guidelines for a controlling shareholder to validate an interested transaction. Recent cases, specifically *Tornetta* and *Match Group*, have expanded the definition of a controlling shareholder and the parameters that may disqualify a director from being considered independent, generating significant debate.[287] This proposed legislation effectively overturns those judicial determinations moving forward by incorporating controlling stockholder transactions within the Section 144 safe harbor and defining a controlling shareholder as either a majority stockholder or a shareholder possessing one-third of the voting stock with managerial authority.[288] Thus, it is posited that Elon Musk would not qualify as a controlling shareholder of Tesla.

The proposals put forth by Professor Bainbridge are consistent with Delaware Senate Bill 21,[289] which defines controlling shareholders as:

> [A]ny person that, together with such person's affiliates and associates:
>
> a. Owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors; or
>
> b. Has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or for the election of directors who have a majority in voting power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.[290]

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[286] DEL CODE § 144 (cited in *Id.* at 49 n.315).

[287] *See* Bainbridge, *supra* note 1, at 4 ("Delaware's approach, while well-intentioned, has become overly restrictive, stifling beneficial transactions and increasing legal uncertainty."); Macey, *supra* note 209 (acknowledging that "it probably is better to provide too much legal protection to minority shareholders than too little," but "the emerging judicial hostility toward the legitimacy of private ordering, which is reflected not only in the substance, but also in the hostile and condescending tone of these recent opinions, is a significant break from the traditional approach to corporate law on which Delaware's well-deserved reputation for jurisprudential excellence is based") (cited in *Id.* at 49 n.316).

[288] *See Eric Talley, Sarath Sanga, and Gabriel V. Rauterberg, Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform - or the Beginning of an Unraveling*, CLS BLUE SKY BLOG, clsbluesky.law.columbia.edu/2025/02/018/Delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling (Feb. 18, 2025) (analyzing five significant changes to Delaware law that the Section 144 amendments would make and four that the Section 220 amendments would make) (cited in *Id.* at 49 n.317).

[289] S.B. 21, 153rd Gen. Assemb. § 1 (Del. 2025). In addition, the bill amends Delaware General Corporation Law (DGCL) § 220, Del. Code Ann., tit. 8, § 220 (2024), to modify the right of shareholders to inspect corporate books and records. First, the amendments explicitly enumerate which corporate materials stockholders may inspect through books and records demands. Second, they establish prerequisites that stockholders must fulfill to exercise these inspection rights. Third, they mandate that when stockholders file complaints based on information obtained through § 220 demands, that information is automatically incorporated by reference into the complaint. The legislation preserves existing inspection rights from other sources through § 220(b)(4), while avoiding the creation of any new rights, either explicit or implicit. Additionally, § 220(f) empowers the Court of Chancery to compel production of supplemental corporate records—such as board minutes, committee actions, financial statements, and independence questionnaires—when these prove necessary and essential to fulfill the stockholder's proper purpose, particularly in cases where the corporation lacks the specifically requested materials (cited in Bainbridge, *supra* note 1, at 10 n.38).

[290] *Id*. In addition, SB 21 defines a control group as "2 or more persons that are not controlling stockholders that, by virtue of an agreement, arrangement, or understanding between or among such persons, constitute a controlling stockholder" (cited in *Id.* at 30 n.142).

In a manner analogous to the aforementioned proposal, S.B. 21 establishes a presumption of control for individuals possessing a majority of the corporation's voting power. Regarding minority shareholders, the functional equivalence language articulated in S.B. 21 is likely to yield outcomes consistent with Professor Bainbridge's proposal about practical certainty. Moreover, akin to his proposal, S.B. 21 mandates stock ownership; however, it further complements the functional equivalence standard by instituting a definitive rule that stipulates that a controller must possess at least one-third of the company's voting power.[291]

2. *Sinclair Oil* Evolution

Professor Bainbridge also proposed adopting a renewed *Sinclair Oil*[292] standard as the first step in any cases challenging the conduct of a controlling shareholder.

Under *Sinclair Oil*, fairness review is triggered:

> When the situation involves a parent and a subsidiary, with the parent controlling the transaction and fixing the terms, the test of intrinsic fairness, with its resulting shifting of the burden of proof, is applied. The basic situation for the application of the rule is the one in which the parent has received a benefit to the exclusion and at the expense of the subsidiary.
>
> . . .
>
> A parent does indeed owe a fiduciary duty to its subsidiary when there are parent-subsidiary dealings. However, this alone will not evoke the intrinsic fairness standard. This standard will be applied only when the fiduciary duty is accompanied by self-dealing—the situation when a parent is on both sides of a transaction with its subsidiary. Self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary.[293]

In the absence of such self-dealing, however, the appropriate standard is the business judgment rule.[294] By implementing this threshold test to determine the standard of review that is suitable for the case at hand, *Sinclair Oil* effectively reduced the risk that the habitual application of either

[291] Bainbridge, *supra* note 1, at 30.
[292] Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (cited in *Id.* at 37 n.179).
[293] *See* Steven M. Haas, *Toward A Controlling Shareholder Safe Harbor*, 90 VA. L. REV. 2245, 2255, at 720 (2004) ("*Sinclair Oil* was significant 'because the court refused to require all parent-subsidiary transactions' to be reviewed under the entire fairness rule."). The opinion uses the terms parent and subsidiary rather than controller and controlled entity, which was appropriate on the facts, but there is nothing in the opinion suggesting an intent to limit the standard to parent-subsidiary cases. *See, e.g.*, Trans World Airlines, Inc v. Summa Corp, No. 1607, 1985 WL 11544, at 2 (Del. Ch. Mar. 12, 1985) (discussing "the ruling in *Sinclair Oil Corporation v. Levien*, supra, which required the controlling shareholder to demonstrate that its conduct was not a cause of the losses suffered by minority shareholders") (cited in *Id.* at 37-38 n.183, 184).
[294] Sinclair Oil, 280 A.2d at 722 (cited in *Id.* at 38 n.185).

standard would be dispositive without considering the case's merits. In the context of the inquiry regarding the *Sinclair Oil* threshold, it is insufficient for the controlling shareholder merely to be a participant in the transaction. The controlling shareholder must derive a benefit that is both at the expense of and to the exclusion of the minority shareholders.[295]

In the immediate post-*Sinclair Oil* period, two distinct lines of case law emerged. In the first line, "the Delaware courts were willing to do some careful scrutiny and analysis in the threshold test before selecting the ultimate standard of review."[296] In the second category of cases, which initially concerned ownership claims, the courts disregarded *Sinclair Oil* and applied a fairness review without conducting any threshold inquiry.[297] Over time, cases involving enterprise claims adopted a similar approach.[298]

A subsequent category of cases has emerged wherein the court referenced *Sinclair Oil* yet deliberately excluded the detriment prong of the *Sinclair Oil* threshold test.[299] Recently, this category has become a prevalent approach regarding controller transactions within the Chancery Court. In the case of *In re Tilray, Inc. Reorg. Litig*.,[300], for instance, the defendants contended that *Sinclair Oil* necessitated not only demonstrating that the transaction conferred a benefit upon the controlling shareholder at the minority's expense, but also that a causal link existed between the two.[301] Chancellor McCormick noted that several rulings of her court inherently dismissed that argument, explaining that "entire fairness presumptively applies *whenever* a controller extracts a non-ratable or unique benefit."[302]

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[295] Bainbridge, *supra* note 1, at 38.
[296] Siegel, *supra* note 24, at 51 (cited in *Id.* at 39 n.190).
[297] *Id*. at 52-53. Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490 (Del. Ch. 1990) is something of an oddball in this period. In it, then-Vice Chancellor Jack Jacobs interpreted *Sinclair Oil* as holding that "the plaintiff must demonstrate that the parent corporation stood on both sides of the transaction and have dictated its terms." It is true that the *Sinclair Oil* decision stated that where "the parent control[s] the transaction and fix[es] the terms, the test of intrinsic fairness, with its resulting shifting of the burden of proof, is applied." *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971). But the court also went on to state that "[t]he basic situation for the application of the rule is the one in which the parent has received a benefit to the exclusion and at the expense of the subsidiary." Jacobs ignored that statement of the rule. Instead, he focused on the former and held that post-*Sinclair Oil* case law taught that "all that is required" to invoke entire fairness "is that the parent corporation have stood on both sides of the transaction." The cases he cited, however, were all ownership claim cases involving freezeout mergers. *See* Bershad v. Curtiss–Wright Corp., 535 A.2d 840 (Del. 1987); *see also* Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985); *see also* Weinberger v. UOP, Inc., 457 A.2d 708 (Del. 1983); *see also* Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952). As Professor Siegel points out, in such cases the controller by definition is getting a benefit at the expense of the minority. *See* Siegel, *supra* note 24, at 56 (cited in *Id.* at 39-40 n.191).
[298] Siegel, *supra* note 24, at 59-60. Yet another line of cases "utilized *Sinclair* as a basis for evaluating the fair dealing prong of entire fairness, rather than as a threshold strainer as it had been designed" (cited in *Id.* at 40 n.192).
[299] *Id*. at 66 (cited in *Id.* at 40 n.193).
[300] No. CV 2020-0137-KSJM, 2021 WL 2199123 (Del. Ch. June 1, 2021) (cited in *Id.* at 40 n.194).
[301] *See id*. at 13 ("Defendants reduce this holding to a three-part test, arguing that 'self-dealing requires three elements: (1) an exclusive benefit to the fiduciary (2) that causes (3) a detriment to the minority stockholders.'") (cited in *Id.* at 40 n.195).
[302] *See id*. at 14 (emphasis in original) (cited in *Id.* at 40 n.196).

In recent years, the courts of Delaware, particularly the Delaware Chancery Court, have largely moved away from the *Sinclair Oil* threshold inquiry.[303] It is important to note that the fairness review "is not triggered solely because a company has a controlling stockholder."[304] Rather, fairness review is now applicable in situations where the controller is involved on both sides of the transaction, irrespective of whether the controller has derived a benefit at the expense of and to the exclusion of the minority shareholders.[305] Entire fairness will also be invoked whenever the controller receives a unique or non-ratable benefit.[306] This holds true even when that benefit does not occur to the detriment of the minority.[307]

As Professor Bainbridge states, entire fairness should be applied in transactions such as freezeout mergers, sales of the controller's shares, compensation to the controller as a director or officer of the controlled entity, or other potential conflicts of interest, only if the controller gains a benefit to the detriment and exclusion of minority shareholders.[308] If not, the business judgment rule is applicable.

The proposal put forth by the Professor serves to elucidate several classic cases that *Sinclair Oil* has not conventionally analyzed while concurrently delivering a more cohesive framework for their examination.[309] For instance, sales of control are highlighted herein. The law acknowledges that control constitutes a valuable asset over which the controller retains a legitimate property right.[310] Consequently, the authority to dispose of an asset forms a fundamental component of ownership.[311]

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[303] *See* Haas, *supra* note 293, at 2257 ("*Sinclair Oil* has essentially disappeared; it seems to live in dividend and tax cases rather than serve as an overarching principle of controlling shareholder law.") (cited in *Id.* at 41 n.199).
[304] Lacey on behalf of S. Copper Corp. v. Mota-Velasco, No. CV 2019-0312-SG, 2021 WL 508982, at 9 (Del. Ch. Feb. 11, 2021) (cited in *Id.* at 41 n.200).
[305] *See* In re Viacom Inc. Stockholders Litig., No. CV 2019-0948-JRS, 2020 WL 7711128, at 11 (Del. Ch. Dec. 29, 2020), as corrected (Dec. 30, 2020) (explaining that fairness applies, *inter alia*, when "a controller engages in a 'conflicted transaction, [such as] when . . . 'the controller stands on both sides'") (cited in *Id.* at 41 n.201).
[306] *See, e.g.*, In re Crimson Expl. Inc. Stockholder Litig., No. CIV.A. 8541-VCP, 2014 WL 5449419, at 13 (Del. Ch. Oct. 24, 2014) (holding that entire fairness applies when the controller extracts from a transaction "something uniquely valuable to the controller, even if the controller nominally receives the same consideration as all other stockholders"); *see also* In re Ezcorp Inc. Consulting Agreement Derivative Litig., No. CV 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016) (holding that "the entire fairness framework governs any transaction between a controller and the controlled corporation in which the controller receives a non-ratable benefit") (cited in *Id.* at 42 n.202).
[307] *See* Cantor v. Perelman, 414 F.3d 430, 435 n.3 (3d Cir. 2005) (As the Third Circuit opined: The District Court relied upon *Sinclair Oil Corp*. for the proposition that "self-dealing occurs when the parent, by virtue of its domination of the subsidiary, causes the subsidiary to act in such a way that the parent receives something from the subsidiary to the exclusion of, and detriment to, the minority stockholders of the subsidiary." However, we do not read *Sinclair Oil Corp.* to hold that a breach of fiduciary duty can never occur under Delaware corporate law without a detriment to the beneficiary.) (cited in *Id.* at 42 n.203).
[308] Bainbridge, *supra* note 1, at 42.
[309] *Id*. at 43.
[310] Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976). Delaware law thus has long recognized that a controller's status as such is a property right that the controller can protect. *See, e.g.*, Tanzer v. Intl. Gen. Industries, Inc., 379 A.2d 1121, 1123 (Del. 1977) (stating that "we are well aware that a majority stockholder has its rights, too"), overruled on other grounds, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (cited in *Id.* at 49 n.246).
[311] *See* LAURENCE C. BECKER, *Property Rights—Philosophic Foundations* 18 (1977) (arguing that rights of ownership include, *inter alia*, the right to transfer ownership) (cited in *Id.* at 43 n.206).

Therefore, the law should generally allow a controller to sell their shares without restriction, as this represents the prevailing principle.[312] Given that the purchaser is motivated to enhance the value of the newly acquired shares and that minority shareholders will participate pro rata in any subsequent gains in the stock's value post-sale, it follows that minority shareholders frequently benefit from such sales of control.[313]

Furthermore, an inherent risk associated with possessing a minority interest in a corporation lies in the possibility that the controller may exercise their ownership rights by opting to sell their control block without prior consultation with the minority. Under the Professor's proposal, the business judgment rule would apply since the controller has derived a benefit that excludes the minority yet does not detract from their interests. Accordingly, consistent with current legal standards, no liability would result.[314]

The cases that delineate the general rule, however, typically proceed to identify numerous exceptions. These exceptions include instances in which a sale occurs under conditions that suggest the purchasers intend to loot or mismanage the corporation, cases involving fraud or misuse of confidential information, sales that constitute an unlawful appropriation of corporate assets rightfully belonging to the corporation, or scenarios wherein the sale encompasses a premium for the transfer of office.[315] Under the Professor's proposal, such cases would trigger the entire fairness review, as the benefits derived by the controller are now both to the exclusion of and at the detriment of the minority stakeholders.

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[312] For statements of the general rule, *see* Treadway Companies, Inc. v. Care Corp., 638 F.2d 357, 375 (2d Cir.1980); Clagett v. Hutchison, 583 F.2d 1259, 1262 (4th Cir.1978); Zetlin v. Hanson Holdings, Inc., 397 N.E.2d 387, 388 (N.Y.1979); Tryon v. Smith, 229 P.2d 251, 254 (Or.1951); Glass v. Glass, 321 S.E.2d 69, 74 (Va.1984) (cited in *Id.* at 43 n.207).

[313] *See* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 786–89 (2003) at 795 ("So long as the legal rules governing private benefits of control from operations do not allow all of the synergy to be captured by the controlling shareholder, the non-controlling shareholders will participate in the value increase resulting from the sale of control.") (cited in *Id.* at 43 n.208).

[314] Bainbridge, *supra* note 1, at 43.

[315] *See* Zetlin v. Hanson Holdings, Inc., 397 N.E.2d 387 (N.Y. 1979) ("Recognizing that those who invest the capital necessary to acquire a dominant position in the ownership of a corporation have the right of controlling that corporation, it has long been settled law that, absent looting of corporate assets, conversion of a corporate opportunity, fraud or other acts of bad faith, a controlling stockholder is free to sell, and a purchaser is free to buy, that controlling interest at a premium price."); *see also* Mendel v. Carroll, 651 A.2d 297, 305 (Del. Ch. 1994) ("A number of liability creating doctrines have been applied which have the effect of creating risks to the controlling shareholder who attempts to realize a control premium. These doctrines include negligence, . . . sale of corporate office, . . . and sale of corporate opportunity . . ..") (cited in *Id.* at 43 n.209).

3. The Role of Market Constraints

Investors would be more inclined toward a refreshed *Sinclair Oil* threshold standard partly because market constraints significantly deter controller self-dealing. These constraints include independent directors, activist hedge funds, institutional investors, proxy advisors, and other market forces that effectively curtail the controllers' authority.[316] Disclosure obligations and scrutiny from the media can also significantly influence controllers' behavior.[317] Additionally, institutional investors have demonstrated a willingness to fulfill their obligations, while media scrutiny can dramatically impact the actions of controllers. This engagement enables institutional investors to leverage their voting power in opposition to excessive transactions, a strategy that is particularly effective against minority controllers.[318]

The Delaware courts exhibit skepticism regarding the effectiveness of independent directors within controlled corporations. However, it is evident that such directors indeed play a substantial role in constraining the overreach of controllers.[319] Consequently, controllers who engage in overreaching behavior encounter considerable adverse repercussions. The market value of their stock is likely to decline, as it reflects investor sentiment towards the controller's propensity for self-dealing.[320] In contrast, controllers who utilize their authority in ways that benefit minority shareholders are likely to experience an increase in share values.[321] The proposal put forth by the Professor acknowledges these inherent incentives.

In a freeze-out merger or analogous squeeze-out transaction, the standards applicable to controlling shareholders are relevant to both parties involved in the transaction.[322] In a typical arrangement, one side of the transaction consists of a shell corporation entirely owned by the

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[316] *See* Hamermesh et al., *supra* note 43, at 341.
[317] *See* J. A. C. Hetherington, *Defining the Scope of Controlling Shareholders' Fiduciary Responsibilities*, 22 WAKE FOREST L. REV. 9, 24 (1987), at 24 ("Even a majority control group may be to some extent constrained in exploiting its position by reporting requirements and the attendant risk of litigation.") (cited in *Id.* at 52 n.263).
[318] *See* Hamermesh et al., *supra* note 43, at 341 (noting that institutional investors have "shown themselves willing to criticize companies—including those with controlling stockholders—and to dissent at the ballot box") (cited in *Id.* at 52 n.264).
[319] *Id*.
[320] Fisch & Solomon, *supra* note 9, at 146-47 ("To the extent that controlling shareholders destroy corporate value or engage in excessive self-dealing, the market for the shares of controlled companies will reflect those risks.") (cited in *Id.* at 53 n.267).
[321] *See* Hetherington, *supra* note 317, at 24 ("Any control group in such a firm has an incentive to adopt policies which cause its stock to perform well in the market if it is considering selling its own stock or raising additional capital.") (cited in *Id.* at 53 n.268).
[322] *See* Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) ("Getty, as majority shareholder of Skelly, stood on both sides of this transaction . . ..") (cited in *Id.* at 54 n.273).

controller.[323] Conversely, the other side consists of the controlled entity.[324] Consequently, the question emerges as to whether a revitalized *Sinclair Oil* standard should be elicited solely due to the controlling shareholder's conflict of interest arising from their involvement on both sides of the transaction.

As observed, "[c]ontrary to much popular usage, having a 'conflict of interest' is not something one is 'guilty of'; it is simply a state of affairs."[325] There exists no definitive guarantee that the party in conflict will engage in self-dealing. Indeed, as previously demonstrated, controlling shareholders possess ex-ante motivations to abstain from self-dealing.[326] Professor Adam Pritchard notes, "minority shareholders generally did not acquire their minority status by accident. They invested in a public offering by a controlling shareholder, in which case the risk of 'unfair' expropriation was incorporated into the price that they paid for their shares."[327] Although a freeze-out merger is considered a quintessential final period transaction, controlling shareholders, being mindful of the cost of capital of the controlled corporation, have ex-ante incentives to refrain from self-dealing.[328] Furthermore, it is not necessarily the case that all freezeout mergers generate advantages for the controller at the expense of the minority; on the contrary, some instances represent mutually beneficial scenarios.[329] Given the virtually determinative nature of fairness review and the associated litigation and reputational risks related to transactions that trigger it, however, the automatic application of entire fairness review to all freezeout transactions is likely to deter certain transactions that yield benefits for all parties involved.[330] In other words, not all freezeout transactions are solely concerned with the division of resources; some revolve around augmenting the overall value for everyone. Therefore, the rejuvenated *Sinclair Oil* standard should prioritize whether the controller derived benefits to the detriment of, and to the exclusion of, the minority rather than merely inquiring whether the controller held positions on both sides of the transaction.[331]

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[323] *See* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L. J. 2, 9 (2005) (explaining that "the controlling shareholder establishes a wholly owned corporation") (cited in *Id.* at 54 n.274).
[324] *See id*. (noting that "the target board (typically dominated by the controller) approves the merger; and the shareholders of the target (again, dominated by the controller) approve the transaction") (cited in *Id.* at 54 n.275).
[325] Comm. on Corporate Laws, *Changes in the Model Business Corporation Act—Amendments Pertaining to Directors' Conflicting Interest Transactions*, 44 BUS. LAW. 1307, 1309 (1989) (cited in *Id.* at 54-55 n.277).
[326] Bainbridge, *supra* note 1, at 55.
[327] A.C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 BERKELEY BUS. L. J. 83, 103 (2004) (cited in *Id.* at 55 n.278).
[328] *See* M. Todd Henderson, *Mining Manne's Vein*, 12 J. L. ECON. & POLICY 339, 348 at 343 (2016) ("Majority or controlling shareholders have incentives to offer minority shareholders protections against expropriation, since doing so would reduce the risks for them and therefore lower the cost of capital.") (cited in *Id.* at 55 n.279).
[329] *See* Thomas W. Maddi, *Nodak Bancorporation v. Clarke and Lewis v. Clark: Squeezing Out "Squeeze-Out" Mergers Under the National Bank Act*, 51 WASH & LEE L. REV. 763, 774 (1994) (observing that, "given the often divergent investment interests of the majority and minority shareholders, a squeeze-out merger effected at a fair or premium price may benefit both groups") (cited in *Id.* at 55 n.280).
[330] *See* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L. J. 2, at 23 (2005) (noting that "entire fairness review for all freezeouts may deter some value-creating transactions") (cited in *Id.* at 55 n.281).
[331] Bainbridge, *supra* note 1, at 55.

The Delaware Supreme Court supports the entire fairness review in freeze-out situations, not just due to conflicts of interest, but also because squeeze-out transactions are inherently coercive. Additional concerns have been raised. For instance, it is claimed that "the controlling shareholder may use insider information to time the freezeout when the stock price is below intrinsic value." [332] This presumes that the controller can push the transaction through both the board and other shareholders at a chosen time. It also overlooks the possible liability that the controller could incur for insider trading.[333] Second, it is argued that "the controlling shareholder may wield its influence over the corporation to drive down the value of shares by, for example, putting off potentially profitable projects or even engaging in negative net present value projects."[334] However, this argument presupposes that the controller would jeopardize its own financial interests. It also suggests that the board of directors would fail to oversee such misconduct, despite their fiduciary responsibility to safeguard minority interests.[335]

Professor Bainbridge argues that, upon close inspection, the coercion argument is not convincing. Initially, the rationale for using entire fairness does not solely apply to freezeout transactions; it could instead justify applying entire fairness to all transactions involving a controller.[336] In *Tornetta v. Musk*, Vice Chancellor Slights noted that the risk of coercion exists not only when a conflicted controller proposes a freezeout merger but also when entering into a compensation arrangement:

> Indeed, in the CEO compensation context, the minority knows full well the CEO is staying with the company whether *vel non* his compensation plan is approved. As our Supreme Court observed in Tremont II:
>
> > [I]n a transaction such as the one considered . . . the controlling shareholder will continue to dominate the company regardless of the outcome of the transaction. The risk is thus created that those who pass upon the propriety of the transaction might perceive that disapproval may result in retaliation by the controlling shareholder.
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> These words apply with equal force to the compensation setting.[337]

Expanding the inherent coercion argument and the entire fairness review to encompass all controller transactions increases the likelihood that numerous beneficial transactions might be

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[332] *See* Benjamin Klein, *The Right Solution to the Wrong Problem: The Status of Controlling Shareholders After in Re John Q. Hammons Hotels Inc.*, 120 YALE L. J. 1251, 1258 (2011). *See* Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 YALE L. J. 1354, 1365-70 (1978) (arguing that freezeouts can be viewed as an extreme form of insider trading) (cited in *Id.* at 55 n.282).
[333] Bainbridge, *supra* note 1, at 55.
[334] *See id*. at 1258. *See* Natasha G. Menell, *The Copperweld Question: Drawing the Line Between Corporate Family and Cartel*, 101 CORNELL L. REV. 467, 496 (2016) (observing that "the board of directors has fiduciary duties running to minority shareholders that require them to resist parental control and to direct the subsidiary in competition with the parent if this would best serve the subsidiary's interests") (cited in *Id.* at 55 n.282).
[335] Bainbridge, *supra* note 1, at 55.
[336] *Id.* at 55-56.
[337] Tornetta v. Musk, 250 A.3d 793, 809 (Del. Ch. 2019) (cited in *Id.* at 56 n.283).

discouraged.[338] As Professor Seigel thus observed, "monitoring all controlling-shareholder transactions by entire fairness is overkill."[339] Ultimately, extensive use of the coercion rationale will lead to more controller transactions requiring cleansing. Hamermesh, Jacobs, and Strine assert that this practice "will not generate systemic value for diversified stockholders. Instead, it is more likely to result in excessive transaction costs, increased D&O insurance costs, and contrived settlements designed only to avoid the costs and justify the attorneys' fee that motivates most corporate representative suits."[340]

Another issue with a broad approach to this problem is its inconsistency with the predominantly board-focused nature of Delaware corporate law. A freeze-out transaction usually necessitates board approval.[341] Even a majority shareholder cannot carry out most freezeout transactions without such approval.[342] In this context, Delaware courts recognize that directors—independent ones included—face inherent coercion due to the controller's overpowering influence.[343] However, directors of a controlled corporation have fiduciary duties to minority shareholders. This obligation may necessitate taking steps to protect the minority from oppression by the controller, which could include issuing stock to reduce the controller's voting influence.[344] While a controlling shareholder can dismiss directors who try to do so, such "a change in composition does not alter the fiduciary principles to which all directors are subject."[345]

The application of *Sinclair Oil* to all freeze-out transactions may be perceived by the courts as excessive despite the weakness of the opposing arguments, particularly considering the well-established case law that applies it at least to freezeouts executed by a majority shareholder. It is reasonable to assert that freeze-out transactions conducted by a majority shareholder are often replete with the risk of self-dealing, thereby warranting the automatic imposition of an entire fairness

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[338] Bainbridge, *supra* note 1, at 56-57.
[339] Seigel, *supra* note 24, at 74 (cited in *Id.* at 57 n.284).
[340] Hamermesh et al., supra note 43, at 344 (cited in *Id.* at 57 n.285).
[341] *See* Fisch & Solomon, *supra* note 9, at 146 ("Decisions at controlled companies are made by boards of directors, which exercise broad discretion pursuant to DGCL § 141(a) . . ..") (cited in *Id.* at 57 n.286).
[342] *See id.* ("The power of shareholders, even controlling shareholders to participate in corporate decisions, is starkly limited by Delaware law.") (cited in *Id.* at 57 n.287).
[343] Lonergan v. EPE Holdings, LLC, 5 A.3d 1008, 1023 (Del. Ch. 2010) (cited in *Id.* at 57 n.288).
[344] *See, e.g.*, Mendel v. Carroll, 651 A.2d 297, 306 (Del. Ch. 1994) ("I continue to hold open the possibility that a situation might arise in which a board could, consistently with its fiduciary duties, issue a dilutive option in order to protect the corporation or its minority shareholders from exploitation by a controlling shareholder who was in the process or threatening to violate his fiduciary duties to the corporation . . .."); *see also* Hollinger Int'l, Inc. v. Black (Hollinger I), 844 A.2d 1022, 1088 (Del. Ch.2004) (approving board's deployment of rights plan to prevent controlling stockholder from selling block of shares to third party), *aff'd*, 872 A.2d 559 (Del.2005); Phillips v. Insituform of N.A., Inc., No. CIV.A. 9173, 1987 WL 16285, at 7 (Del. Ch. Aug. 27, 1987) (holding that Delaware law "teaches that the powers of the board to deal with perceived threats to the corporation extend, in special circumstances, to threats posed by shareholders themselves and a board may, in such circumstances, take action to protect the corporation even if such action discriminates against and injures the shareholder or class of shareholders that poses a special threat") (cited in *Id.* at 57 n.289).
[345] *See* Fisch & Solomon, *supra* note 9, at 146 (cited in *Id.* at 57-58 n.290).

review.[346] In this context, we are addressing a final period transaction, which inherently amplifies the potential for self-dealing.[347] Additionally, we are confronted with a shareholder who, by definition, possesses the authority to elect the entire board and to ratify the transaction, even in cases where all other shareholders oppose it. Consequently, it is prudent to establish a distinct rule whereby freeze-out transactions that involve a majority controller are evaluated for fairness without necessitating evidence that the controller profited at the expense of, and to the detriment of, the minority shareholders. Indeed, there exists a precedent for instituting such an exception. As articulated by former Delaware Chief Justice Leo Strine, the *Lynch* decision was, for instance, originally perceived by numerous observers as "a special rule for going private transactions involving controlling stockholders."[348]

When we turn to freeze-outs effected by a minority controller, however, the inherent coercion rationale rests on an inaccurate assumption. A controller's capacity to retaliate against directors and minority shareholders who dissent from the controller's proposal is contingent upon the controller maintaining "continuous control."[349] Controllers who possess less than a majority of the shares may exert influence over particular transactions; however, they may not possess the sustained control required to compel minority shareholders in relation to other transactions.[350] Furthermore, it is posited that "the market may be an effective monitor of some of these transactions; not only will the controlling shareholder's stock lose proportionate value from an irrational, retaliatory transaction, but if the controlling shareholder were also a minority shareholder, an interested bidder might surface to buy stock at depressed prices."[351] Consequently, the rationale for a carve-out for such transactions is thus not substantiated.[352]

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[346] Bainbridge, *supra* note 1, at 58.
[347] *See* Haas, *supra* note 293, at 2301 ("The final-period transaction is characterized by a fall-out of the previously existing constraints that police a controlling shareholder's conduct in going-concern business transactions.") (cited in *Id.* at 58 n.291).
[348] *See* Strine, *supra* note 235, at 509 (cited in *Id.* at 58 n.292).
[349] Siegel, *supra* note 24, at 41-42 (cited in *Id.* at 58 n.293).
[350] *Id.*
[351] *Id.* at 42. Hamermesh, Jacobs, and Strine observe that "*Lynch*'s inherent coercion doctrine rested on the premise that a controller could bypass a special committee, make a going private tender offer, and escape ultimate fairness review." Hamermesh et al., supra note 43, at 343. The same would be true for a minority shareholder. As Adam Pritchard notes, however, empirical evidence suggests that "minority shareholders are not readily buffaloed into accepting a lowball offer." Pritchard, *supra* note 327, at 101 (cited in *Id.* at 58-59 n.295).
[352] Bainbridge, *supra* note 1, at 59.

4. The Law of Cleansing

If a conflicted controller transaction is subject to review under the entire fairness standard, the law permits such a transaction to be cleansed via approvals by disinterested and independent directors and/or shareholders. However, in recent years, satisfying the requirements necessary for cleansing has become increasingly challenging.[353] This challenge has been a significant catalyst in the ongoing debate regarding the desirability of incorporation in Delaware. In the words of Bainbridge, a corrective measure is warranted and is thus necessary in this context as well.

When the plaintiff presents sufficient facts to initiate an entire fairness review, it is the burden of the defendant to prove that the contested transaction is fair.[354] In accordance with the judgment rendered in *Kahn v. Lynch Commun. Sys., Inc.*,[355] if a transaction involving a conflicted controller is approved either by a committee comprising independent directors or by an informed majority vote of the disinterested shareholders, the standard of review remains entire fairness.[356] However, the burden of proof shifts from the defendant to the plaintiff.[357]

In *Kahn v. M&F Worldwide Corp.*,[358] the Delaware court determined that the transaction could be subject to a more comprehensive cleansing if it received approval from both the independent directors and the disinterested shareholders.

> [I]n controller buyouts, the business judgment standard of review will be applied if and only if: (i) the controller conditions the procession of the transaction on the approval of both a Special Committee and a majority of the minority stockholders; (ii) the Special Committee is independent; (iii) the Special Committee is empowered to freely select its own advisors and to say no definitively; (iv) the Special Committee meets its duty of care in

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[353] GIBSON DUNN, *Stockholder Agreements, Controller Transactions & Non-Compete Covenants*, (Jun. 18, 2024) (noting a "trend of MFW conditions becoming more difficult to meet") (cited in *Id.* at 59 n.296).

[354] *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983) (holding that "even though the ultimate burden of proof is on the majority shareholder to show by a preponderance of the evidence that the transaction is fair, it is first the burden of the plaintiff attacking the merger to demonstrate some basis for invoking the fairness obligation") (cited in *Id.* at 59 n.298).

[355] 638 A.2d 1110 (Del. 1994).

[356] *See id.* at 1117; *see also* In re Cysive, Inc. S'holders Litig., 836 A.2d 531, 548 (Del. Ch. 2003 (holding that *Lynch* gives "defendants the benefits of a burden shift if either one of the devices is employed"). Although *Kahn* purported to offer transaction planners alternative cleansing approaches, in practice approval by an independent board committee proved preferable because it was less costly and less risky. *See* Hamermesh et al., *supra* note 43, at 332 (discussing the "disincentive" to use shareholder approval as a cleansing device). If the independent board committee route is chosen, the burden will shift only if the controller did not dictate the transaction's terms and the independent committee had "real bargaining power" such that it could negotiate with the controller on an arms-length basis. *Lynch*, 638 A.2d at 1117. The committee must be "truly independent" and "fully informed." *Id.* at 1120 (cited in Bainbridge, *supra* note 1, at 60 n.300).

[357] *See* Lynch, 638 A.2d at 1117 (holding that "approval of the transaction by an independent committee of directors or an informed majority of minority shareholders shifts the burden of proof on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff") (cited in *Id.* at 60 n.301).

[358] 88 A.3d 635 (Del. 2014).

> negotiating a fair price; (v) the vote of the minority is informed; and (vi) there is no coercion of the minority.[359]

The controller must ensure that the *MFW* conditions are established before any substantive negotiations regarding the economic terms of the transaction commence. If those protections are established from the outset, the business judgment rule serves as the standard of review, placing the burden of proof on the plaintiff.[360] Under this standard, the court will avoid addressing the merits of the transaction unless the plaintiff can demonstrate waste. This possible waste claim is largely theoretical, as claiming waste requires that the transaction's terms are so unfair that no reasonable person acting in good faith would perceive it as equitable.[361] In the context of *MFW*, however, one addresses the issue of waste only after approval has been granted by two groups of presumably rational individuals: specifically, the special committee of independent directors and the disinterested shareholders possessing a sufficient number of shares to represent a majority of the minority. Consequently, the residual waste claim could be easily dismissed without significantly compromising the protection afforded to minority shareholders.[362]

While *MFW* was determined within the framework of a freeze-out merger, a consistent series of Chancery Court rulings have extended the *MFW* precedent to additional categories of transactions involving conflicted controllers.[363] According to Professor Bainbridge, the extension of the *MFW* standard to all transactions involving conflicted controllers should provoke significantly less controversy, contingent upon the adoption of his proposed course corrections. A comprehensive fairness review would only be applicable in the scenario where the defendant shareholder possesses voting authority equivalent to functional majority control. This significantly mitigates concerns regarding the breadth of the definition of a controller. Furthermore, a comprehensive fairness review would only be instituted if the controller acquired gains at the expense of, and to the exclusion of,

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[359] *Id*. at 645.
[360] MFW, 88 A.3d at 644.
[361] *See* In re McDonald's Corp. Stockholder Derivative Litig., 291 A.3d 652, 693 (Del. Ch. 2023) ("A transaction constitutes waste when it is so one-sided that no rational person acting in good faith could approve it.") (cited in *Id.* at 61 n.307).
[362] Bainbridge, *supra* note 1, at 61.
[363] *See, e.g.*, In re Match Grp. Derivative Litig., No. 2020-0505-MTZ, 2022 WL 3970159, at 15 (Del. Ch. Sept. 1, 2022) (applying *MFW* to a corporate spin-off), *rev'd* in part on other grounds, 315 A.3d 446 (Del. 2024); Tornetta v. Musk, 250 A.3d 793, 800 (Del. Ch. 2019) (applying *MFW* to excessive executive compensation claims against a controlling shareholder); In re Martha Stewart Living Omnimedia, Inc. S'holder Litig., Consol. C.A. No. 11202-VCS, 2017 WL 3568089, at 2 (Del. Ch. Aug. 18, 2017) (applying *MFW* to a transaction in which a merger with a third party in which the controller allegedly extracted disparate consideration); IRA Tr. FBO Bobbie Ahmed v. Crane, Consol. C.A. No. 12742-CB, 2017 WL 7053964, at 9 (Del. Ch. Dec. 11, 2017) (applying *MFW* to a stock reclassification); *see generally* Alex Lindsey, *Expanding MFW: Delaware Law Should Offer a Business Judgment Rule Safe Harbor for All Conflicted Controller Transactions*, 29 FORDHAM J. CORP. & FIN. L. 339, 379 (2023) ("Many Chancery Court decisions have endorsed the MFW factors as effective in contexts other than squeeze out mergers . . ..") (cited in *Id.* at 61 n.311).

minority shareholders, thus alleviating concerns regarding the extensive interpretation of conflicted controller transactions.[364]

The requirement for independent directors constitutes the primary area of concern regarding cleansing under the *MFW* framework.[365] Uncertainty surrounding the definition of independence raises significant apprehensions among those expressing skepticism about the trajectory of *MFW*'s development.[366] There exists a prevailing impression that certain judges of the Delaware Chancery Court have adopted a skeptical stance toward the independence of directors within Silicon Valley firms.[367] Similar sentiments have been echoed by practitioners.[368] In a recent blog post, Professor Ann Lipton speculated that these sentiments were articulated by both a distinguished Delaware academic and a prominent figure in Delaware legal circles. Such developments may "hit Silicon Valley companies particularly hard, because of the chumminess of the tech world, and it's not surprising that once independence is questioned, the tone of opinions is going to come off as skeptical, in a manner that defendants do not like."[369] Their observations are corroborated by recent commentary from law firms, confirming that uncertainty in this area has become an increasingly prominent concern.[370] This issue poses a significant challenge, as ascertaining the independence of a director from the controller is a crucial element in litigating transactions involving a conflicted controller.[371]

According to Delaware law, the assessment of director independence has evolved into a meticulous factual inquiry that is conducted on a case-by-case basis.[372] The fundamental question is "whether the director's decision is based on the corporate merits of the subject before the board, rather

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[364] Bainbridge, *supra* note 1, at 62.

[365] As the Delaware Supreme Court has explained, independence is a contextual inquiry, which asks whether some is "independent from whom and independent for what purpose?" Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1050 (Del. 2004). The questions herein are whether directors are independent from a controller for purposes of *MFW* cleansing. No claim is made as to the utility if the proposed standard in other contexts (cited in *Id.* at 62 n.314).

[366] *See* Off-the-Record interview (May 7, 2024) (cited in *Id.* at 62 n.315).

[367] *Id*.

[368] *See* Off-the-Record Interview with Delaware Academic (May 9, 2024) (stating that distrust of ostensibly independent directors has led to enhanced judicial scrutiny); Off-the-Record Interview with Delaware Practitioner (May 9, 2024) (arguing that the changing definition of independence is making it harder to satisfy *MFW*) (cited in *Id.* at 63 n.317).

[369] *See* Ann Lipton, *The Delaware Contretemps Continues*, BUS. L. PROF. BLOG (Apr. 26, 2024), https://lawprofessors.typepad.com/business_law/2024/04/the-delaware-contretemps-continues.html (cited in *Id.* at 63 n.318).

[370] *See, e.g.*, *In Long-Awaited Match Decision, Delaware Supreme Court Expands MFW Requirements in Conflicted Controller Transactions*, DECHERT (Apr. 24, 2024), https://www.dechert.com/knowledge/onpoint/2024/4/in-long-awaited-match-decision—delaware-supreme-court-expands-m.html (noting "the continuously evolving case law around what social and professional relationships will call into question a director's independence"); WILSON SONSINI, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations* (Apr. 23, 2024), https://www.wsgr.com/en/insights/delawares-status-as-the-favored-corporate-home-reflections-and-considerations.html (noting "the uncertainty that can exist in assessing board independence in some scenarios, along with the frequent occurrence that the independence of excellent board members is a close judgment call") (cited in *Id.* at 63 n.319).

[371] Bainbridge, *supra* note 1, at 63.

[372] *See* Teamsters Union 25 Health Services & Ins. Plan v. Baiera, 119 A.3d 44, 61 (Del. Ch. 2015) ("Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry . . ..") (cited in *Id.* at 64 n.323).

than extraneous considerations or influences."[373] To rephrase, the inquiry is "whether, applying a subjective standard, those ties [between the director and the defendant] were *material* in the sense that the alleged ties could have affected the impartiality of the individual director."[374]

In his *Oracle* decision,[375] then-Vice Chancellor Leo Strine emphasized the independence of two members of a special litigation committee by stating, "*Homo sapiens* is not merely *homo economicus*."[376] In addition to financial or familial considerations, a director could also be biased by "motives like love, friendship, and collegiality."[377] Consequently, courts are required to conduct "a contextual examination of the materiality of the entire panoply of human relationships that may compromise a person's objectivity,"[378] a task that is far from being a clearly delineated or tightly constrained set of considerations.

The outcome has precipitated a significant erosion of certainty and predictability.[379] As former Chief Justice Strine himself acknowledged, the inquiry is "admittedly imprecise,"[380] a notable admission from the jurist who initiated the expansion of the director independence inquiry. Nevertheless, Delaware's "caselaw around what social and professional relationships will call into question a director's independence" continues to diminish in clarity rather than increase.[381] However, as long as Delaware continues to depend on fact-specific, materiality-based standards, inconsistent outcomes will remain unavoidable.[382]

Delaware law's escalating indeterminacy in this domain may be attributed to rising judicial skepticism regarding director independence. This reflects apprehension that even nominally independent directors may experience pressure to comply with a controller's preferences lest they

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[373] Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049 (Del. 2004) (cited in *Id.* at 64 n.324).
[374] *See* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 649 (Del. 2014) (emphasis in the original) (cited in *Id.* at 64 n.325).
[375] In re Oracle Corp. Derivative Litig., 824 A.2d 917 (Del. Ch. 2003) (cited in *Id.* at 66 n.335).
[376] *Id*. at 938 (cited in *Id.* at 64 n.336).
[377] *Id*.
[378] Randy J. Holland, *Delaware Independent Directors A Judicial Contextual Evolution*, 24 U. PA. J. BUS. L. 781, 790 (2022) (cited in *Id.* at 67 n.340).
[379] *See* Jeremy McClane & Yaron Nili, *Social Corporate Governance*, 89 GEO. WASH. L. REV. 932, 958 (2021) ("Subsequent decisions in Delaware and elsewhere have taken an inconsistent approach regarding networks; at times, courts have treated far more intimate ties than those in *Oracle* as unproblematic for director independence, while more attenuated ties have raised doubts."). To be sure, case law gives indications of both a ceiling and a floor. In an opinion from his days as Chancellor, Strine drew a distinction between a friendship in which "the parties had served as each other's maids of honor, had been each other's college roommates, shared a beach house with their families each summer for a decade, and are as thick as blood relations," and one in which the parties who occasionally "dinner over the years, go to some of the same parties and gatherings annually, and call themselves 'friends.'" In re MFW S'holders Litig., 67 A.3d 496, 509 n.37 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014). What we lack is guidance as to where the line falls in the middle (cited in *Id.* at 67 n.341).
[380] Sandys v. Pincus, 152 A.3d 124, 128 (Del. 2016) (cited in *Id.* at 67 n.342).
[381] *See* DECHERT, *supra* note 370 (cited in *Id.* at 67 n.343).
[382] *See* Mohsen Manesh, *Indeterminacy and Self-Enforcement: A Defense of Delaware's Approach to Director Independence in Derivative Litigation*, 6 J. BUS. & SEC. L. 177, 195 (2006) ("Given that different judges will find different facts material, indeterminacy will abound.") (cited in *Id.* at 69 n.356).

jeopardize their positions as directors.[383] Given that rules often exhibit characteristics of being either under- or over-inclusive, or potentially both,[384] judicial skepticism concerning director independence, along with the consequent aim to identify any bias-inducing relationships, results in the preference for standards over rules.[385] The selection of a standard as opposed to a rule inherently introduces an element of uncertainty. Consequently, the variety of situations in which a skeptical jurist may determine a relationship to be bias-inducing will further propel the standards toward more significant uncertainty.[386] Consequently, Professor Bainbridge recommends that the course correction redirect the approach toward a clear-cut rule rather than the existing ambiguous multi-factor standard.[387]

Enhanced and more comprehensible standards would mitigate the apparent inconsistencies observed within the current system. Such standards would yield increased clarity, thereby fostering greater certainty and predictability.[388] They would also reduce administrative expenditures by facilitating the processes for litigants and judicial bodies.[389]

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383 *See* In re Pure Resources, Inc., Shareholders Litig., 808 A.2d 421, 436 (Del. Ch. 2002) (arguing that the Delaware Supreme Court views "the controlling stockholder as the 800–pound gorilla whose urgent hunger for the rest of the bananas is likely to frighten less powerful primates like putatively independent directors who might well have been hand-picked by the gorilla (and who at the very least owed their seats on the board to his support"); Note, *Controller Confusion: Realigning Controlling Stockholders and Controlled Boards*, 133 HARV. L. REV. at 1726 n.102 (2020) ("Some scholars argue that even independent directors may have incentives to follow a controlling stockholder's wishes or otherwise lack adequate incentives to protect other investors."); Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1983 (2019) (arguing that Delaware caselaw suggests that "even independent directors may fear the wrath of controlling stockholders, such that their approval could not be assumed to be freely bestowed"); Leo E. Strine, Jr., *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005) (suggesting that "there is an obvious fear that even putatively independent directors may owe or feel a more-than-wholesome allegiance to the interests of the controller, rather than to the corporation and its public stockholders.") (cited in *Id.* at 69 n.358).

384 *See* MindGames, Inc. v. W. Pub. Co., Inc., 218 F.3d 652, 657 (7th Cir. 2000) ("Rules have the advantage of being definite and of limiting factual inquiry but the disadvantage of being inflexible, even arbitrary, and thus overinclusive, or of being underinclusive and thus opening up loopholes (or of being both over- and underinclusive!).") (cited in *Id.* at 70 n.359).

385 *See* James W. Colliton, *Standards, Rules and the Decline of the Courts in the Law of Taxation*, 99 DICK. L. REV. 265, 273 (1995) (noting that "standards are preferable when the law covers widely varying factual situations") (cited in *Id.* at 70 n.360).

386 *See* J. Haskell Murray, *The Social Enterprise Law Market*, 75 MD. L. REV. 541, 588 (2016) ("Legal indeterminacy creates uncertainty stemming from broad standards that provide for significant judicial discretion.") (cited in *Id.* at 70 n.361).

387 Bainbridge, *supra* note 1, at 70.

388 *See* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1169 (1993) (explaining that "the great advantage of rules (as opposed to standards) in conventional thought is that rules are said to increase certainty, predictability, . . . and decrease arbitrariness and the possibility of biased enforcement") (cited in *Id.* at 70 n.363).

389 *See id*. (including among the advantages of rules is that they provide "ease of administration in law application") (cited in *Id.* at 70 n.364).

5. Assumptions About Independent Directors

In contrast to the judicial skepticism surrounding the effectiveness of director independence, the suggested course correction is based on the assumption that independent directors impose a significant constraint on controlling shareholders. Substantial empirical evidence indicates that independent directors contribute to a reduction in agency costs that surpasses the expenses associated with having external members on the board.[390] Independent directors are increasingly able to retain their positions on boards of controlled companies by ensuring that influential institutional investors are satisfied, as these "investors have a powerful voice and no fear of controlling stockholders […]."[391]

In addition to addressing the pressures exerted by activist hedge funds and other institutional investors, controlling shareholders must acknowledge that replacing independent directors who challenge them with more compliant individuals will incur substantial reputational costs, potentially elevating their cost of capital in both the debt and equity markets.[392] This assumption holds particular validity within the context of the *MFW* framework. The requirement for dual protections by *MFW* illustrates that such protections are "complements and not substitutes."[393] The dual-protection framework established by *MFW* ensures that the controller is unable to circumvent the special committee by engaging directly with the minority shareholders, nor can the controller bypass the minority shareholders by negotiating solely with the special committee.[394] This mutual oversight imposes restrictions on the controller's capacity to exploit either group.[395] The primary assertion is that, particularly in this context, director independence likely serves as a significant constraint on controlling shareholders. Consequently, the present excessively stringent examination of director independence is unwarranted.[396]

Should either the Delaware legislature or judiciary choose to address these concerns, several plausible solutions are available, according to Professor Bainbridge. We commence with potential

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[390] *See* Stephen M. Bainbridge, *Independent Directors and the ALI Corporate Governance Project*, 61 GEO. WASH. L. REV. 1034, 1062 (1993) (recounting empirical studies on the corporate governance benefits of independent directors); Hamermesh et al., *supra* note 43, at 341 ("When *Function Over Form* was published, independent directors had already shown themselves capable of standing up to corporate managers, and CEO tenure had been declining as a result.") (cited in *Id.* at 71 n.367).

[391] Hamermesh et al., *supra* note 43, at 341 (cited in *Id.* at 71 n.368).

[392] *Id*. (noting that "even controllers had to be sensitive to the prospect that replacing independent directors who said no to a conflict transaction with ones who would do their bidding would impair their ability to raise debt and other capital") (cited in *Id.* at 71 n.369).

[393] In re Cox Commc'ns, Inc. Shareholders Litig., 879 A.2d 604, 619 (Del. Ch. 2005) (cited in *Id.* at 72 n.370).

[394] Iman Anabtawi, *The Limits of Shareholder Ratification* 47 (UCLA Sch. of Law, Law-Econ Rsch. Paper No. 23-06, Sept. 19, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4576584, 50 J. CORP. L. 449 (forthcoming 2025) (cited in *Id.* at 72 n.371).

[395] *Id*.

[396] Bainbridge, *supra* note 1, at 72.

legislative remedies. One alternative, for instance, involves aligning Delaware law with the relevant listing standards of the stock exchange. Despite the longstanding efforts to enhance director independence,[397] this initiative gained momentum following the post-dot-com bubble period and subsequently after the subprime mortgage crisis, during which the Sarbanes-Oxley and Dodd-Frank Acts "appointed independent directors as the capitalist cavalry and charged them with riding to the system's rescue."[398] Specifically, the Sarbanes-Oxley Act mandated that publicly traded companies establish an audit committee composed solely of independent directors. Furthermore, it required that stock exchanges adopt listing standards necessitating that listed companies maintain a majority of independent directors.[399] Subsequently, the Dodd-Frank Act mandated that publicly traded corporations establish a compensation committee composed solely of independent directors.[400] In addition to implementing listing standards that adhere to these statutory requirements, the exchanges also instituted regulations requiring publicly traded corporations to maintain a nominating committee formed exclusively of independent directors.[401]

The new listing standards primarily focus on regulations for evaluating the independence of directors. The NYSE Listed Company Manual § 303A.02(b) establishes five definitive criteria for determining director independence.[402] These criteria primarily address issues such as whether the company employs the director or an immediate family member of the director, whether the director or an immediate family member receives compensation exceeding $120,000, and other defined affiliations.[403] Furthermore, there exists a supplementary requirement mandating that the board ascertain if the director possesses any other significant relationship with the corporation.[404] Professor Bainbridge suggests that, instead of adopting a definitive outcome-determinative bright-line definition, the Delaware legislature could establish a clear presumption. In other words, Delaware law could stipulate that a director who meets a specific set of criteria based on the NYSE listing

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[397] *See* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1477 (2007) (describing the legal and market drivers of director independence in the period 1950-2005) (cited in *Id.* at 72 n.373).

[398] STEPHEN M. BAINBRIDGE, *Corporate Governance after the Financial Crisis* 78 (1st ed. 2012) (cited in *Id.* at 72 n.374).

[399] *See* Yaron Nili, *The "New Insiders": Rethinking Independent Directors' Tenure*, 68 HASTINGS L. J. 97, 109 (2016) (describing Sarbanes-Oxley requirements) (cited in *Id.* at 72 n.375).

[400] Regina F. Burch, *Financial Regulatory Reform Post-Financial Crisis: Unintended Consequences for Small Businesses*, 115 PENN ST. L. REV. 409, 437 (2010) (cited in *Id.* at 73 n.376).

[401] *See* Michael E. Murphy, *The Nominating Process for Corporate Boards of Directors: A Decision-Making Analysis*, 5 BERKELEY BUS. L. J. 131, 148 (2008) ("NYSE rules now require the nominating committee to be composed entirely of independent directors. The NASDAQ Exchange adopted a rule with much the same effect, though it contains exceptions of minor significance.") (cited in *Id.* at 73 n.377).

[402] *See* NYSE, LISTED COMPANY MANUAL § 303A.02(b) (2024). The NYSE Listed Company Manual exempts controlled companies—defined as those "of which more than 50% of the voting power for the election of directors is held by an individual, a group or another company—from the requirement to have a majority of independent directors and the requirements to have independent compensation and nominating committees. *Id.*, § 303A.00 (cited in *Id.* at 73 n.378).

[403] *See id.*, § 303A.02(b) (cited in *Id.* at 73 n.379).

[404] *See id.*, § 303A.02(a)(i) (cited in *Id.* at 73 n.380).

standards is presumed to be independent.[405] It remains uncertain whether such an approach would constitute an effective solution. This uncertainty arises from the fact that existing legislation already establishes, outside the framework of a Special Litigation Committee (SLC) motion to dismiss a derivative lawsuit, a presumption of director independence.[406] As demonstrated, this presumption has proven inadequate in facilitating determinacy.[407]

Furthermore, additional presumptions may be contemplated. For instance, Todd Henderson and Professor Bainbridge have suggested amending Delaware corporate legislation to permit entities referred to as board service providers to function as a corporation's board.[408] It has been proposed that the shareholders grant their approval for the selection of the board service provider, paralleling the current election of directors.[409] They assert that the adoption of their proposal could be accompanied by the presumption that a board service provider, approved by shareholders, operates independently. If the corporation has appointed a controller, such a presumption may be premised on the approval of a majority of the minority shareholders.[410]

In considering potential judicial remedies, it appears unlikely that the Delaware courts would embrace the NYSE listing standards as the definitive common law criterion for assessing director independence. It is noteworthy that former Chancellor Strine articulated in the *MFW* case that stock exchange listing standards serve as a valuable reference for courts evaluating a director's independence, as these standards are influenced by experiences in Delaware and other jurisdictions and have undergone rigorous examination by knowledgeable entities.[411] However, as Chancellor Bouchard subsequently observed, Delaware common law repudiates rigid criteria for director

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405 An alternative list of bright-line tests was proposed by the Council of Institutional Investors in an amicus brief in Brehm v. Eisner, 746 A.2d 244 (Del. 2000). *See* Harvey Gelb, *Corporate Governance Guidelines—A Delaware Response*, 1 WYO. L. REV. 523, 558 (2001) (describing brief). As Leo Strine noted, the brief is significant because "it represents the view of a group of powerful investors who hold significant equity portions in America's largest public corporations." Leo Strine, *Derivative Impact? Some Early Reflections on the Corporation Law Implications of the Enron Debacle*, 57 BUS. LAW. 1371, 1402 (2002) (cited in *Id.* at 74 n.386).

406 *See, e.g.*, In re Walt Disney Co. Derivative Litig., 731 A.2d 342, 355 (Del. Ch. 1998), *aff'd* in part, *rev'd* in part and remanded *sub nom.* Brehm v. Eisner, 746 A.2d 244 (Del. 2000) (explaining that CEO Michael Eisner's "long-standing personal and business ties to Ovitz cannot overcome the presumption of independence that all directors, including Eisner, are afforded"); Green v. Phillips, No. CIV. A. 14436, 1996 WL 342093, at 5 (Del. Ch. June 19, 1996) (holding that "the directors' longstanding personal and business ties" were "insufficient to overcome the directors' presumption of independence"); *see generally* Victor Brudney, *The Independent Director—Heavenly City or Potemkin Village?*, 95 HARV. L. REV. 597, at 613 (1982) ("No definition of independence yet offered precludes an independent director from being a social friend of, or a member of the same clubs, associations, or charitable efforts as, the persons whose compensation or self-dealing transaction he is asked to assess.") (cited in *Id.* at 74 n.387).

407 *See supra* notes 331-338 and accompanying text.

408 STEPHEN M. BAINBRIDGE & M. TODD HENDERSON, *Outsourcing the Board: How Board Service Providers Can Improve Corporate Governance* 87-103 (2018) (setting out proposal) (cited in *Id.* at 74 n.389).

409 *See id*. at 93-97 (describing selection and election of a board service provider) (cited in *Id.* at 74 n.390).

410 Bainbridge, *supra* note 1, at 74-75.

411 *See* In re MFW Shareholders Litig., 67 A.3d 496, 510 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M & F Worldwide Corp., 88 A.3d 635 (Del. 2014) (cited in *Id.* at 75 n.391).

independence in favor of the existing fact-specific standard.[412] This position aligns with the overarching principles of Delaware common law, where, in various contexts, the Delaware courts have consistently expressed a preference for nuanced fact-specific inquiries over the implementation of stringent, bright-line rules.[413] Nevertheless, Delaware case law remains abundant with established presumptions.[414]

From an alternative perspective, Ronald Gilson and Reinier Kraakman have proposed establishing a category of professional directors whose primary occupation would be serving on a portfolio of boards.[415] These professionals would possess a deeper understanding of their respective portfolio companies as they would allocate greater time to monitoring these entities. Furthermore, they would exhibit a heightened reliance on institutional shareholders for their positions.[416] To facilitate this process, they suggested establishing a central clearinghouse responsible for managing the logistics of assisting institutional shareholders in selecting professional directors to serve on their company boards.[417] If this proposal is enacted, a court could reasonably presume that such directors act independently. Conversely, the courts of Delaware may presume that directors selected and accredited as independent by an independent nominating committee possess independent status.[418]

A significant challenge associated with any of the proposed assumptions is that they are unlikely to offer substantial additional certainty and predictability in comparison to the existing legal framework, particularly if they can be contested by the type of evidence permitted under the current post-*Oracle* regime.[419] There arises a need for a presumption that is exceptionally difficult to rebut. Professor Bainbridge suggests a standard whereby, should reasonable and informed business

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[412] *See* Teamsters Union 25 Health Services & Ins. Plan v. Baiera, 119 A.3d 44, 61 (Del. Ch. 2015) ("Unlike the NYSE Rules, Delaware law does not contain bright-line tests for determining independence but instead engages in a case-by-case fact specific inquiry based on well-pled factual allegations."); *see generally* Mark J. Loewenstein, *The Quiet Transformation of Corporate Law*, 57 SMU L. REV. 353, 375 (2004) ("One irony of *Oracle*, in light of the recent stock exchange rules, is that the Delaware court seems to be moving toward a more flexible meaning of independence while the stock exchanges have opted for a more precise definition based on financial relationships."); Usha Rodrigues, *The Fetishization of Independence*, 33 J. CORP. L. 447, 466 (2008) ("In Delaware, unlike under SOX, the NYSE, or NASDAQ, one cannot determine independence or interest ex ante. One must instead ask: 'Independent for what purpose? Independence from whom?'") (cited in *Id.* at 75 n.392).

[413] *See* Park Employees' and Ret. Bd. Employees' Annuity and Benefit Fund of Chicago v. Smith, No. CV 11000-VCG, 2016 WL 3223395, at 10 (Del. Ch. May 31, 2016), *aff'd sub nom.* Park Employees' and Ret. Bd. Employees' Annuity and Benefit Fund of Chicago on behalf of BioScrip, Inc. v. Smith, 175 A.3d 621 (Del. 2017). Professor Usha Rodrigues goes so far as to assert "that articulating a simple, non-contextual definition of Delaware's independence is impossible." Rodrigues, *supra* note 412, at 484 (cited in *Id.* at 76 n.393).

[414] *See* William M. Lafferty, *Towards A Relaxed Summary Judgment Standard for the Delaware Court of Chancery: A New Weapon Against "Strike" Suits*, 15 DEL. J. CORP. L. 921, 928 (1990) ("Delaware law contains strong presumptions that favor corporate management and places heightened burdens on plaintiffs that attack corporate decision making.") (cited in *Id.* at 76 n.394).

[415] Ronald J. Gilson & Reinier Kraakman, *Reinventing the Outside Director: An Agenda for Institutional Investors*, 43 STAN. L. REV. 863 (1991) (cited in *Id.* at 76 n.395).

[416] *See id*. at 885-86 (describing advantages of the proposed professional directors) (cited in *Id.* at 76 n.396).

[417] *Id*. at 887 (cited in *Id.* at 76 n.397).

[418] Bainbridge, *supra* note 1, at 76.

[419] *Id.* at 77.

professionals hold differing opinions regarding a director's independence—i.e., if the matter constitutes a close call, reminiscent of the circumstances in *Sandys*[420]—the court should refrain from overturning the presumption of independence.[421]

Senate Bill 21 also addresses the narrow definition of director independence established by the Chancery Court, proposing reforms that are comparable to those detailed herein. Several provisions work in concert to achieve this objective. The term "disinterested director" is defined by the new § 144(e)(4) as "a director who is not a party to the act or transaction and does not have a material interest in the act or transaction or a material relationship with a person that has a material interest in the act or transaction." The reference to a material relationship thus broadens the concept of disinterestedness to include independence.[422] The term "material interest" is defined in new § 144(e)(8) as "an actual or potential benefit, including the avoidance of a detriment, other than one which would devolve on the corporation or the stockholders generally, that … would reasonably be expected to impair the objectivity of the director's judgment when participating in the authorization or approval of the act or transaction at issue..."[423] Additionally, "material relationship" is defined in new § 144(e)(9) as "a familial, financial, professional, employment, or other relationship that … would reasonably be expected to impair the objectivity of the director's judgment when participating in the authorization or approval of the act or transaction at issue…"[424]

While the reference to "other relationship" in § 144(e)(9) may appear to establish a potential loophole that could allow a court to navigate the personal relationships that have complicated the analysis in recent years, the newly implemented § 144(d)(2) incorporates a presumption that aligns with this suggestion above:

> Any director of a corporation that has a class of stock listed on a national securities exchange shall be presumed to be a disinterested director with respect to an act or transaction to which such director is not a party if the board of directors shall have determined that such director is an independent director or satisfies the relevant criteria for determining director independence under any rules promulgated by such exchange, which presumption shall be heightened and may only be rebutted by substantial and particularized facts that such director has a material interest in such act or transaction or has a material relationship with a person with a material interest in such act or transaction.[425]

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[420] *See supra* text accompanying note 336.
[421] This proposed standard is based on the definition of waste. *See* Zapata, 658 A.2d at 183 ("If reasonable, informed minds might disagree on the question, then in order to preserve the wide domain over which knowledgeable business judgment may safely act, a reviewing court will not attempt to itself evaluate the wisdom of the bargain or the adequacy of the consideration.") (cited in Bainbridge, *supra* note 1, at 77 n.401).
[422] Bainbridge, *supra* note 1, at 79.
[423] S.B. 21, *supra* note 289, § 1 (cited in *Id.* at 79 n.408).
[424] *Id.*
[425] *Id.* In addition, new § 144(d)(3) essentially tracks current law by providing that "[t]he nomination or election of the director to the board of directors by any person that has a material interest in an act or transaction shall not, of itself, be evidence that a director is not a disinterested director with respect to an act or transaction to which such director is not a party." (cited in *Id.* at 80 n.411).

In conclusion, the newly established provisions align significantly with Professor Bainbridge's proposals. These provisions are expected to provide substantially increased certainty and predictability, while broadening the definition of independence beyond the restrictive interpretation adopted by the Chancery Court.[426]

6. Strengthening the Guardrails at Controlled Companies

By recognizing that controlling shareholders, in most cases, ought not to be subjected to fiduciary duties, experts do not intend to downplay the issue of domination and inherent coercion. Indeed, the primary concern regarding transactions within controlled companies is the potential for a controlling shareholder to exert undue influence and adversely affect the corporate decision-making process.[427]

This taint may manifest in several ways. Firstly, a controlling shareholder may exert its voting power to nominate and elect directors who are likely to align with the controlling shareholder's interests. Secondly, a shareholder may leverage its authority to remove and replace directors whom it perceives as inadequately responsive to its concerns. Thirdly, a shareholder may undertake or threaten to undertake additional actions, including amending the bylaws, initiating a tender offer, or divesting stock. To the extent that directors maintain other business relationships or employment positions with the controlling shareholder, the shareholder may also threaten to discontinue those affiliations or relationships.[428]

Judicial authorities have acknowledged that such domination may result in directors failing to follow appropriate procedures when evaluating corporate decisions, or in giving undue consideration to the interests of the controlling shareholder, even when those interests conflict with those of other shareholders and the corporation itself. In instances of freeze-out transactions, where a controlled company establishes a special committee to negotiate the terms, courts have raised concerns about the committee's capacity to operate independently. As former Vice-Chancellor Strine elucidated, "the men and women who populate the committees are rarely individuals 'whose financial futures depend importantly on getting the best price and, history shows, [they] are sometimes timid, inept, or . . . , well, let's just say worse.'"[429] Consequently, there are valid reasons to scrutinize the degree of

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[426] Bainbridge, *supra* note 1, at 80.
[427] Fisch & Solomon, *supra* note 9, at 155.
[428] *Id*.
[429] In re Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 619 (Del. Ch. 2005) (Strine, V.C.) (cited in Fisch & Solomon, *supra* note 9, at 155 n.262).

independence exhibited by certain boards within controlled companies. Ultimately, however, corporate law functions within a framework that prioritizes the board. It is the directors, rather than the shareholders, who bear the responsibility for rectifying any inequities in corporate actions. Thus, the appropriate course of action suggested by Fisch and Solomon is to strengthen the board's capacity to operate autonomously, rather than to impose fiduciary duties on shareholders that would inhibit their ability to act in their own self-interest.[430]

Judicial oversight of board decisions encompasses longstanding doctrines, including the obligation of directors to be adequately informed, the merit of relying on the collective decision-making process of a board, and the safeguarding of directors against excessive litigation through the equilibrium established by mechanisms such as the business judgment rule, Directors and Officers (D&O) insurance, and exculpatory charter provisions. Emphasizing the board allows the courts to apply the established presumption of regularity to most decisions within controlled companies without necessitating the more burdensome scrutiny of the entire fairness. Furthermore, concentrating on the role of the board alleviates the courts from the challenging task of determining when a shareholder possesses sufficient control to invoke entire fairness scrutiny.[431] The two authors argue that addressing concerns about domination in non-freezeout cases requires enhancing the board's ability to operate independently from the influence of controlling shareholders. Therefore, they propose three recommendations to achieve this goal.[432]

First, in instances where a plaintiff sufficiently asserts that a controlling shareholder has exerted influence over a board decision, resulting in a measurable benefit to the controller at the expense of minority shareholders, Fisch and Solomon advocate for the application of the one-step cleansing standard pertinent to director and officer conflicted transactions, in lieu of the *MFW* approach. Specifically, they contend that the fully informed consent of either the disinterested directors or disinterested shareholders would effectively cleanse the transaction, thereby subjecting it to the business judgment rule rather than extensive fairness scrutiny. They maintain that such approval, in conjunction with market mechanisms and the fiduciary duties at the board level, offers adequate assurance against the taint of domination, thereby circumventing the additional burdens associated with the full *MFW* process. It is noteworthy that their proposal requires the plaintiff to demonstrate actual, rather than potential, domination. Consequently, due to the significantly reduced procedural burden, the proposal markedly simplifies the determination of who qualifies as a controlling shareholder. Given that numerous new control cases hinge upon the likelihood that sources of soft power may grant shareholders the ability to sway the board, this stipulation is likely

[430] Fisch & Solomon, *supra* note 9, at 155.
[431] *Id.* at 156.
[432] *Id.*

to considerably diminish occurrences where a shareholder's claim is predicated upon newly established control.[433]

Secondly, in instances where a plaintiff sufficiently alleges domination and the decision in question has not undergone proper cleansing through the previously mentioned single-step process, or where the court finds that the cleansing procedure is lacking in procedural adequacy, Fisch and Solomon propose that the court evaluate the decision under the enhanced scrutiny standard[434] as established in the cases of *Unocal* and *Coster*, and as applied in *Sears Hometown*.[435] Similar to those precedents, enhanced scrutiny provides a framework by which a court may assess decisions wherein the actions of the board are not necessarily granted presumptive validity, yet are considered under a reasonableness standard that is distinctly more deferential than the standard of entire fairness. It is essential to note that this more deferential standard mitigates the implications of failing to adhere to the *MFW* procedures, thereby potentially alleviating what could evolve into excessively burdensome collateral litigation concerning matters such as the independence of the special committee or the sufficiency of disclosures to shareholders. Furthermore, the implementation of this more deferential standard eases the burden on the courts in adjudicating whether decisions, such as reincorporation or compensation, are entirely equitable in the absence of substantial quantitative benchmarks for assessing fairness. Furthermore, Fisch and Solomon assert that the courts established the enhanced scrutiny standard in the cases of *Unocal* and *Revlon* specifically to safeguard against soft conflicts that may undermine a board's capacity to function independently.[436] More precisely, in the instances of *Unocal* and *Revlon*, the court addressed the "omnipresent specter that the board... is serving its own interests,"[437] where tangible misconduct may not be evident. In such situations, intermediate scrutiny serves as a judicial safeguard against the potential misuse of control for non-obvious self-dealing. Consequently, their extension of this approach to other subtle conflicts is historically substantiated.[438]

In the context of intermediate scrutiny, Fisch and Solomon advocate for a test analogous to that delineated in *Coster*. According to their proposition, the plaintiff bears the initial burden of presenting colorable allegations indicating that a controlling shareholder dominated the board in the

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[433] *Id.*
[434] Fisch and Solomon draw from the court's discussion of enhanced scrutiny in *Sears Hometown*, 2024 Del. Ch. LEXIS 12 (2024) (cited in *Id.* at 157 n.265).
[435] *See supra* note 130-131 and accompanying text.
[436] *See, e.g.*, Unocal, 493 A.2d at 954 (observing that enhanced scrutiny is appropriate "[b]ecause of the omnipresent specter that a board may be acting primarily in its own interests"); Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 184 (Del. 1986) ("when a board ends an intense bidding contest on an insubstantial basis, and where a significant by-product of that action is to protect the directors against a perceived threat of personal liability for consequences stemming from the adoption of previous defensive measures, the action cannot withstand the enhanced scrutiny which Unocal requires of director conduct.") (cited in *Id.* at 157 n.267).
[437] Revlon, 506 A.2dat 180 (citing Unocal, 493 A.2d at 954) (cited in *Id.* at 157 n.268).
[438] Fisch & Solomon, *supra* note 9, at 157.

decision under scrutiny. Should the plaintiff successfully meet this burden, it becomes the responsibility of the board to demonstrate that it acted "in good faith, after a reasonable investigation, to achieve a legitimate objective."[439] Subsequently, the board is required to demonstrate that its actions represent a reasonable means to achieve the stated objective. Similar to the context of *Coster*, a reasonableness standard signifies that the court does not merely defer to the board's judgment, as would be the case under the business judgment rule, but rather assesses whether such judgment resides within an acceptable range of reasonableness.[440] This degree of judicial scrutiny allows the board to function as an effective check against potential director domination as well as to "smoke out mere pretextual justifications for improperly motivated decisions."[441] Moreover, because intermediate scrutiny is applicable solely when plaintiffs adequately allege domination, their proposal incentivizes controlling shareholders to endorse directors who possess sufficient independence to resist claims of domination.

To conclude, although under existing law, directors of controlled companies who, as a result of domination by controlling shareholders, act in furtherance of the interests of the controlling shareholder rather than those of the corporation are deemed to be acting in bad faith,[442] the authors contend that courts and plaintiffs have not been sufficiently rigorous in holding such directors accountable. When directors engage in bad faith actions, this conduct renders them liable for monetary damages, and they are not eligible for exculpation. In line with the *Caremark* line of cases, they argue that the potential for monetary liability is essential to incentivize directors to act independently. Furthermore, consistent with the *Caremark* decision, Fisch and Solomon advocate for courts to remind directors of controlled companies about this exposure.[443]

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[439] Sears Hometown, 2024 Del. Ch. LEXIS 12, at 81 (cited in *Id.* at 158 n.269).

[440] Importantly, reasonableness is a far less demanding standard than entire fairness. Fisch and Solomon also recognize that this proposal represents a partial overruling of *Sinclair Oil* in its oversight of "European tunnelling", the diversion of assets from the company to the controller. However, they believe that a reasonableness standard is more workable than entire fairness, particularly in light of today's more professional boards which are better able to monitor these issues than at the time *Sinclair Oil* was decided. In this regard, *Coster* still preserves a role for judicial oversight in what we believe is a more workable manner (cited in *Id.* at 158 n.270).

[441] In re Dollar Thrifty S'holder Litig., 14 A.3d 573, 598 (Del. Ch. 2010) (cited in *Id.* at 158 n.271).

[442] Under *Stone v. Ritter*, bad faith encompasses actions "where the fiduciary intentionally acts with a purpose other than that of advancing the best interests of the corporation." 911 A.2d 362, 369 (Del. 2006) (cited in *Id.* at 158 n.272).

[443] Recent decisions of the Delaware courts underscore the timeliness of such a proposal. *See* Firefighters' Pension System of City of Kansas City v. Foundation Building Materials, Inc., 2024 WL 2795026 (Del. Ch. May 31, 2024) (denying a motion to dismiss and finding a claim stated for non-exculpated breach of fiduciary duties because "it is reasonably conceivable that the [special] committee members consciously disregarded their duties and deferred to" a controlling shareholder) (cited in *Id.* at 158 n.273).

V. Beyond Delaware: New Players in Corporate Governance

A. Texas Enters the Arena: A New Challenger in the Competition for Incorporations?

After Musk's Tesla pay package was deemed unfair in *Tornetta*, Musk sent a "poll" to his 175 million followers on X. The poll inquired whether Tesla should change its state of incorporation to Texas.[444] Out of 1.1 million respondents to the survey, more than 87% voted "yes."[445] Governor Abbott of Texas reacted to Musk's poll on X with enthusiasm, stating, "Elon, it's over. The election desk is declaring a landslide victory for Texas."[446] The business court legislation and the public support from the governor mark a new phase in Texas's bid to enhance its competitive standing.[447]

Following Chancellor McCormick's decision on June 13, 2024, to revoke Elon Musk's compensation package as Tesla CEO, the company held its Annual Stockholders meeting. During this meeting, stockholders overwhelmingly voted in favor of ratifying the 2018 CEO Performance Award and the Company's reincorporation in Texas.[448] A bold statement in Tesla's press release announced, "Tesla is Now a Texas Corporation." The day after the shareholder vote, Texas Secretary of State Jane Nelson took to the social media platform X (formerly Twitter) to share a photo welcoming Tesla to Texas.[449]

Two notable points arise from the shareholder vote. Firstly, the proposal to relocate to Texas from Delaware received approval from a significantly higher portion of noncontrolling shareholders compared to the proposal to confirm Elon Musk's 2018 CEO Performance Award. Specifically, around 72% of all votes cast at the Annual Meeting, excluding those shares owned directly or indirectly by Elon and Kimbal Musk, supported the proposal regarding Elon Musk's salary. In

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444 @elonmusk, X, (Jan. 30, 2024, 7:40 PM), https://shorturl.at/jQTV3 (cited in Barzuza, *supra* note 213, at 38 n.228).
445 Professor Michal Barzuza emphasizes that anyone with an account on X could respond to the poll — it was not restricted to Tesla shareholders or even Musk's followers.
446 @GregAbbott_TX, X, (Jan. 30, 2024) https://shorturl.at/bJL05 (cited in *Id.* at 38 n.230).
447 Barzuza, *supra* note 213, at 38.
448 TESLA, *Tesla Releases Results of 2024 Annual Meeting of Stockholders* (June 13, 2024), https://ir.tesla.com/press-release/tesla-releases-results-2024-annual-meeting-stockholders (cited in Macey, *supra* note 209, at 24 n.116).
449 *See* Tom Krisher & David Hamilton, *Shareholders Vote, Approve Texas as Legal Home for Tesla*, KXAN (June 14, 2024), https://www.kxan.com/news/texas/ap-future-of-elon-musk-and-tesla-are-on-the-line-as-shareholders-vote-on-massive-pay-package/; *See also*, S.E. Robinson, X Post, X (June 14, 2024) https://x.com/SERobinsonJr/status/1801692148565168155 (cited in *Id.* at 24 n.117).

contrast, roughly 84% of the total votes from Tesla common stock, excluding shares owned directly or indirectly by Elon Musk or Kimbal Musk, backed the reincorporation from Delaware to Texas.[450]

Secondly, the transition from Delaware to Texas drew the backing of sophisticated investors who are well-equipped to evaluate the advantages of the different jurisdictions. Notably, Vanguard, Tesla's largest external investor with a 7% stake,[451] was a frontrunner, voting in favor of relocating to Texas,[452] along with BlackRock, Tesla's second-largest institutional investor, which also supported the decision.[453] Overall, the relocation to Texas received 1.12 billion votes from institutional investors, accounting for 78% of all shares controlled by them.[454] Even when excluding BlackRock and Vanguard, the reincorporation proposal gained substantial support, with 706 million of the non-BlackRock and non-Vanguard shares in favor and 293 million against.[455] Some observers were surprised by this result, as they anticipated institutions would prioritize the differences in shareholder protection between Delaware and Texas.[456] However, these results align with expectations, as historically, "the market does not greatly value Delaware's highly skilled judiciary and extensive case law," particularly in the context of controlled corporations.[457] Recently, it was reported that Meta Platforms, Inc., a regular defendant in the Delaware Court of Chancery, is also contemplating relocating its incorporation from Delaware to Texas.[458]

In the documents presented to Tesla shareholders urging them to vote for the change to a Texas corporation, the board highlighted the advantages of Texas corporate law over that of Delaware.[459] The proxy materials emphasized that "Texas law specifically allows directors to consider our company's long-term mission to accelerate the world's transition to sustainable energy" and noted that "Texas' highly defined corporate code is expected to provide more certainty for you as we

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[450] Tesla, Inc., United States Securities and Exchange Commission Form 8-K (June 13, 2024) (cited in *Id.* at 24 n.118).
[451] David Love, *Vanguard's Vote Paves Way for Tesla's Incorporation Move to Texas*, NASDAQ (June 14, 2024), https://www.nasdaq.com/articles/vanguards-vote-paves-way-teslas-incorporation-move-texas. Elon Musk is Tesla's largest shareholder with a 13 percent stake in the company (cited in *Id.* at 25 n.119).
[452] *Id*. *See also*, Ross Kerber, *Exclusive: Vanguard vote switch helped pass Tesla CEO Elon Musk's $56 billion pay package*, REUTERS (June 14, 2024), https://www.reuters.com/business/autos-transportation/vanguard-vote-switch-helped-pass-tesla-ceo-elon-musks-56-billion-pay-package-2024-06-14/ (cited in *Id.* at 25 n.120).
[453] *See* Michael Levin, *How Tesla Pumped the Vote*, COLUM. L. SCH. BLUE SKY BLOG (July 1, 2024), https://clsbluesky.law.columbia.edu/2024/07/01/how-tesla-pumped-the-vote/ (cited in *Id.* at 25 n.121).
[454] *Id.*
[455] *Id.*
[456] *Id.*
[457] Edward Fox, *Is There a Delaware Effect for Controlled Firms?* 23 U. PA. BUS. L. 1, 47 (2020) (cited in *Id.* at 25 n.125).
[458] Emily Glazer, Berber Jin, and Meghan Bobrowsky, *Meta Explores Moving Legal Home to Texas*, WALL ST. J. (Feb. 1, 2025). *See also* Trump Media & Technology Grp. Corp, Preliminary Proxy Statement (Schedule 14A) (Feb. 21, 2025), sec.gov/edgar/search (providing disclosures ahead of holding a shareholder vote at Trump Media's annual meeting to reincorporate in Florida, citing "developments in the competitive and regulatory landscape in which we compete, our relationship with and commitment to the jurisdiction where we are headquartered, and broad-based views regarding the legal landscape in Delaware") (cited in Hurt, *supra* note 284, at 4 n.3).
[459] *See, e.g.*, Tesla, Inc, Letter to Tesla Shareholders (Robyn Denholm), SEC Filings (Schedule 14) (June 5, 2024) [hereinafter Tesla Shareholder Letter], sec.gov/edgar/search ("Texas provides stockholders with substantially equivalent governance rights as Delaware, and is expected to provide more certainty for the innovative, big-ticket decisions that Tesla is known for.") (cited in *Id.* at 4 n.4).

continue to make big bets on the future."[460] In addition, proxy materials emphasized that "Delaware courts are increasingly 'second-guessing' boards' and stockholders' reasoned decisions" and that "Delaware law can be indeterminate because of its use of broad, flexible standards that are applied to individual cases in a highly fact-specific way."[461]

Why Texas?[462] Before Tesla relocated to Texas, only two Fortune 500 companies were incorporated there: Southwest Airlines and CenterPoint Energy, both based in the state.[463] Tesla now joins them as the third Fortune 500 company incorporated in Texas, while Delaware boasts 342 Fortune 500 incorporations. There are 21 active public companies on the New York Stock Exchange and 18 on NASDAQ that are incorporated in Texas,[464] in contrast to 1006 Delaware corporations on the NYSE and 1192 on NASDAQ, along with 16 NYSE and 25 NASDAQ companies incorporated in Nevada.[465] Although Texas has not historically been a destination for large publicly held corporations seeking incorporation, it is home to 1,096 public company headquarters, compared to just 148 in Delaware and 477 in Nevada. Additionally, Texas houses 51 headquarters of Fortune 500 companies, closely following California (53) and New York (51). While Texas is known for being business-friendly, it has not actively encouraged foreign corporations to incorporate there, nor has it shaped its laws with that purpose in mind.[466]

Due to the limited number of publicly held corporations, Texas lacks a strong case law framework[467] for addressing or interpreting the corporate governance provisions in the Texas Business Organizations Code (TBOC). This situation does not seem to support Tesla's claims that Texas courts will offer more stability and certainty for corporate managers' actions.

On June 10, 2023, Governor Greg Abbott signed into law House Bill 19, marking a notable advancement in Texas's legal framework. This legislation has led to the establishment of new

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[460] Tesla, Inc, Proxy Statement (Schedule 14A) (May 23, 2024) [hereinafter May 23 Proxy], secgov/edgar/search (cited in *Id.* at 4 n.5).
[461] Tesla, Inc, Proxy Statement (Schedule 14A) (April 29, 2024) (cited in *Id.* at 4 n.6).
[462] Hurt, *supra* note 284, at 7.
[463] Notably, Musk had reincorporated his private aerospace corporation, Space Exploration Technologies Corp. to a Texas corporation on Feb. 14, 2024, and his brain implant company, Neuralink, to a Nevada company in the same month. Earlier, in 2023, Musk as part of the acquisition of Twitter, Inc., Twitter merged with and into a Musk-controlled corporation, X Corp., a Nevada corporation (cited in *Id.* at 7 n.26).
[464] According to Tesla's Special Committee Report, only four corporations (other than Tesla) have reincorporated from Delaware to Texas since 2015: Legacy Housing Corp. (2019); Contango Oil & Gas Co. (2019); DallasNews Corp. (2018); and Geospace Technologies Corp. (2015). *See* Tesla, Inc., Report of the Special Committee, Proxy Statement exhibit E at E-15 (Schedule 14A), (April 29, 2024) [hereinafter "Special Committee Report"] (cited in *Id.* at 7 n.27).
[465] According to Tesla's Special Committee Report, only four corporations (other than Tesla) have reincorporated from Delaware to Texas since 2015: Legacy Housing Corp. (2019); Contango Oil & Gas Co. (2019); DallasNews Corp. (2018); and Geospace Technologies Corp. (2015). *See id.* at E-15 (cited in *Id.* at 7 n.28).
[466] Hurt, *supra* note 284, at 7.
[467] *See* Amy Simmerman, William B. Chandler III, & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOV. (May 8, 2024) ("Texas corporate law has relevant substantive differences from Delaware corporate law, while maintaining certain fundamental similarities (although, to be sure, the Texas case law is much less developed).") (cited in *Id.* at 7 n.30).

specialty courts, particularly the Texas Business Court ("TBC"), which is designed to address extensive and complex business disputes with greater efficiency. These specialized courts operate with considerably limited jurisdiction and are designed to facilitate the resolution of complex business matters.[468] The TBCs are created to resolve issues with significant amounts at stake. Sharing jurisdiction with district courts, business courts focus on cases where the disputed amount exceeds $5 million; certain cases fall under their authority only if the dispute surpasses $10 million. This increased monetary threshold seeks to alleviate court backlogs by providing a specialized venue for addressing complex and substantial conflicts. Additionally, it enables the court to set fees that can cover its expenses, as mandated by law.[469] Moreover, to ensure efficiency in handling complex cases, the business courts are authorized to conduct remote proceedings and utilize existing courtrooms when necessary.[470] Furthermore, business courts have restricted authority over certain types of business disputes. They are divided into eleven divisions according to administrative judicial regions, which encompass the entire state. The court oversees cases involving amounts greater than $5 million, addressing issues such as corporate governance, derivative proceedings, actions against owners, and matters related to securities.[471] For actions with amounts exceeding $10 million, the jurisdiction extends to qualified transactions, contractual or commercial transactions agreed upon by the parties, and actions arising from violations of the Finance Code or Business and Commerce Code.[472]

In 2024,[473] Texas enacted its first dedicated Business Courts, signaling a pro-business intent, although the actual effects of this development remain uncertain. Conversely, the Texas Business Organizations Code includes specific provisions that could be considered pro-shareholder,[474] alongside some that reflect aspects of the Delaware General Corporation Law (DGCL).[475]

The proposed amendment states the following:

> BURDEN OF PROOF IN CERTAIN DERIVATIVE PROCEEDINGS. Notwithstanding any other law, in a derivative proceeding by a shareholder that

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[468] Anat Alon-Beck, *Delaware Beware* 42 (Case Legal Stud. Rsch. Paper No. 2024-8, July 01, forthcoming 2024), ILL. L. REV, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4921048.

[469] BAKERHOSTETLER, *Texas Business Courts* (Sept. 13, 2023), https://www.bakerlaw.com/insights/texas-business-courts/ (cited in Alon-Beck, *supra* note 468, at 42 n.187).

[470] *Id.* (cited in *Id.* at 42 n.188).

[471] *Id.* (cited in *Id.* at 42 n.189).

[472] *Id.* (cited in *Id.* at 42 n.190).

[473] TEX. BUS. ORGS CODE, § 25A.002; *See also* Jack Buckley DiSorbo, *A Primer on the Texas Business Court*, BAYLOR L. REV. 360 (2024); Andrew Zeve & Stephen Shuchart, *Texas Business Courts: What You Need to Know*, WHITE & CASE INSIGHTS, (Sept. 9, 2024), whitecase.com/insight-alert/ Texas-business-courts-what-you-need-know (cited in Hurt, *supra* note 284, at 8 n.31).

[474] TEX. BUS. ORGS CODE § 21.457 ("Except as provided by this code or the certificate of formation of a corporation in accordance with Section 21.365, the affirmative of the holders of at least two-thirds of the outstanding shares of the corporation entitled to vote on a fundamental business transaction is required to approve the transaction.") (cited in *Id.* at 8 n.32).

[475] *Compare* TEX. BUS. ORGS CODE § 7.001 (Limitation of Liability of Governing Person) *with* DEL. CODE, tit. 8, § 102(b)(7) (cited in *Id.* at 8 n.33).

> alleges an act or omission related to the improper consideration of environmental, social, and governance criteria in the performance of the act or omission, the burden of proof is on the corporation to prove the act or omission was in the best interest of the corporation.[476]

The appointment of judges to the business courts is vested in the governor, with advice and consent from the Senate. Judges serve two-year terms, with the possibility of reappointment, and must meet specific qualifications, including being a U.S. citizen, at least 35 years old, a resident of a relevant county for five years, and a licensed attorney with a decade or more experience in areas such as complex civil business litigation or business transaction law.[477]

When comparing this with Delaware courts, notable differences emerge. In Delaware, appointing Superior Court Judges entails a nomination by the governor followed by Senate confirmation. These judges serve twelve-year terms and must possess a comprehensive understanding of business law.[478] The Superior Court may include up to twenty-one judges, with one designated as the president judge who oversees administrative responsibilities. Additionally, three judges must be resident judges, living in their appointed county. A key aspect of ensuring fairness and avoiding political bias is the commitment to balanced representation on the bench. To support this, a crucial rule stipulates that no single political party can have more than a simple majority of judges. This regulation promotes a diverse and bipartisan judicial panel, strengthening the principle of impartial and equitable judicial rulings.[479]

Delaware's judiciary operates without a jury, facilitating the swift and effective resolution of corporate litigation and disputes. This unique aspect enhances Delaware's attractiveness for businesses seeking prompt legal outcomes. If the Texas Business Court were to introduce a jury system, it could weaken its competitiveness compared to Delaware. The absence of a jury in Delaware's system caters to the efficiency that corporations desire in complex business issues.[480] In contrast, the Texas Constitution permits a party to opt for a jury. This option within the Texas legal system adds another dimension of consideration for businesses.[481] The choice to involve a jury may introduce complexities that could potentially impact the efficiency and expeditious nature of corporate legal proceedings. This factor has contributed to Delaware's historical prominence in corporate law matters.[482]

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[476] H.B. No. 4794 (Tex.), https://capitol.texas.gov/tlodocs/88R/billtext/html/HB04794I.htm (cited in Alon-Beck, *supra* note 468, at 43 n.191).
[477] *Id.* (cited in *Id.* at 43 n.192).
[478] BAKERHOSTETLER, *supra* note 469 (cited in *Id.* at 44 n.196).
[479] *Id.* (cited in *Id.* at 44 n.197).
[480] Alon-Beck, *supra* note 468, at 43.
[481] *Id.*
[482] *Id.* at 43-44.

According to Professor Hurt, if boards of publicly held corporations opt to incorporate in Texas, their decision won't stem from a more favorable corporate code or a strong legal precedent for large companies. Instead, those opting for Texas will be motivated by various factors beyond existing laws, such as a positive business environment, a pro-entrepreneurial political climate, and the possibility of reshaping legal frameworks to suit their needs. While Delaware law has long endorsed the principle of "shareholder primacy" over the last fifty years, many controlling shareholders are now seeking "controller primacy" and looking for states that can accommodate this emerging model. Her article suggests that businesses may regard Texas corporate law as a blank canvas, ready for influential business figures to imprint their vision.[483] For instance, a controlling shareholder in a publicly-held company may wish to govern the process of any future sale or merger, control executive pay, and primarily respond only to shareholder buy/sell decisions. They might aim to establish a "controller primacy" legal system from the ground up outside of traditional frameworks in Delaware.[484] During only one week in February 2025, for example, new proposals were introduced in the Texas legislature aimed at improving state laws for managers.[485] At the same time, the Delaware legislature suggested amendments to the DGCL to boost its manager-friendly aspects.[486] This led to renewed debates on whether the two states are competing to lower or enhance their standards.[487] As briefly mentioned throughout this thesis, states vie for incorporation. Given that this paper does not

483 *See* Tesla Shareholder Letter, *supra* note 459 ("On the governance side, legislators in a firm's home state might be more attentive and attuned to how corporate governance law might interact with the firm's day-to-day operations and how governance laws might affect stakeholders such as employees or the communities in which a firm operates."). For example, a bill was introduced into the Texas House of Representatives in 2025 that would exempt corporations operating a spaceport from the Texas franchise tax. *See* H.B. 3045, 89th Leg, Reg. Sess. (Tex. 2025) (cited in Hurt, *supra* note 284, at 8 n.34).

484 Hurt, *supra* note 284, at 8.

485 *See* S.B. 1056, 89th Leg, Reg. Sess. (Tex. 2025) (codifying the business judgment rule and making limitation of liability for fiduciary breaches both the default rule and expanding coverage to corporate officers, but only in both cases for publicly-held corporations incorporated in Texas and either headquartered there or listed on the nascent Texas Stock Exchange); S.B. 1057, 89th Leg, Reg, Sess. (Tex. 2025) (raising the minimum requirements set by the SEC for shareholder proposals to holding 3% of outstanding shares or $1 million in share value) (cited in *Id.* at 8 n.35).

486 *See* S.B. 21, 153 Gen. Assembly (2025) (amending § 144 to include controlling stockholder transactions in the safe harbor for interested transactions; to eliminate language to the effect that entire fairness was to be judged at the time of the transaction; to define controlling shareholder; to define disinterested director and disinterested stockholder; to codify a limitation of liability for controlling shareholders; clarifying what constitutes independence and requiring only a majority of directors on committees be independent). Senate Bill No. 21 also proposes to amend § 220 to restrict the right of inspection of books and records to a small set of organizational, administrative, and financial documents (cited in *Id.* at 9 n.36).

487 *See, e,g.*, Ann Lipton, *Delaware Decides Delaware Law Has No Value*, BUS. L. PROF. BLOG, businesslawprofessors.com/2025/02/Delaware-decides-delaware-law-has-no-value/ (Feb. 17, 2025) (arguing that Delaware should have eliminated shareholder litigation completely to be "simpler, and more honest"); Eric Talley, Sarath Sanga, and Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform - or the Beginning of an Unraveling*, CLS BLUE SKY BLOG, clsbluesky.law.columbia.edu/2025/02/018/Delaware- laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling (Feb. 18, 2025) (positing that this amendment package "reaches beyond a mere restoration of 'balance' or 'predictability.' It systematically recalibrates entire fairness for controller deals, narrow which transactions even count as controller conflicts, and codifies new definitions of 'disinterestedness' that, for some observers, will push Delaware law further toward the side of managers and controlling stockholders.") (cited in *Id.* at 9 n.37).

encompass an in-depth exploration of the topic, I shall refrain from providing a detailed discussion;[488] instead, I will offer some general insights regarding Texas in this regard.

The primary and most quantifiable benefit to a state from incorporation is the franchise tax that corporations are required to pay.[489] Most states impose an annual franchise or privilege tax on corporations; however, this often excludes limited partnerships, limited liability companies, and general partnerships.[490] This tax may apply to all corporations that are incorporated in the state or conducting business there, or, like in Delaware,[491] solely to those incorporated within the state. In the state of Delaware, the minimum annual fee applicable to a corporation is $175; conversely, the maximum fee may reach $250,000.[492] This fee structure, with a substantial amount of $250,000 designated for large corporations incorporated within Delaware and a reduced fee applied to all other corporations, represents a significant revenue source for the state. While Texas claims not to have a corporate income tax, it does impose a franchise tax on most business entities[493] formed or operating within the state, based on their profits.[494] In Texas, the franchise tax is calculated on a business's "margin,"[495] which resembles profit calculations but includes specific exemptions, allowances, and different rates. Consequently, approximately 90% of corporations are exempt from even a minimal tax obligation.[496]

In addition to fees and franchise taxes, being recognized as a center for corporate incorporations may also draw attorneys and law firms to a state that, under ordinary circumstances, lacks significant business activity capable of generating demand for specialized legal services.

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[488] *See, e,g.*, Pierluigi Matera, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73 (2022).

[489] *See* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 942 (reporting that following changing its corporate liability scheme and raising its incorporation tax, Nevada increased the number of publicly-held corporations incorporated there and increased revenues by 10,000%) (cited in Hurt, *supra* note 284, at 11 n.52).

[490] *See, e,g.*, DEL. CODE § 18-1107(b) (imposing a flat $300 annual tax on LLCs, not the corporate franchise tax); But *see* TEX. TAX CODE § 171.002(a) ("taxable entity' means a partnership, limited liability partnership, corporation, banking corporation, savings and loan association, limited liability company, business trust, professional association, joint venture, joint stock company, holding company, or other legal entity") (cited in *Id.* at 11 n.53).

[491] DEL. CODE § tit. 8, § 503(a) (applying franchise tax to "[a]ll corporations accepting the provisions of the Constitution of this State and coming under Chapter 1 of this title, and all corporations which have heretofore filed or may hereafter file a certificate of incorporation") (cited in *Id.* at 12 n.54).

[492] *See id*. § 503(a)(1), (2) (assessing a minimum tax of $175 for corporations with fewer than 5,000 authorized shares, $250 with no more than 10,000 shares, and $85 per each additional 10,000 shares up to $200,000 or $250,000 for a "large corporate filer") (cited in *Id.* at 12 n.55).

[493] Historically, the Texas franchise tax was imposed only on corporations, and then on corporations and limited liability companies; however, in 2008, the franchise tax was extended to all business entities, closing a limited partnership loophole that was frequently used. *See* David A. Vanderhider, *A Marginal Tax: The New Franchise Tax in Texas*, 39 ST. MARY L. J. 615, 632 (2008) (cited in *Id.* at 12 n.58).

[494] *See also* Nikki L. Laing, *Texas Margin Tax: Is it Time for the Curtain Call?*, 47 TEX. J. BUS. L. 11, 32 (2017) (arguing that even though the Texas Supreme Court has not addressed whether the franchise tax is an income tax, and therefore invalid under the Texas Constitution, it "falls within the general definition of an income tax"), quoted in *Id.*, at 12 n.59.

[495] TEX. TAX CODE § 171.101 (cited in *Id.* at 12 n.60).

[496] TEXAS TAXPAYERS AND RESEARCH ASSOC'N, *Texas Franchise Tax* (July 2018) (reporting that in 2017, only 9% of Texas' 1.3 million business entities paid any tax because of exemptions and deductions) (cited in *Id.* at 12 n.61).

Furthermore, this demand could also increase the workload for existing firms to operate as local legal service providers.[497]

Additionally, in some instances, Texas maintains a two-thirds shareholder vote requirement for significant business transactions.[498] When an investor decides to acquire shares in a corporation, they typically have the chance to see which state the founders or managers selected for incorporation. Once the investor becomes a shareholder in a corporation established in State Y, they may object if that corporation plans to shift its state of incorporation to State X. If they wanted an investment in State X, they would have opted for it at a different and lower price.[499] Consequently, any change of business entity or state of incorporation requires shareholder approval.[500] During this process, the board of directors must clarify how the conversion from State Y to State X would benefit the corporation, rather than just the directors, officers, or majority shareholder.[501] If a dissatisfied shareholder attempts to block the reincorporation, a court may analyze the decision differently if the benefits of the change do not equally impact all shareholders.[502]

The year 2024 proved to be challenging for the state of Delaware. From dissatisfied defense litigants to expedited legislative efforts aimed at addressing unpopular judicial rulings, the Delaware Court of Chancery has endured significant scrutiny in the public eye. In February 2025, the Governor

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[497] *See* Jonathan Macey & Geoffrey Miller, *Toward an Interest-Group Theory of Delaware Corporation Law*, 65 TEX. L. REV. 469, 472 (1987) ("Thus, the rules that Delaware supplies often can be viewed as attempts to maximize revenues to the bar, and more particularly to an elite cadre of Wilmington lawyers who practice corporate law in the state."); Mark I. Weinstein, *Limited Liability in California 1928-31: It's the Lawyers*, 7 AMER. L. & ECON. REV. 439, 479 (2005) (arguing that the 1931 California corporation statute reform was led by elite California lawyers, who did not want to lose clients to other states, may have wanted additional clients, and wanted the added prestige or having a modern legal regime) (cited in *Id.* at 13 n.66).

[498] TEX. BUS. ORGS CODE, § 21.457(a) (requiring a two-thirds vote for "fundamental business transactions"). This requirement can be modified in the certificate of formation. Notably, Tesla did change this vote requirement in its certificate of formation when it reincorporated. *See* Certificate of Formation of Tesla, Inc., dated June 13, 2024 ("To the maximum extent permitted by the TBOC. . . the vote of shareholders holding a majority of the shares of stock entitled to vote on the matter then outstanding shall be sufficient to approve, authorize, adopt, or to otherwise cause the Corporation to take, or affirm the Corporation's taking of, any action, including any "fundamental business transaction" as defined in the TBOC.") (cited in *Id.* at 14 n.78).

[499] *See* Matt Levine, *Money Stuff: Texas Tempts Meta*, BLOOMBERG (Feb. 3, 2025) (positing that investors might want "a good set of rules in place to make sure that most of your CEOs are answerable to shareholders and doing a good job managing those companies on your behalf" but sometimes rationally give money to a "ketamine-swilling self-dealing business genius with a radical long-term vision, one who, almost despite himself, makes zillions of dollars for his public shareholders" giving him total control in return for additional returns) (cited in *Id.* at 15 n.80).

[500] *See, e.g.*, TEX. BUS. ORGS CODE, § 21.457 (requiring a two-thirds vote of shareholders for fundamental business transactions, including mergers and conversions); DEL. CODE, tit. 8, § 266(b) (requiring a majority vote of shareholders for conversation of a Delaware corporation to another entity). Delaware only recently changed the vote necessary for a conversion to a majority vote from a unanimous one. *See* MORRIS NICHOLS ARSHT & TUNNELL, *Amendments to Delaware General Corporation Law in 2022* (October 2022), morrisnichols.com/insights-amendments-to-delaware-general-corporation-law-in-2022 (cited in *Id.* at 15 n.81).

[501] *See* Burce H. Kobayashi and Larry E. Ribstein, *Nevada and the Market for Corporate Law*, 35 SEATTLE U. L. REV. 1165, at 1172-73 (noting that the question of "whether firms' opportunity to incorporate under Nevada law injures shareholders" is "deceivingly complex" because they then have to choose between "living with higher agency costs, selling out for the lower price caused by the reincorporation, or incurring the substantial expense of removing the managers or otherwise forcing a move out of Nevada") (cited in *Id.* at 15 n.82).

[502] *See* Maffei v. Palkon, 2025 WL 384054 (February 4, 2025) (reversing the Court of Chancery and applying business judgment review to reincorporation transaction of TripAdvisor, Inc.) (cited in *Id.* at 15 n.83).

of Delaware, along with the legislature, introduced a new array of legislative measures aimed at preventing any potential exodus of corporations from the jurisdiction. Certain commentators suggest that specific aspects of Delaware's legal doctrine have prompted large, controller-owned, publicly held corporations to consider the possibility of a "DExit."[503] The recent rulings by the Court of Chancery that have sparked significant social media backlash against Delaware courts primarily involve controlling shareholders. Scholars suggest that this rising tension stems from a new wave of influential controllers in the U.S. capital markets, shielded by dual-class stock structures and bolstered by social media.[504] Professors Fisch and Solomon highlight three pivotal cases that may deter controlling shareholders in Delaware: *Tornetta v. Musk*,[505] *In re Match Group, Inc. Derivative Litigation*,[506] and *In re Sears Hometown and Outlet Stores, Inc. Stockholder Litigation*.[507] In these instances, transactions involving controlling shareholders were assessed under the entire fairness standard, resulting in the controlling shareholders failing to gain favorable outcomes in each case.

In *Tornetta v. Musk*, the Court of Chancery took two unprecedented actions: first, it determined that Elon Musk qualifies as a controlling shareholder despite holding only 21.9% of Tesla's outstanding shares; second, it examined the substantive issue of whether Musk's $55 billion compensation plan was fair in both its process and price.[508] As the Chief Executive Officer, Elon Musk appears to exercise substantial control over Tesla, despite possessing less than one-third of the total outstanding shares. Moreover, even within a judicial system recognized for its strict enforcement of written contracts, the magnitude of this level of compensation lacks any parallels among other corporations in the United States, regardless of their size or success. Therefore, the decision to withdraw $55 billion from the owner of a social media platform carries significant repercussions.[509]

On the day the opinion was published, Musk shared on X: "I recommend incorporating in Nevada or Texas if you prefer shareholders to decide matters."[510] Six months afterward, Tesla transitioned to a Texas corporation.

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[503] *See* Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, UCLA School of Law, Law & Econ. Res. Paper No. 24-04 (July 2024), J. CORP. L (forthcoming 2025) (providing interesting data on reporting companies that have left Delaware for other states of incorporation that shows the numbers range from two to nine per year) (cited in *Id.* at 27 n.155).
[504] *See* Ann Lipton, *The Legitimation of Shareholder Primacy* (noting that the new ability in the last decades for start-up companies to operate for years and amass large amounts of private capital may not have incentivized corporate structures or cultures that mediated between the power of founders and VC firms and other investors). *See also* Hillary A. Sale, *Monitoring Faceboo*k, 12 HARV. BUS. L. REV. 439, 439 (2022) ("[Zuckerberg] appears to have operated as if he were above the rules, not subject to regulation, and outside the zone where other people's concerns about privacy or false information were infringements on his rights instead of the reverse.") (cited in *Id.* at 27 n.156).
[505] 310 A.3d 430 (Del. Ch. 2024).
[506] 315 A.3d 446 (Del. 2024).
[507] 309 A.3d 474 (Del. Ch. 2024).
[508] Hurt, *supra* note 284, at 27.
[509] *Id*.
[510] *See* Elon Musk (@elonmusk), X (Jan. 30, 2024 6:17 p.m) (cited in *Id.* at 28 n.162).

B. Texas: Corporate Fortress or Uncharted Frontier?

When TripAdvisor and four other publicly held corporations voted to relocate from Delaware to Nevada, the justifications they articulated centered on the limited avenues for personal liability of directors and the reduced risk of litigation.[511] In essence, Nevada afforded a more robust defense against shareholder claims. Similarly, when Tesla sought shareholder votes to transition from Delaware to Texas in 2024, the proxy materials, which included the Special Committee Report, promoted the advantages of Texas's corporate law.[512] However, the efficacy of this defense remains relatively unknown and untested.[513] Texas is home to only a small percentage of the publicly held corporations that are incorporated in Delaware. Due to this relatively low number, Texas courts have not frequently been required to interpret the Texas Business Organizations Code (TBOC) or delineate fiduciary duties in several high-stakes situations that Delaware consistently adjudicates, such as "*Caremark* oversight claims, public company controller transactions, and intermediate scrutiny of defensive tactics."[514] Notably, this observation persists despite the assurances made in the Tesla Shareholder Letter, which indicated that Texas "is expected to provide more certainty for the innovative, big-ticket decisions that Tesla is known for."[515]

It's possible that Texas's current laws attracted Tesla.[516] Still, the Shareholder Letter called for relocating the corporate domicile to Texas for a different purpose: "Fairness and respect require that we honor the collective commitment made to Elon—a commitment that was, and fundamentally still is, about retaining Elon's attention and motivating him to focus on achieving astonishing growth for our company."[517] Concluding her letter, Denholm reveals her stance somewhat: "[W]e believe Texas legislators and courts are in the best position to fairly develop and make decisions about corporate law that applies to Tesla, especially when our next big bet pays off beyond anyone's expectations."[518]

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[511] *See* TripAdvisor, Inc,, Schedule 14A, at 29 (April 26, 2023) (stating that the conversion to a Nevada corporation "will provide potentially greater protection from unmeritorious litigation for directors and officers of the Company" because of the differences in the limitations of liability available in Nevada compared with Delaware) (cited in *Id.* at 37 n.226).
[512] *See* Special Committee Report, *supra* note 464, at E-15 (cited in *Id.* at 37 n.227).
[513] The Report of the Special Committee, however, noted that none of the four corporations that have reincorporated from Delaware to Texas in the past ten years gave greater litigation protections as a reason to move to Texas. *See* Special Committee Report, *supra* note 464, at E-15 (cited in *Id.* at 37 n.228).
[514] *See* Special Committee Report, *supra* note 464, at E-14. The report also noted that where Texas corporate law is silent, courts often look to Delaware law. *See e.g.*, In re DeMattia, 644 S.W.3d 225, 230 (Tex. App. 2022) ("There is limited Texas case law concerning advancement under the TBCA or the TBOC. But the courts of Delaware have addressed advancement on numerous occasions, and courts throughout the United States, including Texas, look to Delaware on matters of corporate law.") (cited in *Id.* at 37 n.229).
[515] Tesla Shareholder Letter, *supra* note 459, at 2.
[516] One drumbeat that runs through the Tesla proxy materials is that the Texas statute is more detailed and certain. *See* Tesla, Inc., Proxy Statement (Schedule 14A) (May 28, 2024) ("Texas is expected to provide stability and certainty through a highly defined corporate code.") (cited in Hurt, *supra* note 284, at 38 n.231).
[517] Tesla, Inc, Proxy Statement (Schedule 14A) (June 5, 2024) (cited in *Id.* at 38 n.232).
[518] *Id.*

Suggesting that the Texas legislature and courts will be exceptionally responsive to Tesla based on its future success seems to indicate that Tesla expects these legal bodies to cater to the needs of a highly profitable corporation.[519]

Tesla managers needed to ensure that they portrayed shareholder rights in Delaware and Texas as essentially equal, particularly if the move were to face scrutiny under the entire fairness standard. The Special Committee Report accurately pointed out that Texas shareholders enjoy the same rights as those in Delaware; the majority of statutory laws are comparable, and Texas courts often reference Delaware when addressing new scenarios.[520] In 2024, Texas was not a low-liability jurisdiction. Therefore, it raises the question: Why would Tesla decide to relocate to Texas when the legal conditions are mainly similar to those in Delaware and often uncertain?[521] Furthermore, concerns regarding the constitutionality of appointing judges rather than electing them have initiated discussions, which may result in constitutional challenges.

C. The Evolving Landscape of Texas Corporate Law

Overall, the corporate laws in Delaware and Texas are broadly similar. The key difference is that Delaware has a wealth of case law regarding corporate fiduciary duties, whereas Texas has a relatively limited amount. There are few publicly traded companies incorporated in Texas, resulting in a nearly complete absence of relevant case law concerning hostile takeovers, oversight duties, and transactions involving controllers.[522] Furthermore, Texas courts have not applied heightened scrutiny in instances of hostile takeovers, mainly because they have not encountered such cases.

In Texas, directors are held to fiduciary duties to the corporation, which include the duties of obedience, care, and loyalty. These responsibilities are owed to the corporation itself rather than to individual shareholders, even if there is only one shareholder.[523] Though the duty of obedience seems fairly exacting, in practice, it is almost obsolete; a director breaches this duty by undertaking an *ultra*

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[519] Hurt, *supra* note 284, at 38.
[520] *See, e.g.*, In re Estate of Poe, 591 SW.3d 607 (Tex. App. 2019) (citing Gantler v. Stephens, 956 A2d 695 (Del. 2009) when explaining how the business judgment rule works as a presumption) (cited in *Id.* at 38 n.233).
[521] Hurt, *supra* note 284, at 38.
[522] The Texas Supreme Court case on controller transactions actually began in Probate Court. Richard Poe, the sole director of the family company, had given all the shares of the company to his son, but while under hospice care, Poe had issued himself more shares for over $3 million, so at his death, the son did not control the corporation. The court reversed on issues of whether the director owed the shareholder a fiduciary duty (he did not) but remanded for findings on fairness under the interested director transaction statute. *See* In re Estate of Poe, 648 S.W.3d 277 (Tex. 2022) (cited in *Id.* at 38 n.234).
[523] *See id*; Ye v. Zhang, 2020 WL 152192 (S.D. Tex. May 15, 2020) (holding that the "duty of obedience, loyalty, and care runs to the corporation, not to individual shareholders or even to a majority of the shareholders") (cited in *Id.* at 39 n.235).

vires act. In the modern era, when corporations often have no stated corporate purpose beyond "any lawful purpose," directors generally do not face personal liability for fulfilling this duty.[524] The cases explicating the duty of care generally define it as most states do: the care that an ordinarily prudent person would use under similar circumstances. However, how the business judgment rule protects breaches of the duty of care may surprise a newcomer to Texas.[525]

The primary defense for a director or officer is the business judgment rule. According to the Tesla Special Committee Report, the business judgment rule doctrines in Texas and Delaware, as well as the entire fairness review, are "essentially the same." However, "Texas sometimes articulates it a bit differently."[526] The business judgment rule in Texas may be stronger than the Delaware presumption. In Texas, there is no clear line of cases establishing a specific articulation of the business judgment rule; however, several cases have made statements indicating that the business judgment rule protects even grossly negligent conduct.[527] The types of claims that are not protected by the business rule may be limited to "acts that are dishonest, fraudulent, or self-dealing."[528] If so, then the business judgment rule in Texas is stronger than the Delaware rule; however, coupled with an exculpatory clause, the results may be similar.

Similar to the Delaware General Corporation Law (DGCL), the Texas Business Organizations Code (TBOC) permits corporations to limit the liability of directors as specified in their articles of incorporation. In fact, the provisions regarding which claims may be exculpated and which may not are nearly identical to those found in Section 102(b)(7) of the DGCL[529]. Over the past decade, since the reformation of the TBOC, no appellate court in Texas has enforced an exculpation clause in cases involving corporations.[530] A notable case involving a publicly held corporation in Texas, *Sealed Filer*

[524] *See* Elizabeth S. Miller, *Overview of Fiduciary Duties, Exculpation, and Indemnification in Texas Business Entities*, 49 TEX. J. BUS. L. 1 (2020) ("The director's duty of obedience forbids ultra vires act but is rarely implicated given that modern corporation laws define corporate powers expansively and permit broad purpose clauses in the certificate of formation.") (cited in *Id.* at 39 n.236).

[525] Hurt, *supra* note 284, at 39.

[526] *See* Special Committee Report, *supra* note 464, at E-15 (cited in *Id.* at 39 n.237).

[527] *See* Chapman v. Arfeen, 2018 WL 4139001, at 15 (Tex. App. 2018) (holding that grossly negligent conduct falls within the business judgment rule) (cited in *Id.* at 39 n.238).

[528] *See id*. ("Nonetheless, the business judgment rule does not apply to protect a company officer from liability for acts that are dishonest, fraudulent, or self-dealing."); *see also* Sneed v. Webre, 465 S.W.3d 160 (Tex. 2015) (to overcome the business judgment rule, the claim must be "characterized by ultra vires, fraudulent, and injurious practices, abuse of power, and oppression on the part of the company or its controlling agency clearly subversive of the rights of the minority, or of a shareholder.") (cited in *Id.* at 39 n.239).

[529] TEX. BUS. ORGS CODE, § 7.001(b), (c) ("Subsection (b) does not authorize the elimination of limitation of the liability of a governing person to the extent the person is found liable under applicable law for: (1) a breach of the person's duty of loyalty, if any, to the organization or its owners or members; (2) an act or omission not in good faith that: (A) constitutes a breach of duty of the person to the organization; or (B) involves intentional misconduct or a knowing violation of law; (3) a transaction from which the person received an improper benefit, regardless of whether the benefit resulted from an action taken within the scope of the person's duty; or (4) an act or omission for which the liability of a governing person is expressly provided by an applicable statute.") (cited in *Id.* at 40 n.245).

[530] The Southern District of Texas, however, noted that Section 7.001(b) functioned the same as Delaware's Section 102(b) (7). In re Life P'ners Holdings, Inc. Sh'der Deriv. Litig, 2015 WL 8523103 (W.D. Tex. 2015) (cited in *Id.* at 40 n.246).

v. Priaulx,[531] was adjudicated by a federal court. The court determined that the exculpation clause was inapplicable because the "[p]laintiffs have sufficiently alleged facts, when taken as true, that show lack of disinterestedness, good faith, and business judgment by RCI's Board, amounting to breach of fiduciary duty."[532] In contrast, in Delaware, a plaintiff would be required to present a significantly stronger collection of facts demonstrating a specific breach of the duty of loyalty to circumvent the same provision.[533]

One of the notable provisions of Delaware law is the procedural requirement of making a demand on the board or alleging demand futility. In contrast, the derivative action procedures in Texas are comparatively less robust. Texas adheres to the Model Business Corporation Act (MBCA) stipulation that requires a demand in all instances.[534] Furthermore, the determination of whether to pursue the cause of action is governed by the business judgment rule.[535] Should the board be silent, the plaintiff is entitled to initiate legal proceedings ninety days after the demand.[536] If the board declines the request, it may submit a motion to dismiss. The board's decision not to proceed will be upheld provided it was made by a majority of a committee of independent and disinterested directors acting in good faith and after a reasonable inquiry confirming that the lawsuit is not in the corporation's best interest.[537]

Unlike the Delaware General Corporation Law (DGCL), the Texas Business Organizations Code (TBOC) explicitly defines the terms "independent person" and "disinterested person."[538] Additionally, shareholders in a closely held corporation are not mandated to make a demand on the board, thereby facilitating the process of initiating a derivative action suit.[539]

Another aspect that may undermine the procedural safeguards of the derivative suit in Texas is that the courts do not integrate the interplay of the standard of review, the exculpation clause, and the threat of personal liability into the preliminary inquiry regarding the futility of demand.[540] Even

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[531] 2023 WL 4144734 (S.D. Tex. Mar. 31, 2023) (denying a motion to dismiss because plaintiffs had alleged facts leading to an inference of a breach of the duty of loyalty, which is not exculpated) (cited in *Id.* at 40 n.247).
[532] *Id*. at 7.
[533] Hurt, *supra* note 284, at 40.
[534] TEX. BUS. ORGS CODE, § 21.553. Plaintiffs may not opt out of making demand by pleading demand futility. *See* Jeffrey M. Golub, *Derivative Lawsuits*, 41 CORP. COUNS. 23, 28 (2015) ("Demand futility is technically no longer a concept in Texas Law.") (cited in *Id.* at 41 n.249).
[535] *See* Sneed, 465 S.W.3d, at 178 ("First, the business judgment rule applies to the board of directors' decision whether to pursue the corporation's cause of action.") (cited in *Id.* at 41 n.250).
[536] TEX. BUS. ORGS CODE, § 21.553(b). A plaintiff may also ask for the waiting period to be waived if irreparable injury would result by delay (cited in *Id.* at 41 n.251).
[537] *See* Johnson ex rel. MAII Holdings, Inc. v. Jackson Walker, L.L.P., 247 SW.3d 765 (Tex. App. 2008) (cited in *Id.* at 41 n.252).
[538] TEX. BUS. ORGS CODE, § 1.004 ("Independent Person"); § 1.003 ("Disinterested Person") (cited in *Id.* at 41 n.253).
[539] *See* Ritchie v. Rupe, 443 SW.3d 856, 880-81 (Tex. 2014) ("Even when a closely held corporation does not elect to operate as a "close corporation," the Legislature has enacted special rules to allow its shareholders to more easily bring a derivative suit on behalf of the corporation.") (cited in *Id.* at 41 n.254).
[540] Hurt, *supra* note 284, at 41.

if the claims alleged would be afforded deference under the business judgment rule, this consideration does not influence the assessment of whether the board of directors responsible for initiating the derivative action is disinterested or independent.[541] The court in *Sneed v. Webre* determined that the permissibility of bringing a case as a derivative suit constitutes a procedural rule;[542] conversely, the business judgment rule pertains to the evaluation of merit. Regrettably, only a limited number of cases in Texas courts have applied the Texas derivative statute to corporations.[543]

It is not surprising that Texas has a significantly limited number of cases regarding the duty of oversight, which Delaware courts uphold as part of the duty of loyalty.[544] In a 2015 federal case, shareholders presented an oversight claim against Life Partners Holdings, Inc.,[545] a Texas corporation implicated in regulatory liability for the sale of unregistered securities in the form of viatical contracts.[546] The court asserted that "in deciding a director oversight claim, the Texas Supreme Court would look to Delaware," and found that the directors fulfilled their duty of oversight.[547]

Tesla's proxy materials contained multiple references to the fact that Texas, akin to many other states, has a "stakeholder statute." This statute permits directors to "consider the long-term and short-term interests of the corporation and the shareholders of the corporation, including the possibility that those interests may be best served by the continued independence of the corporation."[548] Furthermore, even if a corporation has not opted to become a benefit corporation or has not stipulated a social purpose in its charter, the statute specifies that nothing precludes a director from "considering, approving, or taking action that promotes or has the effect of promoting a social, charitable, or environmental purpose."[549] Approximately thirty states have enacted stakeholder statutes, which emerged in response to the corporate takeovers of the 1980s. These statutes are regarded as facilitating boards in considering the welfare of employees and communities before engaging in transactions with predatory acquirers involved in disruptive acquisitions.[550] For instance, a set of graphics provided to shareholders claimed that "[u]nlike Delaware, Texas law specially allows directors to consider our company's long-term mission to accelerate the world's transition to sustainable energy."[551] The Report of the Special Committee that recommended reincorporation in Texas lauded

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[541] *Id.*
[542] Sneed v. Webre, 465 S.W.3d 160 (Tex. 2015).
[543] *See* Sealed Filer, 2023 WL 4144734 at 5 (citing TBOC § 21.553 and Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981)), quoted in Hurt, *supra* note 284, at 41 n.256.
[544] According to Westlaw, one case in Texas cites to In re Caremark, but that case involves a Delaware corporation. *See* Moody v. Nat'l Western Life Ins. Co., 634 S.W.3d 256 (Tex. 2021) (cited in *Id.* at 41 n.257).
[545] In re Life P'ners Holdings, Inc., 2015 WL 8523103 (W.D. Tex. Nov. 9, 2015) (cited in *Id.* at 41 n.258).
[546] Life P'ners, Inc. v. Arnold, 464 S.W.3d 660 (Tex. 2015) (cited in *Id.* at 41 n.259).
[547] In re Life P'ners Holdings, Inc., 2015 WL 8523103 (W.D. Tex. Nov. 9, 2015) (cited in *Id.* at 42 n.260).
[548] TEX. BUS. ORGS CODE, § 21.401(b) (cited in *Id.* at 42 n.263).
[549] Id. § 21.401(c).
[550] Hurt, *supra* note 284, at 42.
[551] *See* May 28 Proxy Statement, *supra* note 516 (cited in *Id.* at 42 n.265).

the stakeholder statute because it "expressly allows directors and officers of a Texas corporation to consider, among other things, a positive impact on the environment when making decisions about the company's business."[552]

For many years, scholars and practitioners have debated whether stakeholder statutes benefit anyone beyond directors, officers, and shareholders,[553] concluding that they do not.[554] In reality, these statutes may serve as a "subterfuge for allowing management to block takeovers that were contrary to managerial interests."[555] Due to the business judgment rule, along with the deferential intermediate scrutiny seen in Delaware, directors have consistently retained the ability to prioritize the corporation's long-term interests,[556] whether this means blocking a reasonable tender offer[557] or supporting employees against a state law.[558] Furthermore, the Special Committee's Report determined that "the effect of constituency statutes on actual liability and litigation rights is negligible, if it exists at all."[559]

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[552] *See* Special Committee Report, *supra* note 464, at E-14 (cited in *Id.* at 42 n.266).
[553] *See* Lucian A. Bebchuk, Kobi Kastiel, & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 94 SO. CAL. L. REV. 1467, 1476 (2021) (finding no evidence that stakeholder statutes result in managers prioritizing stakeholders post-acquisition and theorizing that this is because managers have no incentives to do so) (cited in *Id.* at 42 n.267).
[554] *See* Lucian A. Bebchuk & Roberto Tallarita, *The lllusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 100 (2020) (explaining that "acceptance of stakeholderism would make corporate leaders less accountable and more insulated from investor oversight") (cited in *Id.* at 43 n.268).
[555] *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y. U. L. REV. 733 (2005) (cited in *Id.* at 43 n.269).
[556] *Id.* at 738-39 (arguing that the business judgment rule deference creates the discretion to sacrifice short-term profits because it is too costly to monitor exactly what actions do or do not maximize shareholder value long term) (cited in *Id.* at 43 n.270).
[557] *See* Airgas, Inc. v. Air Prods. and Chems, Inc, 8 A.3d 1182 (Del. 2010) (cited in *Id.* at 43 n.271).
[558] *See* Simeone v. The Walt Disney Co., 302 A.3d 956 (Del. Ch. 2023) (cited in *Id.* at 43 n.272).
[559] *See* Special Committee Report, *supra* note 464, at 23 (conceding that "in most [Delaware] cases, the directors' broad discretion under the business judgment rule coupled with the long-term interest of shareholders will be enough to eliminate a litigable difference between pursuing shareholder and non-shareholder interests.") (cited in *Id.* at 43 n.273).

D. The Texas Business Courts: Reshaping Corporate Litigation

As of the present date, twenty-six states[560] have established specialized "business courts," which are designated to accept cases that fulfill specific eligibility criteria. The most recent states to institute business courts include Wyoming,[561] Utah,[562] and Texas.[563]

The Texas Business Court began operations in September 2024,[564] making its influence on Texas's current business landscape and potential new incorporations still uncertain.[565] It currently operates in five divisions: Austin, Dallas, Fort Worth, Houston, and San Antonio, with plans to extend to six additional divisions in smaller Texas cities.[566] The court has jurisdiction over cases where the controversy exceeds $5 million and involves specific corporate governance or securities law matters; alternatively, it can address a broader range of contract cases if the amount in controversy exceeds $10 million. Notably, if a publicly traded company is involved, no minimum dollar threshold is required.[567]

In contrast to other state court judges, the judges presiding over the Business Court will be appointed by the governor.[568] However, decisions rendered by the Business Court are required to be appealed to a newly established appellate court, which possesses exclusive jurisdiction: the Fifteenth Court of Appeals.[569] Although the initial justices appointed to this court will be selected by the governor, they will subsequently be required to stand for statewide elections, akin to the procedures governing other courts in Texas, including the Texas Supreme Court.[570] The advantages perceived by

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[560] *See* Lee Applebaum and Benjamin Raymond Norman, *Recent Developments in Business Courts 2024*, BUS. L. TODAY (Mar. 2024) (cited in *Id.* at 44 n.285).
[561] *See* Matera, *supra* note 488, at 129 (noting that in 2019, Wyoming created a chancery court along with numerous other steps to entice decentralized autonomous organizations (DAOs) to incorporate as LLCs in Wyoming) (cited in *Id.* at 45 n.286).
[562] UTAH CODE & 78A-5a-102 (establishing the Business and Chancery Court) (cited in *Id.* at 45 n.287).
[563] *See generally* Shane Goodwin, *The Lone Star Docket: How the Texas Business Court Will Shape the Corporate Landscape*, SMU Cox Sch. of Bus. Res. Paper No. 24-14, https://ssrn.com /abstract=5024710 (Nov. 18, 2024) (cited in *Id.* at 45 n.288).
[564] *See* Brandon F. Renken & Nikiya Mellon, *New Ruling Limits Jurisdiction of Texas Business Courts*, MAYERBROWN (Nov. 13, 2024), mayerbrown.com/en/insights/publications/2024/11/new-ruling- limits-jurisdiction-of-texas-business-courts (reporting that cases that were filed before September 1, 2024 could not then seek removal to the Texas Business Court after it began hearing cases) (cited in *Id.* at 45 n.290).
[565] *See* Special Committee Report, supra note 464, at E-14 (noting that how the brand-new Texas Business Court will function is unknown, noting that "even corporate governance cases will be tried to juries rather than judges) (cited in *Id.* at 45 n.291).
[566] TEX. GOV'T CODE § 25A.003 (abolishing the additional divisions if they are not authorized and funded by the legislature by September 1, 2026) (cited in *Id.* at 45 n.292).
[567] Hurt, *supra* note 284, at 45.
[568] Currently, a Texas Business Court judge may serve only a term of two years, though they may be reappointed. *Supra* note 566, at § 25A.009 (cited in *Id.* at 45 n.293).
[569] *See* DiSorbo, *supra* note 473 (cited in *Id.* at 45 n.294).
[570] *See* In re Dallas County, 697 S.W.3d 142 (Tex. 2024) (upholding the creation of the Fifteenth Court of Appeals and the initial appointment of the justices as constitutional because the creation of the court created three vacancies, which can be filled by the governor until the next general election under the Texas Election Code) (cited in *Id.* at 45 n.295).

the legislature in appointing trial court judges may be mitigated if appeals are adjudicated by elected judges. While one could argue that establishing a dedicated business court is essential for creating a reliable and uniform set of corporate governance laws, having such a court does not necessarily ensure this or increase the number of business incorporations or activities.[571] Under the right conditions, a dedicated business court should benefit existing corporate law stakeholders in a state, particularly those involved with closely held corporations, LLCs, limited partnerships, and general partnerships.

However, developing into a specialized court that can compete with the Delaware Court of Chancery requires years of handling a substantial volume of corporate governance cases, not just general "business" cases involving contract disputes and business torts.[572] To compete with the Delaware Court of Chancery regarding administration and procedural efficiency, while excluding concerns related to pro-manager or pro-shareholder regulations, business courts must furnish the outputs that are characteristic of the Delaware Chancery. These outputs include written trial court opinions, a specialized and expert judiciary, and expedited processes.

The ability to replicate these attributes has proven challenging for many states.[573] For instance, while the North Carolina Business Court has been operational since 1996,[574] and does provide written opinions, the Nevada Business Court does not.[575] The preparation of written opinions requires significant time, and depending on the non-business caseloads, judges within a business court may lack the capacity to produce these opinions promptly.[576] According to the regulations of the Texas Business Court, "must issue a written opinion (1) in connection with a dispositive ruling, on the request of a party; and (2) on an issue important to the jurisprudence of the state, regardless of request." Furthermore, judges "may issue a written opinion in connection with any order."[577] Ultimately, the effectiveness of the business court in generating consistent, reliable, and predictable case law will depend on whether the issuance of written opinions is institutionalized as a standard practice within the Texas Business Courts.[578]

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[571] *See* John Coyle, *Business Courts and Interstate Competition*, 53 WM & MARY L. REV. 1915, 1945 (2012) (arguing that the creation of a business court will not incentivize out-of-state-business to expand operations into a state) (cited in *Id.* at 46 n.296).

[572] *Id*. at 1953-54 (claiming that to Delaware courts succeed because of a narrow jurisdictional focus, lack of juries, writing and publishing of opinions, and personal jurisdiction over out-of-state directors) (cited in *Id.* at 46 n.297).

[573] Hurt, *supra* note 284, at 46.

[574] Gregory Day, *Revisiting the North Carolina Business Court After Twenty Years*, 37 CAMPBELL L. REV. 277, 288-89 (2015) (describing the origins and characteristics of the North Carolina Business Court) (cited in *Id.* at 46 n.298).

[575] *See* Joshua Halen, *Transforming Nevada into the Judicial Delaware of the West; How to Fix Nevada's Business Courts*, 16 J. BUS. & SEC. L. 139, at 168 (2015) (determining that the "lack of published opinions is actually harming Nevada's ability to attract businesses to incorporate in the state" and that "[s]everal companies have cited the lack of published opinions and lack of predictability as a reason not to incorporate their business in Nevada") (cited in *Id.* at 46 n.299).

[576] *See id*. (blaming the lack of written opinions in the Nevada Business Court on the fact that judges were spending more time hearing non-business cases) (cited in *Id.* at 46 n.300).

[577] TEX. GOV'T CODE § 25A.017 (cited in *Id.* at 46 n.301).

[578] Hurt, *supra* note 284, at 46.

The Texas Business Organizations Code (TBOC) delineates extensive definitions for the terms "disinterested person"[579] and "independent person."[580] These definitions can significantly influence outcomes in Delaware courts. For plaintiffs seeking to assert demand futility, it is imperative to demonstrate that either a majority of the current board is subject to personal liability (i.e., is interested) or lacks independence from another director, officer, or controlling shareholder involved in a conflicted transaction. In essence, to successfully challenge the demand requirement in Delaware, a plaintiff must establish that the directors are either interested or lack independence. Conversely, directors who can substantiate their status as both disinterested and independent will be excluded from the case, even if the proceedings continue. The interpretation of independence becomes critical not only for the viability of the claim but also for the potential liability of specific individuals. Furthermore, the definition of independence is paramount in evaluating the validity of a special committee composed of directors with respect to the cleansing of controller transactions and other conflicted transactions.

In this regard, the TBOC offers greater clarity than Delaware case law regarding these definitions; however, Texas lacks specific case types in which these categories are of crucial importance.[581]

E. The 2025 Reforms: How Texas Aims to Deter Shareholder Lawsuits

As Texas engages in discussions about DExit, industry players are urging the state legislature to seize this opportunity to revise the TBOC, making it more accommodating for publicly held corporations.[582] In February 2025, lawmakers introduced two bills specifically targeting publicly held corporations that are incorporated in Texas and either have their headquarters there or are listed on a stock exchange based in Texas, likely the Texas Stock Exchange, which has sought registration as a securities exchange with the SEC.

Senate Bill 1056, named "An Act Relating to a Presumption of Good Faith for Directors and Officers of Certain Corporations," extends beyond its title. It formalizes the presumption of the business judgment rule and establishes a default limitation of liability for directors and officers. Notably, this default liability limitation is significantly more extensive than what corporations can

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[579] TEX. BUS. ORGS. CODE § 1.003 ("disinterested person") (cited in *Id.* at 47 n.303).
[580] TEX. BUS. ORGS. CODE § 1.004 ("independent person"). Probably the most significant difference between Delaware case law and the TBOC is that the TBOC makes it clear that dependence will only be found in "business, financial, or immediate family relationships," not person or social ties (cited in *Id.* at 47 n.304).
[581] Hurt, *supra* note 284, at 47.
[582] *Id.*

choose under Section 7.001(b).[583] It aligns more closely with the MBCA and variations seen in states like Nevada.[584]

S.B. 1057 aims to establish regulations concerning shareholder proposals within publicly traded companies, an area that has traditionally been under the jurisdiction of the Securities and Exchange Commission (SEC).[585] Unless specified otherwise in the articles of organization, no shareholder shall be permitted to submit a proposal for consideration at a shareholder meeting unless the shareholder or shareholder group possesses at least $1 million in market value of the corporation's voting stock or at least three percent of the voting stock,[586] thus significantly limiting the pool of shareholders eligible to initiate a proposal. Furthermore, the shareholder or group must have maintained this ownership continuously for the preceding six months. It must "solicit the holders of shares representing at least 67% of the voting power of shares entitled to vote on the proposal."[587]

Rumors are circulating in the Texas bar about an omnibus bill aimed at significantly overhauling the TBOC, with a proposal expected in spring 2025. The amendments would generally complicate shareholders' ability to assert their rights. For instance, shareholders would be prohibited from accessing books and records. At the same time, a derivative proceeding is ongoing, establish a process for courts to assess in advance whether a board committee is disinterested and independent under Section 21.418, and permit corporations to revise their articles of organization to stipulate that plaintiffs must hold at least 2% of the outstanding stock to initiate a derivative proceeding.[588]

Two legislative proposals presented to the Texas Legislature in November appear to favor business interests; however, they directly contradict the rationale articulated by Tesla for its reincorporation in Texas, as outlined in proxy materials. House Bill 988 stipulates that it constitutes a breach of a director's fiduciary duty if the director gives precedence to considerations other than the maximization of the corporation's share value.[589] Conversely, Tesla has advocated for the Texas constituency statute, asserting that it permits managers to concentrate on long-term objectives without

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583 S.B. 1056 (providing that directors and officers will not be personally liable for damages unless they "(1) violated a duty of good faith, loyalty, or due care; and (2) engaged in intentional misconduct, fraud, or knowing violation of the law") (cited in *Id.* at 47 n.305).
584 NEV. REV. STAT. ANN. § 78.138(7) (providing that directors and officers will not have individual liability for damages unless "(a) The director's or officer's act or failure to act constituted a breach of his or her fiduciary duties as a director or officer; and (b) The breach of those duties involved intentional misconduct, fraud, or a knowing violation of law.") (cited in *Id.* at 47 n.306).
585 *See* Exchange Act Rule 14a-8 (requiring shareholders to have continuously held their shares for at least three years and own at least $2,000 worth of securities; or two years and own at least $15,000; or one year and own at least $25,000), (cited in *Id.* at 48 n.307).
586 S.B. 1057. For information purposes, 3% of Tesla's outstanding stock is worth $32.5 billion; Southwest, $530 million; and CenterPoint Energy, $670 million (cited in *Id.* at 48 n.308).
587 *Id.*
588 Hurt, *supra* note 284, at 48.
589 *See* H.B. 988 (cited in *Id.* at 48 n.312).

the obligation to adhere to the Delaware standard of shareholder wealth maximization.[590] Furthermore, House Bill 872 may potentially escalate shareholder litigation, as it stipulates that if a shareholder alleges a breach of fiduciary duty due to directors prioritizing Environmental, Social, and Governance (ESG) goals, the directors bear the burden of proving that their decision was in the corporation's best interest. Regardless of whether managers support ESG initiatives, it is unlikely they will welcome the responsibility of demonstrating that their actions do not favor ESG considerations.[591]

F. Interpreting the Texas Shift: Academic Perspectives and Strategic Analyses

Professors Goshen and Stein provide insights on the ongoing discourse concerning Texas.[592] Scholars and commentators who appreciate Delaware's well-known charm and reputation have characterized Tesla's relocation to Texas as a futile undertaking.[593] They assert that even a prosperous business law court in Texas will bear a resemblance to its Delaware counterpart, thus suggesting that the move, at best, incurs superfluous transaction costs.[594] Furthermore, they argue that the initiative by Elon Musk and the Tesla board to facilitate this transition is motivated by the anticipation that Texas judges and legislators, with whom they have established relationships, will enact legislation that permits them to consolidate their authority within the Tesla corporation, consequently diminishing the oversight exercised by shareholders.[595]

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590 *See* Special Committee Report, supra note 464, at E-14 (cited in *Id.* at 49 n.313).

591 Hurt, *supra* note 284, at 49.

592 Zohar Goshen & Tomer S. Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts* 58 (Columbia L. & Econ. Working Paper No. 5200668, 2024).

593 *See, e.g.*, Gareth Vipers. Ryan Felton, and Ginger Adams Oti, *Elon Musk Wants to Move Tesla's Incorporation From Delaware to Texas*, WALL ST. J. (Feb. 1, 2024 4:12 PM), https://www.wsj.com/business/tesla-to-hold-shareholder-vote-to-incorporate-in-texas-elon-musk-says-8eb78eef ("'The capital you're going to have to expend to create a real business court with that expertise is going to be a lot more, frankly, than the income it produces,' . . . 'Frankly, to move because [Musk] is unhappy with a particular judge's ruling at a particular point in time is very ill-advised,'"—quoting Professor Charles Elson); Ann Lipton, *You'll Never Guess What Today's Blog Post is About*, BUS. L. PROF BLOG (May 31, 2024), https://lawprofessors.typepad.com/business_law/2024/05/youll-never-guess-what-todays-blog-post-is-about.html (arguing that the timing of the Texas moves is likely about a conflict of interest and otherwise has no discernible benefits) (cited in *Id.* at 58 n.280).

594 *See, e.g., id.* ("[C]ontemplating an expensive switch – involving special committee payments, advisors, hours, and expert analysis, not to mention vote whipping – for benefits that even the company itself claims largely are about branding.") (cited in *Id.* at 58 n.281).

595 *See, e.g.*, Matt Levine, *Texas Tempts Tesla*, BLOOMBERG (Feb. 1, 2024 2:51 PM), https://www.bloomberg.com/opinion/articles/2024-02-01/texas-tempts-tesla ("Elon Musk comes into court saying 'well that may all be true but what you are missing is that I am Elon Musk' and Texas Governor Greg Abbott is in the first row of spectators with a big sign saying 'TX <3 U ELON,' is the Texas business court, in its first real high-profile case, going to say 'actually it's illegal to pay Elon Musk that much'? It absolutely is not.") (cited in *Id.* at 58 n.282).

Conversely, supporters of Tesla's move argue that Delaware's treatment of Musk's compensation package indicates the state has strayed from its path to success.[596] They contend that moving to Texas may be warranted because, although Texas has yet to demonstrate that its court can provide the necessary specialization, Delaware has started to undo its specialized doctrines regardless.[597]

Professors Goshen and Stein argue that both the proponents and opponents of the move are mistaken. Regarding its proponents, a careful analysis of Delaware's specialized courts suggests that, although we may dispute some of its recent rulings, they are far from dismantling Delaware's strong connection between corporate law and specialization. Indeed, while the factual and doctrinal issues related to the ratification of Musk's compensation package are complex, they recognize the potential validity in the idea that invalidating the ratification was incorrect.[598] However, critics of Tesla's decision are also misguided in labeling it as unwise. This criticism is flawed because it overlooks the effects of home incorporation on the relationships between agents, principals, and courts, and it wrongly assumes that mechanisms for entrenching boards and controllers will inevitably lead to adverse outcomes rather than positive ones.[599]

Tesla's headquarters, along with a portion of its manufacturing facilities, are situated in Texas, rendering the decision to reincorporate in Texas a decision rooted in its home state.[600] To comprehend the significance of this decision, it is imperative to first grasp the reasons behind the persistent occurrence of home-state incorporations since at least the 1980s.[601] During that decade, as illustrated by Professors Goshen and Stein, corporate America experienced a surge in takeover activities, sparking discussions about their implications for corporate value and society as a whole.[602] Predatory investors would seize control of corporations, subsequently shutting down factories and laying off numerous employees.[603] A notable response to this phenomenon involved successful initiatives led by boards of directors within home-state incorporation frameworks, which sought legislative and

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[596] *See* Keith Paul Bishop, *Delaware Court Awards Attorneys Nearly $18,000/Hour for Frustrating the Will of the Stockholders*, CAL. CORP. & SEC. L. BLOG (Dec. 10, 2024), https://www.calcorporatelaw.com/delaware-court-awards-attorneys-nearly-18000/hour-for-frustrating-the-will-of-the-stockholders (cited in *Id.* at 59 n.283).
[597] *Id.*
[598] Goshen & Stein, *supra* note 592, at 59.
[599] *Id.*
[600] Tesla, Inc., Form 8-K (June 13, 2024) (providing Texas address for principal offices) (cited in *Id.* at 60 n.287).
[601] *See, e.g.*, Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987) (analyzing the phenomena); Lucian A. Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J. L. & ECON. 383, 406 (2003) (providing an empirical study) (cited in *Id.* at 60 n.288).
[602] *See, e.g.*, Jonathan R. Macey, *State Anti-Takeover Legislation and the National Economy*, 1988 WIS. L. REV. 467, 471 (1988) (introducing and opining on the debate); *See also* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981) (cited in *Id.* at 60 n.289).
[603] *See* David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 234 (1991) (describing such events) (cited in *Id.* at 60 n.290).

judicial measures that empowered management to counteract such takeovers.[604] Given that Tesla's headquarters, employee hiring, and state tax payments are in Texas, the company's management wields political influence that they can use to advocate for legal changes in the state, regardless of the current low litigation barriers.[605]

The prevailing corporate theory of that period posited that laws designed to entrench management would have a negative impact on corporate value.[606] However, the actual results were divergent: some firms experienced a decline in value, while others prospered.[607] By insulating managers from hostile takeovers, these organizations permitted dedicated and capable managers to engage in long-term innovative projects, free from the anxiety of disruptions by opportunistic raiders pursuing short-term profits.[608] Consequently, these corporations reaped the benefits of the anti-takeover legislation, whereas those with disloyal and incompetent managers did not.[609]

Professors Goshen and Stein present an additional point for consideration. Shareholders are dispersed throughout the United States and worldwide, rather than being confined to Delaware.[610] Managers are situated according to the location of their corporations' headquarters, which are frequently not in Delaware.[611] Employees are positioned where the factories operate, which is also typically not in Delaware.[612] The determination of a corporation's place of incorporation is solely the prerogative of the shareholders or the managers.[613] Consequently, when a corporation is incorporated in Delaware, despite the absence of a nexus with corporate operations, the relevant triangle consists of shareholders, managers, and the courts.[614] The court addresses the distribution of powers (control rights) between shareholders and managers, irrespective of the potential implications its rulings may have on other stakeholders, such as employees.[615] Rulings from Delaware courts are evaluated based on their impact on a singular objective—maximizing shareholder value.[616] Therefore, even when

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[604] *See, e.g.*, Macey, *supra* note 209, at 470 (documenting successful lobbying by Goodyear Tire in Ohio, Boeing in Washington, Burlington Industries in North Carolina, Gillette at Massachusetts, and others) (cited in *Id.* at 60 n.291).
[605] Barzuza, *supra* note 213.
[606] *See* Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 820 (2017) (tying this prediction to existing agency costs theory) (cited in *Id.* at 60 n.294).
[607] *See* Robert Daines, Shelley Xin Li & Charles C.Y. Wang, *Can Staggered Boards Improve Value? Evidence from the Massachusetts Natural Experiment* 3-4 (Stanford Law & Econ. Olin Working Paper No. 498; Harv. Bus. Sch. Fin. Working Paper No. 16-105; ECGI - Fin. Working Paper No. 499/2017, Sept. 12, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2836463 (cited in *Id.* at 60 n.295).
[608] *Id.*
[609] *Id.*
[610] Ann M. Lipton, *Inside Out (or, One State to Rule Them All): New Challenges to the Internal Affairs Doctrine*, 58 WAKE FOREST L. REV. 321, 323 (2023) (describing the law allowing incorporation state to impact shareholders and employees residing outside the state of incorporation—the internal affairs doctrine) (cited in *Id.* at 61 n.298).
[611] *Id.* (cited in *Id.* at 61 n.299).
[612] *Id.*
[613] Goshen & Stein, *supra* note 592, at 61.
[614] *Id.* at 61.
[615] *Id.* at 61.
[616] *See* McRitchie v. Zuckerberg, 315 A.3d 518, 562-64 (Del. Ch. 2024) (delineating Delaware' commitment to shareholder wealth maximization and the connection to long-term value) (cited in *Id.* at 61 n.301).

shareholders exert pressure on managers to eschew long-term projects or other innovative investments in favor of immediate profits, the interests of shareholders continue to hold precedence.[617]

Nevertheless, when a corporation incorporates in its home state, the legislature and the judiciary need to consider the implications for employees and other residents of the state.[618] The home state must not yield to the pressures exerted by shareholders seeking short-term profitability, often propelled by hostile raiders and activist hedge fund managers, as such actions could result in diminished investments and significant layoffs of employees.[619] Therefore, the home state should provide a buffer for managers against market pressures, thereby enabling them to pursue long-term investments that safeguard employment and ultimately benefit shareholders.[620]

Regarding Texas, while critics question Tesla's motivations for reincorporating, they overlook the possibility that these motivations may not be detrimental to the company. In fact, this move could be just what Tesla needs. Not only could the Texas Business Court could gain the required expertise to resolve corporate disputes, but this action may also indicate the directors' and shareholders' belief that incorporating in Texas enhances the firm's value.[621]

Professors Goshen and Stein highlight that Tesla stands out as one of the world's most innovative companies, with CEO Elon Musk having demonstrated his ability to bring his idiosyncratic vision to life.[622] This situation exemplifies a scenario where shareholders might favor protecting management from disruptive market forces, such as hostile takeovers and hedge fund activism.[623] Notably, other innovative firms create this protection for their leadership by implementing a dual-class stock structure.[624] Another strategy to achieve this objective is to incorporate it into the home state.[625] Certainly, relocating to Texas brings uncertainties, as the Texas Court needs time to build its specialization and reduce judicial errors. However, assessing Tesla's move is warranted, as the decrease in principal costs surpasses the potential rise in adjudication and agent fees. The beneficial adjustments to the firm's overall control costs could ultimately exceed any

617 *Id.*
618 Goshen & Stein, *supra* note 592, at 61.
619 *Id.* at 61.
620 *See* Macey, *supra* note 209, at 470; Goshen & Squire, *supra* note 606, at 820 (together, showing the legislative efforts, and noting they may be beneficial, respectively) (cited in *Id.* at 61 n.304).
621 Goshen & Stein, *supra* note 592, at 62.
622 *See* Hamdani & Kastiel, *supra* note 76, at 1368 ("Under Elon Musk's leadership, Tesla's share price increased over 23,000% in a little more than a decade since its 2010 IPO.") (cited in *Id.* at 62 n.306).
623 *See* Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L. J. 411, 414 (2022) (discussing the potential reduction in principal cost from fighting against such control contests) (cited in *Id.* at 62 n.307).
624 *See* Goshen & Squire, *supra* note 606, at 806-07 (illustrating the benefits that the dual-class structure may bring) (cited in *Id.* at 62 n.308).
625 Goshen & Stein, *supra* note 592, at 62.

transaction expenses associated with relocating the corporate charter from Delaware to Texas.[626] Similarly, companies like Meta[627] and other firms with unique leaders can enhance their value in Texas. Although they have no operational ties to the state, the decrease in principal costs might exceed all other effects on the company's total value.

G. From State Competition to Federalism

"When there are egregiously wrong legal judgments in a single state that substantially harm American citizens in all other 49 states, the Federal government should take immediate corrective action."[628]

As this post emphasizes, Musk possesses a keen awareness of the competitive dynamics among states that are striving to attract corporate incorporation. This rivalry extends beyond interstate boundaries; states such as Delaware must also consider the potential for federal intervention that may supersede the laws they enact, as has occurred historically, particularly in cases involving legislation governing shareholder voting rights.[629] Musk's invocation of federalism in his conflict with Delaware is no coincidence. In a state like Delaware, where franchise fees have become a primary source of revenue, the federalization of corporate law poses a more significant threat than any state action can.[630] If all publicly traded corporations were required to obtain federal charters, for instance, the state of Delaware would experience a substantial decline in its revenue sources.[631]

The ongoing Tesla dispute highlights shareholders' authority to influence management through their votes, which is a familiar context for congressional involvement. This scenario serves as a significant cautionary tale for specialized courts, particularly in the state of Delaware. If these corporate courts misinterpret their limited role in the relationship with management and shareholders, they may provoke federal intervention, especially if they use their powers in ways that jeopardize the shareholder voting process.[632] On the other hand, the federal government should also recognize an

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[626] *Id.* at 62.
[627] *See* Emily Glazer, Berber Jin, and Meghan Bobrowsky, *Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware*, WALL ST. J. (Jan. 31, 2025 5:18 PM), https://www.wsj.com/tech/meta-incorporation-texas-delware-f06e8bab (reporting the possible reincorporation of Meta in Texas) (cited in *Id.* at 62 n.309).
[628] Elon Musk (@elonmusk), X (Nov. 7, 2024, 11:50 AM), https://x.com/elonmusk/status/1854567200113533325 (cited in *Id.* at 2 n.9).
[629] *See generally* Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588 (2003) (describing the impact of federal law and threat of further federalization on corporate law) (cited in *Id.* at 6 n.27).
[630] *See* Roe, *supra* note 629, at 588 (cited in *Id.* at 63 n.315).
[631] *See* DEL. DIV. CORPS. *About the Division of Corporations* (2025), https://corp.delaware.gov/aboutagency/ ("More than 66% of the Fortune 500 have chosen Delaware as their legal home . . . the Delaware Court of Chancery is a unique 225 year old business court that has written most of the modern U.S. corporation case law.") (cited in *Id.* at 63 n.317).
[632] Goshen & Stein, *supra* note 592, at 64.

important lesson: creating a specialized court with the necessary expertise to handle claim dismissals effectively is a costly, lengthy, and challenging endeavor—something that broad federalization cannot easily accomplish.[633]

Professor Bainbridge also joined the discussion about the threat of federal intervention, asserting that "Delaware corporate law is not perfect. It's not even close to perfect. Nothing created by humans ever is. But the corporation is the foundation of our economy, and Delaware corporate law is the engine that makes it run. I firmly believe that federal preemption of corporate law is a terrible idea."[634] The Professor notes that corporate governance has been primarily governed by state law for more than 200 years. Despite the significant increase in federal involvement initiated by the New Deal securities regulations, states have retained control over corporations' internal affairs and governance. This state-centered approach to corporate governance is a key advantage of U.S. capital markets.[635] As Professor Roberta Romano famously stated, the competition among jurisdictions in state regulation embodies the "genius of American corporate law."[636] Before the New Deal, corporate law was solely handled by the states. However, at the turn of the last century, economic progressives began promoting the idea of federal preemption—often in response to various corporate scandals. Following the Great Crash of 1929, there were genuine discussions about establishing federal legislation for corporations. Throughout the 1930s, several attempts were made to federalize corporate law, but all were unsuccessful.[637]

Legislative inaction presents an inherent ambiguity. What can be stated with certainty is that Congress has opted not to take action. Nevertheless, the Supreme Court has regularly dismissed regulatory initiatives aimed at superseding state law and establishing a de facto federal legislative framework for corporations. The Court maintains that "state regulation of corporate governance is regulation of entities whose existence and attributes are a product of state law."[638] The Court has consistently reaffirmed that: "It ... is an accepted part of the business landscape in this country for states to create corporations, to prescribe their powers, and define the rights that are acquired by purchasing their shares."[639] Indeed, the Supreme Court asserts that "[n]o principle of corporation law and practice is more firmly established than a State's authority to regulate domestic corporations."[640] State law, for instance, outlines the rights of shareholders, "including ... the voting rights of

[633] *Id.* at 64.
[634] Stephen Bainbridge, *Delaware Corporate Law Is the Foundation of Our Economy: So Elon Musk and Donald Trump Need to Leave Delaware Alone*, ProfessorBainbridge.com (2024).
[635] *Id.*
[636] ROBERTA ROMANO, *The Genius of American Corporate Law* (1993).
[637] Bainbridge, *supra* note 634.
[638] CTS Corp. v. Dynamics Corp., 481 U.S. 69, 89 (1987) (cited in *Id.*).
[639] *Id.* at 91.
[640] *Id.* at 89.

shareholders."[641] State law delineates the issues that may be authorized solely by the board of directors and those that necessitate authorization from the shareholders. Typically, state law mandates that specific control transactions, such as mergers or the sale of substantially all corporate assets, receive prior approval from the shareholders. Furthermore, it establishes the voting thresholds required, which often entail a supermajority, for shareholder endorsement of such matters. Additionally, state law governs the procedures for shareholder meetings, specifying the individuals entitled to convene said meetings and outlining the circumstances under which actions may be executed without convening a shareholder meeting, along with the prescribed procedures for such actions.[642]

Professor Bainbridge elaborates that the Supreme Court has consistently acknowledged that state law governs the rights and responsibilities of corporate directors: "As we have said in the past, the first place one must look to determine the powers of corporate directors is in the relevant State's corporation law. 'Corporations are creatures of state law' and it is state law which is the font of corporate directors' powers."[643] State law delineates the powers of directors concerning the corporation; for instance, state law establishes the voting requirements for the election of directors. Furthermore, state law dictates whether shareholders possess the right to cumulative voting in the election of directors, whether the corporation's directors may have staggered terms of office, and whether shareholders have the authority to remove directors before the expiration of their term.[644]

Furthermore, the Professor asserts that one should remain cautious in embracing federal preemption. Proponents of preemption exhibit a profound lack of understanding—and potentially a disregard for—the essential relationship between federalism and liberty. In essence, even if it were established that state competition leads to detrimental outcomes, foundational principles of federalism would still advise against the federal preemption of corporate law.[645] Corporations are entities of the state "whose very existence and attributes are a product of state law."[646] States possess a vested interest in supervising the entities they establish. Additionally, states have an interest in safeguarding the interests of their corporations' shareholders.[647] Ultimately, a state has a legitimate "interest in promoting stable relationships among parties involved in the corporations it charters, as well as in ensuring that investors in such corporations have an effective voice in corporate affairs."[648]

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641 *Id*.
642 Bainbridge, *supra* note 634.
643 Burks v. Lasker, 441 U.S. 471, 478 (1979) (citations omitted) (cited in *Id.*).
644 Bainbridge, *supra* note 634.
645 *Id*.
646 CTS Corp. v. Dynamics Corp., 481 U.S. 69, 91 (1987) (cited in *Id.*).
647 Bainbridge, *supra* note 634.
648 CTS Corp. v. Dynamics Corp., 481 U.S. 69, 91 (1987) (cited in *Id.*).

Therefore, state regulation not only serves to protect shareholders but also fosters investor and entrepreneurial confidence in the fairness and efficacy of the state corporate framework law.[649]

According to the Supreme Court's *CTS* decision, state regulation in this area benefits the entire country. As Justice Powell explained, markets that facilitate national and international investment in corporations are crucial for funding both new businesses and existing companies seeking to expand. This free market system works because corporations are typically formed under—and governed by—the laws of their state of incorporation. Removing the states from their traditional role as the primary regulators of corporate governance would deprive them of the opportunity to test different solutions to complex legal issues.

As Justice Brandeis once noted, "[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of country."[650] Since state laws usually only apply to companies incorporated within that state, there's no risk of conflicting rules for the same corporation. This allows for experimentation without confusion, potentially leading to better corporate laws.[651] Conversely, the consistency arising from federal preemption would eliminate the chance to experiment with different regulatory approaches. Consequently, this would hinder the development of innovative regulatory ideas, removing the opportunity for a federalism "laboratory." Instead, we would be left with rules that could be flawed from the beginning and may soon become outdated.[652]

Indeed, competitive federalism fosters both individual liberty and shareholder wealth. When companies have the freedom to choose from various competing regulators, harsh regulations become untenable. If one regulator exceeds its authority, firms can relocate to a jurisdiction with more laissez-faire policies. Conversely, with only one regulator available, the option for regulated entities to exit disappears, eliminating a crucial safeguard against excessive regulation.[653] In essence, competitive federalism not only enlarges the economic pie but also fosters the economic freedom essential for wealth pursuit. A legal framework aimed at wealth maximization must provide individuals with the liberty to seek wealth accumulation. Furthermore, economic liberty is intrinsically linked to personal freedom; these two concepts have typically progressed together.[654]

In conclusion, the modern public corporation has emerged as a significant force in promoting economic freedom. People whose livelihoods depend on corporations cannot ignore politics. Only

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[649] Bainbridge, *supra* note 634.
[650] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (cited in *Id.*).
[651] Bainbridge, *supra* note 634.
[652] *Id.*
[653] *Id.*
[654] *Id.*

democratic capitalist societies allow private corporations to form freely and operate with financial independence.[655]

[655] *Id*.

VI. The Future Of Delaware's Corporate Law: Adaptation Or Decline?

A. Interest Groups and Delaware Corporate Law

The competitive landscape regarding corporate charters, alongside the state of Delaware's preeminent market standing, constitutes a subject of considerable interest among scholars in corporate law. This trend has persisted for several years. Historically, the discourse has not centered on the question of *whether* Delaware will maintain its preeminent position, as the state's supremacy had not been subjected to significant challenge until recently. Instead, the discussion has predominantly centered on the *reasons* behind Delaware's status as the leading state for business incorporations and the implications of its dominance for shareholders and society at a whole.[656]

Nevertheless, circumstances seem to be evolving. In April 2024, approximately twenty esteemed practitioners from a prominent law firm, including a former Chancellor of the Delaware Court of Chancery,[657] convened to issue a "client advisory" alerting the firm's clientele to the emergence of discussions regarding whether Delaware should maintain its status as the preferred state of incorporation for business entities.[658] These legal practitioners and the former Chancellor expressed the opinion that the "current conversation" surrounding Delaware's market supremacy is, based on our experience and market indicators, serious.[659] Ultimately, however, "Delaware is likely to remain in use for some time."[660]

In his essay, Jonathan Macey observes that Delaware provides a multifaceted "product."[661] This product holds substantial significance, particularly from Delaware's standpoint, as the revenue generated from chartering various types of companies, either "indirectly or directly," constitutes approximately one-third of the state's gross revenue, as indicated by Delaware Chief Justice Collins Seitz.[662] The product being offered by Delaware consists of services derived not only from the state's

[656] Macey, *supra* note 209.
[657] *See* Simmerman et al., *supra* note 467, at https://www.wsgr.com/en/people/william-b-chandler-iii.html (cited in *Id.* at 3 n.1).
[658] Simmerman et al., *supra* note 467 (cited in *Id.* at 3 n.2).
[659] *Id.* (cited in *Id.* at 3 n.3).
[660] *Id.* (cited in *Id.* at 3 n.4).
[661] Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON & ORG. 225 (1985) (cited in *Id.* at 3 n.5).
[662] *See* Sarah Petrowich, *Judicial Branch Requests Funding for New Positions to Decrease Judicial Officer Case Load*, DEL. PUB. MEDIA (Feb. 15, 2024), https://www.delawarepublic.org/politics-government/2024-02-15/judicial-branch-requests-funding-for-new-positions-to-decrease-case-load-of-judicial-officers (cited in *Id.* at 3 n.6).

esteemed judiciary, recognized for its "talented and knowledgeable"[663] members, but also from the legislative and executive branches. The Delaware legislature provides a set of corporate law statutory provisions that are both "up-to-date and carefully considered,"[664] in addition to being highly responsive to the preferences of corporations chartered within the state.[665] Historically, this legislative framework has been characterized as "apoliticized and moderate."[666] Furthermore, the executive branch, through the offices of the Secretary of State, enhances Delaware's competitive advantage in the jurisdictional market for corporate charters by being "nimble and user-friendly."[667] Essential filings, including certificates of incorporation, charter amendments, certificates of merger, and franchise tax documents, are processed "quickly and effectively,"[668] without interference.

Professor Macey argues that, while the Delaware judiciary is, for the most part, talented and knowledgeable, the legislature is responsive, and the Secretary of State's office is highly efficient, certain members of the Delaware judiciary appear to be adopting an attitude towards business that seems to be "suspicious or negative."[669] This alteration from a judicial perspective signifies a significant departure from established practices and a change of considerable importance. It is typically challenging and frequently unfeasible for publicly traded companies to evade litigation. Understandably, directors and officers prefer to avoid being subjected to public mockery and disdain, as exemplified by Elon Musk in a recent ruling that broadly criticized "superstar CEOs" and questioned their contributions to value creation.[670] For instance, in the case concerning the invalidation of Elon Musk's compensation package, there was no evidence suggesting that Elon Musk or any chief executive officer had made genuinely unique and irreplaceable contributions to the organization that would justify exceptional forms of compensation, thereby rendering the practice of benchmarking the CEO's salary against that of other CEOs inappropriate. Whether rightly or wrongly, it appears probable that numerous shareholders perceive the contributions of the CEOs of the companies in which they have invested as distinct and more entrepreneurial than managerial in nature.

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[663] Simmerman et al., *supra* note 467 (cited in *Id.* at 3 n.7).
[664] *Id*. (cited in *Id.* at 4 n.8).
[665] Romano, *supra* note 661, at 4 n.9.
[666] *See* Simmerman et al., *supra* note 467. Roberta Romano has observed that an advantage to incorporating in Delaware is that the Delaware State Constitution requires that any revision to the corporate code be supported by a two-thirds supermajority of both houses of the state legislature. Romano, *supra* note 661, at 241. Del. Const. Art IX, sect. 1 (cited in Macey, *supra* note 209, at 4 n.10).
[667] Simmerman et al., *supra* note 467 (cited in *Id.* at 4 n.11).
[668] *Id*.
[669] *Id*.
[670] *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024). For example, the opinion indicated that the board was "perhaps starry eyed by Musk's superstar appeal," using the term "superstar CEO 21 times and suggesting that Musk was not significantly different than other CEOs. The opinion also adduces examples of "visionaries (including Jeff Bezos, Bill Gates, and Mark Zuckerberg) with large pre-existing equity holdings foregoing compensation entirely" (cited in *Id.* at 4 n.14).

Such shareholders would likely criticize a legal framework that prohibited them from expressing this perspective within the compensation structures designed to retain such CEOs.[671]

Furthermore, Professor Macey's essay posits that what has been, whether justly or unjustly, characterized as the "suspicious and negative tone adopted towards corporate boards and management"[672] by Delaware judges often contrasts sharply with the borderline veneration that these judges extend towards the plaintiff-side lawyers who litigate against such officers and directors.[673] It is crucial to consider that the exact agency costs that afflict corporate officers and directors similarly burden the plaintiffs' lawyers who prosecute cases against these individuals. In essence, just as officers and directors do not invariably act in the best interests of their shareholders, plaintiffs' lawyers do not consistently act in the best interests of the shareholders they ostensibly represent. Indeed, *Tornetta v. Musk*, a case in which lawyers persisted in contesting a transaction that was overwhelmingly favorable to minority shareholders, serves as an illustration of lawyers potentially acting against the interests of shareholders.[674]

Taking into account these considerations collectively leads to a straightforward hypothesis regarding the recent questioning of Delaware's preeminent competitive status as the primary jurisdiction for the incorporation of U.S. businesses. In essence, corporations incorporated in Delaware, along with their legal counsel, are beginning to sense a lack of welcome, and they are expressing concerns that the plaintiffs' bar is afforded more deference than the defense bar.[675]

Nonetheless, according to Professor Macey, Delaware is highly improbable to forfeit its preeminent standing despite the recent apprehensions articulated regarding several judgments that have been unfavorable to directors and controlling shareholders. This assertion is predicated on two significant facts. First, any perceived judicial antagonism directed towards management, particularly controlling shareholders, alongside the anomalously disproportionate judicial perspectives on the value added in litigation by both the plaintiffs' bar and the defense bar, remain isolated incidents. Second, it is crucial to acknowledge that Delaware does not need to achieve perfection—or even exhibit exceptional performance in an absolute sense—to maintain its dominant competitive position among the states. Rather, Delaware can sustain its prominent status merely by being perceived as

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671 Macey, *supra* note 209, at 3.
672 *See* Simmerman et al., *supra* note 467. On the other hand, from the plaintiffs' lawyers' perspective, the deck appears to be stacked in favor of defendants because the path of least resistance is for a judge is to dismiss complaints, approve settlements, and not award significant damages. Joel Friedlander, *Thoughts of a Jewish-American Plaintiffs' Lawyer on the Past and Present of Stockholder Litigation*, M&A J. (2023), at 1 (cited in *Id.* at 4 n.15).
673 The recent decision in *Tornetta v. Musk II* to award the Plaintiff's counsel with $345 million in fees in a case in which the Defendants bore the burden of proof for showing what the court viewed to be obvious and massive corporate governance failures is tangible evidence of the benefit that courts see in the value of plaintiffs' attorneys (cited in *Id.* at 5 n.16).
674 Macey, *supra* note 209, at 5.
675 *Id.*

marginally superior to the next best alternative accessible to investors, entrepreneurs, and their advisors. Currently, there is no unequivocal superior alternative to Delaware.[676]

Upon further examination of Delaware's "product," it may be contended that even exceptional products can encounter failures in the marketplace.[677] Certain products may fail not due to a deficiency in value but rather because the companies that produce them do not take into account whether their customers will recognize this value.[678] This sentiment is echoed by the Professor in relation to the state of Delaware. Concisely stated, while Delaware corporate law is nuanced and sophisticated, it may have become excessively complicated, particularly concerning controlling shareholders. In recent years, there has emerged a perplexing layer of unwritten law governing corporate controllers, which has proven to be frustrating and opaque for practitioners, investors, and controlling shareholders alike.

Judicial decisions interpreting Delaware statutes and applying Delaware common law often encompass hundreds of pages. This extensive length can be attributed to the voluminous briefs submitted to the judges and the multitude of arguments posited within these briefs; nevertheless, this phenomenon underscores the increasing complexity of Delaware corporate law.[679] Delaware law occasionally provides protections to minority and non-controlling shareholders against controlling shareholders, notwithstanding the absence of evidence indicating that such shareholders require or desire these protections. In fact, it seems that the minority and non-controlling shareholders attribute minimal value to these benefits. Regardless, from the perspective of jurisdictional competition for corporate charters, it is significant that these non-controlling shareholders are, by definition, not the pertinent decision-makers in the incorporation process. The relevant decision-makers consist of the controlling shareholders and corporate managers, who frequently determine the location for incorporation,[680] along with their legal counsel, recognized as the most influential advisors to corporate management,[681] and their investment bankers,[682] particularly in the context of mergers and acquisitions.[683] Thus, if Delaware's predominance in the corporate chartering market is attributed to the fact that its substantive law rules favor those ultimately responsible for the incorporation

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[676] *Id.*

[677] *See* Duncan Simester, *Why Great New Products Fail*, MIT SLOAN MGMT. REV. (March 15, 2016), https://sloanreview.mit.edu/article/why-great-new-products-fail/ ("A lot of great new products fail") (cited in *Id.* at 6 n.19).

[678] *Id.*

[679] Macey, *supra* note 209, at 7.

[680] Macey & Miller, *supra* note 497, at 485 (cited in *Id.* at 7 n.21).

[681] *See id.* at 486; *see also* Romano, *supra* note 661, at 273 ("lawyers exercise a great deal of influence over the incorporation decision.") (cited in *Id.* at 7 n.22).

[682] *See* Macey & Miller, *supra* note 497, at 487 ("corporations often rely on the recommendations of investment bankers in deciding where to incorporate.") (cited in *Id.* at 7 n.23).

[683] Romano, *supra* note 661, at 275 n.72 (cited in *Id.* at 7 n.24).

decision,[684] then Delaware's preeminence in the jurisdictional competition for corporate charters may be subject to scrutiny.

Recent decisions appear to directly compromise the preferences of the majority shareholders and their advisors, who hold substantial influence in the incorporation decision-making process. These decisions have garnered acclaim in the media, which publishes articles with titles such as "Elite Delaware Court Stands Up to 'Big Money-Powered People.'"[685] Consequently, the stance taken by Delaware courts against these so-called "big money-powered individuals" may potentially present a competitive challenge for the state of Delaware, particularly if these individuals exert significant influence over incorporation decisions.[686]

Of paramount importance, as articulated by scholars Michael Jensen and William Meckling several decades prior, controlling shareholders possess significant incentives to consent to regulations that safeguard the rights of minority shareholders.[687] This is predicated on the expectation that these minority shareholders will foresee the potential self-interested conduct of the controlling parties in future dealings. In the absence of protective measures for minority shareholders, both minority and non-controlling shareholders may either refrain from investing or insist upon a considerable risk premium, as compensation for the anticipated self-serving opportunism of the controllers. More specifically, an owner or manager seeking to solicit external funding from investors must take these factors into account:

> will bear the entire wealth effects of these expected (agency) costs so long as the equity market anticipates these effects. Prospective interests (minority and non-controlling shareholders) will realize that the owner-manager's (controlling shareholder's) interests will diverge somewhat from theirs, hence the price which they will pay for shares will reflect the monitoring costs and the effect of the divergence between the manager's (controlling shareholder's) interest and theirs.[688]

Minority shareholders contribute essential equity to the corporations in which they invest. A jurisdiction that inadequately safeguards minority shareholders "will drive … equity capital away."[689] Put simply, providing additional legal rights and protections for minority shareholders is logical only if, and to the extent that, minority shareholders attribute a positive value to the rights and protections that are established for them by judges and legislatures. It is evident that the specific "protections"

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[684] Macey & Miller, *supra* note 497, at 487 (cited in *Id.* at 7 n.25).
[685] *See* Jennifer Kay, *Elite Delaware Court Stands Up to 'Big Money-Powered People'*, BLOOMBERG LAW (February 28, 2024) (quoting University of Iowa law professor Robert Miller) (cited in *Id.* at 7 n.26).
[686] Macey, *supra* note 209, at 7.
[687] Michael Jensen and William Meckling, *Theory of the firm: Managerial behavior, agency costs and ownership structure*, 3 J. FIN. ECON. 305, 313 (1976) (cited in *Id.* at 8 n.27).
[688] *Id.* (cited in *Id.* at 8 n.28).
[689] Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 at 289 (1977) (cited in *Id.* at 8 n.29).

afforded to minority shareholders by the most controversial recent Delaware Chancery Court rulings are more superficial than substantial. The noteworthy observation here is that, in numerous scenarios, the interests of minority or non-controlling shareholders frequently coincide with those of majority or controlling shareholders. Specifically, both categories of shareholders have a vested interest in the prosperity of the company and the appreciation of the company's equity.

It is essential to recognize that the interests of controlling shareholders and non-controlling shareholders do occasionally conflict; however, this is not a constant state of affairs. In many corporate governance contexts, both controlling and non-controlling shareholders pursue a common objective: to enhance shareholder value for the benefit of all investors involved. Consequently, Delaware law appears to offer "protections" for non-controlling shareholders that may not be sought or appreciated by those very shareholders who are intended to benefit from such proposed safeguards.[690] This principle is particularly relevant in the discussion of executive compensation, where non-controlling shareholders, whose capital is allocated toward substantial executive remuneration, may endorse such generous compensation packages if they effectively incentivize executives to enhance the overall value of the firm.[691]

In any event, minority shareholders in controlled companies within Delaware do not genuinely value the alleged benefits imposed upon them in specific recent rulings that annul agreements between corporations and their controlling shareholders. The insufficient recognition of the protections afforded to non-controlling shareholders through assertive interpretations of Delaware law was notably exemplified by the non-controlling shareholders of the electric vehicle firm Tesla, who overwhelmingly endorsed CEO Elon Musk's compensation package immediately following its invalidation, ostensibly designed to safeguard their interests.

B. Statutory Language vs. Market Practice

Recent concerns about the content of Delaware corporate law have understandably focused on the substantive aspects of specific Chancery Court rulings. Esteemed and reputable members of the Delaware bar, including former Chancellor William Chandler and law professor Larry Hamermesh, have raised significant concerns. In his testimony before the Delaware legislature,

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[690] Macey, *supra* note 209, at 10.
[691] *Id.* at 8.

Chandler remarked that "right now the corporate market is not feeling good about Delaware … because of the uncertainty and unpredictability of a few decisions by just two judges."[692]

The two judges whose decisions are central to the ongoing controversy surrounding the future of Delaware corporate law are J. Travis Laster and Kathaleen St. J. McCormick. A fundamental aspect of the debate concerns the willingness of Delaware courts, particularly these two judges, to align Delaware law with prevailing corporate practices. As Chancellor Laster articulated, "What happens when the seemingly irresistible force of market practice meets the traditionally immovable object of statutory law? A court must uphold the law, so the statute prevails."[693] In a related context, Professor Hamermesh asserted that "[t]o some extent, there's a war between the bench and the corporate bar, and it's got to stop because the Delaware franchise is at stake with that kind of behavior."[694]

Outside of Delaware, the Committee on Mergers, Acquisitions, and Corporate Control Contests of the New York City Bar Association also expressed its concerns, advocating for the Delaware legislature to enact legislation that would terminate "the disruptive uncertainty that now hangs over Delaware-incorporated companies and towards restoring the clarity, predictability, and practicality which has long been the hallmark of Delaware corporate law."[695] The New York attorneys cautioned that "[a]llowing the current lack of clarity to persist beyond the current legislative session would be unduly damaging to the functioning of Delaware corporations and to Delaware's reputation and standing."[696] The correspondence further highlighted that maintaining the status quo would adversely affect both "Delaware corporations and the Delaware franchise."[697]

An anomaly within the narrative of Delaware corporate law in 2024 is the willingness of certain members of the judiciary, specifically Vice Chancellor Laster and Chancellor McCormick, to challenge the influential Executive Council of the Delaware State Bar Association (hereinafter referred to as "the Council"). This Council is tasked with reviewing, recommending, and developing modifications to the Delaware General Corporation Law.[698] Chancellor McCormick, for instance, composed a letter to the Council. In her correspondence, she expressed concerns regarding the pace at which the legislature was advancing to implement amendments to the Delaware corporate code in

[692] *See* X, https://x.com/ajtourville/status/1804599633831661803, (accessed July 10, 2024) (cited in *Id.* at 14 n.49).
[693] West Palm Beach Firefighters' Pension Fund v. Moelis & Co., C.A. No. 2023-0309-JTL (Del. Feb. 23, 2024) (Laster, V.C.) at 2 (cited in *Id.* at 14 n.54).
[694] Jeff Montgomery, *Delaware's Corporate Law Debate Left 'Blood on the Floor'*, LAW 360 (June 21, 2024) (cited in *Id.* at 14 n.55).
[695] Letter from Ilana Ongun, Chair, Comm. on Mergers, Acqs. & Corp. Control Contests, to Bryan Townsend, Senate Majority Leader, Del. Senate (June 24, 2024), https://www.nycbar.org/reports/proposed-amendments-to-the-delaware-general-corporation-law/ (cited in *Id.* at 14 n.56).
[696] *Id.* (cited in *Id.* at 15 n.57).
[697] *Id.* (cited in *Id.* at 15 n.58).
[698] *See* DSBA – Corporate Council, https://delawarecounselgroup.com/dsba-corporate-council/ and Corporation Law Section, https://www.dsba.org/sections-committees/sections-of-the-bar/corporation-law/ (cited in *Id.* at 19 n.92).

response to her opinions authored in 2024.[699] The letter, which has been characterized in the press as "perhaps the most direct intervention into Delaware's legislative process in recent memory by the Court of Chancery,"[700] posited that the then-proposed 2024 legislative amendments lacked "the hallmarks" of "reasoned legislative intervention"[701] and asserted that the legislative proposal "was not the product of a cautious and deliberative process."[702]

Nothing like this occurred after the *Smith v. Van Gorkom*[703] decision, and it was noted. There was a strong legislative response to the Delaware Supreme Court's infamous decision in *Van Gorkom*, often described as "the most controversial decision in the history of Delaware corporate law."[704] The legislative reaction to Van Gorkom was not immediate, taking 20 months.[705] In the *Van Gorkom* case, the Delaware Supreme Court determined that the experienced and unconflicted directors of a public company were grossly negligent in agreeing to sell the company in a friendly acquisition that achieved an impressive 62% premium over the market price. The uproar following *Van Gorkom* was significantly more significant than the turmoil triggered by the *Moelis* decision. Despite this, the Delaware legislature did not overrule *Van Gorkom*, and the case remains good law. In contrast, the state legislature acted almost immediately after *Moelis*, passing a statute aimed at preventing similar outcomes in future cases.[706]

Corporate lawyers and those affected by Delaware corporate law nationwide closely observed the internal conflict between the judiciary and the legislature. Delaware judges openly criticized not only the legislative process as a whole but also specific elements of Delaware corporate law that could, and ultimately were poised to, become law. Practitioners preparing to draft or litigate agreements that potentially challenge the traditional authority of boards of directors realized that at least two notable Delaware judges were apprehensive about the scope, if not the details, of the new legislation validating the very agreements they were drafting or enforcing. Lawyers, particularly litigators, generally prefer to have their contracts interpreted in a less contentious context. Of particular concern to Professor Macey is how the new statute will interact with complex issues, such

[699] Letter from Kathaleen St. Jude McCormick to the Del. State Bar Exec. Comm. (Apr. 12, 2024), https://s3.documentcloud.org/documents/24692528/mccormick-ltr-to-dsba.pdf (cited in *Id.* at 19 n.93).
[700] Jordan Howell, *Top Delaware Judge Calls for More Debate over Contentious Corporate Amendments*, DELAWARE CALL (May 29, 2024) (cited in *Id.* at 19 n.94).
[701] McCormick, *supra* note 699, at 4, 5 (cited in *Id.* at 19 n.95).
[702] *Id*. (cited in *Id.* at 19 n.96).
[703] 488 A. 2d. 858, 874 (Del. 1985).
[704] Robert Miller, *Smith v. Van Gorkom and the Kobayashi Maru: The Place of the Trans Union Case in the Development of Delaware Corporate Law*, 9 WILLIAM & MARY BUS. L. REV. 65, 70 (2017) (cited in Macey, *supra* note 209, at 17 n.75).
[705] The opinion in Smith v. Van Gorkom was issued in January, 1985, and Section 102(b)(7) of the Delaware General Corporation Law was enacted in August, 1986 (cited in Macey, *supra* note 209, at 17 n.76).
[706] Macey, *supra* note 209, at 17.

as the nature of controllers' fiduciary duties and the effect of contracts between controllers and companies on directors' fiduciary duties.[707]

The conflict between the Delaware Bar[708] and the legislature, on one side, and Vice Chancellor Laster and Chancellor McCormick, on the other, is remarkable and notably public. In this dispute, Vice Chancellor Laster and Chancellor McCormick have expressed their concerns regarding the Delaware statutes they are likely to interpret. A corporate planner considering how a statute will be viewed and enforced would reasonably anticipate that the judges' concerns about a statute would influence these interpretations and applications.[709] The emphasis here isn't on the wisdom or appeal of the new Delaware legislation nor on the legality of the judicial rulings that it alters or nullifies. Instead, it centers on how the public controversy surrounding this legislation might impact Delaware's leading role in the competitive landscape for corporate charters. This controversy, characterized as a "rare, bitter national fight over directors' rights to cede some power to big stockholders,"[710] is likely to undermine Delaware's competitive advantage. As noted by Larry Hamermesh, "the Delaware franchise is at stake..."[711]

According to Professor Macy, 2024 marked a break in the historically harmonious relationship between the courts and the legislature. Judges seemed less eager to limit themselves strictly to interpreting and applying constitutional statutes. It's hard to believe that experienced lawyers wouldn't notice this conflict in Delaware.[712]

C. Judicial Indifference to Delaware's Competitive Position and Hostility to Important Constituencies

A notable aspect of the recent national debate regarding Delaware corporate law is the lack of attention the judges, whose decisions the Delaware legislature chose to overturn, paid to the state's competitive standing in the jurisdictional landscape. Although Chancellor McCormick and Vice Chancellor Laster showed indifference to the potentially adverse competitive ramifications of their rulings, it was the concern for maintaining Delaware's status as a desirable location for corporate

[707] *Id.* at 20.
[708] In using the term "Delaware bar," Professor Macey refers to the vast swathes of attorneys nationwide who have expertise in, and who regularly advise clients on, matters of Delaware corporate law.
[709] Macey, *supra* note 209, at 20.
[710] Montgomery, *supra* note 694 (cited in *Id.* at 20 n.100).
[711] *Id.*
[712] Macey, *supra* note 209, at 21.

chartering that ultimately drove the Delaware bar to take action and prompted legislative reforms to the Delaware code.[713]

Viewed in this light, Vice Chancellor Laster's LinkedIn post from May 29, 2024, regarding the new market practice amendments of 2024 is particularly noteworthy. He not only acknowledges but also specifies a lengthy list of key Delaware stakeholders who could gain from the proposed statutory changes he seeks to postpone. The beneficiaries he mentions, both intended and unintended, include (a) "the repeat players (in business transactions that are likely to be litigated) who want the ability to take companies public…without giving up control;" (b) "the lawyers who structure transactions" involving Delaware public companies; (c) activist hedge funds; (d) the nation's largest institutional investors, all of whom have "governance objectives;" (e) plaintiff's lawyers; and (f) lawyers who specialize in arbitration.[714]

Vice Chancellor Laster expressed concerns that the statute could have unintended consequences. He highlighted both the intended and unintended beneficiaries of the statute to illustrate that various implications of the quickly drafted legislation had not been thoroughly considered and cautioned against a broad, open-ended statutory solution. Although the support of all these groups does not automatically imply that the bill is beneficial from a societal perspective, identifying shareholders as potential beneficiaries suggests a positive aspect of the bill. Additionally, from a competitive standpoint, it is undeniable that influential interest groups play a significant role in corporate decisions regarding the location of incorporation. When considering the competition among jurisdictions for corporate charters, it is ironic that Vice Chancellor Laster effectively argued that the new provisions would enhance Delaware's competitive edge by supporting some of its key constituencies.[715]

It's intriguing; he appears to be both disinterested and oblivious to the proposed legislation's competitive ramifications. While this stance is admirable for resisting commercial pressures, it starkly contradicts legal theories surrounding jurisdictional competition for corporate charters, which suggest that "Delaware courts appear to decide cases with an eye on keeping companies incorporating in Delaware."[716] Professor Macey contends that maintaining Delaware's preeminent status in the competition for corporate charters is essential for the fiscal health of the state, as well as for its ability

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[713] SULLIVAN & CROMWELL, *Delaware Court Declines to Enjoin Corporation's Move to Nevada, but Allows Claim for Damages to Proceed* at 2 (February 23, 2024), https://www.sullcrom.com/SullivanCromwell/_Assets/PDFs/Memos/Chancery-Court-Declines-Enjoin-Corporations-Move-Nevada.pdf (cited in *Id.* at 21 n.102-103).

[714] Travis Laster, (Not Posing as a Vice-Chancellor at the Court of Chancery of the State of Delaware), *The Unintended Beneficiaries of Section 122(18)*, LINKEDIN (May 29, 2024), https://www.linkedin.com/pulse/unintended-beneficiaries-section-12218-travis-laster-oruze/?trackingId=0aOhuzmST32wZstuD3tHQg%3D%3D (cited in *Id.* at 21 n.104).

[715] Macey, *supra* note 209, at 22.

[716] Fox, *supra* note 457, at 27 (cited in *Id.* at 22 n.105).

to provide high-quality, low-cost goods and services to its constituents. The prospect that a statutory revision could reinforce Delaware's position as the premier state for incorporation and safeguard a critical source of revenue may seem to be a compelling argument in favor of enacting such a revision. However, this does not appear to be the case.[717]

Delaware faces a notable vulnerability in maintaining its lead in the competition for corporate jurisdiction due to how controlling stockholders are treated under state law. The legislation governing transactions involving controlling shareholders can be both unclear and complicated,[718] often appearing antagonistic, especially when the controlling shareholder participates in management.[719] In 2024, Chancellor McCormick and Vice Chancellor Laster saw increased activity. They received acclaim from the legal community for their "fearless" approach to holding iconic corporate founders and executives accountable to shareholders,"[720] with their decisions praised for "applying really heavy scrutiny to actions taken by companies with controlling shareholders."[721]

In some Delaware courts, there appears to be a suspicion toward controlling shareholders that contrasts with the general admiration for the plaintiff's bar. The rights to litigate are deemed "foundational to a civil society and necessary to protect all other rights."[722] Vice Chancellor Laster has even stated that shareholder "[v]alue ultimately depends on legal rights."[723] While it is undoubtedly true that litigation is often necessary for protecting contract and property rights, it can also be misused to delay and extract settlement payments from companies and directors striving to fulfill their legal and fiduciary responsibilities. Shareholder litigation, especially against controllers, presents both advantages and disadvantages. Some circles in Delaware view pursuing controlling

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717 Macey, *supra* note 209, at 22.

718 *See* Kerry E. Berchem, Ron E. Deutsch & Nicholas Jay Houpt, *Duties of Controlling Stockholders - Murky Waters: Tread Carefully*, AKIN GUMP, (June 2012), https://www.akingump.com/a/web/22475/aohG6/duties-of-controlling-stockholders-pli_article_june-2012.pdf ("Fiduciary duties of directors are fairly clear and well established. For controlling stockholders, however, the water is murky); *See also* In re Southern Peru Copper Corporation Shareholder Derivative Litigation, 30 A.3d 60, 89 (Del. Ch. 2011) (Leo E. Strine, Jr. Chancellor) ("To my mind, which has pondered the relevant cases for many years, there remains confusion.") (cited in *Id.* at 22 n.106).

719 *See* Tornetta v. Musk 310 A.3d 430 (Del. Ch. 2024) (ordering the recission of Elon Musk's board and shareholder-approved compensation plan and "attacking the value of 'superstar' CEOs and the importance of individuals to corporate achievement" and suggesting that CEOs who own large block of the companies they manage might not deserve compensation beyond the returns associated with their share ownership, and raising doubts about whether CEOs make a unique contribution to company value. Jonathan Macey & M. Todd Henderson, *Is a Trial Lawyer Worth 100 Musks?*, WALL ST. J. (May 13, 2024), https://www.wsj.com/articles/is-a-trial-lawyer-worth-100-elon-musks-ebaec6c3 (cited in *Id.* at 22 n.107).

720 *See* Kay, *supra* note 685 (quoting University of Iowa law professor Robert Miller), https://news.bloomberglaw.com/esg/elite-delaware-court-stands-up-to-big-money-powered-people (cited in *Id.* at 22 n.108).

721 *Id*. (quoting University of Pennsylvania professor Jill Fisch) (cited in *Id.* at 22 n.109).

722 Palkon v. Maffei, C.A. No. 2023-0449-JTL (February 20, 2024), at 48. The discussion was in the context of a consideration of the role of litigation rights in safeguarding the rule of law (cited in *Id.* at 23 n.110).

723 *Id.*

shareholders and directors solely as beneficial, ignoring any associated costs. This stance poses a real threat to Delaware's ongoing supremacy in the competitive landscape for corporate charters.[724]

The professor observes that it is not surprising that while the academic community generally commends the rigorous scrutiny imposed on transactions involving controlling shareholders, those same shareholders and their advisors exhibit considerably less enthusiasm regarding Delaware's increasingly stringent legal environment. In March 2023, Gregory Maffei, the controlling shareholder, Chief Executive Officer, and Chairman of Liberty TripAdvisor Holdings, Inc., raised the prospect of reincorporating the company from Delaware to Nevada. Notably, the initial bullet point in the presentation emphasized the litigation risks associated with controlling shareholders, stating that:

> "Recent case law developments in Delaware, in particular with respect to conflicted controller and 'change of control' transactions, have increasingly emboldened plaintiffs' law firms to bring claims against directors and officers, significant stockholders and the company and have increased potential exposure for these parties."[725]

In February 2024, Iowa law professor Robert Miller insightfully noted that Delaware's decisions, which hold controlling shareholders accountable, place "the Delaware franchise … on the line"[726] by resisting powerful interests related to incorporation choices. Although academics widely commend Delaware's rigorous scrutiny of transactions involving controlling shareholders, it does not seem to benefit shareholders. Delaware firms with a controlling shareholder appear to be "slightly less valuable than similar companies incorporated elsewhere,"[727] and "Delaware provides little value for controlled firms."[728] These empirical findings should alarm those invested in protecting Delaware's significant position in the competition for corporate charters, as they suggest that the market does not appreciate the safeguards Delaware offers to minority shareholders of closely held corporations. As Professor Macey emphasizes, it is essential to acknowledge that the empirical result referenced herein originates from 2020, predating the recent decisions. Furthermore, the recent decisions that have instigated considerable controversy have not demonstrated any reduction in the advantages of incorporating in Delaware.[729]

From the viewpoint of controlling shareholders, who define where their companies are chartered, choosing Delaware for incorporation turns out to be a disadvantageous decision. Initially, controllers face losses when they incorporate in Delaware, as it enhances the likelihood of being sued

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[724] Macey, *supra* note 209, at 23.
[725] Palkon v. Maffei, C.A. No. 2023-0449-JTL (February 20, 2024), at 9 (cited in *Id.* at 23 n.112).
[726] *See* Kay, *supra* note 685 (cited in *Id.* at 23 n.113).
[727] Fox, *supra* note 457 (cited in *Id.* at 23 n.114).
[728] *Id*. at 8.
[729] Macey, *supra* note 209, at 23-24.

by minority shareholders, ultimately resulting in unfavorable lawsuit outcomes. Additionally, the costs and risks associated with litigation in Delaware do not translate into an increase in their stock value. Furthermore, these losses come without any counterbalancing benefits, such as greater willingness from minority shareholders to invest in companies incorporated in Delaware.[730]

Delaware's traditionally calm, collaborative, and harmonious corporate law environment has transformed into a highly contentious and emotional arena. However, the underlying reasons are more complex than they may initially appear. The disputes seem to be centered on recent rulings by Vice Chancellor Laster and Chancellor McCormick. Yet, the conflict is less about the specific legal doctrines involved and more about anxieties regarding judicial hostility towards the legitimacy of private ordering overall, particularly concerning the role of controlling shareholders.[731]

The direction for controlling shareholders and those seeking a more user-friendly legal framework is uncertain. No state has clearly positioned itself as a viable substitute for Delaware. While Nevada is eager to rival Delaware, some argue that it has excessively shielded managers from responsibility. A professor even notes to her students that "Nevada is where you incorporate if you want to do frauds."[732] Texas has passed a law to create specialized business courts.[733] There is considerable uncertainty regarding whether judges for these courts should be appointed or elected, and the role of juries in these cases.[734] Although many companies are expected to leave Delaware for other states, the demand for Delaware's established legal framework is likely to persist until a truly viable alternative emerges.

D. Summary: Delaware and Relocation Considerations

Delaware's legal framework often fosters lasting connections, particularly in corporate matters. After a company takes advantage of Delaware's advantages through incorporation or other

[730] *Id.*
[731] Macey, *supra* note 209, at 26.
[732] Allison Frankel, *In new TripAdvisor suit, Delaware lawyers deride Nevada's 'no-liability regime'*, REUTERS (April 2, 2023), https://www.reuters.com/legal/government/column-new-tripadvisor-suit-delaware-lawyers-deride-nevadas-no-liability-regime-2023-04-24/ (cited in *Id.* at 26 n.128).
[733] Adolfo Pesquera, *The Business Courts Are Coming: Can They Meet Expectations?*, LAW.COM (July 20, 2023), https://www.law.com/texaslawyer/2023/07/20/the-business-courts-are-coming-can-they-meet-expectations/ (cited in *Id.* at 26 n.129).
[734] Simmerman et al., *supra* note 467 (cited in *Id.* at 26 n.130).

legal steps, it may discover that the jurisdictional link persists, necessitating that legal matters be resolved within Delaware's courts.[735]

In an interview with Bloomberg Law, Keith P. Bishop, a former California state regulator of securities and financial institutions, expressed sentiments that add an ironic twist to the severe circumstances.[736] With Delaware drawing many publicly traded companies, the idea that a corporation could face difficulties when trying to exit Delaware for another state highlights a certain irony. This situation highlights the potential complexities and enduring relationships that corporations may encounter once they are integrated into Delaware's legal framework. The contrast between Delaware's attractiveness for incorporation and the restrictions on exiting it introduces an intriguing aspect to corporate legal dynamics.[737] Bishop and other legal analysts express concern that Delaware, which has long attracted corporations due to its favorable legal framework, may try to prevent its corporations from relocating to other states. This adds another layer of complexity. As mentioned, while attempts to restrict companies from leaving Delaware could backfire, prompting other states to perceive such actions as breaches of fiduciary duty, it also raises worries about corporations' hesitance to exit Delaware through outbound mergers.[738]

The cautionary note indicates that corporations may hesitate to leave Delaware, fearing potential future challenges if the appeal of its legal framework declines.[739] It's essential to distinguish between small to medium-sized enterprises and large, venture-backed firms. This analysis appears more relevant to privately held, smaller companies, particularly family-owned ones, rather than innovation-driven firms. Professor Alon-Beck suggests that innovation-driven firms pursuing an initial public offering (IPO) are unlikely to be affected, as Delaware law remains the benchmark for corporate governance. She expects this circumstance to continue in the near future.[740]

Notably, this is neither the first instance nor likely the last occurrence of accusations directed towards Delaware courts regarding their impact on corporations choosing to relocate from the state. For example, former Attorney General Bill Barr recently expressed his concerns in an opinion column

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[735] Matthew Bultman, *TripAdvisor's Planned Nevada Move Puts Delaware in Tricky Spot*, BLOOMBERG LAW (May 11, 2023), https://news.bloomberglaw.com/securities-law/tripadvisors-planned-nevada-move-puts-delaware-in-tricky-spot (cited in Alon-Beck, *supra* note 468, at 55 n. 245).
[736] *Keith P. Bishop*, ALLEN MATKINS (last visited Jan. 26, 2024), https://www.allenmatkins.com/professionals/bishop-keith.html; *see* Keith Paul Bishop, *Lawsuit Challenges TripAdvisor's Proposal to Move from Delaware to Nevada*, ALLEN MATKINS BLOG (Apr. 26, 2023), https://www.calcorporatelaw.com/lawsuit-challenges-tripadvisors-proposal-to-move-from-delaware-to-nevada; *see also* Keith Bishop, *TripAdvisor Suit Invites Delaware to Become the Hotel California*, JD SUPRA (May 1, 2023), https://www.jdsupra.com/legalnews/tripadvisor-suit-invites-delaware-to-7340658/ [hereinafter Bishop, *Hotel California*] (cited in *Id.* at 55 n. 246).
[737] Bultman, *supra* note 735.
[738] Bishop, *Hotel California*, *supra* note 736 (cited in Alon-Beck, *supra* note 468, at 55 n.248).
[739] *Id.* (cited in *Id.* at 55 n.249).
[740] Alon-Beck, *supra* note 468, at 55.

published in The Wall Street Journal, titled *Delaware Is Trying Hard To Drive Away Corporations*.[741] Barr articulates apprehension that Delaware is conforming to the practices of other predominantly Democratic states by endorsing environmental, social, and governance ("ESG") principles within a framework that may dismiss shareholder value as the principal guiding principle in corporate law.[742] Furthermore, the contents of this article support Barr's assertions, as over the past twelve years, Delaware has effectively attracted the most prominent innovation-driven private companies. Vice Chancellor Laster, for instance, clarified that when directors of Delaware corporations sincerely decide to implement an ESG initiative, they must have a reasonable belief that it will improve the corporation's long-term value for its stockholders.[743]

In her article, Professor Alon-Beck argues against the "extreme claim"[744] that state competition leads to a race to the bottom. Instead, she contends that it aligns with the "race to the top" theory. She argues that managers of unicorn firms, when faced with choosing between laws that benefit them but contribute to the lower overall value versus laws that may seem less favorable to them but enhance overall value, will lean towards the former due to their need to attract investment. This is why, for instance, states like Nevada are unlikely to replace Delaware; instead, Nevada should be viewed as a market for inferior options. The true challenge to Delaware may arise from potential federal government intervention through new corporate governance regulations.[745]

This new and developing dynamic, however, highlights the crucial intricate balance between jurisdictional choices, corporate governance, and the evolving landscape of corporate law.[746]

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[741] William P. Barr & Jonathan Berry, *Delaware Is Trying Hard to Drive Away Corporations,* WALL ST. J. (Nov. 24, 2023), https://www.wsj.com/articles/delaware-is-trying-hard-to-drive-away-corporations-business-environmental-social-governance-investing-780f812a (cited in *Id.* at 56 n.250).
[742] *Id.*
[743] J. Travis Laster, Hon., *Attorney General Barr Could Use Some Help on Delaware Law*, HARV. L. SCH. F. CORP. GOVERNANCE (Dec. 2, 2023), https://corpgov.law.harvard.edu/2023/12/06/attorney-general-barr-could-use-some-help-on-delaware-law/ (cited in *Id.* at 56 n.252).
[744] Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV . 679, at 5 (2002) (cited in *Id.* at 56 n.253).
[745] Alon-Beck, *supra* note 468, at 56.
[746] *Id.*

VII. Conclusion

The exploration of Delaware's corporate law, particularly concerning controlling shareholders, culminates in the recognition of a legal landscape marked by increasing intricacy and a perceptible shift towards heightened judicial scrutiny. The expansion of who qualifies as a "controller," moving beyond clear-cut majority ownership to encompass notions of "effective control" and "soft power," has, as this thesis demonstrates, injected significant uncertainty into corporate planning. This ambiguity subjects a broader range of shareholders and transactions to the stringent entire fairness standard, often without clear ex-ante guidance, thereby escalating litigation risks and associated costs.

The pivotal *Tornetta v. Musk* decision serves as a stark illustration of this trend, where the novel application of the "Superstar CEO" concept to determine controller status, despite a sub-majority stake, signals a new frontier in judicial intervention, particularly in executive compensation. The rescission of a shareholder-approved, albeit flawed, compensation package underscores the judicial readiness to examine decisions meticulously and, if deemed necessary, overturn those traditionally enjoying substantial board deference. This case, therefore, not only impacts how executive compensation for uniquely influential leaders is structured and reviewed but also amplifies the existing concerns about the "reflexive suspicion" with which Delaware courts may approach transactions involving perceived controllers.

Such judicial activism, while potentially aimed at enhancing minority shareholder protection, has significant ramifications for the business environment. The departure from historically objective criteria for control toward more nuanced, fact-intensive, and arguably subjective standards of "domination" and "influence" complicates compliance and predictability, thereby fostering an environment in which transactional lawyers face considerable challenges in advising clients. The concerns voiced by figures like Phil Shawe, and the very public dissatisfaction of Elon Musk, highlight a growing frustration among business leaders who perceive the Delaware judiciary as increasingly unpredictable and interventionist. This sentiment, if widespread, could indeed impact Delaware's long-held reputation for providing a stable and predictable corporate law regime. The thesis finds that while market mechanisms and the inherent fiduciary duties of boards offer constraints, the current judicial climate in Delaware appears to place less emphasis on these, favoring instead a more direct and searching inquiry into the fairness of controlled transactions.

The unease within Delaware's traditional ecosystem has created an opening for other jurisdictions, most notably Texas, to position themselves as viable alternatives. However, Texas's corporate law landscape remains untested, particularly in complex public company litigation, and its nascent business courts, with appointed judges whose decisions can be appealed to elected judges, and the allowance of jury trials, present their own set of uncertainties when compared to Delaware's established non-jury Chancery system. While Texas is making strides to appear more manager-friendly through recent legislative proposals, the ultimate effectiveness and stability of its regime are yet to be proven. The debate also extends to the specter of federal intervention, a recurring theme in corporate law, which serves as an overarching constraint on any single state's approach, including Delaware's. The genius of American corporate law has often been attributed to state competition, allowing for innovation and responsiveness; however, excessive divergence or perceived failures at the state level can invite federal oversight.

Ultimately, the future of Delaware's corporate law depends on its ability to adapt in the face of these internal and external pressures. The historical alignment between the Delaware bench, bar, and legislature appears strained, with prominent judicial figures sometimes publicly at odds with legislative efforts to curb judicial interpretations deemed detrimental to market practice. While Delaware's deep reservoir of case law, specialized judiciary, and responsive legislature provide a formidable competitive advantage, a perceived hostility towards controlling shareholders or an overly complex and unpredictable legal framework could erode this dominance, especially if influential decision-makers feel unwelcome. The market's reaction, such as the shareholder endorsement of Musk's pay package after its invalidation, suggests that the "protections" offered by recent judicial activism may not always align with the preferences of the very shareholders they intend to benefit. For Delaware to maintain its preeminence, it must navigate the delicate balance between upholding fiduciary duties and providing a legal environment that is predictable, efficient, and responsive to the legitimate needs of the corporations it charters, as well as the various interest groups that rely on its sophisticated legal infrastructure. The ongoing developments signal not necessarily an imminent decline, but rather a critical juncture that requires careful consideration and potential recalibration to ensure Delaware remains the preferred forum for corporate America.

BIBLIOGRAPHY

Alon-Beck, Anat, *Delaware Beware* ILL. L. REV. (forthcoming) (manuscript, Case W. Res. Univ. Sch. of Law Legal Stud. Rsch. Paper No. 2024-8, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4921048).

Bainbridge, Stephen M., *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. (forthcoming 2025) (manuscript rev. Mar. 26, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5022685).

Barzuza, Michal, *Nevada v. Delaware: The New Market for Corporate Law* (ECGI Law Working Paper No. 761/2024, 2024), http://ssrn.com/abstract_id=4746878.

BEBCHUK, LUCIAN A. & JESSE M. FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004).

Bell, David A. et al., *Delaware Chancery Court Orders Recission of Elon Musk Moonshot Grant in Important Case on Transactions with Potential Corporate Controllers*, JD SUPRA (Feb. 9, 2024), https://www.jdsupra.com/legalnews/delaware-chancery-court-orders-4315539/.

BERLE, ADOLF A. & GARDINER C. MEANS, *The Modern Corporation and Private Property* (The Macmillan Co. 1933).

Fisch, Jill E. & Steven Davidoff Solomon, *Control and Its Discontents*, U. PA. L. REV. (forthcoming) (manuscript rev. Feb. 6, 2025, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4968645).

Gilson, Ronald J. & Alan Schwartz, *Corporate Control and Credible Commitment* (Nov. 19, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2182781.

Goshen, Zohar & Tomer S. Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts* (Columbia L. & Econ. Working Paper No. 5200668, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5200668.

Hamermesh, Lawrence A., Jack B. Jacobs & Leo E., Jr. Strine, *Optimizing The World's Leading Corporate Law: A 20-Year Retrospective and Look Ahead*, 72 BUS. LAW. 321 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3954998 .

Hurt, Christine, *Texas, Delaware, and the New Controller Primacy* 67 ARIZ. L. REV. (forthcoming 2025) (manuscript rev. May 21, 2025, SMU Dedman Sch. of Law Legal Stud. Rsch. Paper No. 680, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5156667).

Kastiel, Kobi, *Against All Odds: Hedge Fund Activism in Controlled Companies*, COLUM. BUS. L. REV. 61 (2016).

Keilty, Dominic P., *Starstruck: The Superstar CEO Concept in Delaware Corporate Jurisprudence*, 33 U. MIAMI BUS. L. REV. 263 (2025).

Lin, Da, *Beyond Beholden*, 44 IOWA J. CORP. L. 515 (2019).

Lipton, Ann M., *The Three Faces of Control*, 77 BUS. LAW. 801 (2022).

Macey, Jonathan R., *Delaware Law Mid-Century: Far From Perfect but Probably Not Leaving for Las Vegas* (Yale Law & Econ. Rsch. Paper, Dec. 2, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5043887.

Matera, Pierluigi, *Delaware's Dominance, Wyoming's Dare: New Challenge, Same Outcome?*, 27 FORDHAM J. CORP. & FIN. L. 73 (2022).

Moynihan, Lydia, *Blame Delaware: CEO Defends Elon Musk, Takes out $2M Ad Campaign Hit on 'Anti-Business' State*, N.Y. POST, Apr. 8, 2024, https://nypost.com/2024/04/08/business/ceo-takes-out-2m-ad-campaign-hit-on-anti-business-delaware/.

Strampelli, Giovanni, *How to Enhance Directors' Independence at Controlled Companies*, 44 IOWA J. CORP. L. 103 (2018).

Tornetta v. Musk, No. 2018-0408-KSJM (Del. Ch. Jan. 30, 2024).