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As Delaware has developed its doctrine with respect to controlling shareholders, its view of their relationship to directors has evolved. This evolution has produced some pronounced inconsistencies with respect to the weight placed on director approval of controlling shareholder action. The recent Delaware Supreme Court decisions in Corwin v. KKR Financial Holdings LLC, Kahn v. M & F Worldwide Corp., *and* C & J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust *introduced further uncertainty into the mix by making the determination as to whether a transaction involves a controlling shareholder practically outcome-determinative of many shareholder disputes. If a controlling shareholder is present, there is the potential for close court examination to ensure fairness to the minority; if not, any shareholder challenge is likely to be dismissed without even the chance for discovery.*

Yet even as the presence or absence of a controlling shareholder takes on heightened importance, changes in the business landscape have made controllers more difficult to identify. More companies are adopting multiclass capital structures both in public and private markets, and the popularity of management buyouts means that shareholders with significant stakes, ties to directors, and informational advantages are often placed across the bargaining table from companies themselves. The upshot is that courts are called upon to make early, critical judgments regarding levels of control in an increasingly complex corporate ecosystem.

This Essay, prepared for the Institute for Law & Economic Policy's 25th Annual Symposium, maps the points of doctrinal divergence and proposes changes to the law that better align the concerns posed by controlling shareholders with the law's treatment of them. In particular, this Essay argues that courts do not pay sufficient attention to the most salient fact about

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controlling shareholders: their immunity to the ordinary mechanisms of market discipline. To ensure that the presence of a controller is accurately identified and the appropriate level of scrutiny applied to its self-interested transactions, courts should focus not merely on the putative controller's influence over the board, but on the mechanisms of self-help realistically available to the unaffiliated shareholders.

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INTRODUCTION

Corporate law has an uneasy relationship with controlling shareholders. Corporations are designed to vest management authority in corporate directors and officers rather than shareholders,[1] on the assumption that shareholders are too inexpert—and their preferences too divergent—to trust to make business decisions.[2] Left to their devices, shareholders may drain wealth from the corporation in order to satisfy their private interests.[3] For this reason, it is often said that directors of a corporation may advance what, in their judgment, are the corporation's best interests, even over the objections of shareholders themselves.[4]

At the same time, managers may shirk their responsibilities or leech wealth at the stockholders' expense, and a dispersed and passive shareholder base may be incapable of adequately policing them. In these circumstances, controlling shareholders have the expertise and incentives to discipline management and ensure their focus on

1. *See In re* CNX Gas Corp. S'holders Litig., No. 5377-VCL, 2010 WL 2291842, at *15 (Del. Ch. May 25, 2010) ("[D]irector primacy remains the centerpiece of Delaware law, even when a controlling stockholder is present.").

2. *See* Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 303–04 (2018).

3. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 306 (1998).

4. Lipton, *supra* note 2, at 302.

maximizing shareholder returns.[5] Yet controlling shareholders—like any other shareholder—may also have interests that diverge from the minority and seek to "tunnel" private benefits to themselves by exploiting their informational advantages and influence over directors.[6] As a result, the law has taken an intermediate position with respect to these controllers: they have the right to vote and dispose of their shares to advance their own interests,[7] but at the same time, they owe a fiduciary duty to the minority shareholders and may not use their control over the corporate machinery to extract private benefits.[8]

As Delaware has developed its doctrine with respect to controlling shareholders, its view of their relationship to directors has evolved. This evolution has produced some pronounced inconsistencies with respect to the weight placed on director approval of controlling shareholder action.[9] As a result, Delaware attempted to simplify its law in a series of decisions in 2014 and 2015. In *Corwin v. KKR Financial Holdings LLC*[10] and its progeny, the Delaware Supreme Court held that, so long as a transaction does not involve a conflicted controlling stockholder, the uncoerced, fully informed vote of disinterested stockholders will cleanse a breach of fiduciary duty by corporate directors in the event of a subsequent shareholder lawsuit. Meanwhile, *Kahn v. M & F Worldwide Corp.*[11] ("*MFW*"), set up an alternative scheme for controlling stockholder transactions, allowing them to be cleansed—and thus freed from judicial scrutiny if later challenged in court—only if the deal is negotiated and approved by disinterested and independent directors, and conditioned at the outset on the uncoerced vote of disinterested stockholders. Finally, *C & J Energy Services, Inc. v. City of Miami General Employees' and Sanitation Employees' Retirement Trust*[12] ("*C & J Energy*") sharply limited courts' ability to

5. Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 785 (2003).

6. *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *2 (Del. Ch. Jan. 25, 2016); *see also* Kahn v. Lynch Commc'n Sys., Inc., 669 A.2d 79, 81 (Del. 1995) (relating a controlling shareholder's self-interested behavior in a merger transaction); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (noting the "informational and timing advantages" controlling shareholders possess).

7. *See* Thorpe v. CERBCO, Inc., 676 A.2d 436, 440–42 (Del. 1996).

8. *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 719 (Del. 1971).

9. *See In re Ezcorp Inc.*, 2016 WL 301245, at *16–26; *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006); *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 615 (Del. Ch. 2005); *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 547–51 (Del. Ch. 2003); *In re Pure Res., Inc.*, 808 A.2d at 436 n.17; Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 920–24 (2011).

10. 125 A.3d 304, 311–13 (Del. 2015).

11. 88 A.3d 635, 644 (Del. 2014).

12. 107 A.3d 1049, 1072–73 (Del. 2014).

interfere with a pending shareholder vote; thus, so long as appropriate disclosures are made, even agreements reached in violation of directors' fiduciary duties will be presented to stockholders. The net effect is that, at least in certain contexts, the determination whether a transaction involves a controlling shareholder is practically outcome-determinative of shareholder disputes: if a controlling shareholder is present, there is the potential for close court examination to ensure fairness to the minority; if there is not, any shareholder challenge is likely to be dismissed without even the chance for discovery.

Yet even as the presence or absence of a controlling shareholder takes on heightened significance, changes in the business landscape have made controllers more difficult to identify. More companies are adopting multiclass capital structures both in public and private markets,[13] and the popularity of management buyouts means that shareholders with significant stakes, ties to directors, and informational advantages are often placed across the bargaining table from the companies in which they have invested.[14] The upshot is that in the earliest stages of litigation, courts are called upon to make critical judgments regarding levels of control in an increasingly complex corporate ecosystem.

This Essay seeks to map the points of doctrinal divergence and propose changes to the law that better align the concerns posed by controlling shareholders with the law's treatment of them. In particular, this Essay argues that courts do not pay sufficient attention to the most salient fact about controlling shareholders: their immunity to the ordinary mechanisms of market discipline. To ensure that the presence of a controller is accurately identified, and the appropriate level of scrutiny applied to its self-interested transactions, courts should focus not merely on the putative controller's influence over the board, but on the mechanisms of self-help realistically available to the unaffiliated shareholders.

13. Robert P. Bartlett III, *A Founder's Guide to Unicorn Creation: How Liquidation Preferences in M&A Transactions Affect Start-Up Valuation*, *in* RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 1, 4–6 (Hill & Davidoff-Solomon eds., 2016); Jill Fisch & Steven Davidoff Solomon, *The Problem of Sunsets*, 99 B.U. L. REV. 1057, 1068–69 (2019); Will Gornall & Ilya A. Strebulaev, *Squaring Venture Capital Valuations with Reality*, J. FIN. ECON. (forthcoming 2019) (manuscript at 2–3), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2955455 [https://perma.cc/6FP2-4WXA]; Cynthia Clarfield Hess, Mark Leahy & Khang Tran, *Unicorn Financings: First Half 2018*, FENWICK & WEST 10 (2018) https://www.fenwick.com/FenwickDocuments/Unicorn-Financings-First-Half-2018.pdf [https://perma.cc/UMM4-FFEG].

14. Adam Lewis, *The US PE Industry in 11 Charts*, PITCHBOOK (July 30, 2018), https://pitchbook.com/news/articles/the-us-pe-industry-in-11-charts [https://perma.cc/Y9NR-RXNJ].

I. WHO'S AFRAID OF CONTROLLING SHAREHOLDERS?

Ordinarily, corporate directors are presumed to make business decisions in the best interest of the corporation, a principle known as the business judgment rule.[15] That presumption may be rebutted for "interested" transactions, which are those decisions where some number of directors have financial interests that differ from those of the stockholders.[16] Absent some sort of cleansing mechanism, should these transactions become the subject of a shareholder lawsuit, courts may substantively review them to ensure that they are entirely fair to the corporation and its stockholders.

Because these lawsuits are expensive and their outcomes uncertain, corporate boards usually attempt to "cleanse" interested transactions by seeking advance approval from an objective body: either the disinterested and independent directors, or the disinterested stockholders.[17] If such approval is obtained after full disclosure of the material facts, courts will once again defer to the directors' decisionmaking, and a time-consuming and burdensome fairness review may be avoided.[18]

To be sure, even in companies without a controlling shareholder, it has long been recognized that directors may suffer from "structural bias," namely, a sense of sympathy and fellow feeling for their colleagues that prevents even disinterested and independent directors from scrutinizing conflicting interest transactions too closely.[19] Nonetheless, these biases are generally assumed to be mitigated by the shareholder franchise and the market for corporate control.[20]

The presence of a controlling shareholder, however, amplifies the problem. Directors are no longer beholden to a dispersed shareholder base that may be presumed to be interested mainly, if not exclusively, in maximizing returns; instead, they may be beholden to a single entity with potentially idiosyncratic goals. Directors may fear the loss of their seat—and the loss of additional benefits the controller can

15. *See S*tephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88–89 (2004).

16. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1451–55 (2014).

17. Hill & McDonnell, *supra* note 9, at 910.

18. *Id.*

19. Zapata Corp. v. Maldonado, 430 A.2d 779, 787 (Del. 1981); Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 824 (2004).

20. In recognition of the fact that in some contexts—such as the buyout of a company, or defense against a hostile acquirer—directors' structural biases may be especially strong and resistant to shareholder discipline, courts have typically applied a heightened level of scrutiny. *See* Laster, *supra* note 16, at 1463–65. That is precisely what *Corwin* changed, as discussed further below.

confer—if they fail to bow to the controller's wishes.[21] At the same time, there is great uncertainty as to the effectiveness of ordinary sanitizing mechanisms when the interested person is a controlling stockholder, due to the controller's influence over the board and—by extension—corporate conduct as a whole.

In some of the earliest cases to address controlling shareholder conflicts, Delaware suggested, without fully exploring the issue, that interested transactions could be sanitized by the vote of the independent directors—that is, directors with no personal or professional ties to the controller other than the board seat itself—just as an ordinary director-interested transaction would be.[22] Though these directors necessarily occupied their seats by the controller's grace, Delaware assumed that their professionalism and sense of duty would trump any self-interest when it came to gauging the propriety of the controller's dealings with the corporation.[23]

Delaware became queasy, however, when it came to those transactions that, by statutory command, cannot be approved by directors alone, but instead require a vote of the stockholders.[24] The controlling stockholder, necessarily, would be interested in the transaction, and even if the deal was conditioned on majority approval by the disinterested stockholders (a "majority of the minority"), there might still be cause for concern:[25]

> Even where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind by the controlling stockholder. For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation. At the very least, the potential for that perception, and its possible impact upon a shareholder vote, could never be fully eliminated.[26]

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21. Da Lin, *Beyond Beholden*, 44 J. CORP. L. (forthcoming 2019) (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335195 [https://perma.cc/H9CP-2SEZ].

22. *See, e.g.*, Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) (citing Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984)) (stating that if the transaction in question had been approved by an "independent corporate decisionmaker," it would have received business judgment review); Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403, 406–07 (Del. 1988) ("It is well established in Delaware that one who stands on both sides of a transaction has the burden of proving its entire fairness. *In the absence of arms length bargaining*, clearly the situation here, this obligation inheres in, and invariably arises from the parent-subsidiary relationship." (emphasis added) (citations omitted)); Puma v. Marriott, 283 A.2d 693, 695–96 (Del. Ch. 1971) (applying business judgment review to a controlling shareholder transaction approved by independent directors).

23. *Aronson*, 473 A.2d at 814–15.

24. These include such matters as mergers and amendments to the corporate charter. *See* DEL. CODE ANN. tit. 8, §§ 242, 251 (2019).

25. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994).

26. *Id.* (quoting Citron v. E.I. Du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990)).

In other words, minority shareholders might legitimately fear sabotage of the corporation by a disgruntled controlling shareholder, presumably in ways that would be too subtle or come too quickly for the cumbersome litigation process to remedy. Therefore, transactions with a controlling shareholder that required a shareholder vote were automatically suspect and subject to fairness review.[27]

From there, Delaware law evolved to suggest that in the context of transactions requiring both shareholder and director approval, even *independent* directors may fear the wrath of controlling stockholders, such that their approval could not be assumed to be freely bestowed either.[28] As then-Vice Chancellor Strine put it,

> [T]he [Delaware] Supreme Court saw 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).[29]

These decisions meshed poorly with earlier cases that placed great faith in the ability of independent directors to cleanse controlling shareholder actions; after all, if we do not trust them to do so when shareholder approval is also required, there is no reason to trust them to do so when it is not.[30] Eventually, that distrust of independent director fortitude in the face of a controller's overweening power seeped into judicial review of transactions that did not require a shareholder

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27. *See In re* Wheelabrator Techs., Inc. S'holders. Litig., 663 A.2d 1194, 1203 (Del. Ch. 1995).

28. *See* Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997):

> Entire fairness remains applicable even when an independent committee is utilized because the underlying factors which raise the specter of impropriety can never be completely eradicated and still require careful judicial scrutiny. . . . 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. Consequently, even when the transaction is negotiated by a special committee of independent directors, "no court could be certain whether the transaction fully approximated what truly independent parties would have achieved in an arm's length negotiation."

(quoting *Citron*, 584 A.2d at 502); Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1240–41 (Del. 2012) (applying *Kahn*).

29. *In re* Pure Res., Inc., S'holders Litig, 808 A.2d 421, 436 (Del. Ch. 2002); *see also* 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) ("Delaware is more suspicious when the fiduciary who is interested is a controlling stockholder. When that is so, 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."); Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 509 (2002) [hereinafter *The Inescapably Empirical Foundation*] ("[T]his strain of thought was premised on the notion that when an 800-pound gorilla wants the rest of the bananas, little chimpanzees, like independent directors and minority stockholders, cannot be expected to stand in the way, even if the gorilla putatively gives them veto power.").

30. *See In re Pure Res., Inc.*, 808 A.2d at 436 n.17; Strine, *The Inescapably Empirical Foundation*, *supra* note 29, at 510 (both identifying the tension between *Aronson*'s trust of independent directors and the distrust expressed in later decisions).

vote at all.[31] The case law thus evolved to suggest that *any* transaction in which a controlling shareholder has an interest that diverges from the minority is subject to fairness review by a court ex post—even if approved by independent directors or disinterested shareholders.[32]

Yet on this, the law lagged in at least one significant respect: Delaware courts continued to remain rock solid in their confidence that independent directors could faithfully consider a shareholder's demand that the corporation pursue litigation against a controlling shareholder alleged to have breached its duties to the corporation,[33] despite their refusal to trust independent directors to stand against controllers in any other context. The realpolitik behind the discontinuity is obvious: the demand requirement is considered a critical bulwark against frivolous shareholder litigation. Moreover, litigation demands are, in a real sense, different from ordinary conflict transactions. If directors are too conflicted to consider the merits of a transaction, the court evaluates its fairness. By contrast, if directors are too conflicted to consider the merits of bringing litigation, shareholders themselves are permitted to assume control of corporate machinery to bring the action in their stead. For that reason, demand excusal may legitimately be viewed as its own category of problem.[34]

Nonetheless, the disjunction creates both practical and theoretical problems. Deference in the context of a litigation demand potentially insulates a great variety of controller transactions that would otherwise merit closer judicial scrutiny.[35] This gives rise to the

31. *See Ams. Mining Corp.*, 51 A.3d at 1240; *Kahn*, 694 A.2d at 428.

32. *See In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *12 (Del. Ch. Jan. 25, 2016); Laster, *supra* note 16, at 1460–63. For a time, controlling shareholder tender offers received lesser scrutiny by courts because they do not (technically) require the involvement of the target company's board. *See In re Pure Res., Inc.*, 808 A.2d at 439. More recent case law has harmonized the standards so that tender offers are likely to be treated similarly to other controlling shareholder transactions. *Compare In re* CNX Gas Corp. S'holders Litig., 4 A.3d 397, 400 (Del. Ch. 2010) (describing the standard for reviewing controlling shareholder tender offers), *with* Kahn v. M & F Worldwide Corp., 88 A.3d 635, 645 (Del. 2014) (describing the standard for reviewing controlling shareholder buyouts).

33. *In re Ezcorp Inc.*, 2016 WL 301245, at *29.

34. Notably, when it comes to special litigation committees formed to insulate an otherwise conflicted board, courts evaluate, in a sense, the fairness of the committee's decisionmaking, see Zapata Corp. v. Maldonado, 430 A.2d 779, 788–89 (Del. 1981) ("[T]he Court should inquire into the independence and good faith of the committee and the bases supporting its conclusions."), which is perhaps more akin to the fairness inquiry conducted in the context of other types of conflicted decisions.

35. Itai Fiegenbaum, *The Controlling Shareholder Enforcement Gap*, AM. BUS. L.J. (forthcoming) (manuscript at 28), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3227828 [https://perma.cc/228J-E9CM]. Some decisions have suggested that if the underlying transaction is one that would give rise to fairness review, then any director—independent or not—who was involved in its approval would not be able to faithfully consider a demand for litigation. *See, e.g.*, Parfi Holding AB v. Mirror Image Internet, Inc., 794 A.2d 1211, 1231 n.47 (Del. Ch. 2001) (finding

uncomfortable possibility that even for a transaction that would ordinarily receive entire fairness review, we will defer to independent directors in deciding whether a lawsuit can be brought at all.[36] On a more general level, Delaware has created a menu of case law that can be used to paper over inconsistencies whenever they appear, so that independent directors are trusted to a greater or lesser extent as the court prefers, without the need for further justification.[37]

There is at least one (limited) path out of this dilemma: to elide the demand requirement entirely. Demand is, of course, unnecessary for claims brought directly rather than derivatively, and the Delaware Supreme Court has held that some transactions that would be treated as "derivative" in any other context may be characterized as "direct" when they involve controlling shareholders. Specifically, when a corporation is alleged to have issued voting stock to its controller for less than its true value, the dilution to the minority's voting power is treated as a direct, rather than a derivative, harm, making demand unnecessary.[38] Therefore, at least in this context, courts and litigants can simply examine the underlying transaction without confronting the broader hiccups in Delaware's controlling shareholder doctrine.

In 2014, the Delaware Supreme Court changed the landscape again when it decided *MFW*. There, the court held that a controlling shareholder freezeout merger of the minority—previously subject only to entire fairness review—would be insulated from judicial scrutiny if it was approved by a fully empowered committee of independent directors *and* conditioned from the outset on a fully informed, uncoerced vote of the disinterested stockholders.[39] The *MFW* framework sits uneasily alongside the prior caselaw, as its purpose is to replicate "the shareholder-protective characteristics of third-party, arm's-length mergers."[40] While that may be appropriate in the merger context, the logic hardly applies to transactions that would not have required

the director at issue to be conflicted). The Delaware Supreme Court has not, so far, embraced the idea. *See In re* Cornerstone Therapeutics Inc., Stockholder Litig., 115 A.3d 1173, 1182–83 (Del. 2015).

36. *In re Ezcorp Inc.*, 2016 WL 301245, at *29; Fiegenbaum, *supra* note 35 (manuscript at 28).

37. For example, though mergers present the paradigmatic scenario where Delaware has held that independent directors *cannot* be trusted, in two recent merger cases, the Delaware Supreme Court relied on the classically deferential demand excusal case, *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), to forgive flaws in the negotiation process, *see* Flood v. Synutra Int'l., Inc., 195 A.3d 754, 759 n.37 (Del. 2018), and to dismiss directors from litigation, *see In re Cornerstone Therapeutics*, 115 A.3d at 1182–83.

38. *See* El Paso Pipeline GP Co. v. Brinckerhoff, 152 A.3d 1248, 1263 (Del. 2016).

39. *MFW*, 88 A.3d 635, 644 (Del. 2014).

40. *Id.*

stockholder approval to begin with.[41] Nonetheless, Chancery decisions have applied the *MFW* framework to the same conflicted controller transactions that previously would have been evaluated for fairness—even those transactions that do not ordinarily require a stockholder vote.[42] As a result, under the new regime, outside of the context of demand excusal,[43] it appears that all conflicted controller transactions are subject to searching judicial scrutiny *unless* they are cleansed in the manner outlined in *MFW*.[44]

Yet the full implications of *MFW* are only evident when it is examined alongside *C & J Energy*, decided later the same year, and *Corwin*, issued the year following. *Corwin* held that when there is no controlling shareholder, a fully informed, uncoerced stockholder vote operates to restore business judgment deference to board action.[45] This represented a break from precedent providing that—at least for corporate buyouts—some form of enhanced judicial scrutiny would be available.[46] Meanwhile, *C & J Energy* limited courts' ability to preliminarily enjoin a stockholder vote while litigants conduct

41. *Cf. In re* John Q. Hammons Hotels Inc. S'holder Litig., No. 758-CC, 2009 WL 3165613, at *11–12 (Del. Ch. Oct. 2, 2009) (recognizing that the framework described in *Kahn v. Lynch Communication Systems, Inc.*, 638 A.2d 1110, 1116 (Del. 1994), does not precisely map to other kinds of transactions); *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *15 (Del. Ch. Aug. 18, 2006) (majority-of-the-minority voting condition to cleanse a merger is measured by *outstanding* rather than *voting* shares in order to replicate the statutory requirements for arm's length mergers). The court in *Tornetta v. Musk*, No. 2018-0408-JRS, 2019 WL 4566943, at *13 (Del. Ch. Sept. 20, 2019), recognized as much, and, in the context of a stock compensation award to a controller, held that the *MFW* cleansing conditions would be satisfied by majority approval of the unaffiliated *voting* shares, rather than—as in the context of a merger—majority approval of the unaffiliated *outstanding* shares.

42. *See Tornetta*, 2019 WL 4566943, at *4 (stock compensation paid to controller); *In re* Ezcorp Inc. Consulting Agreement Derivative Litig., No. 9962-VCL, 2016 WL 301245, at *11–12 (Del. Ch. Jan. 25, 2016) (conflicted consulting payments); *see also* IRA Trust FBO Bobbie Ahmed v. Crane, No. 12742–CB, 2017 WL 7053964, at *11 (Del. Ch. Dec. 11, 2017) (endorsing the use of the framework for "transactions involving controllers").

43. *In re Ezcorp Inc.,* 2016 WL 301245, at *29.

44. Although in *Friedman v. Dolan*, No. 9425-VCN, 2015 WL 4040806, at *5 (Del. Ch. June 30, 2015), the court held that executive compensation paid to a controller could be cleansed by the approval of the independent directors alone, subsequent Delaware Chancery Court decisions have declined to follow that position. *See Tornetta*, 2019 WL 4566943, at *4; *In re Ezcorp Inc.*, 2016 WL 301245, at *18–23. In *Feuer ex rel. CBS Corp. v. Redstone*, No. 12575-CB, 2018 WL 1870074, at *10 (Del. Ch. Apr. 19, 2018), the transaction—salary paid to a controller for board service, authorized by independent directors —was reviewed for waste, without any suggestion that entire fairness would be an appropriate standard of review for failure to obtain stockholder ratification under *MFW*. However, because *Redstone* was a derivative action and subject to the demand requirement, this may have been an artifact of the procedural posture; demand may only have been futile with respect to independent directors alleged to have approved a wasteful, rather than unfair, transaction.

45. *See* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 314 (Del. 2015).

46. *See* Iman Anabtawi, *The Twilight of Enhanced Scrutiny in Delaware M&A Jurisprudence*, 43 DEL. J. CORP. L. 161, 166–67 (2019).

expedited discovery, on the theory that doing so could cost shareholders a valuable deal and is unnecessary to boot because shareholders can choose to reject unfavorable transactions without judicial interference.[47]

Together, the trio of cases has widened the gulf between transactions that involve a controlling shareholder and those that do not. The latter can be fully cleansed by a shareholder vote, even in the face of director conflict and breach of fiduciary duty,[48] permitting the resolution of stockholder challenges on the pleadings and without discovery.[49] By contrast, the presence of a controlling shareholder will trigger thorough judicial review unless the controller runs a precise procedural gauntlet.[50] Enormous weight, then, is placed on that initial determination as to whether a transaction involves a controlling shareholder in the first place—and the definition of what counts as control.

II. IDENTIFYING MINORITY CONTROLLERS

If heightened scrutiny is to be applied to (some) controlling shareholder transactions, courts must be able to distinguish between controllers and noncontrollers. Certainly, anyone who possesses more than fifty percent of a corporation's voting power is a controller,[51] but when the putative controller's voting power does not rise to that level, control status depends on whether the putative controller "exercises control over the business affairs of the corporation."[52] Plaintiffs seeking to establish the existence of a controller in the absence of majority voting power may prove either "(1) that the minority blockholder actually dominated and controlled the corporation, its board or the deciding committee with respect to the challenged transaction or (2)

47. *See* C & J Energy Servs., Inc. v. City of Miami Gen. Emps.', 107 A.3d 1049, 1072–73 (Del. 2014).

48. Litigants have argued that *Corwin* does not apply to transactions with no controlling shareholder, but in which a majority of the board is interested. Thus far, Delaware Chancery disagrees. *See In re* Merge Healthcare Inc. Stockholders Litig., No. 11388-VCG, 2017 WL 395981, at *6–7 (Del. Ch. Jan. 30, 2017); Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447, at *10–12 (Del. Ch. Aug. 25, 2016).

49. *See* Joel Edan Friedlander, *Vindicating the Duty of Loyalty: Using Data Points of Successful Stockholder Litigation as a Tool for Reform*, 72 BUS. LAW. 623, 644 (2017); Joseph R. Slights III, Lecture, Corwin v. KKR Financial Holdings LLC*–An "After-Action Report,"* 24 FORDHAM J. CORP. & FIN. L. 6, 13–14 (2018).

50. The entire fairness review standard only applies to conflict transactions. If there is no conflict—such as where a controlling shareholder receives the same merger consideration as the minority—the transaction will receive business judgment deference. *In re* Synthes, Inc. S'holder Litig., 50 A.3d 1022, 1034 (Del. Ch. 2012).

51. Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 507 (Del. 2005).

52. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994).

that the minority blockholder actually dominated and controlled the majority of the board generally."[53] As Vice Chancellor Slights put it, the latter scenario may manifest in "the board's awareness of [the putative controller's] ability to make changes at the board level or to push other coercive levers should he be displeased with the board's performance or decision making."[54]

To be sure, there may be something anomalous about applying the *MFW* framework—and its majority-of-minority voting conditions—to a conflict transaction involving someone with less than fifty percent of the voting power, if only because a majority-of-minority condition may not have much more bite than ordinary stockholder voting if the putative controller has a small stake.[55] Yet, as it turns out, the dual protections of *MFW* have significance in this context because, unlike transactions subject to *Corwin*, a deal subject to *MFW* cannot be cleansed by a shareholder vote alone.[56]

Inquiries into minority-controller status have always been fact intensive, but recent transformations in how businesses are funded have introduced new types of problems. Congress and the SEC have made it easier for businesses to raise capital privately[57] while simultaneously loosening restrictions on the size of private funding vehicles.[58] As a result, businesses today often eschew a public offering of common shares in favor of venture capital financing via the issuance of preferred shares.[59] But preferred shares carry with them bespoke control rights, such as board representation, antidilution guarantees,

53. *In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *13 (Del. Ch. Mar. 28, 2018); *see also* FrontFour Capital Grp. v. Taube, No. 2019-0100-KSJM, 2019 WL 1313408, at *22 (Del. Ch. Mar. 11, 2019); *In re* Rouse Props., Inc., No. 12194-VCS, 2018 WL 1226015, at *12 (Del. Ch. Mar. 9, 2018).

54. *In re Rouse Props.*, 2018 WL 1226015, at *12.

55. *See* Matthew D. Cain & Steven M. Davidoff, *Form over Substance? The Value of Corporate Process and Management Buy-Outs*, 36 DEL. J. CORP. L. 849, 877 (2011).

56. If the minority-interested party has a large enough stake, however, a majority-of-the-minority voting condition may make a difference. For example, when Michael Dell took Dell private, he controlled a sizeable, but noncontrolling, block, and was still unable to obtain the affirmative vote of a majority of the unaffiliated outstanding shares. Dell v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 14–15 (Del. 2017).

57. *See* Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 467–69 (2017); Renee M. Jones, *The Unicorn Governance Trap*, 166 U. PA. L. REV. ONLINE 165, 176–77 (2017); Janet D. Lowder, *Rule 701 Additional Disclosure Threshold Raised to $10M*, NAT. L. REV. (July 27, 2018), https://www.natlawreview.com/article/rule-701-additionaldisclosure-threshold-raised-to-10m-sec-solicits-comments-to [https://perma.cc/KP54-TCMH] (describing easing of rules for issuing stock compensation to employees).

58. de Fontenay, *supra* note 57, at 467–68.

59. Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. (forthcoming 2019) (manuscript at 17), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3352203 [https://perma.cc/2QQD-TYTC].

and the ability to veto certain actions.[60] With each new round of funding, a single business will issue a new class of preferred shares with its own unique set of terms, often accompanied by "changes to the company's governance structure, such as the size and composition of the board."[61] Capital structures may become so complex that the firm needs to hire an outside "equity manager" simply to keep an accurate accounting of various investors' rights.[62] The result is that in their later stages, private companies may be funded by a heterogeneous group of unrelated professional investors, none of whom possesses fifty percent of the voting power, but many of whom exercise significant influence over corporate behavior. Making matters worse, the relaxed regulatory environment has allowed new types of investors—mutual funds, sovereign wealth funds, family offices, hedge funds, and pension funds—to provide late-stage funding alongside more traditional venture capital.[63] The entry of these investors, who may have different expectations and incentives than venture capital funds, may cause more disputes to wind up in court rather than being resolved privately.

For example, in one newly common fact pattern, a privately backed firm suffers from an immediate liquidity crisis. An existing investor dangles a lifeline, but only in exchange for formal control; simultaneously, the investor uses its blocking rights to prevent the firm from pursuing alternative financing.[64] The forced recapitalization inspires a lawsuit, raising the question whether the investor was a controlling shareholder when it proposed the transaction, with all of the fiduciary obligations—and added judicial scrutiny—that designation implies.[65]

Nor is this complexity confined to private companies. More and more public companies are adopting dual-class share structures, often with sunset arrangements that may eventually leave control uncertain.[66] They also often adopt "shareholder agreements" that grant

60. *Id.*

61. *Id.*

62. *New firms help startups keep track of their owners*, THE ECONOMIST (July 6, 2019), https://www.economist.com/business/2019/07/06/new-firms-help-startups-keep-track-of-their-owners [https://perma.cc/3U93-NCX7].

63. Pollman, *supra* note 59 (manuscript at 18).

64. *See, e.g.*, Urdan v. WR Capital Partners, LLC, No. 2018-0343-JTL, 2019 WL 3891720, at *1 (Del. Ch. Aug. 19, 2019); Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, No. 11802-VCL, 2018 WL 3326693, at *1 (Del. Ch. July 6, 2018); Calesa Assocs., L.P. v. Am. Capital, Ltd., No. 10557–VCG, 2016 WL 770251, at *4–5 (Del. Ch. Feb. 29, 2016); OTK Assocs., LLC v. Friedman, 85 A.3d 696, 702–06 (Del. Ch. 2014).

65. *See, e.g.*, *Basho Techs.*, 2018 WL 3326693, at *1; *Calesa*, 2016 WL 770251, at *7; *OTK Assocs.*, 85 A.3d at 724.

66. Andrew William Winden, *Sunrise, Sunset: An Empirical and Theoretical Assessment of Dual-Class Stock Structures*, 2018 COLUM. BUS. L. REV. 852, 854, 930–31. When Pinterest went

special control rights to certain favored shareholders, including the right to seat some number of directors.[67] The Long Term Stock Exchange, a new stock exchange recently approved by the SEC, may encourage public companies to adopt tenure voting systems that grant long-term shareholders greater control rights than shorter-term investors.[68]

In sum, the "controlling shareholder" designation has taken on a new legal significance at the precise moment when business realities have made the exercise of control more difficult to ascertain.

A. Defining Control

In the broadest sense, Delaware has defined control status to mean that the stockholder has "effective control of the board."[69] Alternatively, the test has been described as requiring the "exercise[ ] [of] such formidable voting and managerial power that, as a practical matter, [the putative controller] is no differently situated than if it had majority voting control."[70] A finding of control may hinge on many factors, including voting power, relationships with board members, and "outsized" influence in the boardroom.[71] No particular level of voting power is determinative;[72] even stockholders with over thirty percent or forty percent of the vote have been found not to be controllers.[73]

To be deemed a minority controller, the "power must be so potent that independent directors cannot freely exercise their judgment,

public, for example, it allocated high vote shares to a circle of insiders and early investors, with sunset provisions that will result in the gradual erosion of control over time. *See* Pinterest Inc., Registration Statement (Form S-1/A) (Apr. 8, 2019), https://www.sec.gov/Archives/edgar/data/1506293/000119312519099828/d697629ds1a.htm [https://perma.cc/XFS4-R86G]. Similarly, Cloudflare awarded high vote shares to various insiders and large investors, with the potential for the allocation of power to change over time as high vote shares are converted to low vote shares. Cloudflare, Inc., Prospectus (Form 424B4) (Sept. 12, 2019), https://www.sec.gov/Archives/edgar/data/1477333/000119312519244325/d735023d424b4.htm [https://perma.cc/7CD8-LY3B].

67. *See* Gabriel Rauterberg, *Allocating Control by Contract: An Empirical Analysis of Shareholder Agreements* (working paper) (on file with author).

68. Annie Gaus, *Stock Exchanges in Need of Reform. Is the Long-Term Stock Exchange the Answer?*, THESTREET (May 19, 2019), https://www.thestreet.com/investing/stocks/stock-exchanges-need-reform-ltse-the-answer-silicon-valley-14964363 [https://perma.cc/J4BP-8R28].

69. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307 (Del. 2015).

70. *In re* Rouse Props. Inc., No. 12194-VCS, 2018 WL 1226015, at *11 (Del. Ch. Mar. 9, 2018).

71. Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, No. 11802-VCL, 2018 WL 3326693, at *26–27 (Del. Ch. July 6, 2018).

72. *In re* Crimson Expl. Inc. Stockholder Litig., No. 8541-VCP, 2014 WL 5449419, at *10 (Del. Ch. Oct. 24, 2014).

73. *See, e.g.*, *In re Rouse Props.*, 2018 WL 1226015, at *18–20; *In re* W. Nat. Corp. S'holders Litig., No. 15927, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000). Both decisions were predicated on standstills that contractually limited the power of the blockholder. *In re Rouse Props.*, 2018 WL 1226015, at *7; *In re W. Nat. Corp.*, 2000 WL 710192, at *2.

fearing retribution from the controlling minority blockholder."[74] This standard echoes, to some extent, the reason for suspicion of controlling shareholder transactions generally: as then-Chancellor Strine explained, "[I]t is important to remember that the overriding concern of *Lynch* is the controlling shareholders have the ability to take retributive action in the wake of rejection by an independent board, a special committee, or the minority shareholders."[75] Thus, when a minority controller is at issue, the appropriate question is whether the putative controller is "perceived as having" the capability to exact retribution.[76]

In that vein, one critical factor toward a finding of control comes when the controller explicitly or implicitly threatens the independent directors personally, such as with a loss of board seats.[77] Yet courts have also found the requisite level of control when controllers pose a threat to the *corporate* well-being, such that independent directors acquiesce in order to protect the corporation or the unaffiliated stockholders.[78]

This latter notion of threat is important because it considerably broadens the universe of persons who may be considered controllers. For example, though control status should not be found solely because a stockholder exercises her contractual rights—such as rights to block a transaction or call a debt—control status may be found when contractual rights are used to coerce board action, which presumably occurs when directors fear that failure to comply will harm the entity.[79] Similarly, persons who control the day-to-day functioning of the corporation are in a position to retaliate against the company should their desires be thwarted, and if directors believe they must bow to their wishes to avoid that result, those persons, too, could be deemed controlling stockholders. Perhaps for this reason, control over

74. *In re Rouse Props.*, 2018 WL 1226015, at *11; *see also In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 992 (Del. Ch. 2014).

75. *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 441 (Del. Ch. 2002).

76. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 553 (Del. Ch. 2003).

77. *See In re Pure Res., Inc.*, 808 A.2d at 436; Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1114–15 (Del. 1994); *see also* N.J. Carpenters Pension Fund v. Infogroup, Inc., No. Civ.A. 5334-VCN, 2011 WL 4825888, at *11 (Del. Ch. Sept. 30, 2011) (finding control from a pattern of personal bullying and threats to sue the independent directors).

78. *See* Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, No. 11802-VCL, 2018 WL 3326693, at *29–30 (Del. Ch. July 6, 2018) (threat to limit access to financing); *In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *16 (Del. Ch. Mar. 28, 2018) (board's awareness of CEO's "singularly important role in sustaining Tesla in hard times" when considering CEO's insistence on board consideration of an interested transaction); Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 465 (Del. Ch. 2011) (threat to cut off dividends to minority stockholders); Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *5 (Del. Ch. June 5, 2006) ("significant leverage" due to blockholders' influence over company's revenues).

79. Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., No. Civ.A. 1668-N, 2006 WL 2521426, at *5 (Del. Ch. Aug. 25, 2006).

management is frequently cited as a factor in identifying control status.[80]

The difficulty with this kind of analysis, however, is that it comes into play the *lower* the putative controller's voting power. That is, to the extent the controller's own wealth is bound with the company, it has an incentive to preserve the company's value; this is precisely the benefit of having a controller in the first place.[81] The lower the equity stake, the *less* important the company's value to the putative controller and the greater its willingness to sabotage the company to advance its private interests.[82] Though some controllers may have low stakes but high voting power—due to dual-class share structures, for example—in general, equity investment is associated with votes. Thus, tests that look to the likelihood of retaliation against the *company* may have the ironic effect of designating those shareholders with the *least* amount of voting power as controllers.

These may have been the concerns that animated the analyses of the Delaware Supreme Court and the Chancery Court in *Corwin* itself, where a putative controller functionally ran the company on a day-to-day basis with very little equity investment or voting power.[83] The case involved the relationship between KKR, a publicly traded private equity firm that funded its takeovers with junk bonds, and KFN, a publicly traded shell entity that was created to buy those bonds.[84] KFN, in practical effect, served as a vehicle to facilitate public investment in KKR's takeovers, and KKR held less than one percent of

80. *In re Tesla Motors*, 2018 WL 1560293, at *16 & n.242; *In re* Zhongpin Inc. Stockholders Litig., No. 7393-VCN, 2014 WL 6735457, at *9 (Del. Ch. Nov. 26, 2014), *rev'd on other grounds sub nom. In re* Cornerstone Therapeutics Inc., Stockholder Litig., 115 A.3d 1173 (Del. 2015); *In re Cysive*, 836 A.2d at 552; *see also Basho Techs.*, 2018 WL 3326693, at *27 (control may be inferred from "high-status roles like CEO" and ability to control information flow). Conversely, *lack* of control over day-to-day management may weigh *against* a finding of controlling shareholder status. *See, e.g.*, *In re* Rouse Props., Inc., No. 12194-VCS, 2018 WL 1226015, at *19–20 (Del. Ch. Mar. 9, 2018); *In re* W. Nat. Corp. S'holders Litig., No. 15927, 2000 WL 710192, at *6 (Del. Ch. May 22, 2000).

81. *See* Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1465 (2019) ("Whereas a majority owner cannot be replaced and would not be disciplined by the market for corporate control, her large equity stake in the controlled company provides powerful financial incentives to maximize company value. A majority owner bears most of the costs of her actions and captures most of the benefits.").

82. *Cf. id.* at 1465–66 (controllers with "a small minority of the company's equity stake . . . therefore lack powerful financial ownership-based incentives," which creates a "risk that they will act in ways that are contrary to the interests of other public investors").

83. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 992 (Del. Ch. 2014), *aff'd sub nom.* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015); *Corwin*, 125 A.3d at 307.

84. *In re KKR*, 101 A.3d at 983–87.

KFN's equity.[85] Though KFN's directors were independent and subject to election by KFN's public stockholders, KFN had no employees and contracted with KKR to provide all of its investment functions.[86] KFN could only terminate the arrangement without cause by paying KKR a very large fee.[87] In sum, KFN functioned as something akin to a KKR-specific investment company, with KKR serving in the equivalent of the sponsor and advisory roles.[88]

In 2013, KKR proposed to acquire KFN in an all-stock deal. After forming a special committee to negotiate the transaction, KFN requested that KKR agree to waive its termination fee. KKR refused to do so.[89] Ultimately, KFN agreed to be acquired by KKR, and the deal was approved by the public stockholders.[90]

In a subsequent lawsuit, KFN shareholders argued, among other things, that KKR had been a controlling stockholder and the transaction should have been evaluated on that basis. The Chancery Court, affirmed by the Delaware Supreme Court, disagreed.[91] It held that despite KKR's influence over KFN's day-to-day operations, authority over management ultimately rested with the board, over which KKR had no special influence.[92] Yet it is impossible to examine the relationship between KKR and KFN and not recognize the "potential for [a] perception" by KFN's directors, and its shareholders, that KKR might retaliate against KFN if thwarted.[93] KKR completely controlled every functional aspect of KFN's business up to and including the valuation of its assets[94] (which would be the most critical factor on which the KFN board relied when negotiating a deal). Due to the termination fees and the close relationship between KFN and KKR, KFN had little realistic ability to extricate itself from that arrangement. KKR's minimal equity stake only heightened the danger; with so little direct financial interest in KFN, it might have had little hesitation in using its influence to punish KFN if angered. It defies

85. *Corwin*, 125 A.3d at 306. Though the entities involved were LLCs rather than corporations, the parties litigated the case on the assumption that corporate standards would apply, and the Delaware courts proceeded on that basis. *Id.* at 306 n.3.

86. *Id.* at 306–07.

87. *Id.* at 306.

88. Despite the similarities, KFN was exempt from registration under the Investment Company Act. KKR Financial Holdings LLC, Annual Report (Form 10-K) (Feb. 27, 2014), https://www.sec.gov/Archives/edgar/data/1386926/000104746914001501/a2218341z10-k.htm [https://perma.cc/8G74-C5R5].

89. *In re KKR*, 101 A.3d at 1000.

90. *Id.* at 988–89.

91. *See id.* at 983; *see also Corwin*, 125 A.3d at 306.

92. *In re KKR*, 101 A.3d at 983.

93. Kahn v. Lynch Comm'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994).

94. *In re KKR*, 101 A.3d at 986.

belief to imagine that these facts would not have weighed heavily on the minds of KFN's directors and its shareholders; indeed, KFN directors were troubled by the fact that KKR initiated the transaction at a time when KKR's stock was trading at an unusually high price while KFN's was unusually low.[95] (KKR, due to its responsibility for valuing KFN's portfolio, naturally had great influence over how KFN would be perceived by the market.[96])

In fact, in the context of investment companies, relationships between sponsors, advisors, and funds are heavily regulated precisely because of the potential for exploitation.[97] Among other things, transactions between investment companies and their sponsoring entities must ordinarily be reviewed for fairness by *federal* regulators;[98] in one older case, a court relied on those federal regulations to import a similar fairness requirement into Delaware law.[99]

Nonetheless, at both the Chancery and Supreme Court levels, Delaware adhered to an extremely narrow interpretation of the test for controller status and concluded that it was not even "reasonably conceivable"—the pleading standard in Chancery Court—that KKR was a controlling stockholder.[100] The Chancery Court explicitly discarded that portion of the test for controller status that rests on demonstrating control over the corporation more generally, and instead focused solely on control over the transaction at issue.[101] Thus, despite the abundance of case law—decided both before and after *Corwin*—treating control over day-to-day management as a factor to be considered in the controller analysis,[102] the *Corwin* court cast that aspect of the arrangement aside.[103]

95. *Id.* at 987.

96. *Cf. Kahn.*, 669 A.2d at 85 (remarking that controlling shareholders may use their power to time transactions to their advantage); *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 445 (Del. Ch. 2002) (same).

97. *See* John Morley & Quinn Curtis, *Taking Exit Rights Seriously: Why Governance and Fee Litigation Don't Work in Mutual Funds*, 120 YALE L.J. 84, 91–98 (2010) (summarizing mutual fund regulation).

98. 15 U.S.C. § 80a-17 (2012).

99. *See* Harriman v. E. I. Du Pont de Nemours & Co., 411 F. Supp. 133, 153 (D. Del. 1975). This decision was subsequently cited with approval in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 709 n.7 (Del. 1983).

100. *In re KKR*, 101 A.3d at 995; *see also* Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 308 (Del. 2015).

101. *See In re KKR*, 101 A.3d at 993–95.

102. *See* cases cited *supra* note 80.

103. In this, the court was not alone; it appears that when courts desire to read the test for control status narrowly, they equate the prong of control over the business generally with the prong of control over the transaction, even though the usual formulation is to state these as alternatives. *See In re* Sanchez Energy Derivative Litig., No. 9132-VCG, 2014 WL 6673895, at *8 (Del. Ch. Nov. 25, 2014) ("[A]ctual board control in the transaction at issue is undoubtedly the

B. Conflating Sanitization with Control

The test for minority control status is further muddled by the fact that sanitization measures—intended to comply either with *MFW* or simply with the standards for interested transactions—may themselves be relevant to a determination of control in the first place.

Even before the introduction of the *MFW* framework, then-Chancellor Strine recognized that the inquiry into controlling-shareholder status substantively overlapped with a determination as to whether a controlling shareholder transaction was fair to minority shareholders.[104] This necessarily created a difficult line-drawing question: Was a sanitizing measure so strong as to neutralize controller status, or was it not quite strong enough to neutralize control but sufficiently strong to assure fairness to the minority?[105]

After *MFW*, the inquiry is simplified in some ways. If the *MFW* sanitizing measures are employed, business judgment review is appropriate regardless of whether the interested party is deemed a controlling stockholder; thus, reviewing courts can limit themselves to a determination as to compliance with *MFW* and elide the question whether the interested party was, in fact, a controlling stockholder. That said, matters are more complex when *some* sanitizing measures are employed, but they fall short of the full *MFW* treatment. If they are insufficient to neutralize a putative controller's control, then the lack of compliance with *MFW* triggers entire fairness review; if they *are* sufficient, however, business judgment review may be appropriate (even for those transactions that would have merited closer judicial review pre-*Corwin*). It can be very difficult to distinguish between a minority controller who did not employ *MFW* and simply an interested transaction that can be cleansed via other means.

This was precisely the dilemma facing the court when shareholders of Tesla challenged that company's acquisition of SolarCity.[106] Elon Musk headed both companies, and several Tesla directors also had relationships with SolarCity.[107] Thus, the acquisition

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defining and necessary feature of a minority controlling stockholder . . . ."), *rev'd on other grounds sub nom.*, Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017 (Del. 2015); *In re* Crimson Expl. Inc. Stockholder Litig., No. 8541-VCP, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014) (collecting cases to show that "a large blockholder will not be considered a controlling shareholder unless they actually control the board's decisions about the challenged transaction").

104. *In re* S. Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 789–92 (Del. Ch. 2011); *see also In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 548–49 (Del. Ch. 2003).

105. Or to shift the burden of proof? *See In re Cysive*, 836 A.2d at 548–49.

106. *See In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

107. *Id.* at *1–4, *17.

was clearly an interested one and would be subject to fairness review absent appropriate sanitizing measures. Ultimately, the deal was conditioned on the affirmative vote of a majority of the disinterested outstanding shares of Tesla,[108] but there was no attempt to use an independent special committee at the board level to negotiate the transaction.[109] The critical question, then, was whether Musk—with a twenty-two percent Tesla stake—was a controlling shareholder.[110] If he was not, the affirmative shareholder vote would be sufficient to trigger business judgment review under *Corwin*; if he was, the deal would be subject to entire fairness review.[111] Ultimately, the Chancery Court concluded that the plaintiffs had alleged that Musk *was* a controlling shareholder, partly due to his importance to Tesla and partly due to the fact that the lack of a special committee allowed Musk to influence the board's decisionmaking process.[112] In other words, it was something like the failure to comply with *MFW* that rendered Musk a controlling shareholder in the first instance.

In so holding, the *Tesla* court compared the SolarCity deal to Michael Dell's earlier buyout of his namesake company. Though Michael Dell held roughly sixteen percent of Dell at the time, and—like Musk—occupied a position of singular importance to the company's future, Michael Dell was, according to the *Tesla* court, *not* a controller with respect to the buyout because he sterilized his own power with various sanitizing measures, including the use of a fully empowered independent special committee.[113] These measures, however, were less strict than the measures that would later be mandated in *MFW*; for example, though the Dell buyout was originally conditioned on the majority vote of the outstanding unaffiliated Dell shares, that condition was eventually waived in the course of negotiations.[114]

108. Tesla Motors, Inc., Registration Statement (Form S-4), at 13, 59, 83 (Sept. 29, 2016), https://www.sec.gov/Archives/edgar/data/1318605/000119312516724453/d241192ds4a.htm [https://perma.cc/WU58-S5UL].

109. *In re Tesla Motors*, 2018 WL 1560293, at *7.

110. *Id.* at *12–16.

111. In fact, it is possible that even absent *Corwin*, a conclusion that the deal lacked a controlling shareholder would have restored business judgment review. *Corwin* mandated that shareholder-approved buyouts of the subject company receive business judgment review—arguably overruling prior case law that suggested the unique context of a buyout merited a higher level of scrutiny—but even prior to *Corwin*, disinterested shareholder approval could cleanse other types of interested transactions. *See, e.g.*, Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 881–82 (Del. Ch. 1999). That said, *Corwin* and its progeny represent, for want of a better term, a new *mood* in favor of dismissing cases in their early stages on the strength of a shareholder vote. *See* Friedlander, *supra* note 49, at 645.

112. *In re Tesla Motors*, 2018 WL 1560293, at *19.

113. *Id.* at *15.

114. Though the original merger agreement contained such a condition, an insufficient number of Dell shares favored the transaction. As a result, Michael Dell renegotiated the deal to

But compare the *Tesla* court's reasoning with the Delaware Supreme Court's recent holding in *Olenik v. Lodzinski*.[115] There, a putative controller adopted *MFW* sanitizing measures, but too late in the process to meet *MFW*'s stringent requirements.[116] The court held that the *attempt* to comply with *MFW* functioned as a *concession* that the adopting party was a controlling stockholder.[117] Had this logic been applied to *Dell*, Michael Dell might well have been considered a controller.

Thus, the best we can say is that sanitizing measures that do not comply with *MFW* may serve to neutralize a putative controller, such that he or she may avoid being characterized as a controlling shareholder in the first instance, or, alternatively, they may cement a finding of control by establishing the putative controller's felt need for insulation. And layered on top of these conflicting mandates is the reality that the *MFW* measures are themselves intended to ensure complete neutralization of a controller's power; a determination that a blockholder was not a controller because it employed some, but not all, of those measures requires a rather heroic calibration of the precise level of insulation necessary to ensure arm's length bargaining opposite a party who enjoys, by any standard, outsized influence and informational advantages.

C. Controlled or Concurrent?

There are further levels of confusion regarding the definition of "controlling stockholder." For example, courts distinguish between a "control group where those shareholders are connected in some legally significant way—e.g. by contract, common ownership, agreement, or other arrangement—to work together toward a shared goal"[118] and a mere "concurrence of self-interest among certain stockholders."[119] The former constitutes a controlling stockholder group whose actions are evaluated under *MFW*; the latter does not, and interested transactions may be sanitized under *Corwin*.

This is, in fact, an age-old issue. It has long been recognized that individual shareholders may have private reasons for preferring that

require only the affirmative vote of a majority of the *voting* unaffiliated Dell shares. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 14–15 (Del. 2017).

115. 208 A.3d 704 (Del. 2019).

116. *Id.* at 718.

117. *Id.* at 718 n.71.

118. van der Fluit v. Yates, No. 12553-VCMR, 2017 WL 5953514, at *5 (Del. Ch. Nov. 30, 2017) (quoting Frank v. Elgamal, No. 6120-VCN, 2012 WL 1096090, at *8 (Del. Ch. Mar. 30, 2012)).

119. *Id*. (quoting *In re* Crimson Expl. Inc. Stockholder Litig., No, 8541-VCP, 2014 WL 5449419, at *15 (Del. Ch. Oct. 24, 2014)).

corporations adopt a particular policy or embark on a course of action,[120] and if a critical mass of these shareholders benefits from a potential corporate decision, they will be able to sway corporate conduct in their favor. Yet the law only intervenes when the shareholders form a sufficiently cohesive group. Articulating standards to identify the presence of such a group has bedeviled courts for nearly a century.[121]

The problem was neatly illustrated in *In re PNB Holding Co. Shareholders Litigation*.[122] Directors sought a corporate reorganization that would have the effect of cashing out all but the sixty-eight largest shareholders.[123] These shareholders, not coincidentally, mostly consisted of the existing directors and their family members, who collectively controlled 59.5 percent of the vote.[124] Yet then-Vice Chancellor Strine rejected the argument that they constituted a single controlling shareholder because while each was interested in this particular transaction, they had no other common interests or agreements to pool their votes.[125] Each voted independently, but self-interestedly, for the same deal.[126]

PNB might be compared to *Tesla*. There, the court accepted the plaintiffs' allegation that Musk was a controlling stockholder in part because the remaining Tesla directors' *own* ownership in SolarCity inclined them to accept Musk's proposal.[127] The Tesla directors, in other words, were deemed to be under Musk's control because they were independently, but concurrently, interested in completing the deal.[128] It seems, then, that sometimes concurrent interests in the same transaction are a hallmark of control, and sometimes they are not.[129]

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120. *See* Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561 (2006) (describing the heterogeneity of shareholder interests); Grant M. Hayden & Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445 (2008) (same).

121. *See, e.g.,* ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 215–19 (1932).

122. No. Civ.A. 28-N, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006).

123. *Id.* at *6–7.

124. *Id.* at *1.

125. *Id.* at *10–11.

126. *Id.*; *see also* van der Fluit v. Yates, No. 12553-VCMR, 2017 WL 5953514, at *5 (Del. Ch. Nov. 30, 2017) (control group must be linked legally).

127. *See In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *3–4, *13, *17, *19 (Del. Ch. Mar. 28, 2018).

128. *Id.*

129. Similarly, it is common for disinterested shareholders to ratify the pay packages of corporate directors. *See, e.g.*, Calma v. Templeton, 114 A.3d 563, 579–87 (Del. Ch. 2015) (reviewing Delaware cases in which shareholders approved director compensation packages). All directors are necessarily interested in their own pay (and are often themselves corporate shareholders), but there is no argument that their concurrent interests in their salaries render them, as a group, a single controlling shareholder for *MFW* purposes.

In a related vein, many courts distinguish between controller status and the status of a stockholder on whom a majority of the board is dependent. The former's dealings are subject to entire fairness review absent the protections of *MFW*; transactions with stockholders on whom half the board are dependent, by contrast, may still be cleansed by a stockholder vote alone.[130] Thus, in *Sciabacucchi v. Liberty Broadband Corp.*, Vice Chancellor Glasscock concluded that a twenty-six percent stockholder was not a controller because of various contractual restrictions on its ability to solicit proxies and increase its voting power.[131] Yet he also held that a majority of the board *lacked independence* from the stockholder and, further, that these dependent directors had coerced the independent directors into endorsing the challenged transaction.[132]

At the same time, plenty of authority suggests that the dependence of directors is significant to, if not dispositive of, the controlling shareholder inquiry.[133] This is hardly surprising, given the similarity of the tests for controller status and for independence. Stockholders are controllers when they "dominate" the board;

130. Krasner v. Moffett, 826 A.2d 277, 279 (Del. 2003); Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 882, 891 (Del. Ch. 1999). Presumably, a special committee of independent directors could also cleanse board action in these circumstances, assuming the transaction is not one that would itself require a shareholder vote. *But see* Hill & McDonnell, *supra* note 9, at 924–26 (discussing the unusual case of special litigation committees).

131. (*Sciabacucchi I*), No. 11418-VCG, 2017 WL 2352152, at *17 (Del. Ch. May 31, 2017).

132. *See* Sciabacucchi v. Liberty Broadband Corp. (*Sciabacucchi II*), No. 11418-VCG, 2018 WL 3599997, at *12, *15–16 (Del. Ch. July 26, 2018). Other decisions have similarly distinguished between boards where a majority of members lack independence from a stockholder, and stockholders who control the board. *See, e.g.*, *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 995 (Del. Ch. 2014) (considering the questions separately).

133. *See, e.g.*, FrontFour Capital Grp. LLC v. Taube, No. 2019-0100-KSJM, 2019 WL 1313408, at *22–25 (Del. Ch. Mar. 11, 2019) (relying in part on board members' lack of independence to find presence of controlling stockholder); Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, No. 11802-VCL, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018) (listing "disinterestedness and independence" of directors as one of four factors contributing to the finding of a controlling shareholder); *In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *17 (Del. Ch. Mar. 28, 2018) ("[W]hether a board is comprised of independent or disinterested directors is relevant to the controlling stockholder inquiry because the answer, in turn, will inform the court's determination of whether the board was free of the controller's influence such that it could exercise independent judgment in its decision-making."); Calesa Assocs., L.P. v. Am. Capital, Ltd., No. 10557-VCG, 2016 WL 770251, at *12 (Del. Ch. Feb. 29, 2016) (examining independence of director as part of controlling stockholder inquiry); Thermopylae Capital Partners, L.P. v. Simbol, Inc., No. 10619-VCG, 2016 WL 368170, at *14 (Del. Ch. Jan. 29, 2016) (holding that the test for controller status is met if defendant "had achieved control or influence over a majority of directors through non-contractual means, such as affiliation or aligned self-interest"); OTK Assocs., LLC v. Friedman, 85 A.3d 696, 702 (Del. Ch. 2014) ("effective control of the board" established in part by "close relationships with management").

meanwhile, directors lack independence when they are so beholden to an interested party as to "sterilize[ ] their discretion."[134]

One may attempt to reconcile these divergent lines of precedent by arguing that courts distinguish between the presence of conflicting incentives (suggesting a lack of independence) from actual evidence of bias in decisionmaking (suggesting control).[135] Yet even assuming that is a justifiable point of distinction—let alone one that should be decided, as it often is, on the pleadings—it is hardly consistent throughout the case law.[136]

The inconsistency means that different cases could easily be viewed through alternate lenses that would presumably change their outcomes. Consider, for example, the transaction at issue in *Harbor Finance Partners v. Huizenga*.[137] Republic Industries proposed to acquire AutoNation.[138] Four out of Republic's seven directors had interests in AutoNation in addition to their significant investments in Republic itself.[139] One of those was Republic's Chair and CEO, and the other three conflicted directors had significant ties to him—including his brother-in-law, who personally held ten percent of Republic's stock.[140] Though Republic nominally arranged to have a special committee of the three unconflicted directors negotiate the transaction, in practice, the special committee did very little, and Republic's management arranged most of the deal.[141] Nonetheless, Republic's shareholders voted in favor.[142]

In a subsequent lawsuit filed by Republic shareholders, the case was litigated as an ordinary conflict transaction, and, on that basis, then-Vice Chancellor Strine concluded that the vote of the disinterested Republic shareholders was sufficient to cleanse any conflicts.[143] Yet

134. Aronson v. Lewis, 473 A.2d 805, 814 (Del. 1984). *Cf.* Larkin v. Shah, No. 10918-VCS, 2016 WL 4485447, at *13 (Del. Ch. Aug. 25, 2016) (holding that to demonstrate control status, "the minority blockholder's power must be so potent that it triggers the traditional *Lynch* concern that independent directors' free exercise of judgment has been compromised").

135. *See, e.g.*, *Sciabacucchi I*, 2017 WL 2352152, at *17 ("The Complaint, however, does not evince actual control over a majority of directors; the pleadings are limited to showing that the directors share interests with the Stockholder Defendants, not that the directors are subject to actual control. . . . [I]t does not necessarily follow that an interested party also *controls* directors, simply because they lack independence.").

136. *Compare In re Tesla Motors*, 2018 WL 1560293, at *17 (lack of independence in general is a factor in the control analysis), *with* S*ciabacucchi II*, 2018 WL 3599997, at *16 (actual coercion of independent directors not evidence of control).

137. 751 A.2d 879 (Del. Ch. 1999).

138. *Id.* at 884.

139. *Id.* at 882–83.

140. *Id.* at 882.

141. *See id.* at 885, 891.

142. *Id.* at 885.

143. *Id.* at 903–04.

imagine if the case had been litigated as a conflict transaction by a minority-controller Chair/CEO. The facts would be almost identical to those of *Tesla*, and the vote would not have been sufficient to cleanse; instead, the lack of a functioning independent committee and other protections would have ensured entire fairness review.

The uncertainty regarding the legal implications of dependence is brought into sharper relief by the elasticity of the modern test for independence itself. For a long time, Delaware courts endorsed a relatively stringent analysis, requiring clear evidence of familial or financial ties before a director would be deemed dependent on another person.[144] In recent years, however, Delaware has displayed an increased willingness to consider social and business connections as part of a holistic inquiry into director dependence.[145] The revised analysis may more accurately reflect the "array of . . . motivations . . . that influence human behavior"[146] but presents new complications for the controlling shareholder inquiry. Silicon Valley firms, for example—both public and private—are inclined to stock their boards of directors with a repeat network of industry colleagues,[147] raising the possibility that a variety of common arrangements could be interpreted as creating dependence and (taken to extremes) controlling shareholders.

D. Does Voting Power Even Matter?

The uncomfortable question that arises from all of this is whether controller status depends on voting power—or even stock ownership—at all. In *Basho Technologies Holdco B, LLC v. Georgetown Basho Investors, LLC*,[148] for example, Vice Chancellor Laster suggested that the two had little relevance to the controlling shareholder inquiry. He did not even bother to quantify the voting power of the putative

144. *See, e.g.*, Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1051–54 (Del. 2004) (holding that a series of social interactions did not evidence lack of independence).

145. *See, e.g.*, Marchand v. Barnhill, 212 A.3d 805, 820 (Del. 2019); Sandys v. Pincus, 152 A.3d 124, 126 (Del. 2016); Del. Cty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017, 1023–24 (Del. 2015).

146. *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 938 (Del. Ch. 2003).

147. Erin Griffith, *'We Know Them. We Trust Them.' Uber and Airbnb Alumni Fuel Tech's Next Wave*, N.Y. TIMES (Mar. 13, 2019), https://www.nytimes.com/2019/03/13/technology/silicon-valley-network-mafias.html [https://perma.cc/YZX7-WJP4]; *see also Sandys*, 152 A.3d at 133–34 (discussing repeat relationships in the tech startup world); *In re Oracle*, 2018 WL 1381331, at *16–20 (describing the network of relationships linking Silicon Valley board members with each other); Pollman, *supra* note 59, at 44 ("VCs and other startup investors are repeat institutional players in a reputation-based market for investments.").

148. No. 11802-VCL, 2018 WL 3326693 (Del. Ch. July 6, 2018).

controller anywhere in the opinion,[149] and in his summary of the test for controlling shareholder status, equity ownership was listed as a *secondary* factor, coming *after* items like relationships with directors and managers and the exploitation of contractual rights to channel corporate behavior in a particular direction.[150]

Significantly, recent decisions finding controlling status such as *Basho*, *FrontFour Capital Group LLC v. Taube*,[151] and *Tesla* all highlighted, to a greater or lesser degree, that a minority shareholder may control a board's decision by influencing the informational environment in which the decision is made.[152] In *Basho*, the minority controller supplied false information to the board, and in *FrontFour*, the minority controller withheld information from the special committee.[153] Yet the problem of false or limited information occurs with (unfortunate) regularity.[154] In *RBC Capital Markets, LLC v. Jervis*,[155] for example, a financial advisor with no equity stake or voting power was alleged to have manipulated a corporate board into agreeing to a suboptimal deal by, among other things, intentionally low-balling its valuation analysis. Given the advisor's control over the sale process and the fact that two of the three directors on the committee largely abdicated their role, could the financial advisor be deemed to have "actually dominated and controlled . . . the deciding committee with respect to the challenged transaction"?[156] Indeed, it is difficult not to compare the language used in *RBC*—that "the Board and the

149. The company had a complex capital structure, *id.* at *2–5, making a percentage vote figure difficult to ascertain.

150. *Id.* at *26–27.

151. No. 2019-0100-KSJM, 2019 WL 1313408 (Del. Ch. Mar. 22, 2019).

152. *See id.* at *2; *see also In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *9 (Del. Ch. Mar. 28, 2018); *Basho Techs. Holdco*, 2018 WL 3326693, at *7, 9.

153. Of course, in *Corwin v. KKR Financial Holdings LLC*, 125 A.3d 304 (Del. 2015), KKR's control over information flow was not even sufficient to permit plaintiffs to survive a motion to dismiss. *See* Part II.

154. *See generally* Joel Edan Friedlander, *Confronting the Problem of Fraud on the Board*, 75 BUS. LAW. (forthcoming Winter 2019–2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3359402 [https://perma.cc/CF5F-6R8G] (describing past cases). Significantly, shareholders can only learn about such conduct via discovery; even a books and records demand under Section 220—the typical route for shareholders denied discovery after *Corwin* and *C & J Energy*, *see* James D. Cox et al., *The Paradox of Delaware's "Tools at Hand" Doctrine: An Empirical Investigation* 19 (Vanderbilt Law Research Paper No. 19-10, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355662 [https://perma.cc/C4E6-BEGX]—cannot be used to reach information that is not in the company's possession. *Cf.* Forsythe v. CIBC Emp. Private Equity Fund, No. Civ.A. 657-N, 2005 WL 1653963, at *5 (Del. Ch. July 7, 2005).

155. 129 A.3d 816 (Del. 2015).

156. *In re* Rouse Props. Inc., No. 12194-VCS, 2018 WL 1226015, at *12 (Del. Ch. Mar. 9, 2018). If so, it would mesh poorly with the Delaware Supreme Court's conclusion that financial advisors' obligations to their clients are "primarily contractual in nature," rather than fiduciary. *Jervis*, 129 A.3d at 865 n.191.

stockholders were operating on the basis of an informational vacuum created by" the financial advisor[157]—with the *FrontFour* court's conclusion that a blockholder dominated the sale process by contributing to the "informational vacuum" in which the special committee operated.[158] Thus, a test that relies on control of information—like many of the other factors in the controlling shareholder inquiry—is extraordinarily malleable.[159]

That flexibility lends itself to manipulation by courts dissatisfied with the strictures of *Corwin* and *C & J Energy*. Numerous commenters have expressed doubt that a shareholder vote can meaningfully check managerial disloyalty even in the absence of a controlling stockholder because shareholders as a group are not positioned to investigate wrongdoing or bargain for better options; they are stuck with the transaction that is presented to them.[160] Courts reviewing deals that would be cleansed under *Corwin* may therefore be incentivized to put a thumb on the scales in favor of a controlling-shareholder finding when the conduct at issue appears particularly egregious.

Vice Chancellor McCormick was almost explicit about this reasoning in *FrontFour*.[161] There, a fifteen percent blockholder in a company called Medley Capital engineered a transaction between that firm and two related entities, in part by manipulating a supine and dependent board.[162] Vice Chancellor McCormick enjoined the

157. *Jervis*, 129 A.3d at 856.

158. FrontFour Capital Grp. LLC v. Taube, No. 2019-0100-KSJM, 2019 WL 1313408, at *2 (Del. Ch. Mar. 11, 2019).

159. For a recent example, consider *In re PLX Technology Inc. Stockholders Litigation*, No. 9880-VCL, 2018 WL 5018535, at *1–2 (Del. Ch. Oct. 16, 2018), where an activist investor who obtained board seats via a proxy contest was alleged to have manipulated the board into a fire sale merger in part by withholding information about the acquirer's plans. Given the activist's involvement in the sale process, could it have been deemed a controlling shareholder? The possibility is not so far-fetched; for years, theorists have argued that activists should be recognized as having fiduciary obligations akin to controllers. *See* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1294–1303 (2008). Significantly, Delaware has recognized the ability of an activist to exert "negative" control by blocking board action, see Third Point LLC v. Ruprecht, No. 9469-VCP, 2014 WL 1922029, at *21 (Del. Ch. May 2, 2014), the power of which has contributed to findings of control in other contexts. *See* Basho Techs. Holdco B, LLC v. Georgetown Basho Inv'rs, LLC, No. 11802-VCL, 2018 WL 3326693, at *4 (Del. Ch. July 6, 2018) (finding control in part due to investor's ability to block share issuances); *In re* Tesla Motors, Inc. Stockholder Litig., No. 12711-VCS, 2018 WL 1560293, at *15 (Del. Ch. Mar. 28, 2018) (considering supermajority voting provisions that made it easier for Musk, with his large minority stake, to block corporate action); *see also* sources cited *supra* notes 60–64 and accompanying text.

160. *See, e.g.*, James D. Cox, Tomas Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes On M&A Deals* 67–69 (Vanderbilt Law Research Paper No. 19-06, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3333241 [https://perma.cc/4X4Y-8GSX]; Franklin A. Gevurtz, *The Shareholder Approval Conundrum*, B.C. L. REV. (forthcoming 2019) (manuscript at 4).

161. *FrontFour Capital Grp.*, 2019 WL 1313408, at *33.

162. *Id.* at *25.

shareholder vote until appropriate disclosures could be made but refused to order that Medley Capital seek alternative merger partners.[163] In so holding, the Vice Chancellor expressed regret that the prevailing legal standards prevented her from ordering what she believed to be a just remedy:

> At this stage, the most equitable relief for the Medley Capital stockholders would be a curative shopping process, devoid of [the blockholder's] influence, free of any deal protections, plus full disclosures. Thereafter, if no better proposal surfaces, the Medley Capital stockholders would have the opportunity to cast a fully informed vote for or against the Proposed Transactions . . . .
>
> Under the Delaware Supreme Court's decision in *C & J Energy*, an injunction may not issue if it would "strip an innocent third party of its contractual rights" under a merger agreement, unless the party seeking the injunction proves that the third party aided and abetted a breach of fiduciary duty by the target directors . . . . Under these circumstances, *C & J Energy* leaves this Court no discretion—the most equitable remedy for Medley Capital stockholders cannot be granted.
>
> To ensure that Medley Capital stockholders are fully informed on any vote on the Proposed Transactions, FrontFour is entitled to corrective disclosures consistent with this decision, and Defendants are enjoined from consummating the Mergers until such disclosures have been made. FrontFour may also pursue a damages claim by amending their complaint, if FrontFour so chooses.[164]

Given the context, Vice Chancellor McCormick's conclusion that the blockholder was a controlling shareholder was almost unnecessary to her actual holding, namely, that the proxy statement omitted material information and would need to be revised. Instead, the finding of controlling-shareholder status appears to have been something of a prophylactic measure; by designating the blockholder as a controller, Vice Chancellor McCormick made clear that *even if* disinterested shareholders voted in favor of the deal—something that, statistically, they were likely to do despite obvious defects in the negotiating process[165]—the transaction would still be subject to entire fairness review for failure to meet *MFW* requirements.

The *Tesla* decision has a similar air. Conflicts pervaded a negotiating process that seemed designed almost from the outset as a mechanism for using Tesla's assets to bail out a pet project of Elon Musk's. By holding that plaintiffs had, for pleading purposes, established Musk as a controller, Vice Chancellor Slights ensured that plaintiffs would at least be able to get the discovery that would allow for a more robust judicial review.

To be sure, one of the first things a business law student learns is that even without a formal equity stake, contractual control can be

163. *Id.* at *33.
164. *Id.*
165. *See* Cox & Mondino, *supra* note 160, at 7.

exerted to the point where fiduciary obligations follow.[166] But all of this just raises the question whether the *shareholder* aspect of the controlling shareholder inquiry is necessarily doing any work. On this, it is useful to return to the facts of *FrontFour*: the fifteen percent blockholder in question was subject to an "echo voting" requirement that obligated it to vote its shares in proportion with those of the public stockholders.[167] Its actual control over the subject company therefore did not come from its ownership stake, but from an arrangement similar to that between KKR and KFN: the controller served as a sponsor and advisor to an investment company.

III. A MODEST PROPOSAL

What all of this suggests is that at least some of the vagaries of the case law are traceable to courts' vacillation between the Scylla of a capacious definition of control and the Charybdis of *Corwin*'s doctrinal rigidity. It is common for board members to lack independence from other board members or management; board members frequently rely on information supplied by others, who may themselves have private interests for preferring one course of action over another;[168] and, as discussed above, any number of actors may be in a position to issue credible threats against the company. If all of these are treated as hallmarks of control, they could easily be stretched beyond reason. At the same time, ignoring them entirely risks papering over the very real Hobson's choices that may afflict shareholders asked to approve conflicted transactions.

What is missing is a framework for evaluating the factors that suggest control while simultaneously cabining the inquiry. To make progress on this front, we might return to first principles and inquire anew as to why we have adopted divergent regimes for interested transactions with corporate insiders generally, as compared to interested transactions with controlling shareholders. The critical difference seems to be more than simply a distrust of independent directors in the controlling shareholder context; instead, as *Kahn v. Lynch* articulated, the original motivating factor was a distrust of a

166. *See* Martin v. Peyton, 158 N.E. 77, 80 (N.Y. 1927) (recognizing that a lender may exercise sufficient control as to be considered a partner in the enterprise); BERLE & MEANS, *supra* note 121, at 212–13.

167. *FrontFour Capital Grp.*, 2019 WL 1313408, at *21.

168. Board members are, in fact, encouraged to rely on such persons. *See* DEL. CODE ANN. tit. 8, § 141(e) (2019) (authorizing directors to rely on "any other person as to matters the member reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the corporation").

majority-of-minority shareholder vote as a cleansing mechanism.[169] And the reason for *that*, presumably, is not the potential for retaliation standing alone, but the impossibility of minority shareholders practicing self-help. When a controlling stockholder is at the helm, the ordinary market mechanisms by which shareholders may defenestrate an unfaithful manager are unavailable, and it is that fact that necessitates judicial intervention.[170] This explains why courts have adopted entire fairness review (and *MFW* cleansing) even for transactions that do not require a shareholder vote in the first instance: when the disinterested stockholders are powerless, *none* of the mechanisms of private ordering, including independent director approval, can be trusted to function effectively.

If that is the case, then the flaw in the current approach may lie in the distance between the disease and the cure: courts' focus should not be exclusively on whether the interested party has dominated the board in the past, but also on whether it is immune to shareholder discipline in the future. Under this test, the case for control would be stronger against those who enjoy an ongoing, pervasive influence over the company, if not by equity stakes then by contract (as existed in *Corwin* and *FrontFour*), whereas the case would be comparatively weaker for advisors hired to facilitate a single transaction, as in *RBC*. In the context of a merger vote, courts might consider whether the interested parties would be in a position to wreak vengeance should the deal fall through, and, if they did, whether the remaining shareholders would be able to remove them from their perch. To be sure, reorienting the test in this manner would not be a complete panacea—indeed, the effects may be slight—but it might help guide courts and provide them with some comfort that reliance on the more pedestrian indicia of control will not subsume the inquiry.

This framework could also inform the analysis when a majority of the board is deemed dependent on an interested party to a transaction, as in *Liberty Broadband*. There, the court found a lack of control because Liberty was contractually prohibited from obtaining more than thirty-five percent of Charter's stock and could not solicit proxies, but those same contracts guaranteed that Liberty would always have the right to nominate four directors to a ten-member board, all of whom were to serve on critical board committees.[171] Liberty's embedded control rights over the company, coupled with other directors'

169. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994).

170. *See* Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (holding that controlling stockholder deals receive entire fairness review because of "the reality that . . . the controlling shareholder will continue to dominate the company regardless of the outcome of the transaction").

171. *See Sciabacucchi I*, No. 11418-VCG, 2017 WL 2352152, at *7–14 (Del. Ch. May 31, 2017).

dependence, may have made it nearly impossible to dislodge, which in turn should have favored a finding of control. But by the same token, if a corporation were to undertake a transaction involving a single interested director, even one with multiple board relationships, a court might appropriately conclude that the director was not a controller because of the (relative) ease with which she and/or her compatriots could be ousted. In evaluating the situation, the court might consider such factors as the existence or absence of shareholder proxy access, the presence of a staggered board, plurality versus majority voting, or a high proportion of inside ownership. The court might even take into account the board's history of responsiveness to shareholder demands, such as its implementation of precatory shareholder proposals. For example, in *In re Oracle Corp. Derivative Litigation*,[172] the Chancery Court treated a company's failure to modify executive pay packages in the face of shareholder disapproval as suggestive of a putative controller's influence.

A focus on shareholders' power of self-help might also aid courts in distinguishing between persons with coincident interests and persons who coordinate to form a controlling block. For example, had the transaction in *PNB* failed, there was no chance that the shareholders outside of the "golden circle"[173] could replace the directors who had advocated for a self-interested reorganization, and there was every possibility that the directors and their supporters would have the power and incentive to tunnel value from the company to themselves by alternative means. By contrast, if a critical mass of unaffiliated institutional blockholders in a public company all favored a merger due to their private interests—imagine a group of mutual funds who all hold shares in both a target and acquirer[174]—they would still be unlikely to share sufficient common interests and incentives to steer corporate benefits to themselves if the deal fell through. Unaffiliated shareholders, in other words, would not fear the continuing existence of a unified power set against them if the deal was rejected.[175]

In her article *Beyond Beholden*, Professor Lin recommends a parallel type of analysis for determining a controller's ability to sway nominally independent directors. She finds that when a controlling

172. No. 2017-0337-SG, 2018 WL 1381331, at *16 (Del. Ch. Mar. 19, 2018).

173. *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *1 (Del. Ch. Aug. 18, 2006).

174. *See* Lipton, *supra* note 2, at 311–14 (discussing this increasingly common scenario).

175. Similarly, we may have few concerns about shareholder ratification of nonemployee director compensation because these directors, presumably, do not share a private interest with a significant portion of the stockholder base that would allow them to weather future challenges, and their individual interests may prevent them from coordinating with each other to leech value from the company by alternative means.

stockholder consists of a group of persons, the group may lack cohesion and be unable to dole out reward or punishment with any consistency; the group's influence may therefore be correspondingly lessened.[176] As she puts it, "[W]hen power is diffused, decisions are always the product of give-and-take. No matter his leverage, each actor's ability to influence the outcome is ultimately dependent on the consent of the other actors, and this power reduces to nothingness if consent is withdrawn."[177] She therefore recommends that courts consider the controller's own degree of cohesion when determining the appropriate level of scrutiny to apply to a challenged transaction.[178] The flipside of that inquiry would consider the role of consent by the unaffiliated stockholders—and the likelihood of its withdrawal going forward—as part of the determination as to whether a person or group of persons constitutes a minority controller in the first instance.

A focus on the power of unaffiliated shareholders would also allow for a more nuanced approach to disputes within private companies. Imagine, for example, a startup that has allocated certain control rights to venture capitalists while simultaneously issuing a substantial amount of common stock as compensation to its rank-and-file employees. In this scenario, the common stockholders might be viewed as especially powerless relative to the capital providers. By contrast, when common stock is more tightly held—perhaps limited to founding members who also occupy managerial positions—the founders may be viewed as possessing greater ability to protect themselves in disputes with their investors, making it less likely that capital providers will be deemed to be controllers.[179]

To be sure, in most cases, minority controllers are unlikely to be entirely insulated from challenge. In *OTK Associates, LLC v. Friedman*,[180] for example, Vice Chancellor Laster assumed the defendant to be a controller due to a combination of contractual rights and director relationships, notwithstanding the fact that by the time of his decision, the entire board had been ousted in a proxy contest led by the plaintiff (assisted in part by the court's own preliminary injunction preserving the status quo against the board's defensive measures). Similarly, imperial CEOs and founders whose names are nearly synonymous with their companies may appear indispensable—and

176. *See* Lin, *supra* note 21 (manuscript at 39).

177. *Id.* (manuscript at 37–38).

178. *Id.* (manuscript at 41).

179. *Cf.* Pollman, *supra* note 59 (manuscript at 36) (describing how manager-stockholders often receive "sweeteners" in VC-orchestrated buyouts, demonstrating that these stockholders enjoy greater power than their employee-stockholder counterparts).

180. 85 A.3d 696 (Del. Ch. 2014).

thus impossible to unseat—but, as the saying goes, corporate graveyards are filled with the bodies of indispensable executives.[181] That said, the inquiry into control status should not depend on a finding of complete powerlessness on the part of shareholders, but instead should take into account whether the shareholders may encounter unusual obstacles in their efforts to reassert control.

There are further implications to approaching the inquiry from the point of view of the unaffiliated shareholders. Suppose a controlling shareholder initiates negotiations with the board but then *relinquishes* control of the company—by, for example, shedding its stake—prior to a shareholder vote. The Delaware Supreme Court has suggested that the *MFW* standard still applies because the deal presented to shareholders will be tainted by the controller's lingering influence.[182] But in this scenario, shareholders are now free to protect themselves via ordinary market mechanisms. Once the specter of a thwarted controller is removed, there is no reason shareholders cannot evaluate a transaction negotiated under the shadow of a (former) controller's self-interest in the same way they are presumed to be able to evaluate director-interested transactions under *Corwin* and its ilk.[183] Of course, by the same token, should a party *become* a controller after board negotiations but prior to the vote, *then* the transaction should be held to *MFW*

181. *See, e.g.*, Catherine Clifford, *Uber's Travis Kalanick isn't the Only One—Why Steve Jobs, Jack Dorsey and Others were Ousted From the Companies They Founded*, CNBC (June 22, 2017), https://www.cnbc.com/2017/06/22/ousted-founders-ubers-travis-kalanick-steve-jobs-and-jack-dorsey.html [https://perma.cc/K2QN-KLKU] (describing the ouster of, inter alia, Uber's Travis Kalanick and Apple's Steve Jobs); Elizabeth A. Harris, *For Dov Charney of American Apparel, An Abrupt Fall From Grace*, N.Y. TIMES, (June 19, 2014), https://www.nytimes.com/2014/06/20/business/dov-charney-american-apparel-founder-ousted-amid-inquiry.html [https://perma.cc/RF2Y-LMJU] (describing the ouster of American Apparel's Dov Charney); Laura M. Holson, *A Quiet Departure for Eisner at Disney*, N.Y. TIMES (Sept. 26, 2005), https://www.nytimes.com/2005/09/26/business/media/a-quiet-departure-for-eisner-at-disney.html [https://perma.cc/A2LZ-Z66B] (describing the ouster of Disney's Michael Eisner); Julie Jargon, *Papa John's Founder John Schnatter to Leave Board*, WALL ST. J. (Mar. 5, 2019), https://www.wsj.com/articles/papa-johns-founder-john-schnatter-to-leave-board-11551787717 [https://perma.cc/BC6A-V6GY] (describing the ouster of Papa John's John Schnatter); Chris Kirkham et al., *Steve Wynn Steps Down as Wynn Resorts CEO*, WALL ST. J. (Feb. 7, 2018), https://www.wsj.com/articles/steve-wynn-to-step-down-as-wynn-resorts-ceo-1517972210 [https://perma.cc/92SG-BW7E] (describing the ouster of Wynn Resorts' Steve Wynn); David Gelles et al., *WeWork C.E.O. Adam Neumann Steps Down Under Pressure,* N.Y. TIMES (Sept. 24, 2019), https://www.nytimes.com/2019/09/24/business/dealbook/wework-ceo-adam-neumann.html [https://perma.cc/RG5G-USFM] (describing the ouster of WeWork's Adam Neumann).

182. *See* Olenik v. Lodzinski, 208 A.3d 704, 719 (Del. 2019) ("[D]efendants are not entitled to a pleading stage dismissal based on lack of control because the facts pled support the reasonable inference that EnCap acted as Earthstone's controlling stockholder while key economic negotiations took place between Earthstone and Bold which set the financial playing field for later negotiations.").

183. This, of course, assumes that the voting shareholders are aware of their newly emancipated status. In *Olenik*, the putative controlling stockholder continued to describe itself as such in SEC filings after shedding much of its voting power. *See id.* at 718.

standards, in recognition of the unaffiliated shareholders' continuing vulnerability.

That said, one drawback to evaluating a putative controller's continuing influence is the relative indeterminacy of the inquiry; parties may have difficulty predicting, in advance, how a court is likely to adjudge their legal status. But if the above discussion demonstrates anything, it's that the current test is hardly a font of clarity. Moreover, if transaction planners respond to uncertainty by voluntarily adopting strong cleansing measures for interested transactions, so much the better; this is precisely what Delaware law is designed to encourage.[184] Indeed, it is quietly acknowledged among the Delaware bar today that *Corwin*'s protections are so robust that corporate attorneys have trouble persuading their clients to adopt best practices;[185] a little uncertainty surrounding the controlling shareholder determination (so long as there remains an appropriate theoretical through line) may be just what the doctor ordered.[186]

Another objection may be something like fear of doctrinal drift. In the context of mergers, for example, Delaware law holds that corporate directors of a target company may not agree to terms or employ defensive tactics that would preclude potential acquirers from making a successful topping bid.[187] In practice, however, Delaware has accepted an increasingly optimistic—some might say artificial—view of how a disfavored bidder might hypothetically defeat deal protection devices and other defensive measures. The effect, then, is to grant managers broad discretion to forestall hostile bids and favor friendly ones.[188] A test for controlling status that focuses attention on

184. *See MFW*, 88 A.3d 635, 643 (Del. 2014) ("[T]he common law equitable rule that best protects minority investors is one that encourages controlling stockholders to accord the minority both procedural protections."); Dell v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 37 (Del. 2017) (endorsing particular appraisal valuation techniques in part because they will encourage best practices).

185. *See* Slights, *supra* note 49, at 21.

186. This highlights another problem with drawing an inference of control from parties' adoption of *MFW* protections, as the *Olenik* court recommended. *See Olenik*, 208 A.3d at 718 n.71. Parties may be hesitant to adopt shareholder-protective practices if doing so will eliminate potential lines of defense in future litigation. Moreover, even before *MFW*, it was common for interested transactions to be structured with multiple cleansing measures, if only to generate stockholder support. *See generally* Cain & Davidoff, *supra* note 55. And for certain types of transactions, arm's length bargaining may redound to the corporation's benefit in a subsequent appraisal action. *See Dell*, 177 A.3d at 37 (deferring to deal price in part due to cleansing measures employed in the bargaining process).

187. *See, e.g.*, Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 935 (Del. 2003); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1387 (Del. 1995).

188. James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 349–60 (2018); *see also* Steven M. Davidoff & Christina M. Sautter, *Lock-Up Creep*, 38 J. CORP. L. 681, 701–08 (2013).

shareholders' ability to overthrow a tyrant might similarly become so narrowed as to be all but meaningless.

It seems the only answer is for courts to remain mindful of the concerns that animated additional scrutiny of controlling shareholder transactions in the first place. This is not an area where the law adopts a philosophy of caveat emptor; to the contrary, it is often argued that the United States' broad protections for minority shareholders function as a critical device for encouraging investment and facilitating the efficient allocation of capital.[189] The treatment of putative controllers should reflect that reality.

CONCLUSION

Delaware's difficulties in dealing with controlling shareholders are not new; inconsistencies and ambiguities go back decades. But the combination of *Corwin*, *C & J Energy*, and *MFW* have spotlighted those doctrinal fissures by requiring courts to draw artificially sharp distinctions between control and noncontrol transactions when in fact control exists on an increasingly nuanced spectrum. The distance between the legal inquiry and the factual reality may be unsustainable; in time, we may expect either a relaxation of *Corwin*—as courts draw more inferences of control or find other ways to evade its strictures[190]—or, perhaps, a tightening of *MFW*: the Delaware Supreme Court may continue down the path it began in *Corwin* by narrowing the definition of control in the first place, or it may simply limit entire fairness review, and *MFW* cleansing, to a small subset of controller transactions.

That said, *Corwin* itself may be inherently unstable. The decision is traceable to the Delaware Supreme Court's perception that today's powerful and diversified institutional shareholders have less need for judicial protection than the retail shareholders of days past,[191] but these institutions may be riven with conflicts that undermine the assumption of disinterest on which *Corwin* depends.[192] At the same time, the power that shareholders wield is not static: regulatory efforts

189. *See* John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 NW. U. L. REV. 641, 644 (1999); Mark J. Roe, *Corporate Law's Limits*, 31 J. LEGAL STUD. 233 (2002); *see also* Gilson & Gordon, *supra* note 5, at 789; Leo E. Strine, Jr., *The Soviet Constitution Problem in Comparative Corporate Law: Testing the Proposition that European Corporate Law is More Stockholder Focused than U.S. Corporate Law*, 89 S. CAL. L. REV. 1239 (2016); Marco Ventoruzzo, *Freezeouts: Transcontinental Analysis and Reform Proposals*, 50 VA. J. INT'L L. 841, 910 (2010).

190. *Sciabacucchi I*, No. 11418–VCG, 2017 WL 2352152, at *20–24 (Del. Ch. May 31, 2017) (coercion of shareholder vote negated any ratifying effect under *Corwin*).

191. *See* Lipton, *supra* note 2, at 318–19 (explaining the purported rationale for Delaware's shifting standards of review).

192. *See id.* at 309–14 (discussing conflicts that arise from divergent investor preferences).

are already underway to introduce new limitations. For example, the SEC may soon restrict the activities of proxy advisors[193] and may curtail shareholders' access to the proxy ballot.[194] The Trump administration is also attempting to stifle pension funds' involvement in corporate governance.[195] If Delaware courts come to perceive that a small number of shareholders are so powerful that their votes operate to exploit the others—or that shareholders' power has been reduced to the point where they are no longer positioned to protect themselves—the pendulum may swing back toward more robust forms of judicial review. The controlling shareholder problem will not disappear, but it could be submerged again as new types of conflicts bubble to the surface.

193. Amendments to Exemptions from the Proxy Rules for Proxy Voting Advice, Exchange Act Release No. 87457 (Nov. 5, 2019).

194. Procedural Requirements and Resubmission Thresholds Under Exchange Act Rule 14a-8, Exchange Act Release No. 87458 (Nov. 5, 2019).

195. *See* U.S. DEP'T OF LABOR, FIELD ASSISTANCE BULL. NO. 2018-01 (2018); Exec. Order No. 13868, 84 Fed. Reg. 15495 (Apr. 10, 2019) (describing a plan to evaluate ERISA funds' corporate governance activities related to environmental and social issues).