CONTROLLING SHAREHOLDER PRIMACY

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In just eight months, Delaware's legislature upended over fifty years of corporate law. Its courts had long upheld shareholder primacy, treating shareholders equally in proportion to their ownership. But after several controversial decisions reinforced this principle, sudden amendments to the corporate code shifted the law toward a distinct paradigm: controller primacy.

While motivated by legitimate concerns, the legislation went too far, threatening to fundamentally realign corporate power and purpose. Contrary to shareholder primacy, the new regime disproportionately prioritizes controlling shareholders above all others. It authorizes contracts that cede the board's managerial authority to controllers, insulates their self-dealing from shareholder approval and judicial review, affords them a silent safe harbor from liability, and curtails the information rights of any who would challenge them. Crucially, the amendments conflate traditional majority shareholders, whose large equity stakes align their economic incentives with minority investors, with a growing class of "small" controllers who wield outsized authority through super-voting stock or governance contracts.

This broad empowerment and immunization needlessly risk mismanagement and expropriation by controllers whose interests diverge from other shareholders. To reduce these risks, this Article proposes statutory corrections that recalibrate procedural safeguards based on cash-flow rights rather than voting power. By linking control to economic alignment, Delaware can preserve the benefits of visionary leadership that its legislature sought to promote, while protecting minority investors pursuant to its longstanding principles of corporate governance.

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INTRODUCTION 678
I. SHAREHOLDER PRIMACY IN THEORY AND DOCTRINE 684
A. From Dicta to Dogma 684
B. Corporate Authority and Purpose 688
C. The Nature of Primacy 690
D. Proportionality 693
II. THE LAW GOVERNING CONTROLLING SHAREHOLDERS 695
A. The Historical Approach 695
B. Recent Jurisprudence 696
C. The Legislative Reaction 700
1. Section 122(18): Shareholder Agreements 700
2. Section 144: Controller Transactions 703
3. Section 220: Books and Records Requests 707
III. THE EMERGING PARADIGM OF CONTROLLER PRIMACY 709
A. Corporate Authority 710
B. Corporate Purpose 711
C. Disproportionality 715
IV. RISKS AND REFORMS 716
A. The Costs and Benefits of Control 716
B. The Imbalanced Jurisprudence 720
C. The Imbalanced Amendments 721
D. A Balanced Correction 724
CONCLUSION 728

INTRODUCTION

For over half a century, Delaware corporate law has followed shareholder primacy as its guiding principle.[1] Despite its centrality and ubiquity, this concept is often misunderstood. In the popular imagination and even some academic circles, it can be a caricature of shortsighted greed: the relentless pursuit of profits at the expense of society and the environment.[2] As a theory,

1. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440–41 (2001) (proclaiming an "emerging consensus" that "ultimate control over the corporation should rest with the shareholder class" and "the managers of the corporation should be charged with the obligation to manage the corporation in the interests of its shareholders"); STEPHEN M. BAINBRIDGE, THE NEW CORPORATE GOVERNANCE IN THEORY AND PRACTICE 201 (2008) (describing shareholder primacy as "the dominant normative model" of corporate governance); Ann M. Lipton, *The Legitimation of Shareholder Primacy*, 51 J. CORP. L. 83, 87–88 (2025) (describing shareholder primacy as central to Delaware corporate law). For the history of shareholder primacy's rise to dominance, see *infra* Part I.A.

2. *See, e.g.*, Joe Nocera, *Down with Shareholder Value*, N.Y. TIMES (Aug. 10, 2012), https://www.nytimes.com/2012/08/11/opinion/nocera-down-with-shareholder-value.html (on

however, shareholder primacy posits a more nuanced and less nefarious ideal: A corporation's ultimate (but not exclusive) authorities and beneficiaries are its shareholders,[3] treated equally in proportion to their ownership.[4]

Under this regime, the corporation is analogous to a republic in which the collective body of shareholders elects directors who manage the business and, in turn, owe fiduciary duties of care and loyalty to that same collective.[5] This principle is often tested when a corporation has a controlling shareholder, also called a "controller": someone who holds enough voting power or influence to appoint the directors or otherwise manage the business on its own.[6] In that situation, shareholder primacy would lead the law to subordinate the controller's personal interests to all shareholders' collective interests whenever the two conflict.[7] To that end, legal rules and equitable principles gradually developed to prevent insiders from extracting private

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file with the *Fordham Law Review*) (arguing that corporations' focus on maximizing shareholder value fosters destructive short-termism and led to the 2008 financial crisis); LYNN STOUT, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS, AND THE PUBLIC, at vi (2012) ("Shareholder value thinking causes corporate managers to focus myopically on short-term earnings reports at the expense of long-term performance; discourages investment and innovation; harms employees, customers, and communities; and causes companies to indulge in reckless, sociopathic, and socially irresponsible behaviors."); Grant M. Hayden & Matthew T. Bodie, *The Problem of Purpose in Corporate Law*, 62 HOU. L. REV. 611, 614 (2025) (equating shareholder primacy to "rapacious profitmaking").

3. *See* Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563 (2003).

4. *See* Hansmann & Kraakman, *supra* note 1, at 442 ("The shareholder-oriented model does more than assert the primacy of shareholder interests, however. It asserts the interests of all shareholders, including minority shareholders. More particularly, it is a central tenet in the standard model that minority or noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders. In publicly traded firms, this means that all shareholders should be assured an essentially equal claim on corporate earnings and assets."). For more detailed analysis of proportionality in shareholder primacy, see *infra* Part I.D.

5. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. Ch. 1988) ("The shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests."); Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985) (citing Loft, Inc. v. Guth, 2 A.2d 225 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939)) ("In carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders.").

6. In line with Delaware jurisprudence prior to the 2025 amendments to the Delaware General Corporation Law, DEL. CODE ANN. tit. 8, §§ 101–398 (2026), this Article uses the terms "controlling shareholder" and "controller" in the traditional sense of a shareholder who "exercises control over the business affairs of the corporation," even without a certain percentage of share ownership. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994) (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)). Thus, these terms include majority shareholders but are not limited to them. As discussed at length in Part IV, they also extend to shareholders who control the firm through dual-class stock structures and contractual governance rights.

7. Hansmann & Kraakman, *supra* note 1, at 441 (explaining that the "'standard shareholder-oriented model' of the corporate form" holds that "noncontrolling shareholders should receive strong protection from exploitation at the hands of controlling shareholders").

benefits from the firm at outside investors' expense.[8] In navigating evolving business practices, Delaware courts sought a balance that prioritized all shareholders' aggregate welfare over any individual's unique desires, while still permitting a controller to deal with its own corporation in compliance with rigorous procedural safeguards.[9]

Then, in 2024 and 2025, the state legislature upended this balance. After a series of court decisions reiterated shareholder primacy by prioritizing the shareholder collective over a controller,[10] the Delaware General Assembly reacted quickly and forcefully with two landmark bills. Amid widespread fears that technology firms led by influential controllers like Elon Musk and Mark Zuckerberg would abandon the state,[11] the legislature enacted the most impactful amendments to the Delaware General Corporation Law[12] (DGCL) since its modern era began in 1967.[13] Although the lawmakers had legitimate concerns that recent jurisprudence would stifle innovation by limiting controllers' autonomy,[14] the amendments did not simply override those

8. *See generally* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 789–804 (2003) (summarizing Delaware law regarding the extraction of private benefits of control by controlling shareholders).

9. *See, e.g.*, Kahn v. M&F Worldwide Corp., 88 A.3d 635, 639, 644 (Del. 2014) (providing a new transactional procedure to avoid judicial review of "freeze-out mergers" with controlling shareholders).

10. *See* Tornetta v. Musk, 310 A.3d 430, 520–44 (Del. Ch. 2024) (holding that a controlling shareholder's equity compensation package was not entirely fair, after determining that shareholder vote approving it was not fully informed), *aff'd in part, rev'd in part sub nom. In re* Tesla, Inc. Derivative Litig., Nos. 534, 2024; 10, 2025; 11, 2025; 12, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025); W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 869 (Del. Ch. 2024) (holding that a contract granting a controlling shareholder consent rights over key board decisions was facially invalid because it impermissibly constrained the directors' duty to manage the corporation for all shareholders' benefit), *rev'd on other grounds*, 360 A.3d 215 (Del. 2026); *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 451 (Del. 2024) (holding that courts will subject any transaction in which a controlling shareholder receives a benefit that is not shared pro rata with other shareholders to entire fairness review, unless the transaction is approved by both a completely independent board committee and a majority of minority shareholders).

11. *See* Stephen M. Bainbridge, *DExit Drivers: Is Delaware's Dominance Threatened?*, 50 J. CORP. L. 823, 823, 825–27 (2025) ("Widespread discussion of the potential for mass DExit was triggered by recent criticisms from business leaders and prominent corporate lawyers."); Emily Glazer, Berber Jin & Meghan Bobrowsky, *Meta in Talks to Reincorporate in Texas or Another State, Exit Delaware*, WALL ST. J. (Jan. 31, 2025, at 17:18 ET), https://www.wsj.com/tech/meta-incorporation-texas-delware-f06e8bab (on file with the *Fordham Law Review*).

12. DEL. CODE ANN. tit. 8, §§ 101–398 (2026).

13. *See* Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform—or the Beginning of an Unraveling?*, THE CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling [https://perma.cc/9737-U6BX] ("If adopted, [Senate Bill 21] would mark the most significant single-year revision of Delaware's corporate code since at least 1967, reshaping everything from how controlling stockholders negotiate major transactions to the mechanics of derivative litigation and shareholder access to corporate records.").

14. *See* Zohar Goshen, Assaf Hamdani & Dorothy Lund, *Fixing* MFW*: Fairness and Vision in Controller Self-Dealing*, 15 HARV. BUS. L. REV. 577, 591 n.69 (2025) (explaining that the law governing transactions with controlling shareholders affects "innovative entrepreneurs who seek to execute transformative ideas across the country").

controversial cases. Instead, they abandoned the foundational principle of shareholder primacy with respect to the large and economically significant class of corporations with controlling shareholders.[15]

For these "controlled corporations," this Article argues that Delaware is shifting from that prevailing theory to a distinct paradigm: controller primacy.[16] Under this emerging regime, a controlled corporation's ultimate authority and beneficiary collapse from all shareholders to only the controlling shareholder, which derives power and benefits from its control, not just its proportional share ownership. Instead of shareholder primacy's balance between a controller's individual preferences and all shareholders' collective welfare, controller primacy firmly favors the former. Those with sufficient power and influence over a corporation are expressly liberated to govern by private contract, more easily insulated from judicial review of their actions, and less likely to face challenges from other shareholders.[17]

Currently, this paradigm shift is limited to controlled corporations and does not ostensibly affect other firms, for which shareholder primacy may remain accurate. However, this shift's potential scope is even broader than the already significant and growing proportion of controlled corporations may suggest,[18] because the legislation that portends controller primacy will likely proliferate these firms even further. While one amendment makes control easier to acquire,[19] another set of amendments makes it more valuable to exercise.[20] As powerful founders and investors respond to the resulting

15. *See infra* Part II.C.

16. This Article is not the first to coin the phrase "controller primacy," but it is the first to explain and explore this concept in depth. Professor Christine Hurt's recent article uses the same phrase in the title but mentions it only four times in the text without defining it or describing its implications. Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. 693, 700, 703, 747 (2025). Instead, that article is primarily focused on a comparison between Texas's and Delaware's corporate laws in effect before 2025. Despite using this common phrase, this Article and Professor Hurt's are almost entirely different in purpose and substance.

17. *See infra* Part II.

18. *See* Jonathan Ponder, *How Ownership Can Shape Outcomes*, MSCI (Aug. 19, 2025), https://www.msci.com/research-and-insights/blog-post/how-ownership-can-shape-outcomes [https://perma.cc/ZFN9-WVVP] ("The number of controlled firms has risen over the last decade, and they are now the most common ownership type by count in the MSCI ACWI Index."); JAY R. RITTER, INITIAL PUBLIC OFFERINGS: DUAL CLASS STRUCTURE OF IPOS THROUGH 2025, at tbl. 23 (2026), https://site.warrington.ufl.edu/ritter/files/IPOs-Dual-Class.pdf [https://perma.cc/4TM5-G37P] (finding that firms that are controlled through dual-class stock structures remain a significant portion of initial public offerings, particularly in the technology sector).

19. As discussed *infra* Part II.C.1, the new DGCL section 122(18) facilitates control through private contract rather than shareholder voting rights, which permits any shareholder with sufficient influence over the board of directors to become a controller regardless of the size of its shareholding.

20. *See* Lucian A. Bebchuk & Kobi Kastiel, *Controllers Unbound*, 105 TEX. L. REV. (forthcoming 2027) (manuscript at 30–32) (on file with the *Fordham Law Review*) (explaining that Senate Bill 21 will lead corporations with "small-minority controllers" to proliferate because "the relaxation of controller constraints should be expected to increase the value of control and the private benefits associated with it" and the legislation "will enable controllers to issue shares to fund investments and sell part of their equity capital without any reduction in their voting power").

incentives to obtain and retain control, controller primacy's impact will expand.

This Article makes three main contributions to academic literature. First, while scholars have discussed theories of the firm for decades in terms of shareholder primacy and its perennial antagonist, "stakeholderism,"[21] this Article develops controller primacy as a distinct theory outside this exhausted dichotomy. As controlled firms rise in prominence and number, this new model could facilitate discourse about legal developments in Delaware and beyond.[22] Second, unlike recent articles analyzing the latest DGCL amendments individually,[23] this Article assesses their combined effects. For example, one amendment has enshrined a new type of controlling shareholder that is exempt from the cleansing process provided by another amendment, thus creating a new, silent safe harbor from liability.[24] Third, while current and prior rules regarding controller transactions—among the most contentious areas of corporate law—are based entirely on shareholders' voting power,[25] this Article proposes an alternative framework that also accounts for a controller's economic alignment with other shareholders.[26] This system represents an efficient middle ground between the overly protective jurisprudence of recent years and the overly permissive legislation that followed. If implemented, these proposals may finally achieve one of corporate law's most longstanding yet elusive objectives by balancing minority protection and controller autonomy.

To these ends, Part I of this Article explains the foundational concept of shareholder primacy in theory and in law. After tracing this view's ascendance over the past century,[27] it demonstrates that, as a descriptive claim, shareholder primacy calls for *prioritization* of shareholder value, not *maximization* per popular misconceptions.[28] The law sets this standard not

21. *See, e.g.*, Ann M. Lipton, *Will the Real Shareholder Primacy Please Stand Up?*, 137 HARV. L. REV. 1584, 1588–91 (2024) (book review) (describing the "shareholder/stakeholder divide" in debates over corporate purpose); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 103–08 (2020) (describing the history of stakeholder governance as contrasted with shareholder primacy).

22. A burgeoning trend in corporate law scholarship is comparing various states' laws. *E.g.*, Hurt, *supra* note 16, at 701 (comparing Delaware and Texas); Michal Barzuza, *Nevada v. Delaware* 3–7 (Eur. Corp. Governance Inst., Working Paper No. 761/2024, 2026), https://ssrn.com/abstract=4746878 (on file with the *Fordham Law Review*) (comparing Delaware and Nevada). This Article's exposition of controller primacy could facilitate deeper inquiries into the theories of the firm animating each state's approach to corporate law.

23. *E.g.*, Hurt, *supra* note 16, at 747–49 (analyzing risks arising from Senate Bill 21 without addressing Senate Bill 313); Goshen et al., *supra* note 14, at 600 (same); Gabriel Rauterberg & Sarath Sanga, *Altering Rules: The New Frontier for Corporate Governance*, 42 YALE J. ON REGUL. 291, 322–25 (2025) (analyzing Senate Bill 313 without addressing Senate Bill 21); Mark Lebovitch, *Soap Opera Summer: Five Predictions About Delaware Law's Response to New DGCL 122(18)*, 15 HARV. BUS. L. REV. 283, 285–86 (2024) (analyzing Senate Bill 313 before Senate Bill 21 was enacted).

24. *See infra* notes 185–91 and accompanying text.

25. *See infra* Parts IV.B–C.

26. *See infra* Part IV.D.

27. *See infra* Parts I.A–B.

28. *See infra* Part I.C.

just by imposing enforceable duties on fiduciaries, but also by shaping their discretionary authority and the incentives that inform their decisions. Moreover, shareholder primacy entails proportionality, with all shares of the same class or series treated equally.[29] In addition to explaining this dominant regime, these observations facilitate this Article's subsequent analysis by illuminating the factors that identify which theory of the firm accurately describes the law at any point.

Against this theoretical background, Part II traces shareholder primacy's historical integration and ongoing collapse in Delaware's laws governing controlling shareholders. It first chronicles how judicial standards of review and procedural safeguards have evolved over the past fifty years to protect the firm and minority shareholders from abuse by controllers, pursuing the ideal that the corporation should be run for all shareholders' proportional benefit.[30] Then, after a string of controversial cases upheld this principle and expanded those protections, a swift legislative backlash beginning in 2024 empowered and immunized controllers at minority shareholders' expense, contrary to shareholder primacy.[31]

To portray the law governing controlled firms more accurately after this monumental legislation, Part III formulates controller primacy as a distinct descriptive theory of the firm. Controllers can now use contracts to bypass the board's statutory right to manage the business, which severs shareholder primacy's alleged principal-agent relationship between the shareholder collective and the board of directors.[32] Now, only the controller can purport to be the board's principal. In addition, the amendments insulate most transactions from liability and limit other shareholders' access to information about them.[33] Together, these changes have tilted the delicate balance of fiduciaries' duties and incentives away from prioritizing all shareholders equally in proportion to their shares. Increasingly, the weight of those duties and incentives tips the scale toward a controller's interests whenever they diverge from other shareholders' interests. Although a controller is a species of shareholder, controller primacy is not just a species of shareholder primacy. It is a fundamentally different theory in which corporate authority and purpose are based on control, not just shareholding.

Following the first three parts' descriptive analysis, Part IV offers a normative perspective on Delaware's move toward controller primacy. Engaging with other scholars' analysis of the costs and benefits of controller autonomy, this part argues that this paradigm shift may exacerbate mismanagement and expropriation in controlled firms. The recent amendments conflate three distinct types of controllers, including a new category created by the amendments themselves. Traditional majority shareholders have the same economic incentives as minority shareholders

29. *See infra* Part I.D.
30. *See infra* Part II.A.
31. *See infra* Parts II.B–C.
32. *See infra* text accompanying note 240.
33. *See infra* note 260 and accompanying text.

and can generally be expected to act in all shareholders' interests. In contrast, neither can be said for two categories of "small" controllers—that is, shareholders who lack a majority equity stake but still control the corporation through super-voting stock or newly authorized governance contracts. Accordingly, only majority shareholders merit the automatic deference that the new statute grants to all controllers, while small controllers deserve limited checks from other shareholders or the courts. To correct the amendments' overbreadth, this part proposes a novel statutory framework of procedural safeguards based on economic rights rather than just voting power. Cutting through the complexity of dual-class structures and shareholder agreements, this system retains transactional freedom for majority shareholders but limits it for small controllers to the extent of their misalignment with other shareholders. This part also proposes several complementary corrections to further limit agency costs in controlled firms. By once again basing priority on shareholding rather than just control, these changes would shift the paradigm away from controller primacy back toward shareholder primacy. They would surpass the recent legislation in achieving its own legitimate goals, moving Delaware closer to the balance that its corporate law has long sought.

I. SHAREHOLDER PRIMACY IN THEORY AND DOCTRINE

After tracing shareholder primacy's history, this part analyzes this concept as a descriptive account of corporate law rather than a normative ideal of governance, identifying the issues on which any positive theory of the firm depends.

A. From Dicta to Dogma

Originating over a century ago, shareholder primacy began as a controversial judicial doctrine that fell out of fashion before resurging as a dominant economic principle. It then transformed into the legal theory that has anchored Delaware law ever since.

In 1919, this concept found what remains its most direct and prominent judicial proclamation in *Dodge v. Ford Motor Co*.[34] Rejecting Henry Ford's testimony that his car company was "[o]rganized to do as much good as we can, everywhere, for everybody concerned . . . [a]nd incidentally to make money," the Michigan Supreme Court retorted, arguably in dicta,[35] that "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[36]

34. 170 N.W. 668 (Mich. 1919).

35. *Contrast* Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 165 (2008) (arguing that this statement was "merely judicial dicta, quite unnecessary to reach the court's desired result"), *with* Jonathan R. Macey, *A Close Read of an Excellent Commentary on* Dodge v. Ford, 3 VA. L. & BUS. REV. 177, 180 (2008) (arguing that this statement "actually drives the holding and is not mere dicta").

36. *Dodge*, 170 N.W. at 684.

In the 1930s, the legal scholars Adolf A. Berle and E. Merrick Dodd vigorously debated this view of corporate purpose in consecutive volumes of the *Harvard Law Review*. After Berle argued, in line with *Dodge v. Ford*, that corporate managers are shareholders' trustees and must exercise their authority solely for that group's "ratable benefit,"[37] Dodd responded that corporations have a "social service" function which requires managers to benefit not only shareholders but also other constituencies, including employees, consumers, and the wider community.[38] While this academic debate was never quite resolved,[39] in practice managers soon reached a consensus that was closer to Dodd's view, as Berle eventually conceded.[40] During this "managerialist" era from the 1940s through the 1960s, directors viewed their role as mediating among various constituencies affected by the corporation's conduct, rather than just prioritizing shareholders.[41]

Then, the 1970s brought stagnation to the American economy and the ascendance of the Chicago school of economics.[42] Its best-known leader, Professor Milton Friedman, forcefully rejected managerialism as "pure and unadulterated socialism" and decried a corporation's pursuit of "social responsibilities" as an unauthorized "tax" on shareholders, consumers, and employees.[43] Instead, he argued, a corporate executive's "responsibility is to conduct the business in accordance with [the shareholders'] desires, which generally will be to make as much money as possible while conforming to the basic rules of the society."[44]

As this "Friedman doctrine" resonated throughout the business world, Professors Michael C. Jensen and William H. Meckling formalized it in economic literature by stripping the corporation of legal personhood and recasting it as a nexus of contracts among suppliers of a business's inputs, such as capital, labor, and materials.[45] They also redefined corporate governance as an agency relationship in which shareholders owned the

37. Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931).

38. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148, 1151–52 (1932).

39. *See* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1189–90 (2002).

40. ADOLF A. BERLE, JR., THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954) ("The argument has been settled (at least for the time being) squarely in favor of Professor Dodd's contention.").

41. *See* Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (in the Closet)*, 36 SEATTLE U. L. REV. 1169, 1171 (2013).

42. *See* Marylin Bender, *Chicago School Goes to the Head of the Class*, N.Y. TIMES, May 23, 1971, at 3.

43. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sep. 13, 1970, at 33, 122.

44. *Id.* at 33.

45. Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) ("The private corporation or firm is simply one form of legal fiction which serves as a nexus for contracting relationships and which is also characterized by the existence of divisible residual claims on the assets and cash flows of the organization which can generally be sold without permission of the other contracting individuals.").

corporation and, as principals, delegated authority to directors as their agents, who were obligated to manage the business on shareholders' behalf and subject to their control.[46] In turn, shareholders should monitor and control the directors to prevent and limit agency costs, which arise when an agent acts in its own interest instead of its principal's interest.[47]

Despite its apparent departure from basic tenets of business law that corporations are legal persons and directors are not agents,[48] Jensen and Meckling's contractarian, agency-based model of the firm quickly spread beyond economics and finance to permeate legal scholarship. During the 1980s and 1990s, the law and economics movement rewrote corporate law theory in this model's image.[49] In an early move in this direction, Judge Frank H. Easterbrook and Professor Daniel R. Fischel argued that shareholders are the only group entitled to vote for a corporation's directors because, as "residual claimants" entitled to profits only after creditors are paid, they have the most to gain or lose from managerial decisions and thus the best incentives to monitor directors to limit agency costs and increase firm value.[50] These authors later extended the same contractarian and agency principles to explain why directors have fiduciary duties to shareholders and to argue that those duties should require them to maximize shareholder wealth.[51]

Now with a footing in legal academia, the agency framework rapidly transcended the law and economics community to win over "mainstream" corporate law scholars and practicing lawyers.[52] Professor Robert C. Clark reflected this view's expanding influence in his "classic treatise" in 1986.[53]

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46. *Id.* at 309 ("Since the relationship between the stockholders and manager of a corporation fit the definition of a pure agency relationship it should be no surprise to discover that the issues associated with the 'separation of ownership and control' in the modern diffuse ownership corporation are intimately associated with the general problem of agency.").

47. *See id.* at 308 ("If both parties to the relationship are utility maximizers there is good reason to believe that the agent will not always act in the best interests of the principal. The principal can limit divergences from his interest by establishing appropriate incentives for the agent and by incurring monitoring costs designed to limit the aberrant activities of the agent.").

48. RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. f(2) (A.L.I. 2006) (explaining that "directors are neither the shareholders' nor the corporation's agents" because their "powers originate as the legal consequence of their election and are not conferred or delegated by shareholders").

49. *See* Michael J. Meurer, *Law, Economics, and the Theory of the Firm*, 52 BUFF. L. REV. 727, 730–31 (2004).

50. Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403 (1983).

51. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 92 (1991) ("[T]he fiduciary principle is a rule for completing incomplete bargains in a contractual structure."); *id.* at 93 ("To use the fiduciary principle for any purpose other than maximizing the welfare of investors subverts its function by turning the high costs of direct monitoring—the reasons fiduciary principles are needed—into a shield that prevents investors from controlling managers' conduct.").

52. Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in "Corporate Law,"* 31 J. CORP. L. 719, 725 (2006).

53. *Id.* at 719–20.

While distancing himself from the principal-agent model,[54] he acknowledged that shareholder primacy's essence had permeated contemporary thought on corporate law, noting that "lawyers, judges, and economists usually assume" that a corporation's "more ultimate purpose" is "to make profits for its shareholders."[55] Beyond these observations of others' views, he personally asserted, relying primarily on *Dodge v. Ford*, that cases on fiduciary duties could "easily be read to imply profit maximization as the ultimate goal."[56]

By the turn of the century, shareholder primacy had become so ensconced in corporate law that Professors Henry B. Hansmann and Reinier H. Kraakman confidently declared that shareholder primacy had prevailed over all competing theories of the firm,[57] so much so that they referred to it simply as "the standard model."[58] This is not to say that there was *no* competition, as various forms of "stakeholderism" continued to vigorously contest shareholder primacy, contending that "corporate governance should accommodate the needs of both shareholder and nonshareholder constituencies."[59] Most notable among this view's proponents, Professors Margaret M. Blair and Lynn A. Stout argued that "boards exist not to protect shareholders *per se*, but to protect the enterprise-specific investments of *all* the members of the corporate 'team,' including shareholders, managers, rank-and-file employees, and possibly other groups, such as creditors."[60] Despite garnering countless adherents and remaining a persistent foil to shareholder primacy in corporate law casebooks,[61] stakeholderism never found much support in the Delaware case law that it purported to describe.[62]

To the contrary, in the decades since Hansmann and Kraakman categorically proclaimed shareholder primacy's preeminence, that state's courts have increasingly espoused this theory when describing the ultimate objective of corporate governance.[63] Leo E. Strine Jr., former Chief Justice of the Delaware Supreme Court, has repeatedly asserted that "within the limits of their discretion, directors must make stockholder welfare their sole

54. ROBERT C. CLARK, CORPORATE LAW 22 (1986) ("[T]he relationship between shareholders and directors is not well described as being between principals and agents.").

55. *Id.* at 17.

56. *Id.* at 679.

57. Hansmann & Kraakman, *supra* note 1, at 439 ("There is no longer any serious competitor to the view that corporate law should principally strive to increase long-term shareholder value.").

58. *Id.* at 441.

59. Lipton, *supra* note 21, at 1593.

60. Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 253 (1999).

61. *E.g.*, CHARLES R.T. O'KELLEY, ROBERT B. THOMPSON & DOROTHY S. LUND, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 267–74 (10th ed. 2025) (contrasting "shareholder primacy" and "stakeholder primacy" as alternative views in a section on corporate purpose).

62. *See, e.g.*, *In re* Rural Metro Corp. S'holders Litig., 88 A.3d 54, 80 (Del. Ch. 2014) ("Stockholders' best interest must always, within legal limits, be the end. Other . . . constituencies may be considered only instrumentally to advance that end." (citation modified) (quoting Leo E. Strine, Jr., *Our Continuing Struggle with the Idea that For-Profit Corporations Seek Profit*, 47 WAKE FOREST L. REV. 135, 147 n.34 (2012))).

63. *See infra* note 79 and accompanying text.

end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[64] With varying degrees of enthusiasm, other prominent corporate law scholars have continued to acknowledge that shareholder primacy has remained the dominant descriptive account of corporate law.[65]

B. Corporate Authority and Purpose

Any descriptive account of corporate law must answer two separate questions.[66] First, who is the corporation's ultimate decision-maker? Second, who is the corporation's ultimate beneficiary?[67] In other words, each theory of the corporation makes separate claims about corporate authority and corporate purpose.[68] Shareholder primacy provides the same answer to both questions: Shareholders are both the firm's ultimate decision-makers and its ultimate beneficiaries.[69]

As to corporate authority, the orthodox formulation of shareholder primacy holds that shareholders own the corporation and, as principals, delegate their decision-making authority to directors, who oversee the firm as the shareholders' agents.[70] Shareholders exercise ultimate control over the corporation primarily by voting to elect or remove directors and by suing directors and officers for breaching fiduciary duties.[71]

In contrast to this standard model, Professor Stephen M. Bainbridge offers a variation called "director primacy," which treats directors as the corporation's true leaders, with authority conferred by statute, not delegated

64. Leo E. Strine, Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 768 (2015); *accord* Leo E. Strine, Jr., *A Job Is Not a Hobby: The Judicial Revival of Corporate Paternalism and Its Problematic Implications*, 41 J. CORP. L. 71, 106 (2015) ("Delaware case law is clear that the board of directors of a for-profit corporation chartered under the [DGCL] must, within the limits of its legal discretion, treat stockholder welfare as the only end, considering other interests only to the extent that doing so is rationally related to stockholder welfare.").

65. *Compare* Ann M. Lipton, *What We Talk About When We Talk About Shareholder Primacy*, 69 CASE W. RSRV. L. REV. 863, 866 (2019) ("[T]hough there are continuing debates about whether the law mandates shareholder primacy—and even more debates about whether the law *should* place shareholder welfare at the center of corporate purpose—most commenters would likely agree that shareholder primacy, whatever its faults, accurately describes the legal regime today, either as a formal matter or in practical effect."), *with* STEPHEN M. BAINBRIDGE, THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION 1 (2023) ("[S]hareholder value maximization is both what the law requires and what the law ought to require.").

66. Bainbridge, *supra* note 3, at 549–50.

67. *See id.*

68. *See id.*

69. *See id.* at 563–64.

70. *See supra* text accompanying notes 45–51. Unlike this traditional *economic* analysis, agency *law* is quite clear that directors are not agents of shareholders or even the corporation itself, because their authority to manage the firm is statutory, not delegated by a principal. *See supra* note 48 and accompanying text. While accepting that distinction, this Article entertains the agency-based model of shareholder primacy simply to facilitate discourse with relevant scholarship, not to assert its legal validity.

71. *See* Bainbridge, *supra* note 3, at 568–69.

by shareholders.[72] Director primacy may better describe Delaware law, which expressly obligates the board to manage the corporation's business and, until recently, has not expressly permitted shareholders to do so directly.[73] As another advantage, director primacy dispenses with the fiction, contrary to agency law, that directors are shareholders' agents.[74] Nonetheless, this Article focuses on the traditional account of shareholder primacy because it remains the dominant paradigm in academic and judicial discourse.[75]

Despite divergent views of corporate authority, both shareholder primacy and director primacy share the same view of corporate purpose. Under either model, the answer to this question can also take different forms. The most common is condensed into the ubiquitous assertion that directors must attempt to "maximize shareholder value" or "wealth" over the long term.[76] In this sense, "value" or "wealth" denotes only a share's price, not any broader interests that its holder may have. In contrast, some scholars have presented an alternative, more holistic vision of shareholder primacy in which directors must pursue shareholder "welfare."[77] This less common formulation contemplates all interests of shareholders (or, at least, all interests common to the holders of a majority of shares), including any "*expressed* preferences" besides profits.[78]

Despite this divide, Delaware courts have consistently promoted the more common view. Over the past several decades, judicial opinions have repeatedly and increasingly emphasized that the fiduciary duty of loyalty requires directors to maximize shareholder value.[79] Beneath these pithy

72. *Id*. at 550.

73. Paramount Commc'ns Inc. v. Time Inc., Nos. 10866, 10670, 10935, 1989 WL 79880, at *30 (Del. Ch. July 14, 1989) ("The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm."), *aff'd*, 571 A.2d 1140 (Del. 1989); CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227, 232 (Del. 2008) ("[S]tockholders of a corporation subject to the DGCL may not directly manage the business and affairs of the corporation, at least without specific authorization in either the statute or the certificate of incorporation."). As a new, limited exception to this rule, the recently introduced DGCL section 122(18) permits a corporation to grant governance rights to shareholders in contracts. *See infra* Part II.C.1.

74. *See supra* note 48 and accompanying text.

75. Lipton, *supra* note 65, at 866 ("[M]ost commenters would likely agree that shareholder primacy, whatever its faults, accurately describes the legal regime today, either as a formal matter or in practical effect.").

76. *See id.* at 867 ("In most theoretical discussions of corporate purpose, shareholder primacy has been equated with the notion that corporate directors have a fiduciary duty to maximize the long-term wealth of the stockholders.").

77. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, 2 J.L. FIN. & ACCT. 247, 248–50 (2017).

78. Lipton, *supra* note 65, at 872.

79. *E.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 20 (Del. Ch. 2013) ("Directors of a Delaware corporation owe fiduciary duties to the corporation and its stockholders which require that they strive prudently and in good faith to maximize the value of the corporation for the benefit of its residual claimants."); McRitchie v. Zuckerberg, 315 A.3d 518, 565 (Del. Ch. 2024) ("Directors must seek to maximize the value of the firm for the ultimate benefit of its stockholders."); *see also* Lipton, *supra* note 21, at 1592 ("Delaware case law has become

directives, however, this requirement's precise nature and implementation in the law are more complex than they appear. An exploration of these issues will illuminate shareholder primacy's contours as well as the real questions underlying any accurate account of corporate purpose.

C. The Nature of Primacy

Corporate law distinguishes between "standards of conduct" and "standards of review."[80] A standard of conduct states what directors are supposed to do, while a standard of review describes a court's test to determine whether they have done it.[81] In these terms, shareholder value maximization is a standard of conduct: what directors are supposed to do or at least attempt to do.[82] But even if directors do not do that, they may not be liable for breaching fiduciary duties, depending on the standard of review that a court chooses to apply. Delaware courts have several standards of review for claims of fiduciary duty breaches, ranging from the deferential "business judgment rule" to the strict "entire fairness" test.

In general, for board decisions that do not involve conflicts of interest or a few other special circumstances, courts invoke the business judgment rule and abstain from substantive review.[83] Under this default standard, a director would not be liable for failing to maximize shareholder value, unless a plaintiff can establish a "waste" of corporate assets—that is, that no rational businessperson could believe that the corporation received adequate consideration for the assets.[84] For a court to reject a waste claim, the required relationship between the board's decision and shareholder value is minimal, far from "maximization." Though frequently pleaded in the alternative, claims of waste almost never succeed: A prominent Delaware jurist once likened finding waste to finding the Loch Ness monster.[85]

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much clearer about articulating a formal legal rule that managers have a duty to 'maximize value' for the equity holders in 'every scenario.'").

80. Melvin A. Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 437 (1993).

81. *Id.*

82. *See In re Trados*, 73 A.3d at 37 ("In terms of the standard of conduct, the duty of loyalty therefore mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital.").

83. Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) ("[D]irectors' decisions will be respected by courts unless the directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process that includes the failure to consider all material facts reasonably available.").

84. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 73–74 (Del. 2006) ("[A] plaintiff who fails to rebut the business judgment rule presumptions is not entitled to any remedy unless the transaction constitutes waste."); Glazer v. Zapata Corp., 658 A.2d 176, 183 (Del. Ch. 1993) ("Directors are guilty of corporate waste, only when they authorize an exchange that is so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration.").

85. Steiner v. Meyerson, Civ. A. No. 13139, 1995 WL 441999, at *5 (Del. Ch. July 19, 1995) ("[R]arest of all—and indeed, like Nessie, possibly non-existent—would be the case of disinterested business people making non-fraudulent deals (non-negligently) that meet the legal standard of waste!").

In contrast, when a transaction does involve certain conflicts of interest, a court reviews it for entire fairness.[86] This test requires defendant fiduciaries to prove that the transaction involved both "fair dealing" (or a "fair process") and a "fair price."[87] Although this standard of review is often described as Delaware's "most onerous,"[88] a price can be sufficiently *fair* if it simply provides "the substantial equivalent in value of what [each shareholder] had before."[89] In other words, it does not have to be the *best* deal; it just cannot be a *losing* deal. By this measure, a fair price can clearly fall far short of the *maximum* price that directors could have obtained. So, even under the entire fairness test—ostensibly Delaware's most exacting standard of review—directors are not liable for simply failing to maximize shareholder value, absent additional problems. As the name suggests, this test's orientation is toward fairness, not maximization.

Apparently, directors have an enforceable duty to attempt to maximize shareholder value only in certain sales, breakups, or other changes in control of a corporation. In those events, which are exceptionally rare in most operating companies' lifespans, the board's fiduciary duties indeed require it to take reasonable steps to pursue the available transaction that offers the highest financial return for shareholders.[90] These are commonly called "*Revlon* duties" after a landmark 1986 case involving an attempted hostile takeover of the eponymous cosmetics company.[91]

Even in the relatively rare *Revlon* context, no Delaware case has ever held a director personally liable for favoring other constituencies over shareholders.[92] Outside that context, Delaware court opinions have almost never admonished boards for failing to pursue shareholder value

86. *In re Trados*, 73 A.3d at 44 ("Entire fairness, Delaware's most onerous standard, applies when the board labors under actual conflicts of interest.").

87. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

88. *E.g.*, *In re Trados*, 73 A.3d at 44; Coster v. UIP Cos., Inc., 300 A.3d 656, 662 (Del. 2023).

89. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 940 (Del. 1985) (quoting Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 114 (Del. 1952)). *But see In re* First Bos., Inc. S'holders Litig., CIV. A. No. 10338, 1990 WL 78836, at *7 (Del. Ch. June 7, 1990) (applying a higher standard to the directors' obligation to obtain a "fair price").

90. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when "it became apparent to all that the break-up of the company was inevitable," the "duty of the board had thus changed from the preservation of Revlon as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit"); Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 43–45 (Del. 1994) (extending this duty from sales and breakups of the company to "a sale of control" even without a breakup).

91. *See Revlon*, 506 A.2d at 175–79. This Article does *not* assert that enhanced scrutiny under *Revlon* is a more onerous standard of review than the entire fairness test. Instead, it states only that the former requires value maximization and the latter does not. The latter may be more onerous for other reasons that are irrelevant to this Article.

92. "Other constituencies" do not include the directors themselves. Directors have indeed been held liable due to conflicts of interest under both *Revlon* and entire fairness review. *See, e.g.*, *In re* Mindbody, Inc. S'holder Litig., C.A. No. 2019-0442, 2023 WL 2518149, at *41 (Del. Ch. Mar. 15, 2023) (holding that a director breached his fiduciary duties under *Revlon* by tilting the sale process to a favored bidder to satisfy his personal need for liquidity and future employment), *aff'd in part, rev'd in part*, 332 A.3d 349 (Del. 2024).

maximization. When they have, the directors had expressly—and inadvisably—disavowed any concern for shareholder interests, clearly contravening Delaware's standard of conduct.[93] So, if directors simply make a reasonable *claim* that they were pursuing those interests in line with that standard of *conduct*, then they will not be liable under most standards of *review* just for failing to maximize shareholder value.[94] Given its practical unenforceability in all but the most exceptional situations, what purpose does the ubiquitous concept of shareholder value maximization serve?

Clearly, it is not a true legal duty. The standard definition of a legal duty is an obligation the breach of which gives a remedy.[95] By that measure, shareholder value maximization is not a legal duty except perhaps in the *Revlon* context, because Delaware's other standards of review will not, without more, provide a remedy for a failure to maximize value.[96] Instead, as a standard of conduct, shareholder value maximization may constitute a normative ideal for corporate fiduciaries. Some call it an "underenforced legal norm" in line with literature in other areas of law,[97] but it is closer to an *unenforced* legal norm. Accordingly, judicial proclamations that directors must maximize shareholder value may constitute hortatory aspirations rather than descriptions of enforceable duties. These may serve some purposes, such as shaping corporate norms and directors' behavior,[98] but they do not facilitate the *descriptive* account of corporate purpose that this Article seeks.

Despite shareholder value maximization's limited descriptive function, repeated statements in Delaware court opinions leave no doubt that shareholders are at least *intended* to be the obligees of the board's fiduciary duties and thus the corporation's ultimate beneficiaries, consistent with

93. *E.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 35 (Del. Ch. 2010) ("Directors of a for-profit Delaware corporation cannot deploy a rights plan to defend a business strategy that openly eschews stockholder wealth maximization—at least not consistently with the directors' fiduciary duties under Delaware law.").

94. *E.g.*, Simeone v. Walt Disney Co., 302 A.3d 956, 970–71 (Del. Ch. 2023) (rejecting a claim that Disney had abandoned shareholder value by opposing Florida's "Don't Say Gay" bill because the board had framed its opposition as protecting long-term employee retention, which was a rational business purpose).

95. *Duty*, BLACK'S LAW DICTIONARY (12th ed. 2024). Misuse of the word "duty" is not unique to this context. For example, in contract law, the purported "duty to read" a contract and the purported "duty to mitigate" damages are not legal duties at all. If someone does not read a contract or mitigate their losses due to the other party's breach, then they are not ipso facto liable to anyone. The "duty to read" simply means that someone who does not read a contract is not thereby excused from performing it; this is perhaps a presumption, not a legal duty. Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1108–09 (2015). The "duty to mitigate" simply means that a party cannot recover losses that it could have mitigated through reasonable efforts; this is a limitation on damages, not a legal duty. RESTATEMENT (SECOND) OF CONTRACTS § 350 cmt. b (A.L.I. 1981).

96. *See supra* text accompanying notes 83–89.

97. *See generally* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051 (2015).

98. *See* Bainbridge, *supra* note 3, at 582 ("Because the shareholder wealth maximization norm is central to director socialization, the norm provides a forceful reminder of where the director's loyalty lies. Even if the business judgment rule renders its rhetoric largely unenforceable, the shareholder wealth maximization norm is an ever-present goad.").

shareholder primacy.[99] If this theory is descriptively accurate, then it cannot be based just on a standard of conduct or an enforceable fiduciary duty; it must also depend on other aspects of corporate law and practice. Most notably, with their unique rights to elect, remove, and sue directors, shareholders are the corporation's only constituency (as opposed to other groups, like creditors, employees, customers, and local community members) with the general ability to hold the board accountable—or at least to impose litigation costs and bad publicity through unsuccessful lawsuits—when directors do not put that constituency first.[100] This gives the board an incentive to prioritize shareholders even without an enforceable legal duty to maximize their wealth or welfare.

Accordingly, consistent with the plain meaning of "primacy" as "the state of being first,"[101] the question of corporate purpose comes down to priority: Whose interests does the law place first? A complete answer to this question cannot consider directors' legal duties alone. It also depends on the scope of their discretionary authority and the broader legal structures and incentives that inform their decisions within that scope. Therefore, one must consider all these issues when formulating and assessing alternative accounts of corporate purpose too.

D. Proportionality

The standard account of shareholder primacy—the assertion that shareholders are the corporation's ultimate decision-makers and its ultimate beneficiaries—elides a critical question: *Which* shareholders have this privileged status? With some notable exceptions,[102] academic literature and case law do not address this question but simply refer to shareholders as a monolith, which of course they are not.[103]

Fortunately, this question's answer is obvious from shareholder primacy's basic tenets. In describing corporate authority, the theory focuses on

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99. *See supra* note 79 and accompanying text.

100. *See* Leo E. Strine, Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 HARV. BUS. L. REV. 235, 237, 241 (2014) (claiming that, "even if . . . those who manage public corporations may, outside of the corporate sales process, treat the best interests of other corporate constituencies as an end equal to the best interests of stockholders. . . . American corporate law makes corporate managers accountable to only one constituency—stockholders").

101. *Primacy*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/primacy (on file with the *Fordham Law Review*) (last visited Aug. 7, 2026).

102. *E.g.*, Hansmann & Kraakman, *supra* note 1, at 442 (explaining that, according to shareholder primacy, "all shareholders should be assured an essentially equal claim on corporate earnings and assets"); *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 41 (Del. Ch. 2013) (stating that, when the interests of preferred stockholders with contractual preferences conflict with those of the common stockholders, "it is the duty of directors to pursue the best interests of the corporation and its common stockholders, if that can be done faithfully with the contractual promises owed to the preferred." (quoting LC Cap. Master Fund, Ltd. v. James, 990 A.2d 435, 452 (Del. Ch. 2010))).

103. Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 564 (2006) ("[S]hareholder primacists . . . continue to regard shareholders as a monolith with a single, overriding objective—maximizing shareholder value.").

shareholders' ability to hold directors accountable by voting for and against their election and removal.[104] As to corporate purpose, this theory's prevailing version asserts a requirement or motive to maximize shareholder value—that is, the value of each share.[105] In all these respects, a shareholder's rights, whether voting or economic, are based on how many shares it owns in each class or series of capital stock.[106] For example, if a corporation has only one such class, then a shareholder with ten shares has ten times the authority and is entitled to ten times the benefits as a shareholder with only one share. Dual-class stock structures, in which one class of stock carries more votes per share than another class,[107] may complicate this example's math but do not change the main point that shareholder primacy's account of corporate authority and purpose is based on the extent of each shareholder's shareholding. A shareholder's other characteristics—such as its contractual rights, influence over management, and investment amount—are irrelevant to shareholder primacy.

Delaware courts have demonstrated this principle of proportionality most vividly in applying entire fairness review to transactions that provide one shareholder with a "non-ratable benefit."[108] This refers to a benefit that does not accrue to all shareholders in proportion to their shareholdings; for example, a corporation might make a special distribution only to the controller instead of paying a ratable dividend to all shareholders. If shareholder primacy permitted a corporation to benefit just any shareholder, then a nonratable benefit to one shareholder should not raise concerns. But, by closely scrutinizing such activities, the courts clearly expect a corporation to benefit all its shareholders proportionately, not to favor one share over another based on its holder's extraneous characteristics.

Therefore, a more precise description of shareholder primacy is that all shareholders, *in proportion to their shares* (i.e., with each share of the same class or series treated equally), are the corporation's ultimate decision-makers and its ultimate beneficiaries. Perhaps this detail is so often omitted simply because it is so obvious. Nonetheless, it will prove essential

104. *See supra* text accompanying notes 70–71.

105. *See supra* text accompanying note 79.

106. In contrast, a shareholder's ability to bring a derivative lawsuit on the corporation's behalf is not proportionate to its number of shares. *See* DEL. CODE ANN. tit. 8, § 327 (2026) (requiring that the plaintiff in a derivative suit be "a stockholder of the corporation at the time of the transaction of which such stockholder complains," without imposing a minimum ownership requirement); Del. Ch. Ct. R. 23.1 (imposing the same requirement). But that ability is ancillary, not central, to shareholder primacy's account of corporate authority.

107. Dorothy S. Lund, *Nonvoting Shares and Efficient Corporate Governance*, 71 STAN. L. REV. 687, 701 (2019).

108. *E.g.*, *In re* EZCorp Inc. Consulting Agreement Derivative Litig., C.A. No. 9962, 2016 WL 301245, at *11–12 (Del. Ch. Jan. 25, 2016) (identifying the "extract[ion of] a non-ratable benefit" as a primary trigger for entire fairness review). Contrary to this norm against nonratable benefits, Professors Stephen Choi and Eric Talley have argued that, in theory, permitting corporate managers to share private benefits with block shareholders might reduce the private benefits that managers keep for themselves, which could be better for all shareholders overall. *See generally* Stephen J. Choi & Eric L. Talley, *Playing Favorites with Shareholders*, 75 S. CAL. L. REV. 271 (2002).

to the distinction between shareholder primacy and controller primacy in Part III.

II. THE LAW GOVERNING CONTROLLING SHAREHOLDERS

While Part I addressed shareholder primacy's general integration into Delaware corporate law, this part focuses on that theory's relationship to the specific legal rules governing controlling shareholders. It begins with the traditional framework governing controller transactions (i.e., transactions between corporations and their controllers), which prioritized the protection of minority shareholders, consistent with shareholder primacy. It then examines later judicial developments that also promoted this theory of the corporation, including expanded definitions of control and limitations on contracts between corporations and controllers. Finally, it analyzes recent amendments to the DGCL that codified a sudden departure from shareholder primacy.

A. The Historical Approach

For decades, Delaware's approach to controlling shareholders balanced the board's authority with the protection of minority shareholders, based on the fiduciary duty of loyalty. This framework reflected the traditional model of shareholder primacy by prioritizing the interests of all shareholders proportionately, rather than just the controller.

In 1971, *Sinclair Oil Corp. v. Levien*[109] established the standards of review for transactions involving controlling shareholders. By default, a controller's dealings with the corporation were subject to the deferential business judgment rule,[110] which immunizes a transaction from shareholder challenge and judicial review.[111] However, if such a transaction involved "self-dealing"—where the controller stands on both sides of the transaction and receives a benefit from the corporation "to the exclusion of, and detriment to, the minority stockholders"—then the court would review the transaction, and the controller would have the "onerous"[112] burden of proving entire fairness.[113] This case's approach to controller transactions aimed to protect minority shareholders from expropriation while continuing to permit the board to run the corporation free of judicial interference, absent certain conflicts of interest.

Sinclair Oil afforded business judgment rule protection to controller transactions that did not involve self-dealing.[114] However, the 1983 case of *Weinberger v. UOP, Inc.*[115] addressed one particularly transformational type

109. 280 A.2d 717 (Del. 1971).
110. *Id.* at 720.
111. *See supra* note 83 and accompanying text.
112. *See supra* text accompanying note 88.
113. *Sinclair Oil*, 280 A.2d at 720.
114. *Id.*
115. 457 A.2d 701 (Del. 1983).

of controller transaction: a "freeze-out" merger, which is also known as a "squeeze-out" or "cash-out" merger or a "controller buyout."[116] Whatever its label, this transaction involves the controller becoming the corporation's sole shareholder by, in effect, buying all other shareholders' shares for a price negotiated with the board.[117] The risk of minority expropriation is clear: The controller could use its inherent influence over the board to persuade them to accept a low price per share that is unfair to the other shareholders.[118] Given this palpable risk, *Weinberger* established that freeze-out mergers would always be subject to entire fairness review, not the business judgment rule.[119] Eleven years later, *Kahn v. Lynch Communication Systems, Inc.*[120] confirmed that, even if the transaction were approved by independent directors or disinterested shareholders, it would still be subject to entire fairness review, but the burden would shift from the defendants to the plaintiffs.[121] For several decades, business judgment rule protection was apparently unavailable regardless of procedural protections.[122]

B. Recent Jurisprudence

That changed in 2014. In *Kahn v. M&F Worldwide Corp.*[123] (*MFW*), the Delaware Supreme Court held that the business judgment rule could apply to a freeze-out merger after all, but only if the transaction followed a strict, six-point preapproval process.[124] Essentially, the transaction must be conditioned "ab initio" (i.e., before any substantive negotiations begin) on approvals by *both* a fully empowered special committee composed entirely of independent directors *and* the holders of a majority of the outstanding minority shares in a fully informed, uncoerced vote.[125] This framework was designed to "irrevocably and publicly disable[]" the controller's influence over the board from the negotiation and to give minority shareholders a meaningful voice in their exits from the corporation.[126]

Despite the promise of business judgment rule protection, many transactional planners found *MFW*'s dual-protection framework and its specific criteria, like the ab initio requirement, so difficult that they eschewed it.[127] Apparently, they considered that process even less palatable than the

116. *Id.* at 703–04.
117. *See* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 9 (2005).
118. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1994) (explaining why entire fairness review applies to freeze-out mergers).
119. *Weinberger*, 457 A.2d at 710.
120. 638 A.2d 1110 (Del. 1994).
121. *Id.* at 1117.
122. *See* Kahn v. M&F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014) (noting that, before this decision, entire fairness was the exclusive standard of review for freeze-out mergers).
123. 88 A.3d 635 (Del. 2014).
124. *Id.* at 645.
125. *Id.* at 644.
126. *Id.*
127. *See* PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP, PRIVATE EQUITY DIGEST: CONSIDERING *MFW* FOR CONTROLLER TRANSACTIONS? 1 (2024), https://www.paulweiss.com/media/1vbfccod/private_equity_digest_november_2024.pdf [https://perma.cc/QM4C-W8

risk of entire fairness review in a subsequent shareholder lawsuit challenging the transaction. The Delaware courts' insistence on these strict procedures despite opposition from controllers and their representatives reflected continued adherence to shareholder primacy's proportional consideration of all shareholders.

In *MFW*, the dual-protection framework applied expressly to freeze-out mergers, but its application to other transactions remained unsettled for many years, until 2024.[128] Then, *In re Match Group, Inc. Derivative Litigation*[129] expanded the *MFW* framework to all transactions in which a controller "st[ands] on both sides" and receives a "non-ratable benefit."[130] If such a transaction were properly approved by *both* an independent board committee *and* minority shareholders in compliance with *MFW*'s strict criteria, then the court would apply the business judgment rule and abstain from reviewing the transaction; otherwise, the court would conduct entire fairness review.[131] Notably, the trigger for this standard, a "non-ratable benefit," refers to any benefit that the controller does not share with other shareholders in proportion to their shares.[132] Unlike *Sinclair Oil*'s concept of self-dealing, it does not require any "detriment" to those shareholders.[133] In effect, *Match* confirmed a recent expansion of Delaware courts' "heightened concern for self-dealing" beyond freeze-out mergers and direct harms to minority shareholders, with entire fairness review applying to a broader category of controller transactions.[134] By requiring not just a board committee's approval but also other shareholders' affirmative vote to "cleanse" these transactions (i.e., to insulate them from liability),[135] *Match* signaled the court's skepticism of controllers' motivations and its commitment to protecting minority shareholders, in line with shareholder primacy.

As courts shifted the scope and standards of judicial review of controller transactions, they also changed the criteria for determining whether a shareholder constitutes a controller with fiduciary duties to the corporation

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VQ] (finding that only ten of twenty-five eligible transactions in a recent sample utilized "the full *MFW* framework").

128. *See In re* EZCorp Inc. Consulting Agreement Derivative Litig., C.A. No. 9962, 2016 WL 301245, at *11–16 (Del. Ch. Jan. 25, 2016) (reasoning that the *MFW* framework can apply to any controller transaction involving a nonratable benefit, while acknowledging contrary Court of Chancery rulings and the possibility that the Delaware Supreme Court would limit entire fairness review to freeze-out mergers).

129. 315 A.3d 446 (Del. 2024).

130. *Id.* at 451.

131. *Id.* at 470–71.

132. *See* Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 565–66 (2025) ("But fairness review is no longer limited to cases in which the controller received a benefit at the expense of and to the exclusion of the minority. Instead, fairness review applies whenever the controller stands on both sides of the transaction. Entire fairness also will be invoked whenever the controller receives a unique or non-ratable benefit. This is so even when that benefit does not come at the expense of the minority." (footnotes omitted)).

133. *See supra* text accompanying note 113.

134. *See In re Match Grp.*, 315 A.3d at 463.

135. *Id.* at 451.

and other shareholders. Historically, shareholder control of a corporation had required majority voting power or "actual domination and control."[136] Over the past three decades, however, the courts gradually eroded this requirement. One notable case found that a shareholder could be a controller with merely "a combination of stock voting power and managerial authority that *enables* him to control the corporation, *if he so wishes*," even if he does not *actually* exercise that ability.[137] Another case deemed a minority investor a controller because it used contractual rights to block alternative financing arrangements and to force the company into a transaction that benefited the investor.[138]

This expansion of the concept of shareholder control culminated in *Tornetta v. Musk*[139] in 2024, the same year as *Match*. That case found Elon Musk, Tesla's chief executive officer (CEO), to be a "transaction-specific" controlling shareholder with respect to his compensation package despite holding only 21.9 percent of its voting stock.[140] Besides his stock ownership, the court cited his "managerial supremacy" as a "Superstar CEO" and his personal and professional relationships with most of the other directors.[141] This case became the most public and vivid demonstration that shareholder control could arise from soft power and influence, rather than voting power, "actual domination," or contractual rights.[142] In addition, *Tornetta* reinforced shareholder primacy in a subtle but significant way. Because the minority shareholders who approved Musk's compensation package were not adequately informed of the board's conflicts of interest, the court required the defendants to prove the transaction's entire fairness, and their inability to do this cost them the case.[143] By upholding the standard requirement that a shareholder vote must be fully informed, the court reiterated the board's duties to the shareholders as a whole, not just an influential executive.

In yet another controversial 2024 case regarding controller transactions, *West Palm Beach Firefighters' Pension Fund v. Moelis & Co.*[144] involved a challenge to a shareholder agreement between an investment bank and Ken Moelis, its eponymous founder, CEO, and controlling shareholder.[145] The contract at issue granted Moelis extensive governance rights, prohibiting the board from making eighteen different categories of decisions without his

136. *In re* Sea-Land Corp. S'holders Litig., CIV. A. No. 8453, 1988 WL 49126, at *3 (Del. Ch. May 13, 1988).

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

138. *See* Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, C.A. No. 11802, 2018 WL 3326693, at *26 (Del. Ch. July 6, 2018).

139. 310 A.3d 430 (Del. Ch. 2024), *aff'd in part, rev'd in part sub nom. In re* Tesla, Inc. Derivative Litig., Nos. 534, 2024; 10, 2025; 11, 2025; 12, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

140. *Id.* at 446, 500–02.

141. *Id.* at 503–10.

142. *See supra* text accompanying notes 136–38.

143. *Tornetta*, 310 A.3d at 520–21, 526–27.

144. 311 A.3d 809 (Del. Ch. 2024), *rev'd on other grounds*, 360 A.3d 215 (Del. 2026).

145. *Id.* at 817–18.

consent, allowing him to name a majority of the board nominees, and requiring the board to recommend his nominees to voting shareholders and to fill any vacancies with his chosen candidates.[146] Although the company defended these provisions as standard "market practice" for firms led by founders or funded by private equity, the Delaware Court of Chancery held that they violated DGCL section 141(a), which requires the board to manage the corporation's business and affairs.[147] The court held that the board could not contract these fiduciary duties away to a controller.[148] While this decision most obviously supports director primacy,[149] it also supports shareholder primacy as a theory of both corporate authority and corporate purpose. By invalidating contractual provisions that delegated management functions to a single shareholder, the court preserved the board's ability (i.e., authority) and duty (i.e., purpose) to manage the business for all shareholders' benefit, rather than subordinating their collective interests to one shareholder's specific desires.

Together, these cases suggested to many lawyers and commentators that Delaware courts had grown increasingly "skeptic[al] toward corporate actions in controlled companies."[150] Moreover, these legal developments transpired while public corporations were increasingly adopting dual-class stock structures, which allow founders to retain majority voting control over a corporation even when the public holds a majority of the shares.[151] This trend created many more controlling shareholders in prominent Delaware corporations, operating in a legal environment that many now perceived as hostile after 2024's string of controversial rulings against controllers.[152] Given these corporations' broad influence, a reaction was inevitable.

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146. *Id.* at 824–28.

147. *Id.* at 816–17, 878–79; DEL. CODE ANN. tit. 8, § 141(a) (2026).

148. *Moelis*, 311 A.3d at 863 ("A provision in a stockholder agreement that purports to enable stockholders to manage the business and affairs of a corporation is invalid."). As discussed in Part II.C.1, in 2024, the Delaware General Assembly abrogated this holding of the Court of Chancery by enacting DGCL section 122(18). In 2026, the Delaware Supreme Court reversed the Court of Chancery, holding that the challenged contractual provisions were voidable, not void, such that the plaintiff's claims were time barred under the doctrine of laches. *See* Moelis & Co. v. W. Palm Beach Firefighters' Pension Fund, 360 A.3d 215, 230, 238–39 (Del. 2026). Despite its eventual reversal, the Court of Chancery opinion remains historically significant because it catalyzed the legislative amendments that resulted in the legal regime that this Article analyzes.

149. *See supra* notes 72–74 and accompanying text.

150. Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641, 644 (2025); *see also* Bainbridge, *supra* note 132, at 534 ("According to the lawyers I interviewed, the principal problem is a series of recent cases in which the Court of Chancery exhibited a 'reflexive suspicion' of transactions involving a controlling shareholder.").

151. *See generally* Dhruv Aggarwal, Ofer Eldar, Yael V. Hochberg & Lubomir P. Litov, *The Rise of Dual-Class Stock IPOs*, 144 J. FIN. ECON. 122 (2022). For further discussion of dual-class stock structures, see *infra* text accompanying notes 273–77.

152. *See* Bainbridge, *supra* note 11, at 826 (reporting the Delaware "bar's dissatisfaction with the recent direction of Delaware law" and "growing concern about increased uncertainty, especially with regard to controller transactions").

C. The Legislative Reaction

One founder and alleged controller who found Delaware especially hostile was at the center of one of those cases: Elon Musk. Hours after the *Tornetta* decision was released, invalidating a stock option grant that would have been worth $56 billion to him, he conducted an online poll asking his social media followers whether Tesla should reincorporate in Texas,[153] which it eventually did within six months.[154] Soon afterward, reports surfaced that Mark Zuckerberg, Meta's CEO, was considering whether to follow suit,[155] though he never did. A few other, somewhat less famous companies also left Delaware, primarily for either Texas or Nevada.[156] These actual and potential departures fueled a popular narrative that Delaware's tightening fiduciary standards for controllers were precipitating a mass exodus of the economy's most dynamic firms, sometimes called "DExit."[157]

Justified or not, these fears reached the Delaware General Assembly.[158] In rapid succession, the legislature responded to the perceived threat by enacting two significant laws that reversed the recent judicial trend of limiting controller power: Senate Bill 313 ("SB 313") and Senate Bill 21 ("SB 21").[159]

1. Section 122(18): Shareholder Agreements

SB 313 added section 122(18) to the DGCL.[160] This provision abrogates *Moelis* by permitting a corporation and a shareholder to enter into a contract that cedes various forms of corporate control from the board to the shareholder.[161] In these contracts, corporations can promise to take or refrain from certain actions, either with or without a specified shareholder's

153. Elon Musk (@elonmusk), X, *Should Tesla change its state of incorporation to Texas, home of its physical headquarters?* (Jan. 30, 2024, at 19:40 ET), https://x.com/elonmusk/status/1752491924848820595 [https://perma.cc/D3UU-334M].

154. Tesla, Inc., Quarterly Report (Form 10-Q) 9 (July 24, 2024) (confirming that Tesla "converted to a Texas corporation on June 13, 2024").

155. Glazer, Jin & Bobrowsky, *supra* note 11.

156. *See* Benjamin P. Edwards, *Final 2025 Nevada and Texas Reincorporation Lists*, BUS. L. PROF BLOG (Feb. 3, 2026), https://www.businesslawprofessors.com/2026/02/final-2025-nevada-and-texas-reincorporation-lists [https://perma.cc/KBH3-93AM].

157. *See* Bainbridge, *supra* note 11, at 826–27 (describing business and legal communities' criticism of developments in Delaware corporate law).

158. *See* Bebchuk & Kastiel, *supra* note 20 (manuscript at 1) ("Weak constraints exist in other states—notably Texas and Nevada—and Delaware's legislation appears intended, at least in part, to induce companies to avoid reincorporating in those jurisdictions.").

159. *Id.*; S.B. 313, 152d Gen. Assemb., Reg. Sess. (Del. 2024) (effective Aug. 1, 2024); S. Substitute No. 1 for S.B. 21, 153d Gen. Assemb., Reg. Sess. (Del. 2025) (enacted Mar. 25, 2025). In February 2026, the Delaware Supreme Court upheld SB 21 in rejecting a challenge to its constitutionality. *See* Rutledge v. Clearway Energy Grp. LLC, 360 A.3d 1271, 1276 (Del. 2026).

160. Del. S.B. 313.

161. Rauterberg & Sanga, *supra* note 23, at 296 (stating that the amendment "overturned *Moelis* and empowered boards to delegate their core powers to a shareholder by contract").

consent.[162] Much like the agreement that the *Moelis* court invalidated,[163] a contract under section 122(18) may allow a shareholder to appoint, remove, or replace directors and officers and to block or force seemingly any corporate decision, from transformative mergers and acquisitions to mundane dividend declarations.[164]

Even without such a contract, these abilities would ultimately be available to a shareholder with majority voting power, which unilaterally could both elect directors who will make its preferred decisions and remove any director who does not.[165] But with a contract, such a controller could do all these things far more quickly and easily than it could through the cumbersome processes that shareholders must ordinarily follow.[166] In addition, section 122(18) permits contracts not just with a majority shareholder but with any shareholder, regardless of ownership percentage.[167] Therefore, the amendment has enabled majority shareholders to govern more directly and minority shareholders with sufficient influence over the board to enjoy the same rights.

Some of the arrangements authorized by section 122(18) (namely, veto and consent rights for shareholders, but probably not covenants of the corporation) were already permitted in certificates of incorporation (commonly called "charters") and were often used in contracts too, until *Moelis* restricted those contracts.[168] Overriding that decision,[169] the newly codified right to use contracts instead of the charter can empower a controller at the expense of other shareholders and the board.[170] Because charter

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162. DEL. CODE ANN. tit. 8, § 122(18) (2026).

163. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 818–22 (Del. Ch. 2024) (detailing the "Pre-Approval Requirements" and "Board Composition Provisions" in the contested shareholder agreement), *rev'd on other grounds*, 360 A.3d 215 (Del. 2026).

164. Jill E. Fisch & Steven Davidoff Solomon, *Contract Rights and Control*, 27 U. PA. J. BUS. L. 1128, 1144 (2025) (enumerating "permissible contractual provisions" under DGCL section 122(18)).

165. *See* tit. 8, § 216(3) (providing that directors are elected by a plurality vote of shareholders); *id.* § 141(k) (providing that directors may be removed with or without cause by a majority vote of shareholders).

166. *See id.* § 211 (requiring annual shareholder meetings); *id.* § 212 (governing proxies); *id.* § 222 (requiring notice of shareholder meetings).

167. *Id.* § 122(18) (authorizing contracts with "1 or more current or prospective stockholders" without specifying a minimum ownership amount).

168. *Id.* § 102(b)(1) (permitting a charter to include "[a]ny provision for the management of the business and for the conduct of the affairs of the corporation, and any provision creating, defining, limiting and regulating the powers of the corporation, the directors, and the stockholders, or any class of the stockholders"); *Moelis*, 311 A.3d at 817 (describing the "market practice" of "internal governance arrangements through stockholder agreements," including "extensive veto rights and other restrictions on corporate action," before invalidating them).

169. *See supra* note 161.

170. Fisch & Davidoff Solomon, *supra* note 164, at 1144–45 (explaining that, under DGCL section 122(18), "shareholder agreements can now grant a shareholder broad powers which usurp many of the traditional roles of the board (as well as the ability of other shareholders to exercise their traditional rights)").

amendments require shareholder approval,[171] minority shareholders may reject a proposed provision that unacceptably grants authority to a controller that lacks majority voting power. In contrast, a contract with the same provision can circumvent those shareholders because it requires agreement only by the controller and the corporation's board.[172] This approach contrasts sharply with the Model Business Corporation Act, which also permits the board to cede governance rights to a shareholder by contract but requires approval by all other shareholders.[173]

A provision's placement in a contract or the charter could also present other differences, which either party may find advantageous. Most importantly, the remedies for breach may be different: damages in a contract and avoidance in a charter.[174] Thus, a contract could add flexibility for the corporation by enabling "efficient breach": If net beneficial, the board could choose to take a contractually prohibited action and pay damages to the counterparty, whereas a court might nullify that action if the provision were in the charter instead.[175] In addition, section 122(18) expressly permits a shareholder agreement to be governed by another state's laws,[176] which shareholders might use to seek additional advantages over a charter provision that would necessarily be governed by Delaware law.[177]

Notably, the new provision allows a corporation to enter these contracts "[n]otwithstanding § 141(a)."[178] That section states perhaps the most central provision of Delaware corporate law: that the board must manage the corporation's business and affairs, "except as may be otherwise provided in this chapter or in its certificate of incorporation."[179] Beyond these exceptions for contrary provisions of the statute or the charter, section 122(18)'s "notwithstanding" clause appears intended to add a third exception to this foundational rule.[180] This suggests that the board's fundamental duties to manage the corporation are now subordinate to a private contract's terms. The new law expressly allows a controller to secure board-level management

171. Tit. 8, § 242(b)(2).

172. Rauterberg & Sanga, *supra* note 23, at 322 ("Instead of requiring modifications to board powers to be in the charter, it enables boards to enter into contracts that transfer all or nearly all of their powers to certain shareholders without requiring any input from other shareholders.").

173. MODEL BUS. CORP. ACT §§ 7.32(a)(6), (b)(1) (A.B.A. 2026).

174. Rauterberg & Sanga, *supra* note 23, at 325 ("When a corporate action violates the charter, that action is void and unenforceable. But when a corporate act violates a contract, it may still be valid—it simply opens up the corporation to potential liability for breach of contract.").

175. *Id.*

176. Tit. 8, § 122(18) (stating that the corporation is subject to the remedies available under "the law governing the contract" and explicitly excluding DGCL section 115, which governs forum selection provisions, from the laws that the contract may not contravene).

177. *Id.*; *see* VantagePoint Venture Partners 1996 v. Examen, Inc., 871 A.2d 1108, 1113 (Del. 2005) ("It is now well established that only the law of the state of incorporation governs and determines issues relating to a corporation's internal affairs.").

178. Tit. 8, § 122(18).

179. *Id.* § 141(a).

180. *See* Rauterberg & Sanga, *supra* note 23, at 322 ("Section 122(18) effectively undoes the proviso of Section 141.").

authority through a shareholder agreement with only directors' approval, without other shareholders' consent or even their knowledge. By permitting directors to abdicate their duties to all shareholders by entering a contract with just one shareholder, section 122(18) undermines shareholder primacy's accounts of corporate authority and purpose, each of which depends on those duties.[181]

2. Section 144: Controller Transactions

While SB 313's creation of section 122(18) enshrined expansive authority for controllers to manage the corporation, SB 21's amendments to section 144 granted broader immunity for them to transact with and derive benefits from it safely. The new provision narrows the scope of transactions subject to judicial review and lowers the bar for cleansing those that remain.

Previously, the tests to determine whether a shareholder was a controller were based on case law, including *Tornetta*, which bestowed this status on an executive with less than 22 percent of the corporation's voting stock.[182] Displacing much of this jurisprudence,[183] the new section 144(e)(2) defines the term "controlling stockholder" as a shareholder who has majority voting power in director elections, can otherwise cause the election of a majority of the board, or has both at least one-third of the voting power and "managerial authority" over the corporation's business.[184]

This definition would have excluded many shareholders who were deemed controllers in previous cases, because they would not have held the requisite proportion of shares.[185] Most saliently, in a clear rebuke to the *Tornetta* decision from the previous year, Elon Musk would not constitute a "controlling stockholder" of Tesla under the new statute.[186] Less blatantly, the definition would exclude a shareholder who has "managerial authority" through a contract authorized by section 122(18) but lacks at least one-third of the voting power and the ability to elect a majority of the board.[187] Under previous common law tests, however, such a shareholder could very well constitute a controller.[188] Because the statute was clearly intended to

181. *See supra* Part I.B.

182. *See supra* note 140 and accompanying text.

183. Talley, Sanga & Rauterberg, *supra* note 13 (noting that the legislation was designed to "legislatively overrule" recent court decisions including *Tornetta*).

184. Tit. 8, § 144(e)(2).

185. Talley, Sanga & Rauterberg, *supra* note 13 (noting that the new "bright-line rule . . . will exclude some major stockholders (20–33 percent) from controller scrutiny, even if they exercise significant influence").

186. *Id.* (specifically citing *Tornetta* as a case that would be decided differently).

187. *See* tit. 8, § 144(e)(2)(c) (requiring both "at least ⅓ in voting power" and "power to exercise managerial authority over the business and affairs of the corporation").

188. *See In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006) (explaining how "managerial power" can make a minority shareholder a controller, without specifying a minimum stock ownership requirement); Calesa Assocs., L.P. v. Am. Cap., Ltd., C.A. No. 10557, 2016 WL 770251, at *10 (Del. Ch. Feb. 29, 2016) (finding that a shareholder with 26 percent of a corporation's shares could be controlling).

displace those tests, these nonstatutory controllers do not have to follow any cleansing process when transacting with or otherwise receiving private benefits from their corporations.[189] Indeed, they no longer have fiduciary duties to minority shareholders for any practical purpose.[190] In effect, section 144(e)(2) creates a silent safe harbor for de facto controllers who do not fit its new de jure definition of "controlling stockholder." Absent some other deficiency, the business judgment rule presumably protects transactions involving these controllers without any cleansing process at all.[191]

However, if a shareholder does fit that definition, then section 144 applies to any "controlling stockholder transaction" involving that shareholder. Section 144(e)(3) defines this term as a transaction between the corporation and a controlling stockholder or from which a controlling stockholder receives "a financial or other benefit not shared with the corporation's stockholders generally" (i.e., a nonratable benefit).[192] For these transactions, section 144(b) and (c) provide more streamlined versions of the previous common law cleansing processes to avoid liability for breach of fiduciary duty.

Before SB 21, *MFW* applied to freeze-out mergers, and *Match* applied to all other transactions that would have fit section 144(e)(3)'s new definition

189. S. Substitute No. 1 for S.B. 21, 153d Gen. Assemb., Reg. Sess., synopsis (Del. 2025) ("Section 144 is intended to provide a comprehensive liability exculpation scheme with respect to the fiduciary duties owed by stockholders and with respect to when the safe harbors in § 144(b) and (c) apply.").

190. *Id*. (explaining that "stockholders who are not controlling stockholders or part of a control group . . . do not owe fiduciary duties to the corporation or other stockholders"). Shortly after SB 21's passage, Professors Marcel Kahan and Edward Rock offered an alternative interpretation, arguing that the statute does not eliminate common law fiduciary duties for controllers who fall below the statutory threshold. Marcel Kahan & Edward Rock, *What Newly Amended DGCL § 144 Says (and Does Not Say) About Controlling Stockholder Transactions*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 5, 2025), https://corpgov.law.harvard.edu/2025/06/05/what-newly-amended-dgcl-§144-says-and-does-not-say-about-controlling-stockholder-transactions [https://perma.cc/46KT-L57B]. A leading practitioner rejected this interpretation as unintended by the drafters, unsupported by evidence, and resulting in a senseless "bi-polar regime." Theodore N. Mirvis, *SB 21's § 144 and Controlling Stockholders: Back to the Future?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 5, 2025), https://corpgov.law.harvard.edu/2025/11/05/sb-21s-%C2%A7-144-and-controlling-stockholders-back-to-the-future [https://perma.cc/6HJQ-N78S]. More recently, in *Rutledge v. Clearway Energy Group LLC*, 360 A.3d 1271 (Del. 2026), the Delaware Supreme Court strongly suggested that the new statutory definition of "controlling stockholder" in DGCL section 144(e)(2) had displaced prior case law regarding controller status. After summarizing the jurisprudence "concerning what constitutes 'control' of a corporation," the court stated that SB 21 "*redirects* the previously mentioned judicial development of the concept of 'control' by defining the term 'controlling stockholder.'" *Id*. at 1279–80 (emphasis added). This implies that Delaware courts will not apply that prior case law going forward and will instead rely exclusively on the definition in DGCL section 144(e)(2). Accordingly, consistent with this part's analysis, a shareholder that does not fit that definition may freely transact with the corporation without following the cleansing processes provided by DGCL section 144(b) and (c) or any prior jurisprudence.

191. *See supra* note 110 and accompanying text.

192. Tit. 8, § 144(e)(3).

of "controlling stockholder transaction."[193] Each case held that, if challenged, the applicable type of transaction was subject to entire fairness review by default and could obtain business judgment rule protection only if it followed the rigorous, six-point, dual-approval process first stated in *MFW*.[194] SB 21 dramatically lowered the hurdles set by those cases.[195]

For freeze-out mergers and other "going private transaction[s]," section 144(c) maintains *MFW*'s general requirement of dual approvals by both a special board committee and a majority of disinterested shareholders to avoid liability,[196] while making each approval far easier to obtain. First, the new provision altogether dispenses with *MFW*'s ab initio requirement, which many transactional planners had found impractical.[197] Now, rather than disable itself from the outset of negotiations, a controller can use its influence over the board to obtain the best possible terms for itself and then submit the resulting deal to the board committee and disinterested shareholders. This thwarts *MFW*'s intent to "replicate arm's length bargaining" despite a controller's looming presence.[198] Second, whereas *Match* had clarified that the special board committee must consist entirely of independent directors,[199] the new statutory provision requires only two or more disinterested directors to serve on the committee, no matter how many interested directors sit alongside them.[200] Moreover, a director's disinterestedness is to be determined by the board itself, even if most directors are conflicted, with no apparent "second-guessing by a court."[201] This process introduces the risks that no directors will be truly disinterested and that, even if some are, the interested directors will sway them to favor the controller.[202] Third, section 144 lowers the required shareholder approval threshold from a majority of *outstanding* disinterested shares to a majority of disinterested *votes cast*.[203] In the previous system, abstentions counted as "no" votes, but in the new one, they do not count at all.[204] Because many shareholders in publicly traded or widely held corporations abstain from voting,[205] a controller transaction can now win the requisite shareholder

193. *See supra* notes 128–30 and accompanying text.

194. *See supra* notes 125, 131 and accompanying text.

195. Lipton, *supra* note 1, at 103 (describing the amended cleansing processes as "almost comically undemanding").

196. Tit. 8, § 144(c).

197. *See supra* note 127 and accompanying text.

198. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 452 (Del. 2024).

199. *Id.* at 473 & n.182.

200. Tit. 8, § 144(b)(1), (c)(1).

201. Lipton, *supra* note 1, at 103 n.127.

202. *See* Bebchuk & Kastiel, *supra* note 20 (manuscript at 11) (explaining that prior law recognized "that the presence of dependent directors could distort the deliberations and have a 'chilling effect' on the independent directors").

203. Kahn v. M&F Worldwide Corp., 88 A.3d 635, 645 (Del. 2014); tit. 8, § 144(b)(2).

204. Talley, Sanga & Rauterberg, *supra* note 13 ("The stockholder vote counts only votes actually cast, so abstentions do not act as opposition.").

205. *See, e.g.*, Chuck Callan & Mike Donowitz, *2024 Proxy Season Review*, BROADRIDGE (Oct. 16, 2024), https://www.broadridge.com/article/bbd/2024-proxy-season-review [https://perma.cc/NZA5-EBTM] (reporting that retail investors voted only 29.8 percent of their shares in the 2024 proxy season compared to 77.8 percent for institutional investors).

approval with support from only a small fraction of the minority base. This significantly weakens the ability of motivated minority shareholders to veto a deal that they oppose.

Even more dramatically, for controlling stockholder transactions other than going private transactions, section 144(b) supersedes *Match* by eliminating the dual-approval requirement altogether.[206] Instead, these transactions can be cleansed by just one of the two previously required approvals: *either* a special board committee *or* disinterested shareholders.[207] Even under *Match*, which required that all directors on the special committee be independent, this approval was usually easier to obtain than an affirmative shareholder vote. Social ties, "structural bias," and soft influence often permeate boards of controlled corporations.[208] Under prevailing common law standards, a director could be considered independent even if they had been elected by or had limited personal or professional ties with the controller.[209] Thus, an allegedly independent board committee could be more biased in the controller's favor than would minority shareholders. Now that section 144 has eliminated the requirement of an entirely independent committee,[210] approval by such a body should be even easier than before. Accordingly, controllers will probably seek committee approval alone for most covered transactions,[211] bypassing other shareholders entirely and eliminating any leverage that they had under *Match*'s stricter process.

Together, section 144's overhaul of prior jurisprudence governing controller transactions liberates controllers to deal with their corporations in ways that are harder for other shareholders to monitor and challenge. This favoritism toward controllers marks a significant departure from shareholder primacy's prioritization of all shareholders in proportion to their share ownership.[212]

206. Rutledge v. Clearway Energy Grp. LLC, 360 A.3d 1271, 1281 (Del. 2026) ("By enacting subsection (b) of § 144, the General Assembly displaced our ruling in *Match*.").

207. Tit. 8, § 144(b)(1)–(2).

208. *See* Julian Velasco, *Structural Bias and the Need for Substantive Review*, 82 WASH. U. L.Q. 821, 824 (2004) (arguing that directors are often influenced by "structural bias"—the "prejudice" that they "may have in favor of one another and of management").

209. *See, e.g.*, Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1051–52 (Del. 2004) (holding that allegations of friendship and "mov[ing] in the same business and social circles" were insufficient to rebut the presumption of independence).

210. *See supra* notes 199–202 and accompanying text.

211. *Transformative Amendments Proposed to Delaware General Corporation Law*, PAUL, WEISS (Feb. 25, 2025), https://www.paulweiss.com/insights/client-memos/transformative-amendments-proposed-to-delaware-general-corporation-law [https://perma.cc/8JDG-ZXRP] (noting that, under the amendments, controllers can secure business judgment rule protection in non-freeze-out transactions using only a special committee, thereby avoiding the "significant deal risk" of a minority vote, and predicting that parties will instead rely on special committees to avoid that risk).

212. *Cf. supra* Part I.D.

3. Section 220: Books and Records Requests

SB 21's amendments to DGCL section 220 magnify controllers' newfound freedom and Delaware's shift away from shareholder primacy. That section governs shareholders' requests for books and records of any corporation, whether or not it has a controlling shareholder.[213] Historically, Delaware courts have viewed section 220 as a necessary counterbalance to the business judgment rule's protection of directors and the significant procedural hurdles to shareholder litigation.[214]

In general, if an alleged breach of fiduciary duty directly harms the corporation but harms shareholders only indirectly (e.g., by decreasing the value of their shares), then shareholders cannot sue fiduciaries directly, because the claim belongs to the corporation, not to them.[215] Instead, they may be able to bring a "derivative" claim on the corporation's behalf.[216] To do that, a shareholder must first plead "with particularity" facts showing that it would be "futile" to ask directors to make the claim because a majority of the board is conflicted in some way.[217] To permit shareholders to obtain those facts, the courts established the "tools at hand" doctrine.[218] This doctrine practically required shareholders to request and obtain books and records under section 220 before bringing derivative suits to enforce fiduciary duties.[219] As a result, this administrative provision had become essential for corporate oversight by shareholders.[220]

In some situations, jurisprudence before SB 21 had expanded shareholders' access under this section beyond formal records like board minutes to internal communications and documents, including emails and text messages.[221] However, courts had maintained basic limits on these inspections and approached each case carefully in deciding whether to order

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213. DEL. CODE ANN. tit. 8, § 220 (2026).

214. *See* Seinfeld v. Verizon Commc'ns, Inc., 909 A.2d 117, 120 (Del. 2006) ("The rise in books and records litigation is directly attributable to this Court's encouragement of stockholders, who can show a proper purpose, to use the 'tools at hand' to obtain the necessary information before filing a derivative action. Section 220 is now recognized as 'an important part of the corporate governance landscape.'" (footnotes omitted)).

215. *See* Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1033 (Del. 2004) (establishing the test for distinguishing direct and derivative claims based on "who suffered the alleged harm" and "who would receive the benefit of any recovery").

216. Del. Ch. Ct. R. 23.1 (establishing the procedural requirements for a shareholder to bring a derivative action on a corporation's behalf).

217. United Food & Com. Workers Union v. Zuckerberg, 262 A.3d 1034, 1059 (Del. 2021).

218. Rales v. Blasband, 634 A.2d 927, 934–35 & n.10 (Del. 1993); Grimes v. Donald, 673 A.2d 1207, 1216 & n.11 (Del. 1996).

219. *See* Brehm v. Eisner, 746 A.2d 244, 266 (Del. 2000).

220. *See* Roy Shapira, *Corporate Law Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1953 (2021) (explaining that "section 220 has become a potent investigatory tool, allowing plaintiffs to overcome what once seemed insuperable pleading hurdles").

221. *E.g.*, KT4 Partners LLC v. Palantir Techs. Inc., 203 A.3d 738, 742 (Del. 2019) (holding that a company that conducts business "largely through informal electronic communications" cannot use that choice "to keep shareholders in the dark").

disclosures. Shareholders could inspect books and records only by demonstrating a proper purpose, which must transcend "mere disagreement with a business decision" and "bare allegation[s] of possible waste, mismanagement, or breach of fiduciary duty."[222] In addition, courts permitted access to informal communications only when plaintiffs demonstrated "a credible basis to suspect wide-ranging misconduct and wrongdoing"[223] or that the corporation had "a history of not complying with required corporate formalities."[224]

Despite these judicial guardrails, SB 21's amendments to section 220 have restricted access to informal records even further. Unlike the previous statutory provision, the new version provides a definition of "books and records," which includes only formal documents, such as board meeting minutes.[225] Under section 220(f) and (g), if a corporation simply maintains those formal records, then a court may order it to produce materials that fall outside the new definition, such as informal communications, only if a shareholder demonstrates a "compelling need" for them "by clear and convincing evidence."[226] The new language imposes more stringent requirements than preamendment jurisprudence, which required shareholders to demonstrate only a need (not a "compelling need") for other documents by a preponderance of the evidence.[227] That is a far more common and much lower standard of proof than clear and convincing evidence,[228] which Delaware law typically reserves for specific, extraordinary claims, such as contract reformation and termination of parental rights.[229]

Because the new provision limits access to a corporation's informal internal communications, shareholders will face more difficulty in discovering and opposing all sorts of managerial misconduct, including that arising from a controller's influence. Emails and text messages are much more likely than board meeting minutes to document disloyalty, coercion,

222. AmerisourceBergen Corp. v. Lebanon Cnty. Emps.' Ret. Fund, 243 A.3d 417, 425–26 (Del. 2020) (citation modified) (quoting High River Ltd. P'ship v. Occidental Petroleum Corp., C.A. No. 2019-0403, 2019 WL 6040285, at *5 (Del. Ch. Nov. 14, 2019)).

223. Pettry v. Gilead Scis., Inc., C.A. Nos. 2020-0132, 2020-0138, 2020-0155, 2020-0173, 2020 WL 6870461, at *24 (Del. Ch. Nov. 24, 2020).

224. *KT4 Partners*, 203 A.3d at 756.

225. DEL. CODE ANN. tit. 8, § 220(a) (2026).

226. *Id.* § 220(g).

227. *See, e.g.*, *KT4 Partners*, 203 A.3d at 751–52 (holding that production of emails is appropriate only if "necessary and essential" to the plaintiff's purpose); Sec. First Corp. v. U.S. Die Casting & Dev. Co., 687 A.2d 563, 567 (Del. 1997) (applying the preponderance of the evidence standard to section 220 actions).

228. *See* Hightower v. SharpSpring, Inc., C.A. No. 2021-0720, 2022 WL 3970155, at *10 (Del. Ch. Aug. 31, 2022); Miranda v. Del. State Lottery Comm'n, C.A. No. K10A–10008, 2011 WL 3329282, at *2 & n.7 (Del. Super. Ct. Aug. 1, 2011).

229. *E.g.*, Cerberus Int'l, Ltd. v. Apollo Mgmt., L.P., 794 A.2d 1141, 1152 (Del. 2002); Wilson v. Div. of Fam. Servs., 988 A.2d 435, 443 (Del. 2010).

and other actionable indiscretions.[230] If a board has the common sense to simply keep meeting minutes but exclude from them any evidence of misconduct, then a shareholder will struggle to meet section 220(g)'s heightened standards for accessing any other documents. For example, if a minority shareholder seeks to challenge a controller transaction, a books and records request may still yield the contract memorializing the transaction and the minutes of the board meeting in which directors approved it.[231] However, the shareholder may not be able to access any preceding communications between directors and the controller that demonstrate conflicts of interest or a lack of independence. Without such evidence, a shareholder cannot plead the "particularized facts" needed to establish that demand on the board would be futile, as required to bring a derivative suit.[232] In that case, the claim will not even survive a motion to dismiss, let alone result in liability.[233] Thus, the amendments to section 220 reinforce the revised section 144 in immunizing controllers' activities.[234] With litigation risk accordingly curtailed, they now face fewer impediments in dominating and transacting with their corporations.

In addition to these practical implications, section 220's heightened restrictions may represent another conceptual step away from shareholder primacy. Contrary to that theory's tenet that all shareholders are a corporation's ultimate authorities in proportion to their share ownership, the new provision's obstacles to litigation disempower minority shareholders from effectively exercising their purported authority to hold fiduciaries accountable.

III. THE EMERGING PARADIGM OF CONTROLLER PRIMACY

As Delaware abandons shareholder primacy in controlled corporations, Part III formulates a distinct theory called "controller primacy" to explain the state's emerging approach to corporate authority and purpose in these firms. Like shareholder primacy, this theory is based not just on directors' legal duties but also on the parameters of their discretion and the circumstances that shape their decisions.[235] Given the recent changes to these factors, controller primacy presents a more accurate *descriptive* claim about the evolving law governing controlled firms than shareholder primacy does, without purporting to displace any *normative* value that the latter theory may retain as an ideal of legal principles or business practices. Following the

230. *See KT4 Partners*, 203 A.3d at 742, 753 (recognizing that email is the primary means of communication in many companies and that exclusive reliance on formal minutes can allow managers to hide evidence of wrongdoing).

231. Tit. 8, § 220(a).

232. *See supra* note 217 and accompanying text.

233. *See, e.g.*, Wood v. Baum, 953 A.2d 136, 141–42 (Del. 2008) (affirming dismissal of derivative complaint because the plaintiff failed to plead particularized facts demonstrating that demand was futile).

234. *See supra* Part II.C.2.

235. *See supra* text accompanying notes 99–101.

dichotomy introduced in Part I.B, this part addresses corporate authority and purpose in turn.

A. Corporate Authority

Whether one believes that shareholders or directors have ultimate decision-making authority by default, controllers are rising to that rank in controlled Delaware corporations. Traditionally, shareholder primacy emphasizes that shareholders hold directors accountable as their agents through rights to elect, remove, or sue them.[236] That claim is tenuous in a corporation with dispersed ownership, in which each shareholder acting alone cannot affect an election outcome and must overcome significant hurdles to bring derivative litigation.[237] In a controlled firm, however, that claim is undeniable, but only for the controlling shareholder. Per the traditional definition (as opposed to the new statutory one), that person can control the board, usually through some combination of voting rights, influence, relationships, and—now, thanks to DGCL section 122(18)—various contractual rights.[238] To the extent that a person's control over a corporation arises from any of these factors other than voting power, shareholder primacy fails to capture the situation. Its conception of corporate authority stems solely from share ownership and treats each share of a class or series as an equal claim to power.[239]

By asserting that a controlling shareholder is a controlled firm's ultimate authority, controller primacy provides a more accurate account of corporate authority under the current legal trend in three main ways. First, it contemplates the broader sources of power permeating these environments beyond shareholder voting rights. Second, it recognizes that many controllers' authority is disproportionate to their shareholdings—in other words, they have more power per share than other shareholders do. Third, if one accepts shareholder primacy's traditional view that directors are shareholders' agents in a typical corporation,[240] a contract that delegates the board's authority to a controller, as permitted by section 122(18), breaks any agency relationship with other shareholders, such that directors would be agents only of the controller.

In contrast, a director primacy proponent may object that even a controlled firm's board retains statutory authority over corporate governance under DGCL section 141(a), which the recent amendments have not changed.[241] Technically, the decision to cede that authority to a controller, whether by contract or otherwise, remains within the directors' discretion. But that discretion is illusory when a controller can use various forms of power to

236. *See supra* text accompanying note 71.

237. *See* John Pound, *The Rise of the Political Model of Corporate Governance and Corporate Control*, 68 N.Y.U. L. REV. 1003, 1027–28 (1993). Regarding obstacles to derivative litigation, see *supra* notes 215–17 and accompanying text.

238. *See supra* Part II.C.1.

239. *See supra* Part I.D.

240. *See supra* note 70 and accompanying text.

241. Regarding director primacy, see *supra* notes 72–74 and accompanying text.

constrain the board, including any existing contractual governance rights.[242] In this situation, controllers, not directors, are the corporation's ultimate decision-makers, if they want to be.

Of course, controllers do not *have* to exercise their control; they often let the board manage the corporation's affairs without interference. But this does not undermine controller primacy, just as the idea that shareholders delegate their decision-making authority to directors does not undermine shareholder primacy. Similarly, the fact that directors delegate certain management functions to officers does not undermine director primacy.[243] Under each of those theories, the purported principal's mere *option* to rescind its delegation by removing the purported agent maintains the principal's authority.[244] Relatedly, a controller's mere option, whether or not exercised, to control the board and the corporation's direction makes the controller the firm's ultimate authority.[245]

B. Corporate Purpose

As to corporate purpose, while shareholder primacy identifies all shareholders in proportion to their shares as the firm's ultimate beneficiaries, controller primacy asserts that only the controller holds this title in a controlled corporation. Though not relegated to irrelevance, ordinary shareholders of these firms can claim second place at best.

As expounded in Part I.C, the question of corporate purpose is about priority: Which constituency does the law require or incentivize a corporation's decision-makers to place above the rest?[246] The answer depends not only on those decision-makers' legal duties but also on their discretionary authority and the broader incentive structures arising from each constituency's effective legal rights. In a corporation without a controlling shareholder, those factors should lead directors to prioritize interests common to all shareholders, consistent with shareholder primacy. In a controlled firm, however, the board's authority and incentive structures—and sometimes even their duties—may lead directors to favor the controller's interests over other shareholders' interests whenever the two diverge.

Such a divergence could arise in many ways. While general shareholder interests are traditionally simplified to long-term value maximization,[247] a

242. *See* Rauterberg & Sanga, *supra* note 23, at 323 (explaining that a section 122(18) contract cannot be presumed to be at arm's length because "controlling shareholders often dominate boards").

243. *See* Grimes v. Donald, 673 A.2d 1207, 1215 (Del. 1996) (recognizing that boards typically delegate day-to-day management to officers).

244. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (A.L.I. 2006) ("A principal's failure to exercise the right of control does not eliminate it . . . . The requirement that an agent be subject to the principal's control assumes that the principal is capable . . . of terminating the agent's authority.").

245. This conclusion aligns with prior Delaware jurisprudence on controller status, which depended on one's ability to control the corporation rather than one's exercise of that control. *See supra* note 137 and accompanying text.

246. *See supra* Part I.C.

247. *See supra* note 76 and accompanying text.

controller may prefer to sacrifice some of that value for advantages that it prioritizes, perhaps idiosyncratically.[248] These objectives do not have to be purely selfish or constitute self-dealing in violation of anyone's fiduciary duties. For example, a controller may disproportionately value certain environmental, social, and governance goals that neither maximize firm value nor harm any shareholder in any measurable, discriminatory, and actionable way.[249] In this situation, the board may face a choice between the most profitable option (which would maximize long-term share value and thus ordinary shareholders' utility) and the controller's preference (which would maximize utility, including nonmonetary benefits, for the controller and be second best for all other shareholders). If each option lacks a conflict of interest and could plausibly relate to long-term share value, then the business judgment rule will normally apply and shield the board from liability for either action.[250] In this default situation, the directors do not have an enforceable *duty* to make a particular decision or to prioritize a particular constituency. Given that freedom, a descriptive theory of corporate purpose turns on the constituency that directors have an *incentive* to prioritize under the circumstances.

Even before the recent DGCL amendments, many directors in this situation would have already had strong incentives to prioritize the controller's interests. While they would have faced no liability from ordinary shareholders, a controller could have removed noncompliant directors from the board or damaged their reputations.[251] Arguably, the board's resulting incentive to pursue the less profitable option preferred by the controller was already inconsistent with the standard view of shareholder primacy as value maximization. However, to the extent that this incentive arises solely from the controller's share ownership rather than other sources of control, it could

248. This scenario is different from the concept of "idiosyncratic vision" elaborated by Professors Zohar Goshen and Assaf Hamdani. Their concept refers to a controller's "belief that a proper implementation of her strategy will produce *above-market* returns", with the controller and minority shareholders "shar[ing] the objective of maximizing the firm's expected return." Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 577, 579 (2016) (emphasis added). That framework is consistent with shareholder value maximization and shareholder primacy's standard account of corporate purpose. In contrast, this passage contemplates a controller that pursues a vision to achieve not "above-market returns" for all shareholders, but another objective that the controller values more than financial returns. This is not consistent with shareholder primacy.

249. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 770–74 (2005) (arguing that the business judgment rule gives managers "discretion to sacrifice profits" in the public interest unless it amounts to self-dealing).

250. *See id.* at 770. Even under entire fairness review, there would ordinarily be no liability for the controller in this situation either. *See, e.g.*, *In re* Sears Hometown & Outlet Stores, Inc. S'holder Litig., 309 A.3d 474, 516–18 (Del. Ch. 2024) (holding that a controller was not liable for blocking a liquidation plan that the board approved and believed to be value maximizing, because the controller acted in good faith with a "legitimate objective" to pursue a different strategic vision).

251. *See* DEL. CODE ANN. tit. 8, § 141(k) (2026) (authorizing the removal of directors "with or without cause" by a majority vote); *In re* EZCorp Inc. Consulting Agreement Derivative Litig., C.A. No. 9962, 2016 WL 301245, at *20–22 (Del. Ch. Jan. 25, 2016) (discussing a controller's "retributive" power to damage directors' reputations).

cohere with another, less common conception of shareholder primacy, in which directors must maximize shareholder "welfare," including broader interests beyond just pecuniary share value.[252]

Even so, the recent DGCL amendments have shifted the governance landscape of controlled firms further away from any notion of shareholder primacy. Most importantly, section 122(18) has provided controllers with a more direct and efficient means of controlling the corporation than just exercising or threatening to exercise their voting rights.[253] If a controller uses a consent right in a shareholder agreement to veto a value-maximizing option, then that option is unavailable to the board. Legally, directors cannot be expected, let alone obligated, to take an option that the law has expressly permitted them to eschew through an enforceable contract. Recent Delaware jurisprudence has asserted that default fiduciary duties do not override voluntarily undertaken contractual duties.[254] If that principle applies to a section 122(18) contract and directors cause the corporation to breach it to satisfy an alleged, practically unenforceable duty to maximize profits, then the corporation must pay damages to the controller.[255] If those damages and attendant litigation costs are greater than the difference in expected values between the controller's preferred option and the ostensibly value-maximizing option, then the latter would not maximize value after all. In that case, directors would have to follow the controller's preference not only under contract law but also under the shareholder value maximization norm. Alternatively, even if the law *did* imply a "fiduciary out" (i.e., an excuse from performing a contract to the extent that it conflicts with one's fiduciary duties) from these shareholder agreements, the board would not *have* to avoid performance in pursuit of an option that is only *slightly* better for ordinary shareholders. In that situation, fiduciary duties would not compel either option, as the business judgment rule would accommodate each.[256]

Therefore, when a controller has governance rights, the board's options are limited to those that the controller approves or otherwise permits. Even under a counterfactually strict application of the shareholder value maximization principle, controlled firms' directors would have to take only the most profitable path that controllers *let* them take. With these rights, a rational and self-interested controller would steer the board along the path that most benefits the controller, which may not be the best path for ordinary shareholders. Whether or not exercised, this ability undermines shareholder

252. *See supra* notes 77–78 and accompanying text.

253. *See supra* Part II.C.1.

254. *In re* Columbia Pipeline Grp., Inc. Merger Litig., 316 A.3d 359, 395 (Del. Ch. 2024) ("[T]he Delaware courts do not regard the fiduciary duties imposed by equity as more important than voluntarily assumed contractual commitments."), *rev'd on other grounds*, 342 A.3d 324 (Del. 2025); *see also* Rauterberg & Sanga, *supra* note 23, at 324–25 (arguing that, for many section 122(18) contracts, "fiduciary duties are weak, if not completely toothless").

255. Regarding the concept of efficient breach in this situation, see *supra* text accompanying note 175.

256. *See supra* note 250 and accompanying text.

primacy, because the corporation's ultimate beneficiary does not depend on share ownership alone.[257] To the contrary, DGCL section 122(18) has permitted controllers to ascend to this privileged status no matter how many shares they own,[258] as long as they can influence the board to grant them governance rights in a shareholder agreement.

While that new subsection has directly increased boards' incentives and sometimes their obligations to prioritize controllers, the recent amendments to sections 144 and 220 have diminished their opposite incentives to prioritize all shareholders equally. This outcome also contradicts shareholder primacy. For over a decade before those amendments were enacted, Delaware case law had increasingly encouraged directors to obtain minority shareholders' fully informed consent before transacting with controllers.[259] Reversing this trend, the amendments to these sections allow boards to insulate most of these transactions from liability without shareholder approval and to deny shareholders access to internal communications that they could use to challenge those transactions.[260] Together, these new rules limit shareholders' ability to approve, contest, and even discover many transactions with controllers and other board decisions that cater to them. In those situations, directors now have little to fear from ordinary shareholders and thus less of a reason to prioritize them. Comparatively, the controller's influence will loom larger in directors' minds and weigh more heavily on their incentives.

This demotion in priority does not mean that ordinary shareholders of controlled firms face outright subjugation in the new legal regime. After all, their very presence implies that a corporation needed their capital; otherwise, the firm would not have sold shares to minority investors in the first place. This need gives both the board and the controller incentives not to egregiously mistreat ordinary shareholders—if not to avoid liability, then perhaps to avoid diminishing the current stock price and deterring future investors. In this way, to the extent that controllers care about share values or anticipate a need for additional outside investment, capital markets may discipline them against extracting maximal private benefits from their firms. Moreover, the DGCL amendments do not displace federal securities laws, which continue to provide numerous protections to ordinary shareholders of public corporations.[261]

Despite their potential to mitigate certain excesses, market discipline and securities laws cannot prevent Delaware's broader shift toward controller primacy. Even with these exterior guardrails, the new legal regime provides directors with overwhelming incentives to favor controllers over other shareholders, without permitting outright expropriation of minority

257. *See supra* Part I.D.
258. *See supra* note 167 and accompanying text.
259. *See supra* Part II.B.
260. *See supra* Parts II.C.2–3.
261. *See generally* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711 (2006) (describing how various categories of federal securities regulations protect investors and promote market efficiency).

investments. As a descriptive account of corporate law, controller primacy holds only that a controller is a controlled firm's *ultimate* beneficiary, not its exclusive beneficiary. Consequently, this account may remain accurate even when baseline protections for minority shareholders endure.

C. Disproportionality

Although a controller is, of course, a type of shareholder, controller primacy is not just a specific instantiation of shareholder primacy. It is a distinct theory of the corporation.

Whether based on shareholder "value" or "welfare," any form of shareholder primacy holds that all shareholders are a corporation's ultimate authorities and beneficiaries in proportion to their shares, with each share of a class or series bestowing equal rights to power and benefits.[262] Traditionally, even a shareholder with an overwhelming voting majority exercised control formally through the board of directors.[263]

But under section 122(18), a controller can bypass these cumbersome procedural channels and make decisions directly on the corporation's behalf. Even when a controller does act through the board, the new regime facilitates the controller's domination. In some cases, fiduciaries will have contractual obligations to follow the controller's wishes without any legal excuse from performance. In others, they will simply have strong incentives to do so without any appreciable risk of liability to ordinary shareholders. One way or another, Delaware no longer simply tolerates but now actively facilitates substantial grants of managerial authority and private advantages to controllers, who can choose to exert more power per share to derive more benefits per share than ordinary shareholders can.

Accordingly, controller primacy accurately describes this emerging regime by elevating controlling shareholders above all others as their corporations' principal authorities and beneficiaries. This status arises from control in all its forms, not just from shareholding, so controller primacy is *not* just a form of shareholder primacy.

If Delaware law continues toward controller primacy, neither directors nor ordinary shareholders will be a controlled corporation's most important constituency. In these firms, controllers will have paramount authority and be able to wield it to prioritize their own interests over those of other shareholders. Traditional checks on self-dealing will apparently continue in principle but will be hobbled in practice by new impediments for other shareholders to learn about and successfully contest these transactions. The remaining safeguards may prevent outright abuse but will not be enough for anyone else to equal controllers as the corporation's ultimate decision-makers or beneficiaries.

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262. *See supra* text accompanying notes 3–4.
263. *See supra* note 73 and accompanying text.

IV. RISKS AND REFORMS

Following the first three parts' assessments of shareholder primacy and controller primacy as descriptive theories of the corporation, Part IV shifts to a normative analysis. It considers the legal and economic implications of Delaware's emerging form of controller primacy and proposes targeted corrections to its pathologies.

A. The Costs and Benefits of Control

The empowerment of controllers is not categorically detrimental. Although the Delaware legislature's primary motive for the recent amendments may have been economic survival,[264] lawmakers and corporate lawyers held principled beliefs that the state's jurisprudence had gone too far in disempowering controllers and needed statutory correction. Reacting to the invalidation of certain shareholder agreements in *Moelis*, proponents of SB 313 sought to uphold freedom of contract and to conform the law to the alleged "market practice" in which corporations granted extensive managerial rights to founders and investors through these agreements.[265] Meanwhile, SB 21's supporters aimed to reduce the uncertainty and litigation costs that *Match* and *Tornetta* had introduced to routine transactions.[266]

On more conceptual grounds, many scholars also support some degree of controller empowerment. Although corporate law theory and doctrine have historically focused on protecting minority shareholders from abuse by controllers,[267] several academics have highlighted the potential benefits of

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264. *See* Press Release, Off. of the Governor, Governor Meyer Signs SB21 Strengthening Delaware Corporate Law (Mar. 26, 2025), https://news.delaware.gov/2025/03/26/governor-meyer-signs-sb21-strengthening-delaware-corporate-law [https://perma.cc/RKX5-RPKX] (quoting Governor Matt Meyer as stating that SB 21 will "help keep" Delaware as "the best place in the world to incorporate your business" and "will also protect state revenue that will fund education, affordable housing, and infrastructure improvements across our state").

265. *E.g.*, Lawrence A. Hamermesh, *Letter in Support of the Proposed Amendments to § 122 DGCL*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 11, 2024), https://corpgov.law.harvard.edu/2024/06/11/letter-in-support-of-the-proposed-amendments-to-%C2%A7-122-dgcl/ [https://perma.cc/T95U-ZHU4] (arguing that the amendments were "urgently" needed to restore predictability because the *Moelis* decision had invalidated governance arrangements that were "market practice" and widely relied upon by investors). *But see* Gladriel Shobe, Jarrod Shobe & William W. Clayton, Moelis *and Private Equity in the Public Market*, 43 YALE J. ON REGUL. 598, 598 (2026) (finding through an empirical analysis that "aggressive stockholder agreements of the type invalidated in *Moelis* are rare and phased out relatively quickly").

266. *E.g.*, William B. Chandler III, Amy Simmerman & Brad Sorrels, *Delaware Legislators and Governor Propose Landmark Legislation*, WILSON SONSINI (Feb. 18, 2025), https://www.wsgr.com/en/insights/delaware-legislators-and-governor-propose-landmark-legislation.html (on file with the *Fordham Law Review*) (describing the proposed SB 21 as "necessary and remarkable" legislation intended to "address problems of recent vintage" regarding controlling shareholder litigation and books and records demands); *see also* Bainbridge, *supra* note 11, at 826 (describing "the bar's dissatisfaction with the recent direction of Delaware law," including concerns about "unpredictability" and "increased uncertainty, especially with regard to controller transactions").

267. *See, e.g.*, Lucian A. Bebchuk & Assaf Hamdani, *The Elusive Quest for Global Governance Standards*, 157 U. PA. L. REV. 1263, 1282 (2009) (arguing that, in controlled

liberating certain controllers to manage and transact with their firms.[268] Notably, Professors Zohar Goshen and Assaf Hamdani have called for legal changes to allow controllers "to pursue their idiosyncratic vision"—that is, to implement their own ideas of how to maximize shareholder value, even if minority investors disagree.[269] In their view, the law should "balance idiosyncratic vision and minority protection" rather than focus only on the latter.[270] To the degree that corporate law theory supports Delaware's shift toward controller primacy, this balancing objective might provide a foundation.

This support would be limited, however, as scholars do not extend that objective to all controlling shareholders. In a "concentrated-ownership structure," the controller's cash-flow rights (i.e., its claim to financial distributions to shareholders, notably dividends and proceeds of the corporation's sale or liquidation) match its voting rights.[271] This describes the prototypical controlling shareholder that holds a majority of shares in a corporation with a single class of common stock. In that context, the controller's "significant equity investment" provides incentives to manage the company in a value-maximizing manner and not to extract private benefits of control.[272] This concentrated-ownership structure aligns with the principle of proportionality identified in Part I.D, as the controller's authority and benefit entitlements are commensurate with its shareholding. By contrast, in a dual-class corporation, a controller's voting rights far exceed its residual cash-flow rights.[273] Accordingly, its economic incentives are not as aligned with minority investors, who thereby face higher agency costs as the controller is more likely to mismanage the business and to extract excessive private benefits from it.[274] Many other scholars of law, economics, and business have also highlighted risks posed by dual-class controllers with relatively small equity stakes.[275] Accordingly, Goshen and Hamdani

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corporations, "the fundamental concern that needs to be addressed by governance arrangements is the controlling shareholder's opportunism"). For doctrinal history, see *supra* Part II.A.

268. *E.g.*, Gilson & Gordon, *supra* note 8, at 785 (describing a "tradeoff" in which "[t]he presence of a controlling shareholder reduces the managerial agency problem, but at the cost of the private benefits agency problem"); Ronald J. Gilson & Alan Schwartz, *Corporate Control and Credible Commitment*, 43 INT'L REV. L. & ECON. 119, 120 (2015) (positing that a controlled firm can make "credible commitments" to long-term strategies that firms with dispersed ownership cannot support); Goshen & Hamdani, *supra* note 248, at 560 (exploring "a fundamental tradeoff . . . between the entrepreneur's pursuit of her idiosyncratic vision and investors' need for protection against agency costs"); Albert H. Choi, *Concentrated Ownership and Long-Term Shareholder Value*, 8 HARV. BUS. L. REV. 53, 53 (2018) (arguing that "a moderate amount of private benefits of control can actually enhance long-term value by inducing commitment and investment by the controlling shareholder").

269. Goshen & Hamdani, *supra* note 248, at 569.

270. *Id.* at 594.

271. *Id.* at 592.

272. *Id.* at 595.

273. *Id.* at 590.

274. *Id.* at 590–91.

275. *E.g.*, Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1084 (2010)

advocate that "corporate law should preserve the link between controllers' freedom to pursue their vision and their significant equity investment."[276] Similarly, Professor Albert Choi suggests that "heightened scrutiny" should apply to dual-class controllers' decisions when "the separation of control from cash flow rights is extreme."[277]

These recommendations are consistent with traditional justifications for shareholder primacy. According to that view, shareholders should be a corporation's ultimate authorities and beneficiaries in large part because they are residual claimants, who have the most to gain from good governance, the most to lose from mismanagement, and thus the best incentives to monitor directors.[278] In a dual-class structure, however, the controller's residual cash-flow rights—and thus its financial exposure to those gains or losses and its resulting incentives—are limited relative to its voting rights.[279] To the extent of that limitation, the classic economic argument for shareholder primacy does not endorse deference to a controller based purely on super-voting rights or other sources of disproportionate control. Instead, that argument supports the principle that corporate law should promote value creation for all shareholders in proportion to their economic entitlements—namely, their cash-flow rights.

While every matter subject to a shareholder vote potentially affects firm value, not all of them pose equal risks. The archetype of shareholder voting is the annual director election.[280] Although shareholders may choose directors who eventually increase or decrease value to varying degrees, a board election rarely raises immediate concerns that a particular choice will harm the corporation or its shareholders. Thus, there is no categorical reason to prevent a dual-class controller, who holds a majority of voting power without a majority of cash-flow rights, from determining an election's outcome alone. This ability is, after all, the clearest benefit of the bargain that a controller strikes to receive voting control in the first place. Similar

(finding a negative correlation between firm value and the "wedge" between voting rights and cash-flow rights, indicating higher agency costs in dual-class firms); Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1464–66 (2019) (analyzing the specific risks posed by controllers who own a small fraction of equity but hold a majority of votes); Ronald W. Masulis, Cong Wang & Fei Xie, *Agency Problems at Dual-Class Companies*, 64 J. FIN. 1697, 1700, 1722 (2009) (finding that insiders with greater voting rights relative to cash-flow rights are more likely to extract private benefits).

276. Goshen & Hamdani, *supra* note 248, at 595.

277. Choi, *supra* note 268, at 79–80.

278. *See supra* notes 50–51 and accompanying text.

279. *See* Bebchuk & Kastiel, *supra* note 275, at 1466 ("In sum, dual-class structures with small-minority controllers generate significant governance risks because they feature a unique absence of incentive alignment. These controllers own a small fraction of the company's equity capital and thus bear only a small (and sometimes extremely small) share of the losses that their actions may inflict on the company's value. Yet they exercise effective control over decision-making and can capture the full private benefits of that control. This means that they may tolerate underperformance by the company where their private incentives offset any cost to their small shareholdings. At the same time, they are fully insulated from market disciplinary forces, and no threat of removal exists to help ensure they will not act against the interests of other public investors.").

280. *See supra* note 5.

logic could extend to a sale of the corporation through a merger that requires a shareholder vote,[281] if the controller is not a party to the transaction and does not receive a nonratable benefit from it.

In contrast, some other matters may pose more substantial, immediate, or direct risks of value destruction or diversion due to conflicts of interest. Delaware law delineates these situations by subjecting them to entire fairness review unless they follow a prescribed approval process. They consist primarily of conflicted transactions involving directors, officers, or controlling shareholders.[282] The law has long recognized that parties interested in these transactions may extract private benefits at the firm's expense.[283]

As economic alignment between an interested party and the corporation decreases, the risk of value destruction or diversion arising from a transaction between them increases. To ensure that these transactions prioritize the firm instead of the interested party, the decision should require approval from the holders of a majority of cash-flow rights (an "economic majority"),[284] not just voting rights. This principle provides a benchmark for assessing the laws governing controller transactions in the past, present, and possible future.

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281. *See* DEL. CODE ANN. tit. 8, § 251(c) (2026) (requiring that a merger agreement be approved by the holders of a majority of the target company's voting shares).

282. *See* Marciano v. Nakash, 535 A.2d 400, 404 (Del. 1987) (stating that entire fairness review applies to interested director transactions); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115 (Del. 1994) (stating that entire fairness review applies to controlling shareholder transactions).

283. *See* Gottlieb v. Heyden Chem. Corp., 90 A.2d 660, 663 (Del. 1952) ("Human nature being what it is, the law, in its wisdom, does not presume that directors will be competent judges of the fair treatment of their company where fairness must be at their own personal expense.").

284. In a complex capital structure, different shareholders' effective cash-flow rights may diverge in certain situations. For example, a corporation's certificate of incorporation may grant preferred stock greater distributions upon liquidation than common stock would receive. In those situations, an "economic majority" should be determined based on the cash-flow rights that each share would have if it were common stock, because Delaware's law of fiduciary duties does not prioritize preferred stock rights. *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 39–40 (Del. Ch. 2013) (explaining that "the rights and preferences of preferred stock are contractual in nature" and that its holders "are owed fiduciary duties only when they do not invoke their special contractual rights and rely on a right shared equally with the common stock" (quoting *In re* Trados Inc. S'holder Litig., Civil Action No. 1512-CC, 2009 WL 2225958, at *7 (Del. Ch. July 24, 2009))). Separately, hedge funds and corporate insiders may utilize derivatives to acquire voting power while hedging away economic exposure or even holding a net negative economic interest, which may eliminate or even reverse their incentives to increase firm value. Professors Henry T.C. Hu and Bernard Black have called this phenomenon "empty voting" and explained how it complicates the traditional system of shareholder voting. *See generally* Henry T.C. Hu & Bernard Black, *The New Vote Buying: Empty Voting and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006). Therefore, an "economic majority" should exclude each share whose holder has hedged its economic risk in this manner, so that this measure captures those who are genuinely incentivized to maximize firm value.

B. The Imbalanced Jurisprudence

According to this benchmark, immediately before the recent DGCL amendments, Delaware law had gone further than necessary in requiring shareholder approvals for transactions with controllers. Under *Match*, any transaction in which a controller "st[ands] on both sides" and receives a "non-ratable benefit" would receive business judgment rule protection only if approved by both an independent board committee and a majority of the minority (i.e., other) shareholders.[285] Otherwise, "entire fairness is the presumptive standard of review."[286]

Although majority-of-the-minority approval does entail an economic majority's support, in many cases it requires much more than that. For example, in a concentrated-ownership structure in which the controller holds 60 percent of the corporation's single class of stock, the *Match* standard would apply the business judgment rule to a transaction with that controller only if it were approved by holders of more than another 20 percent of the total stock.[287] Combined with the controller's stake, this would require support from over 80 percent of shares, well over an economic majority.

Even in a dual-class structure, a similar result would often arise. Suppose that a dual-class controller has high-voting shares that grant 60 percent of the corporation's voting rights but only 20 percent of its cash-flow rights, such that the other shareholders have the remaining 40 percent of voting rights and 80 percent of cash-flow rights. Because shareholder approval under *Match* is based on voting rights, not cash-flow rights, a transaction with this controller would require other shareholders' approval by the same threshold as in the previous example: over 20 percent of the total voting shares. Because of the dual-class structure, this translates to approval by the holders of more than 60 percent of the cash-flow rights (with 40 percent coming from the minority shareholders and 20 percent coming from the controller itself).[288] While less than the 80 percent support required in the concentrated-ownership example, 60 percent is still substantially more than an economic majority. Therefore, based on the benchmark established in Part IV.A, Delaware law under *Match* overprotected minority shareholders and inefficiently impeded controllers' autonomy, rather than balancing these goals in line with corporate law theory.

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285. *In re* Match Grp., Inc. Derivative Litig., 315 A.3d 446, 451 (Del. 2024).

286. *Id.*

287. If the controller holds 60 percent of the shares, then the minority holds the remaining 40 percent. To satisfy the majority-of-the-minority condition, the transaction requires the affirmative vote of a majority of that 40 percent block, which is greater than 20 percent of the total shares.

288. Here, the minority holds 40 percent of the total voting rights but 80 percent of the total cash-flow rights, resulting in a two-to-one ratio of cash-flow to voting rights. As in the previous example, a majority-of-the-minority vote requires greater than 20 percent of the total votes. With the two-to-one ratio, that 20 percent corresponds to 40 percent of the total cash-flow rights.

C. The Imbalanced Amendments

Although the recent DGCL amendments were motivated in part by legitimate concern that case law had gone too far in hindering controllers,[289] they unfortunately did not strike a balance between idiosyncratic vision and minority protection either. Instead, they went too far in the opposite direction.

The amendments affect the laws governing controllers in two critical ways. First, they have enshrined a third type of controlling shareholder: a "contractual controller." DGCL section 122(18) expressly authorizes a shareholder to control the corporation not through owning more single-class common stock as in concentrated ownership or more high-voting shares as in a dual-class corporation, but through an endless variety of contractual governance rights, regardless of their ownership percentage.[290] Second, the amendments to section 144 have limited the scope and complexity of the cleansing process required for transactions with both concentrated-ownership controllers and dual-class controllers, while excluding strictly contractual controllers from that process altogether.[291]

To the extent that traditional concentrated-ownership controllers can now pursue their idiosyncratic visions more easily, the amendments appear to follow scholars' recommendations. Under the new section 144(b), except in a freeze-out merger or other going private transaction, a shareholder with a majority of both voting and cash-flow rights no longer needs any approval from other shareholders to avoid liability for transactions with its corporation,[292] because it can do so with approval by a properly constituted board committee instead. In practice, committee approvals should be much easier for a majority shareholder to obtain.[293] Therefore, in this one situation, an economic majority, held by the controller itself, would suffice to approve these transactions, in line with Part IV.A's benchmark.

In other circumstances, however, the amendments fall short of that benchmark. Instead, they may exacerbate the agency costs commonly attributed to alternative control structures, ignoring widespread admonitions from scholars.[294]

The problems begin with the revised section 144's new definition of "controlling stockholder," which excludes anyone who lacks both one-third of the voting power in director elections and the ability to otherwise choose a majority of the board.[295] Only a shareholder who fits this definition must follow the provision's requisite cleansing process when transacting with the corporation,[296] which is intended to protect the corporation and minority

289. *See supra* notes 265–66 and accompanying text.
290. *See supra* Part II.C.1.
291. *See supra* Part II.C.2.
292. *See supra* note 207 and accompanying text.
293. *See supra* notes 208–11 and accompanying text.
294. *See supra* notes 275–77 and accompanying text.
295. DEL. CODE ANN. tit. 8, § 144(e)(2) (2026).
296. *Id.* § 144(e)(3).

shareholders from extractive self-dealing. Controllers who do not fit the new definition but still exert control with less than the required voting power or through other means, including contractual controllers, are exempt from the provision's requirements.[297] They can transact with the corporation as freely as a nonshareholder can, without approval from disinterested directors or disinterested shareholders.[298] Accordingly, an economic majority of shareholders cannot prevent a purely contractual controller from engaging in transactions that decrease or divert firm value.

As an additional consequence, shareholders that want to exercise control with a limited equity investment now have an incentive to do so by contract rather than by owning more voting shares. If cash-flow rights and investment amount are held constant, an investor choosing between more contractual governance rights and more voting shares may prefer the former more strongly under the new legal regime than under the previous one.[299] Accordingly, the recent amendments are likely to expand the class of shareholders who wield contractual control that is disproportionate to their equity stakes yet remain exempt from section 144's cleansing processes.[300]

A contractual controller like this presents the same types of problems associated with dual-class controllers, potentially to an even greater degree. In each situation, the controller's control rights (whether through contractual governance or voting power) exceed its cash-flow rights, so its incentives are not as aligned with minority investors as a concentrated-ownership controller's. For those investors, this misalignment increases agency costs in the form of mismanagement and extraction. To the extent that a contractual controller can limit its equity investment more than a dual-class controller practically can,[301] the former will be even less aligned with minority investors and impose even higher agency costs.

Furthermore, a concentrated-ownership controller's relatively illiquid control block prevents it from quickly abandoning the firm, which increases

297. *See supra* notes 189–90 and accompanying text.

298. *See supra* text accompanying note 191.

299. *See* Gladriel Shobe, Jarrod Shobe & William W. Clayton, *Private Equity and Stockholder Agreements: Empirical Insights for the Moelis Debate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 14, 2025), https://corpgov.law.harvard.edu/2025/04/14/private-equity-and-stockholder-agreements-empirical-insights-for-the-moelis-debate [https://perma.cc/68HM-DGPA] ("Delaware is sending a clear message to controlling insiders that they can essentially avoid judicial review of their conflicted transactions if they simply structure their control in the form of a contract rather than high-vote stock.").

300. This mechanism for controller proliferation, based on SB 313, is separate from but complementary to Professors Lucian A. Bebchuk and Kobi Kastiel's contention that SB 21 will have similar effects. *See supra* note 20.

301. In principle, someone with only one share could become a contractual controller. *See supra* note 167 and accompanying text. In contrast, the minimum equity required to maintain majority voting control in a standard dual-class structure where the high-voting stock has ten votes per share and the low-voting stock has one vote per share is one divided by eleven, which equals approximately 9.1 percent, plus one share. *See, e.g.*, ALPHABET INC., AMENDED AND RESTATED CERTIFICATE OF INCORPORATION art. IV, § 2(a) (2022) [hereinafter ALPHABET CHARTER] (providing that holders of Class A Common Stock are entitled to one vote per share and holders of Class B Common Stock are entitled to ten votes per share).

its commitment and thus reduces agency costs for minority investors.[302] In contrast, a contractual controller with far fewer shares can sell them and walk away from the corporation much more readily—perhaps even more so than a dual-class controller can, because high-voting shares in dual-class firms usually convert to low-voting shares upon transfer.[303] A relatively easy exit option may further limit a contractual controller's commitment to the corporation and exacerbate minority investors' agency costs. Of all three types of controllers, a purely contractual one is the least economically aligned with minority shareholders.

For the many controllers who do meet the new statutory definition of "controlling stockholder" with less than a majority of voting shares, other changes to section 144 have also heightened the risk of extraction. Typically, this risk attends a transaction between the corporation and the controller or from which the controller receives nonratable benefits.[304] For example, a controller might sell an asset to the corporation at an inflated price or buy one from the corporation at a discount,[305] cause the corporation to increase the controller's equity stake for insufficient consideration and thereby dilute minority shareholders' equity value,[306] or influence the board to approve an excessive compensation package for a controller who is also an executive.[307] Unlike the previous standard under *Match*,[308] the new section 144(b) insulates a controller transaction (other than a going private transaction) from liability if it is approved by a special board committee alone, without other shareholders' consent.[309] By obviating the need for their approval, the amendments disenfranchise other shareholders from policing many forms of extraction by controllers who lack an economic majority.

Therefore, rather than just promoting the social benefits of a concentrated-ownership controller's idiosyncratic vision, the recent DGCL amendments could encourage more pernicious forms of control and facilitate mismanagement and extraction by small controllers. Instead of balancing idiosyncratic vision and minority protection as scholars suggest,[310] the new

302. Goshen & Hamdani, *supra* note 248, at 593.

303. *See, e.g.*, ALPHABET CHARTER art. IV, § 2(f)(iii) (providing that each Class B (ten-vote) share automatically converts into one Class A (one-vote) share upon any transfer except to a permitted transferee).

304. *See* Gilson & Gordon, *supra* note 8, at 787 (explaining that a controller extracts private benefits by securing value "that is not received by the non-controlling shareholders," typically through contractual dealings with the firm, freeze-out mergers, or sales of control).

305. *See, e.g.*, Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1218 (Del. 2012) (finding a breach of fiduciary duty when a controller forced a corporation to purchase an asset from the controller at an unfairly high price).

306. *See, e.g.*, Gentile v. Rossette, C.A. No. 20213, 2010 WL 2171613, at *11–13 & n.62 (Del. Ch. May 28, 2010) (finding a breach of fiduciary duty when a controller caused the corporation to convert its debt to him into shares at a price below fair market value).

307. *See, e.g.*, Carlson v. Hallinan, 925 A.2d 506, 513 (Del. Ch. 2006) (finding a breach of fiduciary duty when a controller caused the corporation to pay him excessive compensation and management fees).

308. *See supra* notes 130–33 and accompanying text.

309. DEL. CODE ANN. tit. 8, § 144(b) (2026).

310. *See supra* note 270 and accompanying text.

amendments have created an opposite and greater *imbalance* between these goals than the previous legal regime presented.[311]

D. A Balanced Correction

Targeted statutory changes could correct this imbalance.[312] Ideally, only concentrated-ownership controllers should have a freer hand to directly manage their corporations and transact with their corporations, because only those controllers' incentives are clearly aligned with minority investors.[313] This approach would be consistent with more general principles of Delaware law. Notably, the business judgment rule prevents review of directors' decisions only when there is no apparent reason to suspect their motivations, such as a conflict of interest.[314]

Similarly, the law should prevent review of controlling shareholders' actions only when there is no apparent reason to suspect *their* motivations. Given their uniquely aligned incentives, only concentrated-ownership controllers deserve that deference by default. In addition, to receive the same deference through a shareholder vote, controllers who lack an economic majority on their own should not have to obtain approval from even more than that threshold—that is, an economic supermajority—as they did before the amendments. Instead, per Part IV.A's benchmark, the appropriate level of support would be a simple economic majority of shareholders, *including* the controller. A few legislative adjustments could help achieve these objectives while fulfilling the amendments' legitimate goals.

First, to cover contractual controllers who are currently outside section 144's scope, the definition of "controlling stockholder" in section 144(e)(2) should include shareholders with rights in a contract or the charter to exercise authority that the law otherwise vests exclusively in the

311. Per Part IV.A, a balanced approach to cleansing a controller transaction would require the approval of an economic majority: more than 50 percent of cash-flow rights. Under *Match*, cleansing a transaction with the hypothetical dual-class controller from Part IV.B would require approval from more than 60 percent of cash-flow rights. Under DGCL section 144(b), the same transaction would not require *any* shareholder approval because it could be cleansed by a board committee instead. *See supra* note 309 and accompanying text. As zero (no shareholder approval) is farther from fifty than sixty is, this example illustrates that the new regime under section 144(b) is more imbalanced than the old one under *Match*.

312. One might consider whether this imbalance could instead be corrected through private ordering—that is, by individual corporations adopting charter amendments that counteract the recent statutory changes or voluntarily implement the voting thresholds based on cash-flow rights proposed below. Unfortunately, that would not work in controlled corporations. Amending a charter requires both board approval and a shareholder vote. Tit. 8, § 242. Because a controller dictates these outcomes directly or indirectly, any charter amendment would effectively require the controller's consent. A controller is not likely to voluntarily forgo the contractual freedom granted by section 122(18) or the streamlined safe harbors of section 144. Nor is such a charter amendment likely before an initial public offering (IPO), when founders and early investors have incentives to adopt governance terms that are friendly to controllers. Therefore, private ordering is unlikely to resolve the issues presented by the recent DGCL amendments. Instead, statutory corrections are necessary to achieve a balance between controller autonomy and minority protection.

313. *See supra* Part IV.A.

314. *See supra* note 83 and accompanying text.

board of directors.[315] This change would not contravene the legislature's apparent intent to reject *Tornetta*, as Elon Musk would still not have fit the proposed definition at Tesla.[316]

Next, section 144(b)'s cleansing process for controller transactions other than going private transactions, which requires informed approval by either a board committee or minority shareholders but not both,[317] should be revised to require both approvals. However, the shareholder approval requirement should be changed from a majority of votes cast to the holders of an economic majority, including the controller. The definition of an "economic majority" could account in various ways for complex capital structures, derivative securities, and other arrangements that could limit a given shareholder's alignment with other shareholders.[318] In most situations, the clearest, fairest, and most efficient approach would be to treat each share of each class or series of common or preferred stock equally, disregarding any "contractual" rights, such as liquidation preferences, that may appear in the charter or shareholder agreements.[319]

Because a concentrated-ownership controller possesses an economic majority on its own, it would not need other shareholders' approval for ordinary transactions with the corporation; the controller's written consent would suffice for the shareholder vote.[320] Instead, approval from other shareholders would be necessary only for dual-class and contractual controllers, and only to the extent that they lack an economic majority on their own. In Part IV.B's example of a dual-class controller with 60 percent of voting rights and 20 percent of cash-flow rights, *Match* would have required a transaction with that controller to be approved by holders of more than another 20 percent of the total votes and thus more than 40 percent of the total cash-flow rights. Under this part's proposal, the same transaction would require only an economic majority, so a controller with 20 percent of cash-flow rights would need approval only by holders of more than another 30 (not 40) percent of total cash-flow rights, which amounts to 15 (not 20)

315. *See* Fisch & Davidoff Solomon, *supra* note 164, at 1146 (arguing that "a shareholder should be treated as controlling . . . when the contract authorizes the shareholder to take an action that otherwise would be within the exclusive authority of the board of directors").

316. Under SB 21's new definition of "controlling stockholder," Elon Musk "would not have been classified as a controller at all" because he lacked one-third of Tesla's voting power. Talley, Sanga & Rauterberg, *supra* note 13. He would not have been a controller under this proposal either because he did not have board-level governance rights under a shareholder agreement. *See* Tornetta v. Musk, 310 A.3d 430, 502–10 (Del. Ch. 2024) (describing the factors relevant to Musk's control of Tesla, which did not include such an agreement), *aff'd in part, rev'd in part sub nom. In re* Tesla, Inc. Derivative Litig., Nos. 534, 2024; 10, 2025; 11, 2025; 12, 2025, 2025 WL 3689114 (Del. Dec. 19, 2025).

317. Tit. 8, § 144(b).

318. *See supra* note 284.

319. *See In re* Trados Inc. S'holder Litig., 73 A.3d 17, 39–40 (Del. Ch. 2013) (grounding fiduciary duties in the default rights of common stock rather than "special contractual rights" of preferred stock).

320. *See* tit. 8, § 228(a) (permitting shareholders to act by written consent without a meeting, prior notice, or a vote, if authorized by the same shareholders who would need to authorize the action at a meeting).

percent of the total votes. Thus, while the proposed change to section 144(b) would restore a shareholder approval requirement for transactions with small controllers, the required threshold would generally be lower under this proposal than it would have been before the amendments.[321]

Next, to limit the ability of controllers with misaligned incentives to directly manage their corporations in their own interests rather than the firm's,[322] the corporation should be able to confer directorial authority on shareholders by contract under section 122(18) only with the informed approval of an economic majority, including the counterparty to the proposed contract.[323] This is still more lenient than the Model Business Corporation Act's approach, which permits such a contract only if approved by *all* shareholders.[324] Concentrated-ownership controllers could obtain the requisite approval on their own because they possess an economic majority by definition. Therefore, their rights under section 122(18) would ultimately remain the same. In contrast, small controllers would have to convince other shareholders to the extent needed to obtain an economic majority including their own shares. If the required disclosures allow other shareholders to identify material misalignments, this approval requirement could permit only controllers with aligned incentives to directly manage the corporation by contract.[325]

In addition, section 122(18) should require "sunset" provisions to limit the duration of covered contracts unless an economic majority, including the

321. This Article does not propose a substantive change to DGCL section 144(c), which provides a safe harbor from liability for going private transactions only if they are approved by both a majority of disinterested directors on a board committee and a majority of votes cast by disinterested shareholders. Tit. 8, § 144(c). This Article supports lowering the shareholder approval threshold for other controller transactions because the transaction may advance the controller's idiosyncratic vision for maximizing long-term value and other shareholders will remain in a position to benefit from that value. In a going private transaction, however, disinterested shareholders will not benefit from that value, as they receive only the merger consideration in exchange for their shares and then exit the corporation. As they have no long-term interest in the firm, a controller's long-term vision is irrelevant to them; their only interest is in the immediate merger consideration. Accordingly, strict dual-approval safeguards remain necessary to ensure that disinterested shareholders receive fair value in a going private transaction, no matter how high the controller's economic stake may be.

322. *See* Rauterberg & Sanga, *supra* note 23, at 323 (describing shareholder agreements with controllers as "exactly the kind of dominated if not collusive transaction that externalizes costs to non-signatory shareholders").

323. This proposal would achieve the goal, described by Professors Gabriel Rauterberg and Sarath Sanga, "to craft an altering rule that takes into account the interests of nonparties—that is, the interests of shareholders who are not at the table but who will nonetheless be impacted by the delegation of board authority." *Id.* at 326.

324. *See supra* note 173 and accompanying text.

325. As a complementary amendment, the economic majority approval requirement could also apply to charter amendments that grant similar governance rights to shareholders, to avoid a disparity in the approval processes. That way, the same shareholder approval would be needed to confer governance rights in a contract as in the charter. Although this would eliminate one of the former's most important advantages over the latter under the current regime for both managers and controllers, each of those groups may have other reasons to prefer contracts over charter provisions for this purpose. *See supra* notes 174–77 and accompanying text.

counterparty, approves their extension. This would account for the diminishing effectiveness of founder control that other scholars have prominently documented.[326] For example, by the time of the *Moelis* litigation, about ten years after Ken Moelis entered the contested shareholder agreement, he owned "approximately 6.5% of the outstanding equity and possesse[d] the right to obtain additional shares that would [have brought] his equity interest to 11.5%."[327] If he had exercised that right and then sought to extend that agreement's term under the proposed rule, he would have had to convince the holders of more than another 38.5 percent of the total equity to obtain economic majority support. This vote would test whether the investors who had bought shares in his company over the preceding decade, knowing about his governance rights, still trusted him with those rights. By providing a fair and accessible avenue to maintain the shareholder agreement in effect, this part's proposed amendments to section 122(18) would not subvert SB 313's apparent rejection of the *Moelis* decision, which had, in contrast, invalidated several challenged contract provisions. Instead, like the suggested changes to section 144, these proposals could maintain the legislation's general intent while limiting agency costs to minority shareholders that could arise from misaligned controllers' permanent entrenchment.

Finally, DGCL section 220 should be amended to lower shareholders' burden of proof when seeking informal books and records, like emails and text messages, from "clear and convincing evidence" to a "preponderance of the evidence." A shareholder would meet this burden by demonstrating that it is more likely than not that fiduciaries engaged in wrongdoing not reflected in formal records.[328] Under the recently amended section, if a plaintiff could meet this burden but not the "clear and convincing" standard, then a court cannot order defendants to produce evidence that would help verify whether some *probable* (i.e., more likely than not) malfeasance has *actually* occurred.[329] Thus, the current rule may prevent courts from identifying and remedying many misdeeds. While not completely reverting to the previous version of section 220, the proposed change would return a reasonable level of enforceability to Delaware's fiduciary regime without exposing management to onerous disclosure obligations in connection with

326. *See* Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 604–09 (2017) (arguing that the superior skills and vision that justify founder control at the IPO stage tend to erode over time as the founder ages and the business environment changes, while the agency costs of the dual-class structure increase).

327. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 828 (Del. Ch. 2024), *rev'd on other grounds*, 360 A.3d 215 (Del. 2026).

328. *See* Reynolds v. Reynolds, 237 A.2d 708, 711 (Del. 1967) ("The side on which the greater weight of the evidence is found is the side on which the preponderance of the evidence exists.").

329. DEL. CODE ANN. tit. 8, § 220(g) (2026) (providing that "the Court of Chancery may order the corporation to produce . . . other specific records of the corporation only if and to the extent . . . [a] stockholder has demonstrated by clear and convincing evidence that such specific records are necessary and essential to further [its proper] purpose").

opportunistic strike suits and fishing expeditions that lack probable cause for concern. That would fulfill SB 21's intent in amending this section[330] without thwarting meritorious shareholder litigation as much as the actual amendment does.

Together, these modifications to the recent DGCL amendments could limit the agency costs associated with dual-class and contractual controllers while liberating concentrated-ownership controllers to pursue their preferred strategies for increasing shareholder value. All controllers would retain freedom to exercise their control in most management decisions without any interference from other shareholders, whose approval would be required only for a very limited set of activities that present heightened risks of value destruction or diversion: transactions that are with a controller or provide it with a nonratable benefit,[331] and entry into or extension of a shareholder agreement that grants board-level governance rights.[332] Moreover, even for these activities (other than a going private transaction), a concentrated-ownership controller would not need shareholder approval at all, and a small controller would need that approval only to the extent that it lacks an economic majority on its own. These proposals are technically feasible and would advance the most important policy goals that motivated SB 313 and SB 21.

Even so, at least for now, some of these proposals would face opposition from the controllers and lawmakers who supported the recent amendments. However, compared with Delaware's current shift toward controller primacy, this Article's proposed revisions would strike a better balance between idiosyncratic vision and minority protection. In addition, by granting primacy based on economic rights rather than just voting and governance rights, this proposal would shift the law away from controller primacy back toward shareholder primacy, because one's priority would again depend more on shareholding, not just control.

CONCLUSION

Delaware's recent statutory amendments mark a monumental reorientation of corporate law. For decades, the state's jurisprudence had aimed to balance managerial autonomy with protections for minority investors in accordance with shareholder primacy. To the contrary, the new statutory regime elevates not shareholding but control—regardless of its source—as the new axis of corporate authority and purpose. This potential paradigm shift to controller primacy is not merely theoretical. By empowering controllers to bypass the board through contracts and bypass the courts through streamlined

330. *See* Patrick Gibbs et al., *Delaware Amends Section 220—Will Scope of 'Books and Records' Production Be Limited?*, COOLEY: SEC. LITIG. & ENF'T (Mar. 27, 2025), https://sle.cooley.com/2025/03/27/delaware-amends-section-220-will-scope-of-books-and-records-production-be-limited [https://perma.cc/KP28-4LHZ] (explaining that SB 21's amendments to section 220 were intended to "narrow document production" and curb the "proliferation of burdensome books and records demands").

331. *See supra* notes 304–07 and accompanying text.

332. *See supra* note 322.

committees, while constraining other shareholders' access to critical information, the amendments have fundamentally reallocated power and risk within controlled firms.

This reallocation may have had legitimate motivations. Delaware competes in a national market for charters, and doctrinal uncertainty could drive visionary founders to rival jurisdictions. Contractual flexibility and attainable safe harbors can reduce transaction costs, facilitate long-term strategic planning, and ultimately preserve Delaware's appeal to innovative enterprises. For firms in which controllers and other shareholders have aligned economic interests, these benefits may outweigh the costs.

But the amendments have overcompensated, creating predictable and avoidable risks. By treating all controlling shareholders alike, the law insulates not only traditional majority shareholders, but also dual-class and contractual controllers, whose incentives may diverge from those of other shareholders. This conflation invites mismanagement and extraction in precisely the firms where minority consent or judicial review is most needed.

Delaware could reconcile its market-oriented goals with its historic commitment to investor protection through straightforward statutory refinements, including robust but fair procedural safeguards that account for controllers' economic alignment. These reforms would not repeal the amendments or resurrect rejected case law. Instead, they would preserve Delaware's competitive advantage by seeking an equilibrium between controller autonomy and minority rights, while promoting clarity for counsel and confidence for investors.

Controller primacy, as currently enacted, tilts the scale toward those who least need the law's protection. By tailoring rules to controllers' economic characteristics and restoring proportionality to corporate authority and purpose, Delaware can facilitate idiosyncratic vision while limiting abuse and opportunism. This calibrated approach would balance the privilege of control with the rights of ownership, advancing the fundamental principle that a corporation must serve all its shareholders, not just the most powerful.