THE MYSTERY OF DELAWARE LAW'S CONTINUING SUCCESS[†]

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This Article challenges the widely held view that Delaware corporate law is dominant because it possesses superior traits, such as a well-understood statute, many judicial decisions interpreting the law, and wise and experienced judges administering that law. The authors evaluate superiority by the measure first identified by Romano as the relevant one for jurisdictional choice—reducing transactions costs in major transactions. The authors show that since the 1980s Delaware law has become increasingly complex and uncertain, due largely to judicial decisions that appear to tailor doctrines to produce fairness in individual cases, at the expense of certainty in planning and executing transactions. The result has been a variety of mini-rules that require firms and their lawyers to structure transactions formalistically to avoid the most intrusive forms of judicial review. These rules have led to a litigation explosion in Delaware, with concomitant high litigation costs. The authors also demonstrate the weaknesses of the Delaware General Corporation Law as compared to the Model Business Corporation Act. Finally, the authors examine and reject a series of apologies for Delaware law by commentators who concede at least some of these problems.

INTRODUCTION

Over thirty years ago William L. Cary famously argued that Delaware dominated corporate laws through a "race to the bottom" in which it pandered to the desires of managers at the expense of shareholders.[1] Ralph Winter responded by arguing that Delaware's gains could not

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1. William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663 (1974).

come at the expense of investors, given the efficiency of capital markets.[2] We argue here that both were mistaken. Although Delaware law is less friendly to corporate managers than that of many other states, its market position allows extraction of economic rents from investors in Delaware corporations. This was first observed by Jon Macey and Geoffrey Miller in 1987, and then by Douglas Branson in 1990.[3] No one has provided evidence to reject their hypothesis, but Delaware corporate law remains dominant.

For nearly a century, Delaware's corporation law has dominated its market. The explanations given for its dominance have varied over the years, and new ones continue to be offered. This Article reviews the major explanations and finds them wanting. At the same time that explanations for success have been offered, some commentators have criticized the quality of Delaware law and have suggested that it is not ideal, and indeed may be inferior to some other laws. We offer some additional evidence on this point, and we question whether the commentators to date have been avoiding asking the right questions.

We begin in Part I with a brief review of the competition and some of the early literature. Part II reviews some of the difficulties with Delaware law, principally the indeterminacy created by judge-made law, with little legislative effort to clarify murky areas. In addition to this critical review, this Part provides an unfavorable comparison of the Delaware statute with the Model Business Corporation Act, focusing on the relative transaction costs imposed by each legal regime. Part III examines and rejects the arguments made by modern commentators who acknowledge Delaware's problems, while searching for a positive account of why it remains superior. We conclude in Part IV.

I. DELAWARE'S HISTORICAL DOMINANCE OF THE CHARTERING COMPETITION

The competition for corporate chartering business goes back to the late nineteenth century, when New Jersey engaged in major reforms to give corporations powers lacking in all other states.[4] New Jersey's reason was purely financial: it believed that it could eliminate its debt from the Civil War by obtaining franchise fees from major corporations.[5] New Jersey was able to compete for corporate charters because virtually all

2. *See* RALPH K. WINTER, GOVERNMENT AND THE CORPORATION (1978); Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977) [hereinafter Winter, *Theory of the Corporation*].

3. Douglas M. Branson, *Indeterminacy: The Final Ingredient in an Interest Group Analysis of Corporate Law*, 43 VAND. L. REV. 85 (1990); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX. L. REV. 469 (1987).

4. CHRISTOPHER GRANDY, NEW JERSEY AND THE FISCAL ORIGINS OF MODERN AMERICAN CORPORATION LAW 33–53 (1993).

5. *Id.*

American states followed the "Internal Affairs Rule," the English choice of law rule that applies the law of the incorporating jurisdiction to the governance of the corporation, rather than Europe's "Real Seat Rule," which required incorporation at the location of the corporation's real headquarters.[6] New Jersey enhanced corporate flexibility by lifting restrictions on capital and authorizing corporations to own shares in other entities, to engage in mergers, to do business outside the state without specific charter authorization, and to exist perpetually.[7] Delaware copied the New Jersey statute essentially verbatim in 1899 as it entered the chartering competition.[8]

While Delaware was swift to imitate the New Jersey law, New Jersey retained a first-mover advantage and with it, most of the chartering business. With the election of Woodrow Wilson as governor in 1911, however, New Jersey passed statutes (the "Seven Sisters") that, *inter alia*, restricted stock issuance, imposed administrative regulation over all mergers, and reversed the earlier rules that allowed corporations to own shares in other entities.[9] At this time Delaware became the favored state for incorporation.[10] During the period 1996–2000, 58% of all publicly held firms and 59% of the Fortune 500 Industrial firms were incorporated in Delaware.[11] During the period 1978–2000, 56% of all initial public offerings ("IPOs") involved Delaware corporations.[12] Delaware's share of IPOs listed on the New York Stock Exchange increased during the 1990s, reaching 73–77% during parts of that decade.[13]

Until the 1970s, the dominant view of this competition in the United States was managerialist, and therefore negative.[14] It focused on management as the sole relevant interest group. It posited that states catered to corporate managers, who were seeking the least accountability and the greatest flexibility to pursue their own ends at the expense of powerless investors. The modern debate about competition for charters began with Cary's famous 1973 article, in which he detailed the ways in which Delaware's courts and legislature supposedly courted management to rein-

6. William J. Carney, *The Political Economy of Competition for Corporate Charters*, 26 J. LEGAL STUD. 303, 312–18 (1997).

7. GRANDY, *supra* note 4, at 43–44.

8. *Id*. at 76.

9. *Id.* at 81–83. This history is also briefly traced in Cary, *supra* note 1, at 664–65.

10. GRANDY, *supra* note 4, at 99.

11. Lucian Arye Bebchuk & Alma Cohen, *Firms' Decisions Where to Incorporate*, 46 J.L. & ECON. 383, 389–91 (2003) (referring to Table 1. Distribution of Firms' Locations Among States and Table 2. Distribution of Incorporations Among States).

12. Robert Daines, *The Incorporation Choices of IPO Firms*, 77 N.Y.U. L. REV. 1559, 1571 (2002) (referring to Table 2. Market Share of IPO Charters).

13. *Id.* at 1572 (referring to Table 3. Delaware's Share of All IPOs Listed on NYSE).

14. Cary, *supra* note 1; Donald E. Schwartz, *A Case for Federal Chartering of Corporations*, 31 BUS. LAW. 1125 (1976); Joel Seligman, *The Case for Federal Minimum Corporate Law Standards*, 49 MO. L. REV. 947 (1990); *see also* Louis K. Liggett Co. v. Lee, 288 U.S. 517, 541, 564–65 (1932) (Brandeis, J., dissenting) ("Able, discerning scholars have pictured for us the economic and social results of thus removing all limitations upon the size and activities of business corporations and of vesting in their managers vast powers once exercised by shareholders . . . .") (citation omitted).

corporate in Delaware by imposing few constraints on managerial behavior.[15] He claimed this was the result of a conscious state policy to maximize chartering revenues at the expense of shareholders, because these revenues constituted a substantial portion of the budget of this small state.[16]

Ralph Winter moved the debate to a level of theory with his response, and he introduced the role of markets as a constraint on pro-management legislation. He argued that in efficient capital markets, states that offer managers chances to serve their own interests rather than those of investors will lose in the competition for charters.[17] This occurs, he claimed, because firms with shirking or disloyal managers will produce lower profits, and their share prices will be depressed, which will in turn lead to higher capital costs for these companies and a weakened ability to compete in product markets. Such firms are obviously targets for takeovers.[18] As a result, managers will seek states with laws that will assure investors that agency costs will be minimized. One author characterized Delaware's preeminence as stemming from the "combination of its flexible corporate code, the responsiveness of its legislature, the wealth of legal precedent, its efficient and knowledgeable court system, and its business-like Secretary of State's office."[19] In this Article, we will challenge the benefits of Delaware's corporate code, its legal precedent, and its court system.

Our view of the purported statistical evidence of Delaware law's superiority is that it is currently unpersuasive about quality of law issues; Delaware could maintain its statistical dominance even if its law were inferior. In view of that, the qualitative justifications generally given to explain Delaware's dominance are centrally important. Part II contains a critical examination of those claims, which we find flawed.

II. A BRIEF AND UNFAVORABLE COMPARISON OF DELAWARE LAW

The principal difficulty we face in this Part is that we are making qualitative rather than quantitative arguments. As a result, our results are not falsifiable in a world of falsifiable literature about the chartering competition. Much of our analysis depends not on statutory differences, although there are some, but rather on how Delaware courts have reacted to disputes involving important transactions—primarily, but not

15. Cary, *supra* note 1.

16. *Id.* at 670. Cary's arguments were repeated in a more polemical form in RALPH NADER ET AL., TAMING THE GIANT CORPORATION (1976).

17. Winter, *Theory of the Corporation*, *supra* note 2, at 256.

18. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965).

19. Demetrious C. Kaouris, Note, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 1011 (1995); *see also* Guhan Subramanian, *The Influence of Antitakeover Statutes on Incorporation Choice: Evidence on the "Race" Debate and Antitakeover Overreaching*, 150 U. PA. L. REV. 1795, 1810 (2002).

exclusively, mergers and acquisitions. We suspect that those who practice in the mergers and acquisitions area will be more persuaded by our analysis than those who are not forced to confront the doctrinal difficulties created by the Delaware courts. While we believe that we can demonstrate that the quality of Delaware law (measured by the standards Romano identified) has declined and that the trend line slopes downward, we have a more challenging task on the comparative side. Reported state law decisions are sparse in many jurisdictions, and state law has a messy quality that prevents us from making strong claims generally in this area. We can say that there is evidence (drawn from the widespread adoption of the Model Act, with its bright lines and safe harbors in many areas that are troublesome in Delaware law) that suggests the trend line may be upward-sloping in at least some jurisdictions outside of Delaware.

A. What Do We Mean by the Quality of Law?

Any discussion of the quality of corporate law requires a concept of what would constitute a superior body of law. Much recent commentary, looking at differences between developed market economies and less-developed economies, has focused on the development of rules for the protection of minority shareholders.[20] While this is an important feature, it cannot be the only important feature of a superior system of corporate law, especially where efficient capital markets pressure firms to offer optimal contract terms to reduce transaction and agency costs as well as to protect minority interests (regardless of the mandatory rules of corporate law) or pay a higher price for capital.[21] Rather, we argue that once agency cost and minority protection questions have been dealt with, the principal feature of an efficient corporate law is a reduction in the transaction costs of organizing and operating a business entity.[22] Romano's pioneer-

20. Among the landmarks in this literature are works by Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny. Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002); Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Legal Determinants of External Finance*, 52 J. FIN. 1131 (1997); *see also* Bernard S. Black, *The Legal and Institutional Preconditions for Strong Securities Markets*, 48 UCLA L. REV. 781 (2001). It is possible to argue that all modern American corporate laws achieve this result, through judicial scrutiny of directors' conflicting interest transactions, seizures of business opportunities, and appraisal rights for freezeout mergers. Some statutes may have gaps in appraisal protection for conflict of interest asset sales, but even these should be encompassed by statutes governing directors' conflicting interest transactions.

21. In the presence of well-defined property rights investors are capable of demanding, and entrepreneurs or managers of offering, sufficient protections for public (minority) shareholders to attract capital on competitive terms. William J. Carney, *The Theory of the Firm: Investor Coordination Costs, Control Premiums and Capital Structure*, 65 WASH. U. L.Q. 1, 20–21 (1987).

22. Delaware jurists have acknowledged this. Myron T. Steele & J.W. Verret, *Delaware's Guidance: Ensuring Equity for the Modern Witengamot*, 2 VA. L. & BUS. REV. 189, 191 (2007) ("Moreover, this development is further complicated in Delaware's corporate law because the disputes are primarily economic, and thus require increased predictability and efficiency—since all parties typically hope to get back to the business of profit as quickly as possible, there is great benefit in being able to predict

ing work identified this as the primary motivator of changes in states of incorporation.[23] Thus, from the perspective of corporate managers, this characteristic is the mark of good corporate law. This is not to say that other goals of corporate law are unimportant or other criteria of goodness might not be considered.[24] It is only to say that most other goals are less relevant to those selecting the jurisdiction in which to incorporate.

A corollary of that goal of reducing transaction costs involves the rules of property rights offered by an incorporating jurisdiction. A well-defined system of property rights is the essential ingredient of any successful market economy. Here we attempt to spell out what that means for corporate law, at least briefly.

Well-specified property rights provide the most efficient legal system because they facilitate exchange with the lowest possible transaction costs.[25] Efficient rules allow ready identification of the owners of property so that owners can transfer assets to those who value them most highly.[26] Efficient property rules minimize the number of claimants on any asset, as a multiplicity of owners increases the transaction costs of acquiring assets.[27] Exclusivity of ownership encourages investments in assets because the owner knows that no one else can share in the benefits of that investment without buying those benefits from her.[28] Although firms frequently require multiple owners to accumulate sufficient capital, each owner's claim in a corporation is discrete and transferable.

Efficient legal rules governing property rights also specify all the terms of ownership so that the owner (or buyer) can determine all permitted uses at the lowest possible transaction cost.[29] In corporate law

future outcomes."); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1444 (1989); Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 949 (1984). We thus ignore arguments that might be made about benefits received by or costs incurred by third parties from the organization and operation of corporations because investors generally will be unlikely to attach much importance to third-party effects, at least to those unlikely to create liability.

23. Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. ECON. & ORG. 225, 227 (1985) [hereinafter Romano, *Law as a Product*].

24. *See, e.g.*, William Klein, *Criteria for Good Laws of Business Association*, 2 BERKELEY BUS. L.J. 13 (2005) (identifying fairness, economic goals, political control and administrative costs as possible goals).

25. Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 322 (1985); Daniel S. Levy & David Friedman, *The Revenge of the Redwoods? Reconsidering Property Rights and the Economic Allocation of Natural Resources*, 61 U. CHI. L. REV. 493, 493–94 n.3 (1994).

26. Holderness, *supra* note 25, at 322; Michael C. Jensen et al., *Analysis of Alternative Standing Doctrines*, 6 INT'L REV. L. & ECON. 205, 211 (1986).

27. Holderness, *supra* note 25, at 326.

28. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 3.1 (4th ed. 1992); David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 707 (1987). The implications of this for consideration of "other constituencies" by a corporation are obvious. *See* William J. Carney, *Does Defining Constituencies Matter?*, 59 U. CIN. L. REV. 385, 391 (1990).

29. "[T]he virtues that accompany all bright-line tests . . . [are] that they provide clear guidance to transactional planners and limit litigation." Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342, 374 (Del. Ch. 2004). "Transactional lawyers desire 'bright' and predictable lines because they want to know, with certainty, the consequences of the structures they choose for their transactions. Fine and ephemeral distinctions are less important than clarity." David C. McBride & Danielle Gibbs, *Interfe-*

courts typically treat all contract rights of persons other than shareholders as fully specified, so persons acquiring contract rights need not go beyond the four corners of the written agreement.[30] Courts assign the remaining residual rights to the shareholders.[31]

The goal of specification of property rights also suggests that rights should not be left "open," in the sense that courts will define their exact contours after a dispute arises. Boundary descriptions in deeds that fail to close, for example, may be treated as so fatally defective as to convey nothing, leaving ownership in the putative grantor.[32] Contract law treats agreements to agree, where critical terms are left open, as illusory promises and unenforceable.[33] Open definitions encourage litigation, which dissipates assets in negative sum games for firm participants in which only lawyers win. Open definitions lead to opportunistic behavior, in which claimants may take positions that were not contemplated at the time of initial bargains. Open definitions also allow one party to a bargain to

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rence with Voting Rights: The Metaphysics of Blasius Industries v. Atlas Corp., 26 DEL. J. CORP. L. 927, 928 (2001). Chancellor Allen recognized this in *Speiser v. Baker*, where he wrote:

> As a general matter, those who must shape their conduct to conform to the dictates of statutory law should be able to satisfy such requirements by satisfying the literal demands of the law rather than being required to guess about the nature and extent of some broader or different restriction at the risk of an *ex post facto* determination of error. The utility of a literal approach to statutory construction is particularly apparent in the interpretation of the requirements of our corporation law—where both the statute itself and most transactions governed by it are carefully planned and result from a thoughtful and highly rational process.
>
> Thus, Delaware courts, when called upon to construe the technical and carefully drafted provisions of our statutory corporation law, do so with a sensitivity to the importance of the predictability of that law. That sensitivity causes our law, in that setting, to reflect an enhanced respect for the literal statutory language.

525 A.2d 1001, 1008 (Del. Ch. 1987).

30. For cases holding that bondholders' rights are exclusively creatures of contract and are not governed by fiduciary duties, see *Metropolitan Life Insurance Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1524 (S.D.N.Y. 1989); *Simons v. Cogan*, 549 A.2d 300, 303 (Del. 1988); *Parkinson v. West End Street Railway*, 53 N.E. 891, 892 (Mass. 1899). For a discussion of the desirability of clarity in interpretation, see Judge Ralph Winter's opinion in *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1048 (2d Cir. 1982) ("Whereas participants in the capital market can adjust their affairs according to a uniform interpretation, whether it be correct or not as an initial proposition, the creation of enduring uncertainties as to the meaning of boilerplate provisions would decrease the value of all debenture issues and greatly impair the efficient working of capital markets."). *But see* Pepper v. Litton, 308 U.S. 295, 306–07 (1939). For general discussions of the allocation of closed contract rights to stakeholders other than shareholders, see William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521 (1982); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23 (1991).

31. *See Simons*, 549 A.2d at 303.

32. AMERICAN LAW OF PROPERTY § 12.98 (A. James Casner ed., 1952). There are, of course, a variety of ways to use the defective description as a means of determining the land intended to be conveyed.

33. ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 29 (1963). There is, of course, a great deal of effort given to filling gaps in incomplete contracts. *See, e.g.*, U.C.C. § 2-204(3) (2004); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 286 (1987). For an explanation of the economic rationale for declining to enforce such promises, see POSNER, *supra* note 28, § 4.2.

hedge against the risk of errors by using litigation to attempt to spread the costs of inadequate initial investments in decisions to the winners.[34]

At some point the marginal benefits of further specification decline to the point at which they equal marginal costs. This point may vary from firm to firm and from one type of law to another, but at some point all firms and corporate laws seem to resort to some open definitions of property rights. For example, corporate laws governing the duties of officers and directors appear to be left open, with such broad fiduciary concepts as duty of care and duty of good faith and loyalty. But in corporate law this indeterminacy turns out to be illusory in most jurisdictions; the business judgment rule assures that directors do not lose cases involving charges of breach of the duty of care, and the duties of good faith and loyalty are confined to limited sets of actions.[35] Open definitions frequently are justified on the basis of problems encountered in markets for information. For example, it may not be possible to foresee all of the future circumstances that might cause conflicts between rival claimants to property rights.[36] Modern discussions of default rules and gap-filling generally focus on efficiency, in terms of providing the default rule that minimizes transaction costs.[37] However, there are some dissenters from this view who focus more on information asymmetries and who argue that a rule should be adopted that forces the knowledgeable party to contract expressly.[38]

For some parts of the legal system, this is an adequate description of the role of legal rules. But where contracts are of indefinite duration and, as a result, the contracting is more relational, the role of gap-filling can grow to the point where it sometimes appears to dominate over simple enforcement of well-specified property rules. In his accompanying article, Professor Ribstein argues that use of "uncorporations" permits a return to a more strictly contractual regime.[39]

The great achievement of New Jersey and then Delaware was to expand the set of property rights of corporate actors, and thus to increase the flexibility of the corporate form to respond to changing business and market conditions. The history of American corporate law through at least the 1960s is characterized by the continuing expansion of property

34. *See* POSNER, *supra* note 28, §§ 3.11–.13.

35. *See generally* William J. Carney, *Section 4.01 of the American Law Institute's Corporate Governance Project: Restatement or Misstatement?*, 66 WASH. U. L.Q. 239 (1988). Duties of good faith are confined to transactions between interested officers and directors and the corporation, duties not to compete with the corporation, particularly in the seizure of business opportunities, and duties to inform the corporation and its shareholders of material information about the firm and their behavior. We will argue later in Part II that these duties are much less well defined in Delaware than in most states.

36. *See, e.g.*, Easterbrook & Fischel, *supra* note 22, at 1434.

37. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 92 (1989).

38. *Id.* at 118.

39. Larry E. Ribstein, *The Uncorporate Solution to the Corporate Mystery*, 2009 U. ILL. L. REV. 131.

rights and flexibility for the corporate form. A recent study indicates that laws promoting corporate flexibility remain the most important factor in selecting the state of incorporation for companies going public.[40]

B. *The Empirical Evidence Is Not Persuasive of Superiority*

Early empirical studies generally supported Winter's "race to the top" position that shareholders either benefited, or at least did not suffer, when firms reincorporated in Delaware, which was generally thought to be the most flexible and enabling state.[41] Roberta Romano contributed importantly to the "race to the top" literature with her survey of the reasons given by corporate officials for reincorporating in Delaware.[42] She found that executives were making the reincorporation decision in anticipation of major transactions in which, presumably, Delaware law would reduce the anticipated costs of transacting.[43] She identified public offerings, mergers and acquisitions, and takeover defenses as the most frequent causes of reincorporation.[44] Until now no one has challenged that hypothesis. We do not intend to challenge the results of her survey, but we do suggest that the executives who responded to her survey may have been systematically mistaken in their choices, or at least not prescient in predicting the development of Delaware law.

To a large extent, the early work assumed that this competition for corporate chartering business was among all the states. In the past decade this view has changed somewhat, not only because of what seems to be Delaware's increasing dominance, but also because other states are not successful (indeed, most do not appear to have tried) in attracting incorporation business from firms located outside their borders. Romano described the efforts of other states as defensive moves to prevent further losses of corporations to Delaware.[45] One of us has characterized this as a competitive market with a dominant producer.[46] Others believe that Delaware has been so victorious in the competition that only Delaware law matters, as a descriptive matter, and that Delaware has won the

40. Marcel Kahan, *The Demand for Corporate Law: Statutory Flexibility, Judicial Quality, or Takeover Protection?*, 22 J.L. ECON. & ORG. 340, 363 (2006).

41. These studies are summarized in ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 14–24 (1993) [hereinafter ROMANO, GENIUS].

42. Romano, *Law as a Product*, *supra* note 23, at 249–52.

43. In the context of litigation expected in connection with contemplated initial public offerings or initiation or expansion of a mergers and acquisitions program, "the ready availability of legal opinions and a well-developed case law, are, in fact, critical, for they can reduce the cost of doing business." *Id*. at 250.

44. *Id.*

45. *Id.* at 226.

46. William J. Carney, *The Production of Corporate Law*, 71 S. CAL. L. REV. 715, 718 (1998) [hereinafter Carney, *Production*].

race, whatever its direction.[47] An alternative view asserts that competition continues but is bilateral, between Delaware and each other state.[48] Guhan Subramanian's work challenges this view, finding significant corporate migration to states other than Delaware.[49] The principal concern of corporate lawyers in states other than Delaware may only be that their law not become so antiquated that corporations are tempted to incur the substantial transaction costs of moving to Delaware.[50] For our purposes, characterizing the nature of the competition matters less than the fact of competition, or perhaps potential competition, for chartering business. The fact is that incorporators have choices, and they have chosen Delaware by an impressive majority.

There are those who claim Delaware law's superiority explains its dominance. Early reincorporation studies were inconclusive, showing, at best, that there were no significant losses from moving to Delaware.[51] Because these studies did not produce negative price movements, the debate generally rejected the race to the bottom hypothesis.[52] The nature of the debate changed when Robert Daines employed Tobin's Q to measure value in Delaware corporations versus others.[53] He found that incorporation in Delaware added approximately 5% to the value of a firm.[54] Other studies have disagreed.[55] One study, which found a negative correlation between Delaware incorporation and value, employed different samples, time periods, and control variables.[56] The most recent

47. *See* Lucian Bebchuk et al., *Does the Evidence Favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1778 (2002); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 684–85 (2002).

48. Daines, *supra* note 12, at 1572–73.

49. Subramanian, *supra* note 19, at 1818–22 (finding substantial numbers of reincorporations to Maryland, Nevada, Massachusetts, Minnesota, and New York with a total of 15% of companies incorporated neither in their home state nor in Delaware).

50. For a discussion of these transaction costs, see Romano, *Law as a Product*, *supra* note 23, at 246–48. Bernard Black contends these costs are trivial. Bernard Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 544 (1990). Romano has expanded her arguments that these costs are substantial in ROMANO, GENIUS, *supra* note 41, at 34–35.

51. Peter Dodd & Richard Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" Versus Federal Regulation*, 53 J. BUS. 259, 277 (1980) (average prediction error on announcement date is -0.01%, although there were significant price increases over the preceding sixty months); Allen Hyman, *The Delaware Controversy—The Legal Debate*, 4 DEL. J. CORP. L. 368, 396 (1979) (no statistically significant price movement on or after the announcement date, although stock prices rose prior to the announcement date). *But see* Michael Bradley & Cindy A. Schipani, *The Relevance of the Duty of Care Standard in Corporate Governance*, 75 IOWA L. REV. 1, 65–69 (1989) (significant 1% rise on announcement date, following significant rise preceding that date); Jeffry Netter & Annette Poulsen, *State Corporation Laws and Shareholders: The Recent Experience*, FIN. MGMT., Autumn 1989, at 29, 35 (positive returns around announcement date); Romano, *Law as a Product*, *supra* note 23, at 271 (statistically significant gains of 3.8% in ten-day window around announcement date).

52. Bradley & Schipani, *supra* note 51, at 69; Netter & Paulsen, *supra* note 51, at 37; Romano, *Law as a Product*, *supra* note 23, at 272–73.

53. Robert Daines, *Does Delaware Law Improve Firm Value?*, 62 J. FIN. ECON. 525, 529 (2001).

54. *See id.*

55. Bebchuk et al., *supra* note 47, at 1784–86. Note that Daines's results are not consistent across the period studied.

56. Paul A. Gompers et al., *Corporate Governance and Equity Prices* 7–10 (Nat'l Bureau of Econ. Research, Working Paper No. 8449, 2001).

study, by Subramanian, finds that Delaware firms were worth approximately 3% more than non-Delaware firms in the period 1991–93, and 2% more in 1994–96.[57] Thereafter, the Delaware difference is statistically insignificant, and even turned negative in the period 1998–99.[58] The results of over twenty-five years of empirical work thus remain inconclusive. We do not attempt to add to that body of literature. Our effort is qualitative, and thus suffers from the weakness of not being falsifiable, a weakness that seems inescapable in this context.

There is some evidence that Delaware's market power may be weakening. Subramanian found that during the 1990s Delaware obtained a 56% market share among reincorporations, down from an 80% to 90% share in earlier periods. This contrasts with Delaware's dominance of IPOs during that same period.[59] His study reveals that Delaware lost 118 corporations while gaining 208 through reincorporation in the test period.[60] Subramanian offers an explanation that centers on the presence of more and stronger antitakeover laws in other states. However, this is countered by the poor performance of some states with the strongest antitakeover statutes, where more corporations opt out of their coverage.[61] We offer another explanation that attempts to synthesize Subramanian's work and Romano's earlier results: reincorporations of public companies occur when management is contemplating a major transaction, in which litigation costs and uncertainty become important. If managers and their advisers are aware of the present difficulties with Delaware law governing important transactions, that awareness may influence a move to other states. The rush to Delaware for IPOs during the same period becomes more puzzling in view of the evidence of its less dominant performance in the market for reincorporations. One possible explanation borrows from Coates's observations about adoption of antitakeover defenses by IPO firms.[62] It may be that at least some groups of lawyers advising issuers on IPOs are less familiar with the difficulties of Delaware law involving mergers and acquisitions if they are not specialists in those areas.

C. Delaware's Indeterminacy Problem

There is much about Delaware corporate law that is efficient and attractive. Corporate law is largely about default rules, and in that sense

57. Guhan Subramanian, *The Disappearing Delaware Effect*, 20 J.L. ECON. & ORG. 32, 41–43 (2004).

58. *Id.*

59. Subramanian, *supra* note 19, at 1820–22; *cf.* Dodd & Leftwich, *supra* note 51, at 280 (finding a 90% share in 1927–77); Romano, *Law as a Product*, *supra* note 23, at 244 (finding an 82% share in 1960–82).

60. Subramanian, *supra* note 19, at 1821.

61. *Id.* at 1831 (noting much higher opt-out rates in Ohio, Pennsylvania, and Massachusetts).

62. John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1303–06 (2001).

can be considered trivial.[63] All other state laws share very much the same sets of rules, and we do not propose to discuss them here.[64] From our perspective, the interesting rules are the mandatory rules, mostly involving fiduciary duties, that seem difficult, if not impossible, to contract around.[65] The dominant phenomena present in recent Delaware judicial decisions are a loss of the courts' faith in the good faith of directors and a significant erosion of the deference formerly granted under the business judgment rule. Thus, the set of decisions now contestable in court has grown exponentially. This is not to say that directors' risk of personal liability has increased at the same rate, because most, if not all, Delaware corporations have availed themselves of the liability shield offered by title 8, section 102(b)(7) of the Delaware Code.[66]

63. Black, *supra* note 50, at 544.

64. For a study of the similarity of most state law provisions, see Carney, *Production*, *supra* note 46.

65. But see Ribstein, *supra* note 39, for the case of contracting around these duties in uncorporations. While corporations can relieve directors of much liability risk in charter provisions under title 8, section 102 of the Delaware Code, this does not protect their decisions from being overturned. *See* Joseph Hinsey IV, *Business Judgment and the American Law Institute's Corporate Governance Project: The Rule, the Doctrine, and the Reality*, 52 GEO. WASH. L. REV. 609, 611–12 (1984). Since Hinsey wrote, the protections given by section 102(b)(7) have become less certain. In *Emerald Partners v. Berlin*, the supreme court held

> that an exculpation defense based on a charter provision authorized by section 102(b)(7) is an affirmative defense that the directors must bear the burden of establishing. Presumably that burden includes the obligation to negate the statutory categories of excepted-out conduct—specifically, breaches of the duty of loyalty to the corporation or its stockholders, acts or omissions not in good faith or that involve intentional misconduct or a knowing violation of law, and transactions from which the director derived an improper personal benefit.

William T. Allen et al., *Realigning the Standard of Review of Director Due Care with Delaware Public Policy: A Critique of Van Gorkom and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449, 463 (2002); *see* Emerald Partners v. Berlin, 726 A.2d 1215, 1223–24 (Del. 1999). When taken with the recent holding of *Stone v. Ritter*, 911 A.2d 362 (Del. 2006), that a failure to provide proper monitoring is a breach of the duty of good faith rather than of the duty of care, the risk to Delaware directors may have been exponentially increased. This threat was dramatically enhanced by *Ryan v. Lyondell Chemical Co.*, where the Vice Chancellor held that allegations that a board accepted a take-it-or-leave-it bid without reserving shopping rights constituted a breach of the duty of good faith. No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008). The Delaware Supreme Court has accepted an interlocutory appeal. Lyondell Chem. Co. v. Ryan, No. 401, 2008, 2008 WL 4294938 (Del. Sept. 15, 2008). Douglas Branson notes the tension between Delaware's flexibility, epitomized by its "equal dignity" rule that allows corporations to achieve the same results by different statutory avenues, and the doctrine of *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971), which provides that inequitable action, no matter how much it complies with law, its impermissible. Branson, *supra* note 3, at 92–100.

66. DEL. CODE ANN. tit. 8, § 102(b)(7) (2001). *But see Stone*, 911 A.2d 362; *Ryan*, 2008 WL 2923427. Jonathan Macey argues that the Chancellor's decision exonerating Disney's directors for their remarkably generous, one might say wasteful, compensation decisions in the employment and termination of Michael Ovitz is evidence in support of Romano's theory that Delaware continues to offer companies predictability of law. Jonathan Macey, *Delaware: Home of the World's Most Expensive Raincoat*, 33 HOFSTRA L. REV. 1131, 1132 (2005). We do not quarrel with Macey's observation that it was a foregone conclusion that Disney's directors would not be held liable for their actions, given the applicability of section 102(b)(7). Macey is indeed correct that offering directors such safety even for the egregious mismanagement evidenced in that case provides a degree of certainty, but only for directors personally and not for their decisions, as we shall point out. Macey reiterates the hypothesis expressed in Macey & Miller, *supra* note 3, that Delaware corporate law seems designed to ben-

We begin by recalling a group of decisions that illustrate Delaware's attractiveness to managers. Bayless Manning, using a baseball metaphor, referred to them as "the famous Delaware keystone combination–*Keller* to *Havender* to *Hottenstein*."[67] *Keller* created a roadblock to recapitalizations to eliminate preferred dividend arrearages that blocked new financings, referring to the expectancy that arrearages would be paid as a vested right that could not be destroyed by a stockholder vote.[68] *Havender* removed the roadblock when the transaction was structured as a merger under a statute that predated the issuance of the preferred stock, holding that shareholders took their stock subject to existing laws and that each section of the statute had independent legal significance, thus turning the Delaware General Corporation Law into a menu from which planners could select the most congenial form.[69] In *Hottenstein*, Judge Biggs characterized these cases critically, saying: "The Keller case remains a landmark in the law of Delaware only to signify that what cannot be done directly under Section 26 of the General Corporation Law may be done by subterfuge under Section 59."[70]

Subsequently another federal court, applying Delaware law, offered the following, more sympathetic explanation: "The rationale is that a merger is an act of independent legal significance, and when it meets the requirements of fairness and all other statutory requirements, the merger is valid and not subordinate or dependent upon any other section of the Delaware Corporation Law."[71]

The Delaware Court of Chancery has referred to this as the "bedrock doctrine of independent legal significance."[72] After offering practitioners considerable clarity about their clients' freedom of action under Delaware law, the Delaware Supreme Court's equitable interests (implied in Judge Leahy's language in *Langfelder*), reasserted themselves in *Schnell v. Chris-Craft Industries*.[73] In response to a notice from stock-

efit the corporate litigation bar, rather than corporations or their shareholders, through what could be described as lengthy, expensive, and embarrassing trials, signifying nothing.

67. Bayless Manning, *The Shareholder's Appraisal Remedy: An Essay for Frank Coker*, 72 YALE L.J. 223, 227 (1962).

68. Keller v. Wilson & Co., 190 A. 115, 125–26 (Del. 1936).

69. Fed. United Corp. v. Havender, 11 A.2d 331, 338 (Del. 1940).

70. Hottenstein v. York Ice Mach. Corp., 136 F.2d 944, 953 (3d Cir. 1943). Two states have adopted the independent legal significance doctrine as a rule of interpretation under their corporate codes. GA. CODE ANN. § 14-2-103 (2008); MO. ANN. STAT. § 351.017 (West 2001). Other states have done so by judicial interpretation. *See, e.g.*, Welch v. Via Christi Health Partners, 133 P.3d 122, 129–30 (Kan. 2006); Bove v. Cmty. Hotel Corp., 249 A.2d 89, 92–93 (R.I. 1969).

71. Langfelder v. Universal Labs., Inc., 68 F. Supp. 209, 211 (D. Del. 1946); *see also* Orzeck v. Englehart, 195 A.2d 375, 378 (Del. 1963).

72. Warner Commc'ns v. Chris-Craft Indus., Inc., 583 A.2d 962, 970 (Del. Ch.), *aff'd*, 567 A.2d 419 (Del. 1989); *see also* Hariton v. Arco Elecs., Inc., 188 A.2d 123, 125 (Del. 1963) (declining to treat an asset sale in exchange for the buyer's shares, followed by a liquidating distribution of the stock to the seller's shareholders, as a *de facto* merger, triggering appraisal rights). For a review of the development and history of the doctrine, see C. Stephen Bigler & Blake Rohrbacher, *Form or Substance? The Past, Present and Future of the Doctrine of Independent Legal Significance*, 63 BUS. LAW. 1 (2007).

73. Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 439 (Del. 1971).

holders of a proxy fight at a scheduled annual meeting, the board amended the bylaws to grant itself power to set the date of the annual meeting and accelerated the meeting, as permitted by statute.[74] The result, the plaintiffs alleged, was to increase the difficulty of engaging in a successful proxy solicitation.[75] In response to management's defense that it had acted in a manner authorized by the statute, the court stated that "[t]he answer to that contention, of course, is that inequitable action does not become permissible simply because it is legally possible."[76] A critical commentator might note this decision as the end of bright line property rights under the "independent legal significance" doctrine and the beginning of equity's close *ex post* examination of corporate actions.[77] Recent commentators have noted the gradual erosion of the doctrine of independent legal significance over the past ten years.[78] These authors note that the courts have attempted to distinguish the cases disregarding the doctrine by claiming that it only "applies to exercise of legal power. It does not apply to fiduciary review."[79] Unfortunately, that rationalization does not apply to the Chancellor's most recent departure, which involved only the availability of appraisal rights and which did not address breaches of fiduciary duties.[80]

Recent commentary sums up Delaware law's current situation as follows: "The law governing the responsibilities of directors has become so muddled that, incredibly, one can't get a consistent answer to the most basic corporate law question of how many fiduciary duties directors have—if you ask Delaware lawyers, the answer can range anywhere from two to five!"[81]

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74. *Id.* at 434.

75. *Id.*

76. *Id.* at 439.

77. Chief Justice Myron Steele has admitted as much, noting that the Delaware Court of Chancery's equity powers have given it

> wide latitude to craft remedies and mold precedent to fit particular patterns in the tradition of the English High Court of Chancery. This fact has allowed the court of chancery to maximize efficiency in resolving disputes, while undercutting the future applicability of precedent, which has led to a tension between efficiency and predictability.

Steele & Verret, *supra* note 22, at 191–92; *see also* Leo E. Strine, Jr., *If Corporate Action Is Lawful, Presumably There Are Circumstances in Which It Is Equitable to Take That Action: The Implicit Corollary to the Rule of* Schnell v. Chris-Craft, 60 BUS. LAW. 877, 881 (2005) ("Nearly thirty-five years ago, the Delaware Supreme Court emphatically rejected the proposition that compliance with the DGCL was all that was required of directors to satisfy their obligations to the corporation and its stockholders."). Justice Jacobs has characterized Delaware law as favoring the law side until about 1980 and equity thereafter. Jack B. Jacobs, *The Uneasy Truce Between Law and Equity in Modern Business Enterprise Jurisprudence*, UCLA SCH. L. PROGRAM BUS. L. & POL'Y OCCASIONAL PAPER SERIES, Jan. 2006, at 7, 12.

78. *See* Bigler & Rohrbacher, *supra* note 72, at 10–13.

79. *Id.* at 16 (quoting SICPA Holdings S.A. v. Optical Coating Lab., Inc., No. CIV. A. 15129, 1997 WL 10263, at *5 (Del. Ch. Jan. 6, 1997)).

80. La. Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172, 1191 (Del. Ch. 2007), *review denied sub nom.*, Express Scripts, Inc. v. Crawford, No. 113, 2007 WL 707550 (Del. Mar. 9, 2007).

81. Paul T. Schnell, *From the Editor—M&A at Year-End*, M&A LAW. (Glasser LegalWorks, New York, N.Y.), Jan. 2005, at 3–4. Where one might have thought of two duties, care and loyalty, the

A number of commentators have observed Delaware's warts. The first observation was by Macey and Miller, who observed that Delaware's high franchise fees apparently did not capture all available monopoly rents, but left some for the Delaware bar to claim, largely through costly litigation.[82] Branson claimed that these rents were collected because of the indeterminacy of Delaware legal rules, which were rife with open, indeterminate, fact-intensive tests.[83] More recently, Fisch and Kamar have separately discussed the details of this indeterminacy.[84]

One measure of Delaware's indeterminacy and its costs is the Delaware courts' relatively high reversal rate. Former Chief Justice Veasey has stated that the reversal rate for decisions from the Delaware Court of Chancery is approximately 25%.[85] We examined all of the Delaware Supreme Court's rulings entered in appeals of corporation cases from the Court of Chancery for 2002 (the nearest year to his remarks for which we could obtain data), and excluding appeals rejected from interlocutory orders[86] and treating cases that were reversed in part as reversed, we found ten affirmances and nine reversals.[87] Delaware's high reversal rate is

Delaware Supreme Court has recently clarified that the monitoring duty comes under the rubric of the duty of good faith. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).

82. Macey & Miller, *supra* note 3, at 491 n.84.

83. Branson, *supra* note 3, at 91.

84. *See* Jill Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061 (2000); Ehud Kamar, *A Regulatory Competition Theory of Indeterminacy in Corporate Law*, 98 COLUM. L. REV. 1908 (1998).

85. Norman Veasey et al., *The Role of Corporate Litigation in the Twenty-First Century*, 25 DEL. J. CORP. L. 131, 135 (2000) (comments of the Chief Justice of the Delaware Supreme Court). This does not address the question of whether a greater percentage of Court of Chancery decisions are appealed than from other courts of original jurisdiction.

86. Sunderland v. Raider, No. 593, 2002, 2002 WL 31477185, at *1 (Del. Nov. 4, 2002); *In re* Pure Res., Inc. S'holders Litig., No. 557, 2002, 2002 WL 31304145, at *2 (Del. Oct. 10, 2002); Cantor v. Cantor Fitzgerald, L.P., No. 616, 2001, 2002 WL 181195, at *1 (Del. Jan. 31, 2002); Cribb v. Telxon Corp., No. Civ.A. 17706, 2002 WL 122633, at *1 (Del. Jan. 17, 2002).

87. Affirmed: Hallett v. Carnet Holding Corp., No. 499, 2000, 2003 WL 1978743, at *2 (Del. Feb. 4, 2003) (filed in 2002); Applebaum v. Avaya, Inc., 812 A.2d 880, 894 (Del. 2002); Apex, Inc. v. Nationwide Television & Appliance Assocs., No. 336, 2002, 2002 WL 31546528, at *1 (Del. Nov. 13, 2002); Monk v. Imaging Automation, Inc., No. 229, 2002, 2002 WL 2017218, at *1 (Del. Aug. 29, 2002); Spellman v. Katz, No. 158, 2002, 2002 WL 1968245, at *1 (Del. Aug. 22, 2002) (which may not be a corporate case); Palmer v. Berger, No. 259, 2002, 2002 WL 192473, at *1 (Del. Aug. 14, 2002); Grimes v. Alteon, Inc., 804 A.2d 256, 266 (Del. 2002); *In re* Infinity Broad. Corp. S'holders Litig., 802 A.2d 285, 294 (Del. 2002); Kohls v. Kenetech Corp., No. 433, 2000, 2002 WL 529908 (Del. Apr. 5, 2002); Sorrento Networks, Inc. v. Telcom-SNI Investors, LLC, No. 493, 2001, 2002 WL 126435, at *1 (Del. Jan. 23, 2002). Reversed (at least in part): Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 939 (Del. 2003) (filed in 2002); Parfi Holding AB v. Mirror Image Internet, Inc., 817 A.2d 149, 160 (Del. 2002); Gotham Partners, L.P. v. Hallwood Realty Partners, L.P., 817 A.2d 160, 178 (Del. 2002); Levco Alternative Fund Ltd. v. Readers' Digest Ass'n, Inc., No. 466, 2002, 2002 WL 1859064, at *3 (Del. Aug. 13, 2002); Tyson Foods, Inc. v. Aetos Corp., 809 A.2d 575, 583 (Del. 2002); Stifel Fin. Corp. v. Cochran, 809 A.2d 555, 562 (Del. 2002); Saito v. McKesson HBOC, Inc., 806 A.2d 113, 119 (Del. 2002); Telxon Corp. v. Meyerson, 802 A.2d 257, 266 (Del. 2002); Cerberus Int'l Ltd. v. Apollo Mgmt., L.P., 794 A.2d 1141, 1156 (Del. 2002). The Delaware courts' records for 2002 showed that 0.37% of all cases disposed of by the Court of Chancery were reversed. OFFICE OF THE COURTS, 2002 STATISTICAL REPORT OF THE DELAWARE JUDICIARY, *available at* http://courts.delaware.gov/AOL/Annual%20Reports/FY02/?index.htm. The Court of Chancery disposed of 3525 cases in 2002. *Id.* at 24. Of the dispositions, 2183 were from matters involving estates. *Id*. at 34. Another 440 dispositions

consistent with Delaware law's being so indeterminate that Delaware appellate and trial judges disagree on its application with relative frequency, their specialized expertise notwithstanding.[88] In some cases the appellate decisions are sufficiently surprising that they generate considerable commentary by both academics and practitioners.[89] Many of these decisions involved changes in Delaware's law,[90] and they occurred in areas involving review of important transactions, such as mergers and acquisitions.[91]

The important observation here is not that the rules are difficult to discern once announced, but that new rules have been announced with

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involved guardianships (350), trusts (fifty-two), and "other matters" (thirty-eight). *Id.* at 33. That leaves 902 cases unaccounted for, which we assume were the corporate cases. There were fifty-five appeals filed from the Court of Chancery in 2002, and fifty-eight appeals from the Court of Chancery were disposed of in 2002. *Id.* at 19.

88. Following the holding in *Stone v. Ritter*, 911 A.2d 362, 369–70 (Del. 2006), that a "sustained and systematic failure of the board to exercise oversight" could constitute a breach of the duty of good faith, thus preventing both exculpation under title 8, section 102(b)(7) of the Delaware Code, and indemnification under section 145, Vice Chancellor Noble declined to dismiss the complaint in *Ryan v. Lyondell Chemical Co.*, No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008), where the board accepted a high premium "take-it-or-leave-it" offer with no opportunity to shop for a higher bid. Since that time, two Court of Chancery judges have weighed in with cautionary language about characterizing failures to obtain more information as breaches of the duty of good faith, without mentioning the *Ryan* decision. *In re* Lear Corp. S'holder Litig., No. 2728-VCS, 2008 WL 4053221 (Del. Ch. Sept. 2, 2008); McPadden v. Sidhu, No. 3310-CC, 2008 WL 4017052 (Del. Ch. Aug. 29, 2008).

89. For example, based on LEXIS searches conducted June 19, 2007, *Omnicare*, 818 A.2d 914, was cited in sixty-nine law review and periodical references; *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985), was cited in 880 law review and periodical references; *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985), was cited in 967 law review and periodical references; *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), was cited in 1146 law review and periodical references; and *Weinberger v. UOP, Inc*., 457 A.2d 701 (Del. 1983), was cited in 786 law review and periodical references.

90. Veasey et al., *supra* note 85, at 135.

91. *See, e.g.*, *Omnicare*, 818 A.2d at 934 (applying *Unocal*'s "heightened scrutiny" standard to review a deal protection device in the sale of a corporation); Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1120–22 (Del. 1994) (invalidating a special committee approval of a cash-out merger where the dominant shareholder threatened to make a legally permitted tender offer); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 n.12 (Del. 1989) (creating an exception from *Revlon* for "mergers of equals"); Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1286 (Del. 1989) (relaxing the "auctioneering" duty articulated in *Revlon* in some cases); *Revlon*, 506 A.2d at 184 (imposing a duty of "scrupulous fairness" on boards attempting to sell a company); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1356 (Del. 1985) (imposing a relaxed version of "heightened scrutiny" where the "threat" was hypothetical rather than immediate); *Unocal*, 493 A.2d at 954 (imposing a new level of heightened scrutiny on takeover defenses before the business judgment rule might apply); *Van Gorkom*, 488 A.2d at 873 (imposing a new standard of care for directors to be informed); *Weinberger*, 457 A.2d at 715 (rejecting the "business purpose" test and imposing a new duty of fair dealing and fair price in takeout mergers); Singer v. Magnavox Co., 380 A.2d 969, 974 (Del. 1977) (imposing a "business purpose" requirement for takeout mergers); Carmody v. Toll Bros., 723 A.2d 1180, 1192 (Del. Ch. 1998) (invalidating a dead hand shareholder rights plan); Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. Ch. 1988) (imposing a requirement of demonstration of a "compelling justification," even for a board acting in good faith, to defend a decision limiting shareholder voting power); Katz v. Bregman, 431 A.2d 1274, 1276 (Del. Ch. 1981) (holding that a shift in materials from steel to plastic, involving a bare majority of all assets, constituted a sale of "substantially all" assets under the "unusual transaction" standard); Gimbel v. Signal Cos., 316 A.2d 599, 606 (Del. Ch. 1974) (imposing a qualitative "unusual transaction" requirement on a quantitative "substantially all" requirement concerning shareholder approval of asset sales).

remarkable regularity. These rules represent surprises for those who complete transactions that become subject to subsequent challenge in an unexpected way and are now subject to new risks of liability for participants. To the extent they are fact intensive, they make prediction more difficult for planners of transactions. They have been characterized as standards, and in one sense the notions of care, good faith, and loyalty covered by fiduciary obligations are standards. However, they have devolved into a series of mini-standards that could fairly be described as rules, as we shall demonstrate. The frequency of litigation in Delaware, often described as a blessing, might as easily be a handicap. As with viruses, the frequency of their replication creates the probability of every possible mutation occurring within a day, increasing the probability that some mutations will be drug resistant. Similarly in Delaware, multiple decisions involving closely related fact patterns can lead to unfortunate results.

We now explore some of the areas of Delaware law in which uncertainty has delayed transactions and increased litigation costs to an extent that suggests the executives responding to Romano's earlier survey might respond quite differently today—or that they ought to if they were fully aware of these costs. We should emphasize that not all Delaware law is difficult and indeterminate; the business judgment rule (generally) remains alive and well in Delaware, at least outside the important area of mergers and acquisitions.[92] However, this general clarity in one area does not distinguish Delaware from other jurisdictions, which reach the same result.[93] Here we concentrate on important areas involving major transactions, the focus of executives' reasons for migrating to Delaware in Romano's study, where indeterminacy can impose high costs on transactions. We review the Delaware approach to takeout transactions, decisions involving control, and briefly examine some other areas.

1. Weinberger*: The Mother of All Litigation?*

Weinberger v. UOP, Inc. involved charges that a parent corporation's actions in cashing out minority shareholders of its subsidiary were tainted by the disloyalty of some of the subsidiary's directors, who were

92. Except in those cases where the Delaware courts find that the board's decision-making process is not sufficiently deliberative—that is, resembling a judicial determination, as in *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 360–61 (Del. 1993); *Van Gorkom*, 488 A.2d 858; and *In re Emerging Communications, Inc. Shareholders Litigation.*, No. 16415, 2004 WL 1305745, at *7–8, *25 (Del. Ch. June 4, 2004) (holding one independent director liable and charging him with knowledge that a price approved in a fairness opinion was too low, by virtue of his background as an investment adviser, although the result may have been different had he not received fees from the controlling stockholder). Some commentators took dicta in *In re Caremark International, Inc. Derivative Litigation*, 698 A.2d 959, 970 (Del. Ch. 1996), to impose a new monitoring duty to be informed about potential law violations on boards. Philip S. Garon et al., *Challenging Delaware's Desirability as a Haven for Incorporation*, 32 WM. MITCHELL L. REV. 769, 819–20 (2006). They were correct: a year later the Delaware Supreme Court characterized this as a duty of good faith. *Stone*, 911 A.2d at 369–70.

93. Carney, *supra* note 35.

both parent employees and appointees on the subsidiary's board.[94] These directors produced information about the value of the subsidiary for the parent that they did not share with their fellow directors of the subsidiary or its public shareholders.[95] The Model Act would clearly identify this transaction as one in which these directors had a "conflicting interest," which would mandate "required disclosure" to the bodies making the decision—both the board and shareholders of the subsidiary.[96] The Delaware Act is equally clear, defining an "interested transaction" as a transaction between two corporations in which a director of one corporation is also an officer or director of the other corporation.[97] The *Weinberger* opinion makes no mention of the statute, proceeding as if it were creating judicial standards.[98] Other decisions applying *Weinberger* take the same approach.[99] Former Chief Justice Veasey made a revealing comment about his view of the preeminent role of the Delaware Supreme Court when he said:

> The Supreme Court, I think, basically decides appeals from the Court of Chancery and reverses usually only when the Supreme Court sees a new direction for the law. Very few cases are reversed just on the basis of ordinary error, but there are some of those, of course.
>
> The Supreme Court does, I think, have the responsibility for policy direction in business law cases and hopefully would inform the nation and the world about what we see as the way these cases should go in the future.[100]

For a brief moment following *Weinberger*, it appeared that fairness might be a manageable rule of limited application because the court indicated that appraisal would be the remedy in future disputes about the value of minority shares.[101] Two years later, in *Rosenblatt v. Getty Oil*

94. *Weinberger*, 457 A.2d at 705. In fairness, *Schnell v. Chris-Craft Indus.*, 285 A.2d 437, 439 (Del. 1971), is the real genesis of this change, permitting courts to set aside otherwise lawful transactions if they find unfairness, thus elevating equity over law.

95. *Weinberger*, 457 A.2d at 705.

96. MODEL BUS. CORP. ACT § 8.60(1)(ii), (7) (2008). The UOP directors would have been subject to the protections of section 8.62(7) of the old Model Business Corporation Act, which provides that if a conflicted director has a duty to another corporation, his conflict will not taint the transaction if he discloses the nature of his conflict and plays no part in the deliberations or the vote. For an example of how these provisions play out, see *Fisher v. State Mutual Insurance Co.*, 290 F.3d 1256 (11th Cir. 2002) (applying Georgia law).

97. DEL. CODE ANN. tit. 8, § 144(a) (2001).

98. Title 8, section 144 of the Delaware Code focuses on directors' conflicts of interest. Despite the clear evidence of directors' conflicts of interest, *Weinberger*'s sweeping language suggests the duties were breached by the parent corporation rather than by the subsidiary's directors. If the rule becomes one of majority stockholder duties, then section 144 has no role to play. But the facts of *Weinberger* did not require such an expansive reading.

99. *See* Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1115–18 (Del. 1993); Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1103–08 (Del. 1985); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937–41 (Del. 1985).

100. Veasey et al., *supra* note 85, at 135.

101. Weinberger v. UOP, Inc., 457 A.2d 701, 703, 715 (Del. 1983). The court stated, "Thus, we return to the well established principles of *Stauffer v. Standard Brands, Inc.* and *David J. Greene & Co.*

Co., the court approved a freezeout of minority shareholders where the independent directors of the subsidiary corporation hired their own advisers and negotiated the merger terms with apparent vigor, thus simulating an arm's length bargaining process.[102] But that was the end of judicial restraint. In the same year, in *Rabkin v. Philip A. Hunt Chemical Corp.*, the supreme court declined to hold that appraisal was exclusive where a buyer of a majority interest that entered into a one year standstill for any takeout began planning the takeout before the expiration of the year—apparently a plausible claim of unfairness, sufficient to avoid dismissal.[103] If the independent committee bargains too hard and deadlock is reached, the lesson of *Kahn v. Lynch Communication Systems, Inc.* seems to be that the majority shareholder cannot bargain too hard in return—that a threat of a tender offer at a lower price is "unfair" and "compromise[d]" the ability of the independent committee to negotiate "at arm's length."[104] Vice Chancellor Strine has noted that *Lynch* complaints are not subject to dismissal, and thus always have settlement value.[105] The suggestion of arm's length bargaining under these conditions is an artificial construct of the Delaware courts that bears little relation to reality.

Ironically, Delaware courts have repeatedly held both that it is not unfair for a parent corporation to make a tender offer for minority shares and that the price offered is not constrained by the "entire fairness" doctrine.[106] Further, a short-form merger is not currently subject to the fairness doctrine.[107] The inference to be drawn from these cases seems to be that it is permissible for a parent corporation to withdraw from negotiations with an independent committee and conduct a tender offer and short-form merger, but it is not permissible to mention it to the indepen-

v. Schenley Industries, Inc., mandating a stockholder's recourse to the basic remedy of an appraisal." *Id.* at 715 (citations omitted). But the principles of *Stauffer* were rejected in short-form mergers after *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), in *Roland International Corp. v. Najjar*, 407 A.2d 1032, 1036 (Del. 1979), to allow application of *Singer*'s business purpose test. In *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242, 247 (Del. 2001), Justice Berger traced the circuitous history of the *Stauffer* doctrine, noting that dicta implicated fairness review in short-form mergers in *Bershad v. Curtiss-Wright Corp*., 535 A.2d 840 (Del. 1987), and *Kahn v. Lynch*, 638 A.2d 1110 (Del. 1994), only to revive it in the *Glassman* decision.

102. 493 A.2d at 937–38.

103. 498 A.2d at 1100. In 2001 Justice Berger conceded that "*Rabkin*, through its interpretation of *Weinberger*, effectively eliminated appraisal as the exclusive remedy for any claim alleging breach of the duty of entire fairness." *Glassman*, 777 A.2d at 247.

104. 638 A.2d at 1115, 1121.

105. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 605 (Del. Ch. 2005) ("Because that standard [of review] (as heretofore understood by practitioners and courts) makes it impossible for a controlling stockholder ever to structure a transaction in a manner that will enable it to obtain dismissal of a complaint challenging the transaction, each *Lynch* case has settlement value, not necessarily because of its merits but because it cannot be dismissed.").

106. Solomon v. Pathe Commc'ns Corp., 672 A.2d 35, 39 (Del. 1996); *In re* Siliconix Inc. S'holder Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. 2001), *reprinted in* 27 DEL. J. CORP. L. 1011, 1020–21 (2002); Eisenberg v. Chi. Milwaukee Corp., 537 A.2d 1051, 1056 (Del. Ch. 1987); Lynch v. Vickers Energy Corp., 351 A.2d 570, 575 (Del. Ch. 1976).

107. DEL. CODE ANN. tit. 8, § 253 (2001). In *Glassman*, 777 A.2d at 244–47, Justice Berger traces the changing status of this rule.

dent committee because that would be considered "coercive" in the context of merger negotiations. Nothing could demonstrate more clearly the artificiality of the distinctions of the Delaware courts.

Guhan Subramanian has traced the difficulties in the Delaware courts concerning the effects of boards' attempts to protect their decisions from fairness review, both by using special committees and by requiring shareholder approval by a majority of the minority shareholders.[108] Only one of the cases he cites even mentions section 144 of the Delaware statute, which provides procedures for what on its face appear to be safe harbors that protect board decisions from entire fairness review.[109] Subramanian notes that the Chancery judges split over the effect of a special committee post-*Weinberger*. Chancellor Allen held that use of a special committee of independent directors restored business judgment rule review,[110] while Vice Chancellors Jacobs and Chandler held that special committee approval only shifted the burden on entire fairness from the defendants to the plaintiff.[111] In 1994 the supreme court agreed with Vice Chancellors Jacobs and Chandler, albeit in *dicta*, that the only effect of a properly functioning special committee was to shift the burden on fairness.[112] While several courts have rejected decisions of some special committees as burden shifting because of a perceived lack of independence or bargaining power,[113] Subramanian points out that such a charge cannot be levied against minority shareholders when they are given the power, through a majority of minority voting rules, to approve or reject a freezeout transaction.[114] Yet in *Rosenblatt v. Getty Oil Co.*,[115] the court only accorded such a shareholder vote burden-shifting status. Subramanian concluded that "[t]his case, like *Lynch* nine years later, illustrates the Delaware Supreme Court's unwillingness to relinquish entire fairness review regardless of the procedural protections that the controller provides." He finds it puzzling that combining two proce-

108. Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 11–17 (2005).

109. Citron v. E.I. DuPont de Nemours & Co., 584 A.2d 490, 500 (Del. Ch. 1990) (remarking that section 144 is a "useful starting point" in discussing a freezeout merger, but contained no further discussion of its applicability).

110. *In re* Trans World Airlines, Inc. S'holders Litig., No. 9844, 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988) (Allen, C.), *reprinted in* 14 DEL. J. CORP. L., 870, 883 (1989).

111. *Citron*, 584 A.2d at 501; Rabkin v. Olin Corp., No. 7547, 1990 WL 47648, at *17 (Del. Ch.), *aff'd*, 586 A.2d 1202 (Del. 1990).

112. Kahn v. Lynch Commc'n Sys., 638 A.2d 1110, 1120–21 (Del. 1994).

113. *See, e.g.*, *id.*; Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1106 & n.7 (Del. 1985).

114. Subramanian, *supra* note 108, at 15–16.

115. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985). More recently, the Court of Chancery has allowed a minority shareholder challenge to a merger approved under circumstances that formally satisfy conflict of interest requirements under both Delaware's statute and the Model Business Corporation Act—where the transaction has been approved, after adequate disclosure, by a majority of the minority shares voting. *In re* JCC Holding Co. S'holders Litig., 843 A.2d 713 (Del. Ch. 2003). Defendants' argument that most of the plaintiffs were estopped from complaining about fairness because they had either voted to approve the transaction or accepted the merger consideration, thus precluding a class action for lack of numerosity, was rejected because the court held that a freezeout merger was inherently coercive. *Id.* at 716.

dural safeguards accords the decision no more protection than either safeguard alone.[116]

2. *Weinberger's Doctrinal Consequences: Posturing and Exceptions*

The consequences of this doctrine are several. First, the implication is that a buyer will be hard pressed to pay a control premium to a controlling shareholder if it also wishes to acquire the remaining minority shares at some lower price, which will preclude some value-creating transfers of control.[117] Second, a simulation of arm's length bargaining will shift the burden on fairness charges if the independent committee bargains hard, but not so hard that the control shareholder has to employ all of its negotiating power—an artificial construct.[118] Third, the decisions allowing tender offers followed by short-form mergers without fairness duties provide a clear road map to avoid the fairness confusion, perhaps rendering this needless litigation superfluous.[119] Fourth, this

116. Subramanian, *supra* note 108, at 16. On the question of whether voting for a freezeout merger waives appraisal rights, Vice Chancellor Strine explained the court's reluctance to attach much importance to shareholder votes in fairness proceedings, stating that

> [b]ecause *Lynch* is premised on the empirical assumption that stockholder votes on mergers with controlling stockholders invariably involve a form of inherent coercion, that case denies ratification effect to minority approval of mergers of that kind. As a logical consequence, our law cannot . . . coherently say that minority stockholders "acquiesce" in the fairness of a merger with a controlling stockholder merely by voting yes or accepting the merger consideration.

In re JCC Holding Co., 843 A.2d at 716.

117. *See, e.g.*, *Rabkin*, 498 A.2d at 1107, where frozen out plaintiffs claimed a breach of fiduciary duty to pay the same price previously paid to the control shareholder, and the supreme court found an allegation of "a conscious intent by Olin, as the majority shareholder of Hunt, to deprive the Hunt minority of the same bargain that Olin made with Hunt's former majority shareholder."

118. Chancellor Allen warned against posturing when he wrote: "This is not a call to pay even greater attention to appearances; it is advice to abandon the theatrical and to accept and to implement the substance of an arm's-length process [for special committees dealing with a management buyout]." William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 BUS. LAW. 2055, 2062 (1990).

119. *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421 (Del. Ch. 2002); *In re* Siliconix Inc. S'holders Litig., No. CIV A. 18700, 2001 WL 716787 (Del. Ch. June 19, 2001), *reprinted in* 27 DEL. J. CORP. L. 1011 (2002). These decisions are criticized by Peter Letsou and Steven M. Haas, who argue that these holdings resulted from a misreading of *Solomon v. Pathe Communications Corp.*, 672 A.2d 35 (Del. 1996). *See* Peter Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 BUS. LAW. 25, 28 (2005); *see also* Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders*, 152 U. PA. L. REV. 785, 818 & n.122 (2003). Others who criticize the results of these cases disagree and seem to accept the premise that they were correctly decided under Delaware law. *See, e.g.*, Jon E. Abramczyk et al., *Going Private "Dilemma"?—Not in Delaware*, 58 BUS. LAW. 1351 (2003); Bradley R. Aronstam et al., *Delaware's Going Private Dilemma: Fostering Protections for Minority Shareholders in the Wake of* Siliconix *and* Unocal Exploration, 58 BUS. LAW. 519 (2003); Bradley R. Aronstam et al., *Revisiting Delaware's Going Private Dilemma Post-*Pure Resources, 59 BUS. LAW. 1459 (2004); Kimble Charles Cannon, *Augmenting the Duties of Directors to Protect Minority Shareholders in the Context of Going-Private Transactions: The Case for Obligating Directors to Express a Valuation Opinion in Unilateral Tender Offers After* Siliconix*,* Aquila *and* Pure Resources, 2003 COLUM. BUS. L. REV. 191; A.C. Pritchard, *Tender Offers by Controlling Shareholders: The Specter of Coercion and Fair Price*, 1 BERKELEY BUS. L.J. 83 (2004). The resolution of this disagreement is not important for our purposes; what is important is the huge litigation cost imposed by the *Weinberger* decision. We note that Vice Chancellor Strine, in *In re Pure Resources*, 808 A.2d at 442–47, raised the specter that the *Weinberger* fairness test could be returned through the back

proliferation of standards of review leads to concern among Delaware judges that overarching principles are being ignored in the formalism of the creation of numerous categories, which could in the long run lead to instability in Delaware law should the judges determine to unify the approach to transactions with like results.[120]

Some recent negotiated acquisitions provide an acquiring firm with a "top-up" option to buy shares from the target if its initial tender offer fails to obtain the 90% ownership required for a short-form merger, providing yet another path around *Weinberger*, at least until its legality is judicially determined.[121] Given this situation, one can speculate about the stability of these doctrines.[122] One might wonder whether frozen-out minority shareholders are really treated unfairly if the price they receive is more than the market price prior to the transactions.[123] One might also wonder whether minority shareholders take their shares with notice of a lack of widely available contractual protections against unilateral determination of the price by a new controlling shareholder.[124] Perhaps more confusingly, the *Weinberger* doctrine seems to be bleeding into what were once thought to be arm's length negotiated acquisitions, at least where a dominant or controlling shareholder receives some consideration not received by others.[125]

Takeout mergers have been subject to *Weinberger*'s entire fairness standard for over twenty years. One of the difficulties with these cases is

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door by testing whether the majority shareholder's tender offer is actionably coercive because of the vulnerability of a nontendering shareholder, or because the independent directors were not as aggressive in bargaining in the tender offer context as they might (or should) have been in a merger, thus reviving the *Kahn v. Lynch* approach in this context .

120. *See, e.g.*, Vice Chancellor Strine's concerns in *In re Pure Resources*, 808 A.2d at 442–47, concerning the disparate treatment of tender offers followed by short-form mergers versus section 251 long-form mergers. In other contexts, see the views of the Three Chancellors on distinctions between sales governed by *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986), and mergers of equals governed by *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

121. Agreement and Plan of Merger Between Koch Industries Inc. and Georgia-Pacific Corporation § 2.04 (Nov. 13, 2005), *available at* http://www.sec.gov/Archives/edgar/data/41077/000119312505224156/dex21.htm. Top-up options provide that if the acquirer reaches the 70% ownership level in a negotiated tender offer, the target will sell the acquirer sufficient treasury shares to allow it to reach the 90% ownership level, thus allowing avoidance of *Weinberger*.

122. For example, do these options offend the *Blasius* rule by defeating shareholder voting rights in freezeout mergers? *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 n.2 (Del. Ch. 1988). Or do they simply violate the procedural fairness required by *Weinberger*? *See* Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

123. *See* William J. Carney & Mark Heimendinger, *Appraising the Non-Existent: The Delaware Courts' Struggle with Control Premiums*, 152 U. PA. L. REV. 845 (2003).

124. *Id*. For a discussion of "shark repellent" charter amendments designed to protect minority shareholders in freezeouts, see William J. Carney, *Shareholder Coordination Costs, Shark Repellents and Takeout Mergers: The Case Against Fiduciary Duties*, 1983 AM. B. FOUND. RES. J. 341.

125. *See, e.g.*, *In re* Tele-Commc'ns, Inc. S'holders Litig., No. Civ.A. 16470, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005), *reprinted in* 31 DEL. J. CORP. L. 1162, 1173–74 (2006) (holders of B supervoting common received premium over holders of A common); *In re* LNR Prop. Corp. S'holders Litig., 896 A.2d 169, 176–78 (Del. Ch. 2005) (*Weinberger* applies where controlling shareholder of acquired corporation receives buyer's securities while others receive cash); *In re Pure Res.*, 808 A.2d at 435–37.

that the supreme court took years to make clear whether these duties apply simply because the dominant shareholder dominates the board of directors, and thus is vicariously responsible for their conflicts of interest, or whether the dominant shareholder owes fiduciary duties independently, by virtue of its power to vote its shares for a freezeout merger. Prior to *Kahn v. Lynch Communications Systems, Inc.*, the Court of Chancery had split on this question, holding in *In re Trans World Airlines, Inc.*[126] that approval by a disinterested special committee of the board would invoke the business judgment test (thus implicitly concluding that duties reside at the board level) and in *Citron v. E. I. Du Pont de Nemours & Co.*[127] that neither approval by an informed independent committee nor informed minority shareholders would relax the entire fairness standard, although it would shift the burden to the plaintiff. It was not until *Kahn* that the supreme court held that approval by either independent directors or shareholders shifted the fairness burden to the plaintiff, and thus, implicitly, that duties lie at the director level rather than the majority shareholder level.[128]

The holding in *Kahn* was consistent with a line of Court of Chancery decisions that held that a dominant shareholder owed no fairness duties to minority shareholders when making a tender offer for their shares, other than avoiding coercive offers and inadequate disclosures.[129] In 1996 the supreme court finally confirmed the holdings of these cases in *Solomon v. Pathe Communications Corp.*[130] In an attempt to avoid this rule, a Siliconix shareholder alleged that the directors of the subsidiary, who were elected by the controlling shareholder, failed to carefully evaluate the fairness of the tender offer, thus breaching their duty of loyalty.[131] However, Vice Chancellor Noble rejected this claim and made explicit the rationale that must underlie the distinction between going private mergers and tender offers:

> It may seem strange that the scrutiny given to tender offer transactions is less than the scrutiny that may be given to, for example, a merger transaction which is accompanied by more general breaches of fiduciary duty by the directors of the acquired corporation. From the standpoint of a Siliconix shareholder, there may be little substantive difference if the tender is successful and Vishay proceeds, as it has indicated that it most likely will, with the short-form merger. The Siliconix shareholders may reject the tender, but,

126. *In re* Trans World Airlines, Inc. S'holders Litig., No. 9844, 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988), *reprinted in* 14 DEL. J. CORP. L., 870, 883 (1989).

127. 584 A.2d 490, 501–02 (Del. Ch. 1990).

128. 638 A.2d 1110, 1117 (Del. 1994).

129. *In re* Ocean Drilling & Exploration Co. S'holders Litig., No. 11898, 1991 WL 70028, at *3 (Del. Ch. Apr. 30, 1991), *reprinted in* 17 DEL. J. CORP. L. 326, 334 (1992); Lynch v. Vickers Energy Corp., 351 A.2d 570, 573 (Del. Ch. 1976), *rev'd on other grounds*, 383 A.2d 278 (Del. 1977).

130. 672 A.2d 35, 39 (Del. 1996).

131. *In re* Siliconix Inc. S'holders Litig., No. CIV. A. 18700, 2001 WL 716787 (Del. Ch. June 21, 2001), *reprinted in* 27 DEL. J. CORP. L. 1011, 1021 (2002).

> if the tender is successful and the short-form merger accomplished, the shareholder, except for the passage of time, will end up in the same position as if he or she had tendered or if the transaction had been structured as a merger . . . .
>
> The difference in judicial approach can be traced to two simple concepts. The first is that accepting or rejecting a tender is a decision to be made by the individual shareholder, and at least as to the tender itself, he will, if he rejects the tender, still own the stock of the target company following the tender. The second concept is that the acquired company in the merger context enters into a merger agreement, but the target company in the tender context does not confront a comparable corporate decision because the actual target of a tender is not the corporation (or its directors), but instead is its shareholders. Indeed, the board of the tender target is not asking its shareholders to approve any corporate action by the tender target.[132]

Vice Chancellor Noble's explanation was perfectly consistent with the independent legal significance doctrine—board duties attach in mergers but not in tender offers because the corporate entity is not involved.[133] Vice Chancellor Strine was much more troubled by this distinction in 2002:

> Indeed, it can be argued that the distinction in approach subjects the transaction that is more protective of minority stockholders when implemented with appropriate protective devices—a merger negotiated by an independent committee with the power to say no and conditioned on a majority of the minority vote—to more stringent review than the more dangerous form of a going private deal—an unnegotiated tender offer made by a majority stockholder. The latter transaction is arguably less protective than a merger of the kind described, because the majority stockholder-offeror has access to inside information and the offer requires disaggregated stockholders to decide whether to tender quickly, pressured by the risk of being squeezed out in a short-form merger at a different price later or being left as part of a much smaller public minority. This disparity creates a possible incoherence in our law.[134]

Vice Chancellor Strine believed a single standard would have been more appropriate for going-private mergers and parent corporation tender offers. Confronted with binding supreme court precedent precluding that option, he opted instead to redefine the content of coercion in such tender offers. An offer would be considered "non-coercive only when: 1) it is subject to a non-waivable majority of the minority tender condition; 2) the controlling stockholder promises to consummate a prompt § 253 merger at the same price if it obtains more than 90% of the shares; and

132. *Id.* at *7, *reprinted in* 27 DEL. J. CORP. L. at 1022.
133. *See supra* text accompanying notes 68–71.
134. *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 435 (Del. Ch. 2002).

3) the controlling stockholder has made no retributive threats."[135] Similarly, he expanded the requirement of full disclosure by offering an opportunity (hard to reject, one suspects) for the target board to review the tender offer terms at its leisure, and he imposed on the independent directors "a duty to undertake these tasks in good faith and diligently, and to pursue the best interests of the minority."[136] The result seems so close to the *Weinberger* standard in mergers as to be indistinguishable.

Phrases such as "entire fairness" have a powerful ring. Who can be *against* fairness? Yet others have argued that fairness is an empty vessel into which lawyers and judges can pour whatever content suits them and their clients from time to time.[137] When courts sanction a result achieved in one manner (tender offer followed by a short-form merger) while closely scrutinizing a conventional freezeout merger for fairness, it becomes clear that fairness in takeouts is a concept of variable content. It is difficult to discern how corporate managers and directors could find this a congenial legal setting.

3. Weinberger*'s Practical Consequences*

Weinberger v. UOP represented the best and worst of times for certainty in Delaware corporate law.[138] One positive feature of the case was the abandonment of the legalistic and economically irrelevant "Delaware Block" method of valuation, which imposed a judge-made, mechanical approach to valuation that nonetheless remained uncertain because of the ability of courts to manipulate it by attaching varying weights to the multiple parts of the test, creating indeterminate expected outcomes in appraisal cases.[139] Another positive feature of *Weinberger* was its abandonment of the six-year-old business purpose test for takeout mergers announced in *Singer v. Magnavox* in 1977.[140] (So much for *stare decisis* in Delaware corporate law.)[141] While the Delaware Supreme Court seemed

135. *Id.* at 445.

136. *Id.*

137. "Fairness is an invulnerable position; who is for unfairness? But for lawyers fairness is 'a suitcase full of bottled ethics from which one freely chooses to blend his own type of justice.'" Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 703 n.17 (1982) (quoting George Stigler, *The Law and Economics of Public Policy: A Plea to the Scholars*, 1 J. LEGAL STUD. 1, 2, 4 (1972)).

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

139. *See* Francis I. duPont & Co. v. Universal City Studios, Inc., 312 A.2d 344, 348–49 (Del. Ch. 1973) (rejecting discounted cash flow testimony, treating valuation methods as a question of law, not fact). In fairness, appraisal cases have been difficult for most courts to deal with. The outdated and discredited Delaware Block method has been employed in many other jurisdictions even after its rejection in Delaware. *See* Rutherford B. Campbell, Jr., *The Impact of Modern Finance Theory in Acquisition Cases*, 53 SYRACUSE L. REV. 1 (2003).

140. Singer v. Magnavox Co., 380 A.2d 969, 975–80 (Del. 1977). For a critical view of the business purpose test as irrelevant to minority shareholder welfare, see William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. B. FOUND. RES. J. 69.

141. A distinctive feature of Delaware corporate law decisions also noted by Fisch, *supra* note 84, at 1078–79.

to say that fairness concerns were to be handled exclusively in appraisal proceedings where the dispute was about value, thus ending equitable reviews, it turned out that nothing could have been further from the truth.[142] By introducing a requirement of procedural fairness in addition to fair price, the court opened Pandora's box for corporate planners.[143] In the period 1999–2000, of 1048 fiduciary duty cases filed in the Delaware Court of Chancery, 813 (nearly 78%) involved allegations of breach of fiduciary duty in acquisitions—the fruit of *Weinberger* and *Revlon*.[144]

4. The Diseconomies of Litigating Economic Issues

Cases involving valuation issues, both *Weinberger* "fairness" cases and appraisal cases, present particular difficulties for all courts, and the Delaware courts are not immune. A misunderstanding of finance or an overemphasis on misguided doctrine can produce results that both depart wildly from market valuations and encourage litigation. The Delaware Supreme Court has stated that the "market price of shares may not be representative of true value" in the face of modern learning about efficient capital markets.[145] In *Smith v. Van Gorkom*, the supreme court criticized a board that relied on a 46% premium over the market because it was uninformed about "intrinsic value."[146]

142. After stating that the "quasi-appraisal remedy" granted in the instant case would only apply to pending cases and mergers preceding its decision, the court stated that "[t]hereafter, the provisions of [title 8, section 262 of the Delaware Code], as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cash-out merger." *Weinberger*, 457 A.2d at 714–15.

143. *See, e.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1121 (Del. 1994) (holding that a threat of a tender offer at a price lower than that offered an independent committee in cash-out merger negotiations was unfair); Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104–05 (Del. 1985) (holding that planning for a cash-out merger before a contractual bar expired violated the majority shareholder's obligation to pay a higher price if a takeout occurred *during* the bar period).

144. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 179–80 (Del. 1986) (imposing a duty of "scrupulous fairness" on boards attempting to sell a company); *Weinberger*, 457 A.2d at 710–12; Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 169 tbl.2 (2004).

145. Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 n.12 (Del. 1989). While we do not argue that this statement is false, it fails to suggest any of the reasons for this shortcoming, such as the existence of material nonpublic information. Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. CHI. L. REV. 941, 942–49 (2002) (arguing in favor of giving often conclusive weight to market evidence when valuing corporations).

146. 488 A.2d 858, 874 (Del. 1985). This misguided search for the Holy Grail of intrinsic value began with *Tri-Continental Corp. v. Battye*, 74 A.2d 71, 72 (Del. 1950). The suggestion that there is a "true" or "intrinsic" value other than market value has always been puzzling. In *Basic Inc. v. Levinson*, Mr. Justice White, concurring in part and dissenting in part, stated:

> To define the term "integrity of the market price," the majority quotes approvingly from cases which suggest that investors are entitled to "rely on the price of a stock as a reflection of its value." But the meaning of this phrase eludes me, for it implicitly suggests that stocks have some "true value" that is measurable by a standard other than their market price. While the scholastics of medieval times professed a means to make such a valuation of a commodity's "worth," I doubt that the federal courts of our day are similarly equipped.

485 U.S. 224, 255 (1988). One could raise the same question about Delaware judges. In fact, Mr. Justice White held a common misimpression about "just price." Joseph Schumpeter reads the scholastics as characterizing any price that is competitively determined as "just." JOSEPH A. SCHUMPETER, THE

More recently, the supreme court rejected an appraised valuation that was 200% above the pre-transaction market value on the basis that the "[t]rial court's decision to reject the addition of a control premium . . . placed too much emphasis on market value."[147] The court criticized the Court of Chancery's valuation as *too low*, because it failed to add a control premium to the market price of comparable companies to reach the asserted value of the whole firm, rather than the "discounted" market price of a small block of shares in the trading market.[148] The preannouncement market price was $17.25;[149] the consideration paid in the cash-out merger was worth approximately $28;[150] the appraised value initially determined by the Court of Chancery was $51;[151] and the final value awarded after remand, including the control premium, was $73.29.[152] If a shareholder purchased shares immediately before the announcement, the gain was 325%. This bizarre result has received relatively little attention, except to the extent that it has become an accepted part of Delaware law.[153] It should be noted that at least one recent case provides a more sophisticated approach to valuation issues.[154]

Vice Chancellor Strine has candidly admitted that Delaware law, as he and these authors understand it, departs from notions of what a dissenting shareholder's shares are worth in the market. He wrote recently:

> The concept of fair value under Delaware law is not equivalent to the economic concept of fair market value. Rather, the concept of fair value for purposes of Delaware's appraisal statute is a largely judge-made creation, freighted with policy considerations. As a result, the court's task is not to find the actual real world economic value of the petitioners' shares, but instead to determine the value of the petitioners' shares on the assumption that they are entitled to a pro rata interest in the value of the firm when considered as a going concern, specifically recognizing its market position and future prospects.[155]

Results that depart so dramatically from economic reality encourage litigants to play a lottery by increasing the number of cases involving valua-

HISTORY OF ECONOMIC ANALYSIS 93 (1954). One might make the same claim for market prices in corporate law.

147. Rapid-Am. Corp. v. Harris, 603 A.2d 796, 806 (Del. 1992).

148. *Id.* at 806–07.

149. Harris v. Rapid-Am. Corp., No. 6462, 1990 WL 146488, at *2–3 (Del. Ch. Oct. 2, 1990), *reprinted in* 16 DEL. J. CORP. L. 1478, 1484–85 (1991).

150. *Id.* at *3, *reprinted in* 16 DEL. J. CORP. L. at 1484–85.

151. *Id*.

152. Harris v. Rapid-Am. Corp., No. 6462, 1992 WL 69614, at *3–4 (Del. Ch. Apr. 6, 1992), *reprinted in* 18 DEL. J. CORP. L 307, 312–13, 315 (1993).

153. *But see* Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127 (2001); Carney & Heimendinger, *supra* note 123.

154. *In re* Emerging Commc'ns, Inc. S'holders Litig., No. Civ.A. 16415, 2004 WL 1043794 (Del. Ch. May 3, 2004); Cede & Co. v. Technicolor, Inc., No. Civ.A. 7129, 2003 WL 23700218 (Del. Ch. Dec. 31, 2003).

155. Finkelstein v. Liberty Digital, Inc., No. Civ.A. 19598, 2005 WL 1074364, *12 (Del. Ch. Apr. 25, 2005) (footnotes omitted).

tion issues. The huge number of *Weinberger* fairness cases filed in 1999–2000 provides some evidence of this trend.[156] The number of appraisal filings has also accelerated recently, but we cannot separate this from an increase in the number of mergers at about the same time.

5. *Mergers and Sales: Proliferation of Modes of Review*

For over a century and a half, the business judgment rule has been the principal bulwark against second-guessing directors' decisions.[157] Much of what we discuss below is the story about how this rule of judicial deference to decisions "in the absence of any evidence of 'fraud, bad faith, or self-dealing in the usual sense of personal profit or betterment'"[158] has morphed into a much diminished domain, as the Delaware courts have narrowed the presumption of good faith to allow much greater judicial intrusion into a board's decisions. The clarity of the business judgment rule's deference was applied to a board's decision to defend against a change in control by former Chancellor Seitz in *Johnson v. Trueblood*. In that case, Seitz rejected an argument that "a" motive to preserve control was insufficient to defeat the rule, arguing rather that all business decisions are motivated in part by directors' desire to retain their positions, and that the plaintiff, in order to defeat the presumption, had to demonstrate that the desire to retain control was the "sole or primary purpose."[159]

Delaware's supporters have long argued that one of the principal advantages of incorporating in Delaware is its court system.[160] Not only are the judges, particularly in the Court of Chancery, highly specialized to corporate law, they are faced with large numbers of cases and write numerous opinions that provide a large body of data on the meaning of Delaware's law.[161] In modern academic parlance this has been characterized as a network effect—a positive externality produced by the large

156. Robert Thompson & Randall Thomas, *The Public and Private Faces of Derivative Lawsuits*, 57 VAND. L. REV. 1747, 1761 (2004).

157. Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (describing the business judgment rule as "a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company"); DENNIS J. BLOCK ET AL., THE BUSINESS JUDGMENT RULE 4 (3d ed. 1989).

158. Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 64 (Del. 1989) (quoting Grobow v. Perot, 539 A.2d 180, 187 (1988)).

159. Johnson v. Trueblood, 629 F.2d 287, 292 (3d Cir. 1980) (applying Delaware law).

160. *See, e.g.*, DAVID A. DREXLER ET AL., 1 DELAWARE CORPORATION LAW AND PRACTICE § 1.02 (2007); ROMANO, GENIUS, *supra* note 41, at 39–40; Kahan & Kamar, *supra* note 47, at 708; *see also* Demetrious G. Kaouris, *Is Delaware Still a Haven for Incorporation?*, 20 DEL. J. CORP. L. 965, 975 n.59 (reporting that on the two-hundredth anniversary of the Delaware Court of Chancery, Chief Justice Rehnquist remarked: "Corporate lawyers across the United States have praised the expertise of the Court of Chancery, noting that since the turn of the century, it has handed down thousands of opinions interpreting virtually every provision of Delaware's corporate law statute. No other state can make such a claim.").

161. *See* Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1212 (2001); Romano, *Law as a Product*, *supra* note 23, at 274–77.

number of corporations incorporated in Delaware and litigating in their courts.[162]

Michael Klausner illustrates this point with what he describes as the "*Unocal-Revlon* rule," which he characterizes as authority to take defensive action against a tender offer "if the tender offer constitutes a 'danger to corporate policy and effectiveness,' and the defensive measure is 'reasonable in relation to the threat posed.'"[163] Although he conceded that the rule's meaning and applicability to specific factual settings was highly uncertain at the time he wrote, he stated that corporations could expect it to be clarified in future decisions.[164] The probability of clarification is especially high in Delaware, he claimed, because corporate law cases are tried by judges rather than juries and are more frequently addressed in judicial opinions.[165]

A decade after Klausner wrote, it is questionable whether things have worked out as he quite reasonably predicted. One reason is that the Delaware courts have developed different standards of review for a wide variety of circumstances. As a result, a judge must first classify the actions under review into one of the increasing number of categories before applying the law. Vice Chancellor Strine found himself puzzled about whether director-approved takeover defenses involving bylaw changes should be judged employing *Unocal*'s "heightened scrutiny" or *Blasius*'s standard of "compelling justification."[166] After noting that invoking *Blasius* is nearly always outcome-determinative and that the rules of both cases seemed to apply, he used the Solomonic approach of splitting the difference to conclude that "it may be optimal simply for Delaware courts to infuse our *Unocal* analyses with the spirit animating *Blasius* and not hesitate to use our remedial powers where an inequitable distortion of corporate democracy has occurred."[167] In a recent case, to the surprise of most observers, a majority of the supreme court characterized a deal protection device in a negotiated transaction following a good faith search for buyers as a defensive tactic, and struck it down under *Unocal*.[168] These surprises illustrate the perils of planning in a legal regime where broad fiduciary standards seem to have evolved into multiple, ill-defined, open-ended rules. The problems with Delaware case law were recently summarized as follows:

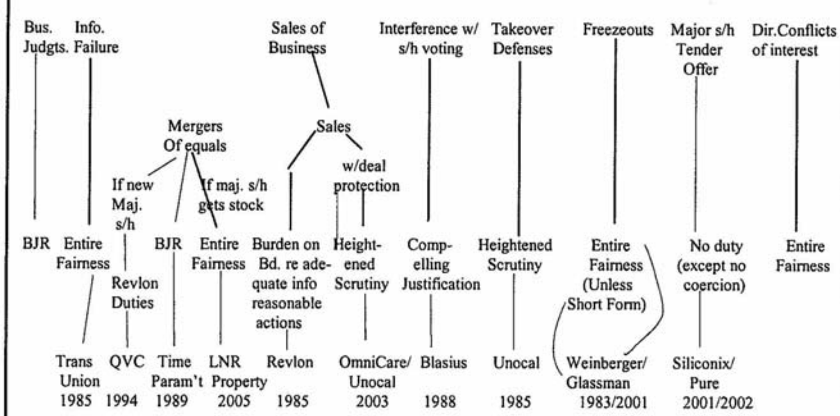
> The extensive body of corporate case law in Delaware that many find laudable is necessitated by gaps in the Delaware statute. Even

162. Michael Klausner, *Corporations*, *Corporate Law and Networks of Contracts*, 81 VA. L. REV. 757, 761–63, 774–80 (1995).
163. *Id.* at 775–76.
164. *Id.* at 776.
165. *Id.* at 778.
166. *See* Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 661 (Del. 1988); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985).
167. Chesapeake Corp. v. Shore, 771 A.2d 293, 323 (Del. Ch. 2000) (Strine, V.C.).
168. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 918 (Del. 2003).

> though the case law is extensive, Minnesota's statutory codification creates more certainty than the Delaware case law because of (a) internal ambiguities in many of the Delaware judicial decisions; (b) apparent inconsistencies among certain contemporaneously decided Delaware cases; (c) divergence of certain decisions with the letter of, and apparent policy behind, the Delaware statute; and (d) tendency of the Delaware courts to reverse or ignore precedent and upset expectations.[169]

The number of categories into which transactions can be placed, with different consequences for burdens of proof and standards of judicial review, has proliferated.[170] One of us employs Figure 1 to illustrate the varieties in a course on mergers.

FIGURE 1
MODES OF JUDICIAL REVIEW



The most recent addition to the number of categories was a 2005 Court of Chancery decision involving an arm's length acquisition in which a dominant shareholder received an interest in the buyer, though other shareholders did not, and *Weinberger*'s entire-fairness rule was applied.[171] Similar problems arise where founders hold super-voting classes

169. Garon et al., *supra* note 92, at 773. Texas authors have made similar arguments about Texas law. Byron F. Egan & Curtis W. Huff, *Choice of State of Incorporation—Texas Versus Delaware: Is It Now Time to Rethink Traditional Notions?*, 54 SMU L. REV. 249, 250 (2000) ("The Texas Legislature over the past fifteen years has sought to address the Delaware bias by improving the corporation laws of the State and establishing clear statutory answers to questions that have historically been addressed in Delaware by case law. . . . The Delaware courts have in turn tended to establish legal principles that often create more questions than they resolve.").

170. For discussions by two Delaware judges of the possibility of courts successfully applying indeterminate standards, see Jacobs, *supra* note 77, at 46–49; Strine, *supra* note 77.

171. *In re* LNR Prop. Corp. S'holders Litig., 896 A.2d 169, 171 (Del. Ch. 2005). Other cases in the chart include: *Omnicare*, 818 A.2d at 934; Glassman v. Unocal Exploration Corp., 777 A.2d 242, 244–48 (Del. 2001); Paramount Commc'ns, Inc. v. QVC Network, Inc., 637 A.2d 34, 43 (Del. 1994); Para-

of shares and receive different consideration.[172] Adaptations to recently developed rules making appraisal exclusive in short-form mergers, such as "top-up" options designed to assure that a bidder reaches the magic 90% ownership level, raise new questions for review and offer new possibilities for categorization.[173] Our point here is that categories developed in equity have taken on the property of bright-line rules, allowing practitioners to structure transactions to achieve the most relaxed standard of review available. We also observe that new categories are created with distressing regularity, providing surprises for both experienced practitioners and their clients. The following time line illustrates the frequency of surprises.

1983:	*Weinberger*'s entire fairness rule for parent-dominated mergers.
1985:	*Van Gorkom*'s close scrutiny of board information before the business judgment rule can be applied.
	Revlon's articulation of the "auctioneering" rule for sales or break-ups.
	Unocal's announcement of heightened scrutiny for takeover defenses.
1988:	*Blasius* announces the requirement of a "compelling justification" for board actions affecting shareholder voting.
1989:	*Paramount v. Time* rejects the auctioneering rule for stock for stock "mergers of equals."
1994:	*Paramount v. QVC* holds that a merger of equals doesn't exist when a controlling shareholder emerges from a merger.
1996:	*Solomon v. Pathe Communications Corp*. holds that dominant shareholders do not owe fiduciary duties in tender offers to the minority stockholders.
2001:	*Glassman v. Unocal* holds that *Weinberger*'s entire fairness doctrine does not apply to short-form mergers.
2002:	*Pure Resources* qualifies the tender offer privilege of *Solomon* to impose fiduciary-like conditions on the use of a tender offer.
2003:	*Omnicare* holds that a deal lock-up device may be judged coercive or preclusive under *Unocal*.

mount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140, 1150 (Del. 1989); *Blasius*, 564 A.2d at 658; Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 185 (Del. 1986); *Unocal*, 493 A.2d at 949; Smith v. Van Gorkom, 488 A.2d 858, 864 (Del. 1985); Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

172. *In re* Tele-Commc'ns, Inc. S'holders Litig., No. Civ.A. 16470, 2005 WL 3642727 (Del. Ch. Dec. 21, 2005), *reprinted in* 31 DEL. J. CORP. L. 1162, 1173–78 (2006).

173. *See supra* text accompanying note 121.

2005: *In re LNR Property Corp. Shareholders Litigation* treats an arm's length sale as a *Weinberger* type transaction where the controlling shareholder, who receives a pro rata share of the cash proceeds, is allowed to buy an interest in the purchasing entity.[174]

2007: *Louisiana Municipal Police Employees Retirement System v. Crawford* treats a dividend declared in advance of a stock for stock merger which, by itself, would not have triggered appraisal rights, as part of the merger consideration, thus ignoring the independent legal significance doctrine.[175]

While experienced M&A lawyers may be able to cope with all of these changes,[176] the fact remains that each of them was a surprise at the time of announcement and was applied retroactively. More surprises are sure to come.[177]

Even some present and former Delaware judges have expressed concern about the usefulness of at least parts of this taxonomy. William Allen, Jack Jacobs, and Leo Strine (the "Three Chancellors") wrote about the elevation of form over substance in the distinction between sales and "mergers of equals," which are sufficiently close in result to suggest the same type of review should be involved.[178] In doing so, these judges seem to have ignored the Delaware Supreme Court's 1963 warning against making fine distinctions based on elevating substance over form, when it stated that "[t]o attempt to make any such distinction between sales under [section] 271 would be to create uncertainty in the law and invite litigation."[179]

Delaware law on the requirement for a shareholder vote for the sale of "substantially all" of a corporation's assets has long been murky, lead-

174. *In re LNR Prop. Corp.*, 896 A.2d at 171; *Omnicare*, 818 A.2d at 934; *Glassman*, 777 A.2d at 244–48; Solomon v. Pathe Commc'ns Corp., 672 A.2d 35, 37 (Del. 1996); *Paramount*, 637 A.2d at 43; *Paramount*, 571 A.2d at 1150; Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 658 (Del. 1988); *Revlon*, 506 A.2d at 185; *Unocal*, 493 A.2d at 949; *Weinberger*, 457 A.2d at 711; *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 433 (Del. Ch. 2002).

175. La. Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172, 1191–92 (Del. Ch. 2007). The court justified this departure from independent legal significance on the basis that payment of the merger was conditioned on shareholder approval of the merger. *Id.*

176. *See* R. Franklin Balotti & Seth Barrett Tillman, *Gazing into the Crystal Ball of Future Developments in Delaware Corporate Law: What If the Past Is Not Prologue?*, CORP. GOVERNANCE ADVISOR, May–June 2007, at 3 (describing the standard features of deal terms in 2007).

177. *Id.* at 3–4; *infra* Part II.C.6 (exploring whether disclosure obligations will expand beyond those currently required by federal law). The *Crawford* decision, 918 A.2d 1172, was noted by commentators as a surprise for experienced Delaware practitioners. *See* Bigler & Rohrbacher, *supra* note 72, at 4.

178. William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 864–65 (2001). Chancellor Allen became a professor of law before this article was written, and Vice Chancellor Jacobs is now Justice Jacobs of the Delaware Supreme Court.

179. Hariton v. Arco Elecs., Inc., 188 A.2d 123, 125 (Del. 1963) (rejecting the "*de facto* merger" doctrine adopted elsewhere).

ing transactional lawyers wishing to avoid litigation to take an unnecessarily cautious course in advising clients in this area.[180]

All of this must be examined from the "compared to what?" perspective. We cannot produce a comprehensive, fifty-state comparison on all of the difficulties with Delaware law that we have described. One evidentiary problem arises because only a few state trial court decisions are reported, while all Delaware Court of Chancery decisions are available. Thus, decisions of cases that are not appealed, which constitute the vast majority of cases, are simply not visible. We can argue that there is another reason why there are relatively few appellate decisions in Model Act states: the Model Act, with more bright line safe harbors, attempts to achieve greater clarity, albeit, one could argue, at the cost of missing behavior some might conclude should be sanctioned. We preface this discussion with a chart showing how the Model Act and other states have either rejected or attempted to cabin the indeterminacy of Delaware law.

180. The Delaware courts have turned a quantitative standard, requiring a shareholder vote for the sale of "all or substantially all" assets, into a qualitative one that cannot be easily specified, because it seems to depend on such factors as whether the sold assets are operating or investment assets and whether the sale was one "in the ordinary and regular course of business." *See, e.g.*, Katz v. Bregman, 431 A.2d 1274, 1275 (Del. Ch. 1981); Gimbel v. Signal Cos., 316 A.2d 599, 606–07 (Del. Ch. 1974). Experienced practitioners have observed that there is a broad area, probably involving asset sales of between 25% and 75% of assets, where predicting whether a shareholder vote is required in Delaware is extremely difficult. Leo Herzel et al., *Sales and Acquisitions of Divisions*, 5 CORP. L. REV. 3, 25 (1982). In contrast, the Model Business Corporation Act now creates a bright-line safe harbor, so that no shareholder vote is required if the corporation is left with a significant continuing business activity and no more than 75% of assets, measured by value and revenues produced, are sold. MODEL BUS. CORP. ACT. § 12.02(a) (2008). Recently, Vice Chancellor Strine, recognizing the confusion created by Delaware's standard, attempted to move the law toward a more quantitative and certain standard in *Hollinger Inc. v. Hollinger International, Inc.*, 858 A.2d 342, 376–78 (Del. Ch. 2004). After tracing the legislative history of the section from a simple "all" to "substantially all" in 1967, he employed dictionary definitions to suggest that "substantially all" had to be much closer to "all" than *Katz v. Bregman* had suggested. *Id.* at 376–78. But in the end, his opinion relied on some of the qualitative features of the *Signal* case he found "more than a tad unclear," such as International's history of acquisitions and sales of large operations. *Id.* at 383. Strine conceded, "It would be less than candid to fail to acknowledge that the [section] 271 case law provides less than ideal certainty about the application of the statute to particular circumstances." *Id.* at 378.

Delaware Doctrinal Indeterminacy	**Model Act/State Treatment**
Weinberger's entire fairness duty	§ 13.40 exclusivity of appraisal
Stockholder ratification of conflicting interest transactions in freezeouts only shifts burden on fairness without restoring the business judgment rule	§ 8.61(b) prohibits equitable relief or damages if ratified by independent directors or shareholders
Unocal's heightened scrutiny test (followed in two states and six federal courts)	*Unocal* rule rejected in one state and nine federal courts, six states have adopted business judgment rule for takeover decisions, thirty have enacted other constituency statutes
Blasius requirement of a compelling justification for board action changing stockholder voting rights	§ 10.21 permits shareholders to trump board decisions on changes in voting rules for shareholders, obviating judicial review in most cases
Sale of "substantially all" assets is qualitative and often requires a stockholder vote	§ 12.02(a) eliminates a qualitative test in favor of a quantitative safe harbor

Here we offer only a few examples of how some other jurisdictions have maintained a less complex and stable body of corporate law. Many states have limited bodies of decisional law. Many of the decisions applying the law of other states emanate from federal courts, which are less authoritative on questions of state law. We can say with certainty that only a few state courts have begun down the road to the heightened scrutiny exemplified by the *Unocal* decision.[181] For most states, the expected

181. Citations to *Unocal* or its progeny in other state courts involving application of non-Delaware law are quite rare. *See, e.g.*, Katz v. Chevron Corp., 27 Cal. Rptr. 2d 681 (Ct. App. 1994); Heckman v. Ahmanson, 214 Cal. Rptr. 177 (Ct. App. 1985). Because Kansas has copied the Delaware statute, it is not entirely surprising that its courts would follow *Unocal*. In *Burcham v. Unison Bancorp, Inc.*, 77 P.3d 130, 147–50 (Kan. 2003), the Kansas Supreme Court reviewed the criticisms and commentary about the *Unocal* rule before applying it. The court stated:

> In addition, we note that despite criticism from outside sources, the Delaware courts, and with rare exceptions other jurisdictions, have continued to apply the *Unocal* test for over 20 years in a variety of fact patterns. A significant body of case law has developed. As our Court of Appeals has noted, "Kansas follows Delaware's basic principles regarding application of the business judgment rule to insulate board decisions from attack." Consequently, we adopt the *Unocal* test as refined by its progeny.

decision rule will be the business judgment rule.[182] Seven states have enacted statutes designed to preserve the deference of the business judgment rule in takeover defense decisions.[183] Thirty states effectively

Id. at 149. This may not exhaust the set of state court decisions, but most state trial courts do not publish opinions, and as a result, it is impossible to determine how many other decisions there are. Some federal courts applying state law have concluded that *Unocal* would apply in those jurisdictions. Int'l Ins. Co. v. Johns, 874 F.2d 1447, 1459 (11th Cir. 1989) (applying Florida law); Simon Prop. Group, Inc. v. Taubman Ctrs., Inc., 261 F. Supp. 2d 919, 937–38 (E.D. Mich. 2003) (applying Michigan law); AHI Metnall, L.P. v. J.C. Nichols Co., 891 F. Supp. 1352, 1356 (W.D. Mo. 1995) (applying Missouri law); R.D. Smith & Co. v. Preway Inc., 644 F. Supp. 868, 876 (W.D. Wis. 1986) (applying Wisconsin law); Dynamics Corp. of Am. v. CTS Corp., 637 F. Supp. 406, 409–10 (N.D. Ill.), *aff'd*, 794 F.2d 250, 264 (7th Cir. 1986), *rev'd on other grounds*, 481 U.S. 69 (1987) (applying Indiana law). *But see* Torchmark Corp. v. Bixby, 708 F. Supp. 1070, 1082 (W.D. Mo. 1988) (applying Missouri law but declining to apply a *Unocal* standard to defensive tactics not taken in apprehension of a challenged takeover). *Compare* Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342, 1347 (D. Nev. 1997) (applying Nevada law), *with* Horwitz v. Sw. Forest Indus., Inc., 604 F. Supp. 1130, 1134 (D. Nev. 1985) (business judgment rule applied to adoption of a poison pill).

182. Only one state court appears to have held that the business judgment rule applies to takeover defenses, following the general approach of pre-*Unocal* law in Delaware, as described by former Chancellor Seitz in *Johnson v. Trueblood*, 629 F.2d 287, 292 (3d Cir. 1980), which was essentially the business judgment rule subject to plaintiff's proof that entrenchment was a primary motive. Shoen v. Shoen, 804 P.2d 787, 794 (Ariz. Ct. App. 1990). The Arkansas Supreme Court cited *Unocal* in a case that ultimately involved self-dealing by the defendant director-officers but did not apply its standard of review. Hall v. Staha, 858 S.W.2d 672, 679 (Ark. 1993). Numerous federal decisions prior to *Unocal* applied the business judgment rule to defenses. Treco, Inc. v. Land of Lincoln Sav. & Loan, 749 F.2d 374, 377 (7th Cir. 1984) (applying Illinois law); Buffalo Forge Co. v. Ogden Corp., 717 F.2d 757, 759 (2d Cir. 1983) (applying New York law); Treadway Cos. v. Care Corp., 638 F.2d 357, 383 (2d Cir. 1980) (applying New Jersey law); Heit v. Baird, 567 F.2d 1157, 1162 (1st Cir. 1977) (apparently applying Massachusetts law); Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252, 1259–60 (S.D.N.Y. 1985) (applying New Jersey law, but striking down a poison pill on other grounds); Asarco Inc. v. Court, 611 F. Supp. 468, 473 (D.N.J. 1985) (applying New Jersey law); Terrydale Liquidating Trust v. Barness, 611 F. Supp. 1006, 1018 (S.D.N.Y. 1984) (applying Missouri Law); Martin Marietta Corp. v. Bendix Corp., 549 F. Supp. 623, 634 (D. Md. 1982) (applying Maryland law). But see the post-*Unocal* decisions in *AHI Metnall*, 891 F. Supp. at 1357; *Gearhart Industries, Inc. v. Smith, International, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984) (applying Texas law). Two months after *Unocal* was decided, the previous Delaware standard of review, described by former Chancellor Seitz in *Trueblood*, 629 F.2d at 292, was employed to review the actions of directors of a New York corporation, without citation to either *Unocal* or *Trueblood*. Turner Broad. Sys., Inc., v. CBS, Inc., 627 F. Supp. 901, 910 (N.D. Ga. 1985). Other decisions applying New York law have taken the same approach, with some citing *Trueblood*. Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255, 265 (2d Cir. 1984); British Printing & Commc'n Corp. v. Harcourt Brace Jovanovich, Inc., 664 F. Supp. 1519, 1529 (S.D.N.Y. 1987); Samuel M. Feinberg Testamentary Trust v. Carter, 652 F. Supp. 1066, 1081 (S.D.N.Y. 1987) (holding that a showing of entrenchment as a primary purpose denies defendants the benefit of the business judgment rule). Decisions of other federal courts have applied the business judgment rule post-*Unocal*. *In re* Munford, Inc., 98 F.3d 604, 611 (11th Cir. 1996) (applying Georgia law); Bonner v. Law Cos. Group, 964 F. Supp. 341, 343 (N.D. Ga. 1997) (applying Georgia Law); WLR Foods, Inc. v Tyson Foods, Inc., 869 F. Supp. 419, 422 (W.D. Va. 1994) (applying Virginia law), *aff'd* 65 F.3d 1172 (4th Cir. 1995); NCR Corp. v Am. Tel. & Tel. Co., 761 F. Supp. 475, 490 (S.D. Ohio 1991) (applying Maryland law). We make this claim based on the virtually universal adoption of this rule in all other contexts not involving conflicts of interest, and the adoption of statutes, cited below, that reaffirm this deference to directors' decisions in many jurisdictions. Carney, *supra* note 35, at 268–71 (concluding that four American cases that might arguably have been a departure from the business judgment rule really involved conflicts of interest) (citing Joseph Bishop, *Sitting Ducks and Decoy Ducks: New Trends in Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1095–99 (1968)).

183. *See* ARIZ. REV. STAT. ANN. § 10-2702 (2007); KY. REV. STAT. ANN. § 271B.12-210(4) (West 2007); MD. CODE ANN., CORPS. & ASS'NS. § 2-405.1 (LexisNexis 2007); MASS. GEN. LAWS ch. 156B, § 65 (2007); MO. REV. STAT. § 351.347 (2007); 15 PA. CONS. STAT. § 1715(d) (2007); VA. CODE ANN. § 13.1-690 (2007).

give directors *carte blanche* discretion by allowing them to consider other constituencies, which effectively makes them unaccountable to shareholders.[184] Even in potentially controversial areas, many states have filled in the gap of no law. Delaware, for example, has a number of decisions on poison pill takeover defenses that more or less delineate the limits of toxicity for such defenses.[185] Many states have none. Others have one that was decided adversely to the adopting company.[186] But in many states, this paucity of authority has been replaced with poison pill ratification statutes,[187] and statutory authorization for other defenses.[188] In Georgia, where a federal court decision supporting a dead hand poison pill suggested directors had total and unreviewable discretion, the legislature amended the statute to permit only a "slow hand" rights plan with a time limit of 180 days from the election of new directors.[189]

6. Disclosure Duties: The New Growth Area in Delaware Litigation?

A prominent Delaware attorney and author, Frank Balotti, has predicted that disclosure litigation may be the next developing area in Delaware corporate law.[190] It may be that this area is developing in Delaware, and perhaps in other states as well, in response to the heightened pleading requirements of the Private Securities Litigation Act, which has raised the bar on pleading fraud with particularity, and especially *scien-*

184. *See* MODEL BUS. CORP. ACT § 8.30(3)(a) (2005). Accountability to multiple constituencies allows directors to pick and choose the groups to favor at any given time, and thus to explain any chosen result as being beneficial to some constituency. Carney, *supra* note 28, at 420–21.

185. *See, e.g.*, Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998) (invalidating a "slow hand" pill); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (validating a flip-over pill); Carmody v. Toll Bros., 723 A.2d 1180 (Del. Ch. 1998) (holding that a complaint against a "dead hand" pill stated a claim for relief); Stahl v. Apple Bancorp, Inc., [1990 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 95,412 (Del. Ch. 1990) (approving a flip-in plan).

186. *See, e.g.*, Amalgamated Sugar Co. v. NL Indus., Inc., 644 F. Supp. 1229 (S.D.N.Y. 1986) (applying New Jersey law). It was followed in *West Point–Pepperell, Inc. v. Farley, Inc*., 711 F. Supp. 1088 (N.D. Ga. 1988); *Minstar Acquiring Corp. v. AMF Inc*., 621 F. Supp. 1252 (S.D.N.Y. 1985); and *Asarco*, 611 F. Supp. 468.

187. *See, e.g.*, COLO. REV. STAT. § 7-106-208 (2007); GA. CODE ANN. § 14-2-624 (2008); IDAHO CODE ANN. §§ 30-1610, -1706 (2008); 805 ILL. COMP. STAT. 5/6.55 (2008); IND. CODE § 23-1-26-5, -35-1(f) (2008); IOWA CODE § 490.624A (2008); KY. REV. STAT. ANN. § 271B.12-210(5); MASS. ANN. LAWS ch. 156B, § 32A (LexisNexis 2008); MICH. COMP. LAWS § 450, 1342a (2002); NEV. REV. STAT. § 78.378 (2004); N.J. STAT. ANN. 14A:7-7(1), (3) (West 2008); N.Y. BUS. CORP. LAW § 505(a)(2) (McKinney 2008); N.C. GEN. STAT. § 55-6-24 (2008); OHIO REV. CODE ANN. § 1701.16 (West 2006); OR. REV. STAT. § 60.157 (2007); 15 PA. CONS. STAT. §§ 1525, 2513; R.I. GEN. LAWS § 7-5.2-7 (2008); S.D. CODIFIED LAWS § 47-33-5 (2008); TENN. CODE ANN. § 48-16-205 (2008); UTAH CODE ANN. § 16-10a-624 (2008); VA. CODE ANN. § 13.1-646; WIS. STAT. § 180.0624 (2007); WYO. STAT. ANN. § 17-16-624 (2008); *see also, e.g.*, HAW. REV. STAT. § 415-20 (2008) (repealed 2000 & 2001).

188. Thirty-seven states adopted a variety of takeover defense authorization statutes in the eight years after the Supreme Court of the United States struck down a "first generation" statute in *Edgar v. MITE Corp.*, 457 U.S. 624 (1982). *See* Carney, *Production*, *supra* note 46, at 752–53.

189. GA. CODE ANN. § 14-2-624(d) (legislatively reversing *Invacare Corp. v. Healthdyne Technologies, Inc*., 968 F. Supp. 1578 (N.D. Ga. 1997)). The initiative in drafting the amendment was taken, as is customary, by the standing bar association committee.

190. Balotti & Tillman, *supra* note 176, at 4.

ter, without prior access to discovery.[191] Or perhaps it represents Delaware's response to what Marc Roe has characterized as Delaware's real competition—the federal government.[192] Delaware law has long taken the view that to be actionable as a breach of fiduciary duty, omitted material must change the mix of information otherwise provided to stockholders, often citing federal standards for this approach.[193] In *Skeen v. Jo-Ann Stores, Inc.*, the court, in rejecting a complaint that omission of management projections of the company's performance for the next five years constituted a material omission in violation of directors' duties, stated:

> Appellants are advocating a new disclosure standard in cases where appraisal is an option. They suggest that stockholders should be given all the financial data they would need if they were making an independent determination of fair value. Appellants offer no authority for their position and we see no reason to depart from our traditional standards. We agree that a stockholder deciding whether to seek appraisal should be given financial information about the company that will be material to that decision. In this case, however, the basic financial data were disclosed and appellants failed to allege any facts indicating that the omitted information was material. Accordingly, the complaint properly was dismissed for failure to state a claim.[194]

At another point the court stated: "To state a disclosure claim, appellants 'must provide some basis for a court to infer that the alleged violations were material . . . . [They] must allege that facts are missing from the [information] statement, identify those facts, state why they meet the materiality standard and how the omission caused injury.'"[195]

This doctrine was reinforced in *McMullin v. Beran*, where the court stated: "In *Skeen*, it was argued that the minority shareholders should have been given all of the financial data they would need if they were making an independent determination of fair value. We declined to establish 'a new disclosure standard where appraisal [is] an option.'"[196]

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191. Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (amending various sections of the Securities Act of 1933 (adding, *inter alia*, 15 U.S.C. § 77z-1, -2) and the Securities Exchange Act of 1934, most particularly section 21D(b) (15 U.S.C. § 78u-4(b)) governing pleading standards); *see also* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2510 (2007) (explaining the burden in pleading *scienter*). Data compiled by the Stanford Securities Class Action Clearinghouse shows a steady decline in the number of federal cases filed since a peak in 2001. *See* Stanford Securities Class Action Clearinghouse, http://securities.stanford.edu (last visited Dec. 10, 2008).

192. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 600 (2002).

193. *See* Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1173 (Del. 2000); Rosenblatt v. Getty Oil Co., 493 A.2d 929, 944 (Del. 1985); ("[T]he materiality standard of *TSC Industries, Inc. v. Northway, Inc.* . . . applies."); Arnold v. Soc'y for Sav. Bancorp., Inc., No. 12883, 1993 WL 526781, at *6 (Del. Ch. Dec. 17, 1993), *reprinted in* 19 DEL. J. CORP. L. 1127, 1139 (1994).

194. 750 A.2d at 1174.

195. *Id.* at 1173 (quoting Louden v. Archer-Daniels-Midland Co., 700 A.2d 135, 140 (Del. 1997)).

196. 765 A.2d 910, 925 (Del. 2000) (citations omitted).

Although some decisions of the Court of Chancery have observed this rule,[197] Vice Chancellor Strine was first critical of, and then went beyond, its constraints on directors' disclosure duties. Strine's jurisprudence must be put in the context of his 2002 opinion in *In re Pure Resources, Inc., Shareholders Litigation* in which he rejected the supreme court's materiality standard in *Skeen*.[198] *Pure* involved a transaction with a controlling shareholder that exercised its control in takeout negotiations by simply announcing the takeout terms and never varying from them. Vice Chancellor Strine concluded that the special committee was unwilling to challenge Unocal, the parent corporation, as aggressively as it would have challenged a third-party bidder, but it nevertheless recommended that shareholders reject the offer.[199] The Schedule 14D-9 did "not disclose *any* substantive portions of the work" of the investment bankers who served as advisors.[200] Vice Chancellor Strine stressed that in transactions with controlling shareholders, "they have large informational advantages that can only be imperfectly overcome by the special committee process, which almost invariably involves directors who are not involved in the day-to-day management of the subsidiary," so that the work of investment bankers becomes even more important, as does the need to disclose it in full detail.[201]

Perhaps most importantly, Vice Chancellor Strine's opinion is not consonant with opinions of the Delaware Supreme Court, as he candidly conceded.[202]

> This is a continuation of an ongoing debate in Delaware corporate law, and one I confess to believing has often been answered in an intellectually unsatisfying manner. Fearing stepping on the SEC's toes and worried about encouraging prolix disclosures, the Delaware courts have been reluctant to require informative, succinct disclosure of investment banker analyses in circumstances in which the bankers' views about value have been cited as justifying the recommendation of the board.[203]

Vice Chancellor Strine claims an ambivalence in recent Delaware Supreme Court opinions that is less than obvious upon closer inspection. In

197. In *In re Siliconix Inc. Shareholders Litigation*, No. Civ.A. 18700, 2001 WL 716787, at *10 (Del. Ch. June 19, 2001), *reprinted in* 27 DEL. J. CORP. L. 1011, 1028 (2002), Vice Chancellor Noble dismissed a complaint that the Schedule 14D-9 prepared by the subsidiary in response to a parent's tender offer did not disclose "details and assumptions" relating to projections. In rejecting this claim, the court noted that there was no substantial likelihood shown by plaintiffs that the details and assumptions would "'significantly alter the total mix of information already provided' to shareholders." *Id.* The court concluded that the plaintiff failed to show that these details and assumptions "justify overcoming the reluctance of courts to order disclosure of 'soft information.' Such information might be 'helpful,' but here it has not been shown to be material." *Id*.

198. 808 A.2d 421, 449 (Del. Ch. 2002).

199. *Id.* at 431–32.

200. *Id.* at 448.

201. *Id.* at 450.

202. *Id.* at 449.

203. *Id.* (citation omitted).

Skeen, plaintiffs' complaints were similar: the absence of a summary of methodologies used, ranges of values generated by the bankers, and the absence of management's projections of future performance, *inter alia*. The supreme court rejected these claims on materiality grounds, stating that:

> The problem with appellants' argument is that it ignores settled law. Omitted facts are not material simply because they might be helpful. To be actionable, there must be a substantial likelihood that the undisclosed information would significantly alter the total mix of information already provided. The complaint alleges no facts suggesting that the undisclosed information is inconsistent with, or otherwise significantly differs from, the disclosed information. Appellants merely allege that the added information would be helpful in valuing the company.[204]

In re Netsmart Technologies, Inc. Shareholders Litigation represents Vice Chancellor Strine's full departure from the federal law and *Skeen* on materiality.[205] Like *McMullin*, *Netsmart* involved a conflict of interest situation in which a management team chose to sell to private equity investors to obtain a larger share of the enterprise.[206] Remarkably, Vice Chancellor Strine did not cite the governing law of the *Skeen* opinion concerning additional disclosures, choosing instead to cite his own opinion in *Pure Resources* that was critical of the *Skeen* rule. Noting the informational advantage of management in a leveraged management buyout, he stated:

> It would therefore seem to be a genuinely foolish (and arguably unprincipled and unfair) inconsistency to hold that the best estimate of the company's future returns, as generated by management and the Special Committee's investment bank, need not be disclosed when stockholders are being advised to cash out. . . .
>
> The conclusion that this omission is material should not be surprising. Once a board breaches a topic in its disclosures, a duty attaches to provide information that is "materially complete and unbiased by the omission of material facts."[207]

It remains to be seen whether Vice Chancellor Strine's view on the extent of the materiality definition prevails in the debate he has initiated. His approach certainly counsels an increase in disclosure, perhaps to the "prolix," to fend off such complaints in the future.

204. Skeen v. Jo-Ann Stores, Inc., 750 A.2d 1170, 1174 (Del. 2000). It is worth noting that Vice Chancellor Strine's characterization of this as a "continuing debate" in Delaware law is based on the governing case law from the supreme court and is continued in *In re Staples, Inc. Shareholders Litigation*, 792 A.2d 934, 954 (Del. Ch. 2001).

205. 924 A.2d 171 (Del. Ch. 2007).

206. *Id.* at 175.

207. *Id.* at 203.

7. *Fiduciary Duties to Preferred Shareholders*

Preferred stock is everywhere seen as the oddest of hybrids between debt and common stock. Despite that, the rights of preferred shareholders are generally seen as contractual rather than deriving from fiduciary duties.[208] The standard recital of the courts is that "it is well established that the rights of preferred stockholders are contract rights."[209] At the same time, most statutes, including Delaware's, treat preferred stock in the same manner as common, except to the extent that it is enhanced or limited by the charter.[210] Noting that preferred contract rights are protected in a limited way by the implied covenant of good faith and fair dealing, Vice Chancellor Jacobs stated that "[t]o allow a fiduciary duty claim to coexist in parallel with an implied contractual claim, would undermine the primacy of contract law over fiduciary law in matters involving the essentially contractual rights and obligations of preferred stockholders."[211]

The flintiness of the law in this area was famously demonstrated in *Havender v. Federal United Corp.*, where the Delaware Supreme Court permitted the destruction of accrued arrearages on preferred stock, because the statute permitting exchanges of securities in mergers antedated the issuance of the preferred and was thus part of the shareholders' contract.[212] Notwithstanding these rules, exceptions have been created that cast doubt on the basic nature of the relationship of preferred stock to the corporation, its managers, and common shareholders. In *Baron v. Allied Artists Pictures Corp.*, the court held that the board had "a fiduciary duty to see that the preferred dividends, 'which were in arrears,' are brought up to date as soon as possible in keeping with prudent business management."[213]

The greatest confusion arises, predictably, in connection with acquisition and sale transactions. The blurring of the lines between contract and fiduciary duties is quite ancient here. In 1928, preferred shareholders complained that a merger agreement did not provide them with a fair

208. Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 649–51 (1997) (noting the exceptions to the doctrine).

209. Baron v. Allied Artists Pictures Corp., 337 A.2d 653, 657 (Del. Ch. 1975).

210. Title 8, section 212(a) of the Delaware Code provides a one share, one vote rule unless modified in the certificate of incorporation. The Model Act makes no distinction among shares in section 6.01 and provides the same voting rule as Delaware in section 7.21.

211. Gale v. Bershad, No. CIV. A. 15714, 1998 WL 118022, at *5 (Del. Ch. Mar. 4, 1998), *reprinted in* 23 DEL. J. CORP. L. 1294, 1306 (1998).

212. 11 A.2d 331, 342–43 (Del. 1940). Another example is found in *Warner Communications Inc. v. Chris-Craft Industries, Inc.*, 583 A.2d 962, 971 (Del. Ch. 1989), where the court held that preferred voting rights, in the event of an amendment, alteration or repeal of charter provisions protecting their rights and preferences, were not triggered by a merger in which they received shares in another corporation because it was not the amendment, but the conversion of their shares that adversely affected them.

213. 337 A.2d at 660. One can question whether this duty runs to the preferred shareholders or to the common, who had lost board control when dividends fell in default.

amount of the purchase price, pleading that it was "grossly unfair and fraudulent with respect to the preferred stockholders."[214] The court viewed its duty as determining whether the terms of the merger were "so grossly unfair and inequitable to the preferred stockholders . . . as to be a fraud upon them and entitle them to equitable relief."[215] The employment of the term "fraud," in its equitable sense of overreaching by a fiduciary, makes the move from law to equity, opening up the court's discretionary powers to judge the fairness of the terms.[216] While the opinion did not invoke fiduciary duties, Chancellor Allen invoked them in 1986 when he explained that, although stated preferences were strictly governed by contract, where "the right asserted is not to a preference as against the common stock but rather a right shared equally with the common, the existence of such right and the scope of the correlative duty may be measured by equitable as well as legal standards."[217] Chancellor Allen also explained that claims for a fair allocation of merger proceeds "fairly implicate fiduciary duties and ought not be evaluated wholly from the point of view of the contractual terms of the preferred stock designations."[218] Imposing a duty of "fair sharing" among competing claimants on directors is such an open standard that room for litigation should always exist.

At about the same time, the Court of Chancery addressed the complaint of preferred shareholders left behind in their corporation when the common stock was acquired. In the face of defendants' claim that preferred stockholders were limited to their contract rights and preferred stockholders' claims of breach of fiduciary duties owed them, Chancellor Brown, in Solomonic fashion, ruled that "the answer . . . lies somewhere between the legal positions advocated by the parties."[219] The court then engaged in a fact-intensive analysis of whether the terms of the acquisition were initiated by the buyer or the seller. The resulting body of law is something less than clear and invites further litigation. Directors are thus given the task of mediating between two claimants without guideposts for the division.

214. MacFarlane v. N. Am. Cement Corp., 157 A. 396, 397 (Del. Ch. 1928).

215. *Id*. at 399.

216. *See, e.g.*, *id.* Another example of this move appears in *Gimbel v. Signal Cos.*, 316 A.2d 599, 609 (Del. Ch. 1974), where Chancellor Quillen rejected a business judgment defense to a challenge to the adequacy of the sale price of a division, noting that the business judgment does not apply where fraud is present. Lacking any evidence of personal interests on the part of the directors, he relied on earlier authority that if

> the price proposed to be accepted is so far below what is found to be a fair one that it can be explained only on the theory of fraud, or a reckless indifference to the rights of others interested, it would seem that it should not be allowed to stand.

Gimbel, 316 A.2d at 610 (quoting Allied Chem. & Dye Corp. v. Steel & Tube Co., 120 A. 486, 494 (Del. Ch. 1923)).

217. Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 594 (Del. Ch. 1986).

218. *Id.*

219. Dalton v. Am. Inv. Co., 490 A.2d 574, 582 (Del. Ch. 1985).

8. *Shareholder Voting Rules: Of* Blasius

Corporate laws are ambivalent about the allocation of power in one area that governs shareholder voting: most statutes grant concurrent power to both boards and shareholders to amend bylaws, or at least facilitate such sharing.[220] Where Delaware's statute contains an "open" caution limiting board power over shareholder voting, the Model Act contains a bright line rule requiring shareholder approval of changes in their voting rules.[221] In *Blasius Industries, Inc. v. Atlas Corp.*, the Court of Chancery imposed a new and strict requirement that a board show a "compelling justification" for deliberate infringements on the stockholder franchise, even when undertaken in good faith.[222] Vice Chancellor Strine has stated that "it is not easy in most cases [involving takeover defenses] to determine whether the *Blasius* standard should be invoked."[223] The lines drawn by the courts in implementing this doctrine have been difficult to reconcile. For example, the difference between bylaws requiring advance notice for shareholder proposals and those delaying the effect of such proposals once approved is a matter of form and not substance.

In *Nomad Acquisition Corp. v. Damon Corp.*, the Delaware Court of Chancery denied a preliminary injunction against a board-adopted bylaw that required sixty days advance notice before stockholders could submit a nomination of a candidate for the board.[224] However, in *Datapoint Corp. v. Plaza Securities Co.*, the supreme court invalidated a bylaw that both required sixty days advance notice and delayed the effective

220. Title 8, section 109(a) of the Delaware Code places amendment power in the shareholders once stock is issued, but provides that the board may have concurrent power if provided in the certificate of incorporation, which is virtually always the case. The Model Act grants concurrent power to amend unless the articles of incorporation provide otherwise, or a bylaw adopted by shareholders provides that directors may not amend, repeal, or reinstate that bylaw. MODEL BUS. CORP. ACT § 10.20 (2008).

221. The last sentence of title 8, section 109(a) of the Delaware Code provides, "The fact that such power has been so conferred upon the directors . . . shall not divest the stockholders . . . of the power, nor limit their power to adopt, amend or repeal bylaws." The Model Act provides that voting rules for shareholders may only be altered in the articles of incorporation, and changes that increase quorum or voting requirements must be approved by the same vote as proposed to be adopted. MODEL BUS. CORP. ACT § 7.27.

222. 564 A.2d 651, 652, 658–63 (Del. Ch. 1988).

223. Chesapeake Corp. v. Shore, 771 A.2d 293, 320 (Del. Ch. 2000). He explained the difficulties:

> In the more typical case involving board actions touching upon the electoral process, the question of whether the board's actions are preclusive is usually hotly contested. And the preclusion question and the issue of the board's "primary purpose" are not easily separable. The line between board actions that influence the electoral process in legitimate ways (e.g., delaying the election to provide more time for deliberations or to give the target board some reasonable breathing room to identify alternatives) and those that preclude effective stockholder action is not always luminous. Absent confessions of improper purpose, the most important evidence of what a board intended to do is often what effects its actions have.

Id.

224. Nos. 10173, 10189, 1988 WL 96192 (Del. Ch. Sept. 16, 1988); *see also* Kidsco Inc. v. Dinsmore, 674 A.2d 483, 495–96 (Del. Ch. 1995) (holding that a bylaw adopted by the board requiring sixty days notice of special meetings was reasonable).

date of stockholder action taken by written consent for fifty-nine days, on the basis that it imposed an unreasonable delay on the effectiveness of stockholder action.[225]

Commentators have attempted to rationalize the *Blasius* line of cases by arguing that when the board action interferes with imminent stockholder action it will be invalidated, but if the threat is not imminent and the action is not preclusive, it will survive.[226] However, all actions taken by boards to restrict stockholders' exercise of their franchise have similar effects, and the fact that one is taken on a "clear day" does not change its effect. This is another example of what is sometimes described as nuanced judging that falls into the trap of fine distinctions that become formalistic rules in operation. It is hardly surprising that experienced counsel advise putting takeover defenses into effect well in advance of any anticipated need for them. Until very recently, most public firms had adopted staggered boards, and IPO firms during the 1990s employed them with great frequency.[227] IPO firms also adopted provisions that both precluded stockholder action by written consent and denied stockholders the power to call special meetings.[228] Some firms have also raised the voting requirement for stockholder amendments to the bylaws.[229]

9. *Litigation Costs and Delays*

In the 1970s, William Cary suggested that the Delaware judiciary, which he described as being drawn from the Delaware corporate bar, was complicit in the plan he saw to give managers increased flexibility and reduced accountability.[230] Everything that has transpired in the development of Delaware corporate law doctrine since then refutes his claim. Delaware judges are remarkably thoughtful, perhaps too much so, seeing unnecessary nuances and complexities. They are remarkable for their contributions to the scholarly literature on Delaware corporate law,

225. 496 A.2d 1031, 1036 (Del. 1985). To the same effect is *Quickturn Design Systems, Inc. v. Shapiro*, 721 A.2d 1281, 1291–92 (Del. 1998), where a bylaw delaying stockholder-called special meetings for ninety days was sustained by the Court of Chancery and not appealed, but an amendment to a rights plan that would delay redemption by a newly elected board after a proxy contest was invalidated. Although the decision in *Quickturn* was based on title 8, section 141(a) of the Delaware Code, the effect is very much the same.

226. McBride & Gibbs, *supra* note 29, at 930.

227. Lucian A. Bebchuk et al., *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence and Policy*, 54 STAN. L. REV. 887, 895 (2002); Lucian A. Bebchuk, *Why Firms Adopt Antitakeover Arrangements*, 152 U. PA. L. REV. 713, 726 fig.1 (2003).

228. Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83, 95–96 tbl.2 (2001); Michael Klausner, *Institutional Shareholders, Private Equity, and Antitakeover Protection at the IPO Stage*, 152 U. PA. L. REV. 755, 764 tbl.4 (2003).

229. Dale A. Oesterle & Alan R. Palmiter, *Judicial Schizophrenia in Shareholder Voting Cases*, 79 IOWA L. REV. 485, 505 (1994). Typically this is achieved through shareholder approval of provisions in either the charter or bylaws. *But see* USACafes v. Office, No. 8186, 1985 WL 44685, at *3 (Del. Ch. Oct. 28, 1985), *reprinted in* 11 DEL. J. CORP. L. 1034, 1038 (1985) (board amendment to bylaws).

230. Cary, *supra* note 1, at 672.

which attempts in some cases to explain and justify, and in others to critique, the law they have participated in developing.[231] It has been widely believed that their skill, experience, and focus on a corporate docket allow the Court of Chancery judges to dispose of complex litigation with dispatch, and in many cases they do.[232] Romano's path-breaking work concluded that firms reincorporate in Delaware at the time "they undertake, or anticipate engaging in, discrete transactions involving changes in firm operation and/or organization."[233] We do not dispute her conclusion, which she reached in 1985, but we do believe that the evidence we offer suggests that such reasons are no longer as powerful.

One is tempted to point to the most egregious examples of litigation costs in the Delaware courts, such as the Technicolor acquisition, which was completed in 1983, but involved ongoing litigation until the close of 2005—Delaware's version of *Jarndyce v. Jarndyce.*[234] This boon to lawyers makes seven appearances in the reports of the Delaware Supreme Court.[235] The result: the dissenting shareholder received $5.41 per share more than the merger offered on its 201,200 shares, for a total recovery of $1,088,492. It is difficult to imagine a more Pyrrhic victory. A close second may be *Berlin v. Emerald Partners*, which made its first appearance in a Court of Chancery decision in 1988 and was followed by eighteen further appearances in LEXIS, culminating in 2003.[236]

231. Among the writings of three recent judges on the Delaware Court of Chancery, known as the Three Chancellors, are: William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894 (1997); William T. Allen, *Commentary on the Limits of Compensation and Deterrence in Legal Remedies*, 60 LAW & CONTEMP. PROBS. 67 (1997); William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395 (1993); Allen et al., *supra* note 178; William T. Allen et al., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067 (2002); William T. Allen et al., *Realigning the Standard of Review of Director Care with Delaware Public Policy: A Critique of* Van Gorkom *and Its Progeny as a Standard of Review Problem*, 96 NW. U. L. REV. 449 (2002); William T. Allen, *Response: Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, Inc., 73 N.Y.U. L. REV. 1149 (1998); William T. Allen, *Securities Markets as Social Products: The Pretty Efficient Capital Market Hypothesis*, 28 IOWA J. CORP. L. 551 (2003); Jack B. Jacobs, *Comment on Contestability*, 54 U. MIAMI L. REV. 847 (2000); Jack B. Jacobs, *Delaware Receivers and Trustees: Unsung Ministers of Corporate Last Rites*, 7 DEL. J. CORP. L. 251 (1982); Jack B. Jacobs, *Introduction: Professor Richard Epstein*, 21 DEL. J. CORP. L. 1 (1996); Leo E. Strine, Jr., *Delaware's Corporate Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 CORNELL L. REV. 1257 (2001); Leo E. Strine, Jr., *The Professorial Bear Hug: The EBB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic "Just Say No" Question*, 55 STAN. L. REV. 863 (2002). A host at a conference once remarked that these Delaware judges had written enough to obtain tenure at any law school.

232. Kahan & Kamar, *supra* note 161, at 1212.

233. Romano, *Law as a Product*, *supra* note 23, at 226.

234. CHARLES DICKENS, BLEAK HOUSE 510 (Porter & Coates 1998) (1853).

235. Cede & Co. v. Technicolor, Inc., 884 A.2d 26 (Del. 2005); Cede & Co. v. Technicolor, Inc., 875 A.2d 602 (Del. 2005); Cede & Co. v. Technicolor, Inc., 758 A.2d 485 (Del. 2000); Cede & Co. v. Technicolor, Inc., 684 A.2d 289 (Del. 1996); Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156 (Del. 1995); Cede & Co. v. Technicolor, Inc., 636 A.2d 956 (Del. 1994); Cede & Co. v. Technicolor, Inc., 634 A.2d 345 (Del. 1993); Cede & Co. v. Technicolor, Inc., 542 A.2d 1182 (Del. 1988).

236. Emerald Partners v. Berlin, No. 295, 2003, 2003 WL 23019210 (Del. Dec. 23, 2003); Emerald Partners v. Berlin, No. 9700, 1988 WL 25269 (Del. Ch. Mar. 18, 1988).

We used a small sample of Delaware Supreme Court decisions to learn something about the length and presumably related costs of litigation. We used the nineteen supreme court decisions selected as lead cases in the Mergers & Acquisitions casebook written by one of this Article's authors.[237] There are many ways to criticize this technique—small sample size, selection bias because they were sufficiently interesting to warrant inclusion in a casebook, perhaps path-breaking and therefore difficult cases requiring more consideration, etc. However, we believe they are suggestive.

One impressive fact can be observed: when injunctive relief is requested, the Delaware courts treat the motion and the appeal with dispatch, even where the questions of law are of first impression. Ten of the decisions were of this type. They were completed in an average of 8.4 months from the date of the challenged corporate action to a final appeal.[238] Other classes of cases are less flattering: four *Weinberger* "fairness" cases took an average of 8.7 years to resolve,[239] while the remaining five cases (including *Technicolor*) required an average of 10.1 years to resolve.[240]

Robert Thompson and Randall Thomas have provided data that corporate managers might regard as terrifying about the frequency of corporate litigation in Delaware. They reported 1280 corporate law complaints filed in the Delaware Court of Chancery in 1999 and 2000.[241] Of those, 1003, or 78%, involved claims of breach of fiduciary duty, while the others were statutory, and might have involved such disputes as shareholders' demand for records.[242] Most of the cases, 824, involved class actions, most of which arise in the context of acquisitions, while 137 claims were derivative.[243] The authors point out that the number of com-

237. WILLIAM J. CARNEY, MERGERS AND ACQUISITIONS: CASES AND MATERIALS (2000). We omitted cases in supplements on the theory that some might not have reached final resolution as of the date of this writing.

238. Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998) (four months); Brazen v. Bell Atl. Corp., 695 A.2d 43 (Del. 1997) (twelve months); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (Del. 1995) (five months); Paramount Commc'ns, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989) (one month); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1988) (ten months); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987) (ten months); Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (less than one month); Moran v. Household Int'l, Inc., 500 A.2d 1346 (Del. 1985) (fifteen months); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (two months); Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) (twenty-four months).

239. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110 (Del. 1994) (nine years); Rabkin v. Philip A. Hunt Chem. Corp., 498 A.2d 1099 (Del. 1985) (6.5 years); Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985) (8.3 years); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983) (eleven years).

240. *Cede*, 684 A.2d 289 (twenty-three years); Williams v. Geier, 671 A.2d 1368 (Del. 1996) (9.8 years); Rapid-Am. Corp. v. Harris, 603 A.2d 796 (Del. 1992) (ten years); Barkan v. Amsted Indus., Inc., 567 A.2d 1279 (Del. 1989) (3.8 years); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (four years).

241. Thompson & Thomas, *supra* note 156, at 1761.

242. *Id.* Their article does not reconcile the difference between 1003 fiduciary duty complaints filed and the 1048 such cases reported subsequently, as cited *infra* note 233.

243. *Id.* at 1762.

plaints filed is much larger than the total number of lead cases: 1048 fiduciary duty cases were reduced to 348 total lead cases.[244] At the same time, their study misses actions involving Delaware corporations brought in other jurisdictions under the Internal Affairs Rule. Unfortunately, we have been unable to locate any systematic studies of derivative suits or shareholder class actions involving Delaware corporations brought in other jurisdictions.[245]

Elliot Weiss and Lawrence White add to this picture with a study of plaintiffs' attorneys' fees in shareholder class actions in the Court of Chancery.[246] In 104 suits studied, a complaint was typically filed within several days after the announcement of a transaction, of which fifty-one (94% of the dismissals) were dismissed before any adverse judicial ruling was taken on the complaint.[247] This suggests an automatic filing response where the legal categories of judicial review were promising—sales of control rather than mergers of equals, and especially those cases where the buyer had a prior ownership interest in the target.[248] The authors found little indication that plaintiffs' attorneys invested much effort in these cases. In the forty-eight settlements, the size of fees recovered was strongly dependent on whether the deal terms improved after suit was filed, although the authors found that "plaintiffs' attorneys frequently were able to free ride on the improved terms negotiated by [special negotiating committees] or on the price improvements that resulted from competing bids."[249] For settlements that involved no price improvement, legal fees averaged $492 per hour, while for settlements in cases where there was price improvement, the average fee was $1,800 per hour.[250] One author notes that where corporations are headquartered outside Delaware with principal counsel nearby, litigation costs in Delaware are

244. *Id.*

245. Romano found that out of a sample of thirty-five shareholder suits involving Delaware firms, twenty-nine were brought in Delaware. ROMANO, GENIUS, *supra* note 41, at 42. We did a brief search on LEXIS, in Corporate Cases, Federal and State, using the search term "corporation and minority and [shareholder or stockholder] and [freezeout or freeze out]" and retrieved 615 cases, of which we excluded those 225 cases in the federal courts, leaving 390 cases, of which eighty-six (22%) were in Delaware, followed by Massachusetts with forty-six cases (11.8%), New York with fifty-five (14%), and Pennsylvania with fifteen (3.8%). Of the remaining states, only California (twelve), Illinois (thirteen), New Jersey (ten), and Ohio (twelve) were in double digits. It seems likely that the Massachusetts numbers are influenced by the doctrine of fiduciary duties of majority shareholders first enunciated in *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505 (Mass. 1975). While Delaware may have a majority of the public corporations in the U.S., its total corporate count is likely not nearly as disproportionate to its population, since most nonpublic firms incorporate in their home states. Obviously these numbers tell us nothing about the cost of litigation in individual cases, but they are suggestive (as are Massachusetts's numbers) that open-ended legal doctrines intended to protect minority shareholders can create higher legal costs.

246. Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (2004).

247. *Id.* at 1827–28

248. *Id.* at 1825–28.

249. *Id.* at 1829 (emphasis omitted).

250. *Id.* at 1830.

further increased by the participation of both principal counsel and Delaware counsel.[251]

Litigation costs in Delaware are exacerbated in derivative suits by the inability of boards and their special committees to dispose of litigation not in the interest of the corporation without second-guessing by the Delaware courts. Delaware has declined to apply the deference of the business judgment rule to decisions to dismiss derivative litigation, even when the decision is made by fully informed directors with no stake in the litigation.[252] Regardless of the outcome of a court's review of this decision, using "its own independent business judgment" (an oxymoron for a court), the matter must proceed to a hearing on the motion, with all of the costs that entails. In contrast, the Model Act, under similar circumstances, provides that the suit "shall be dismissed" if the court finds that the decision makers were qualified, conducted a reasonable inquiry, and determined in good faith that maintenance of the proceeding was not in the best interests of the corporation.[253]

When determining the independence of a special litigation committee, the definition of an independent director is more ephemeral in Delaware than elsewhere. One critic, Robert Brown, characterizes the Delaware courts as applying "shifting and inconsistent tests" of independence.[254] Although Brown is critical of the Delaware courts' general unwillingness to look at nonfinancial ties as sources of a lack of independence, he does cite cases where the Delaware courts have worried about personal relationships.[255]

251. Charles W. Murdock, *Why Illinois? A Comparison of Illinois and Delaware Corporate Jurisprudence*, 19 S. ILL. U. L.J. 1, 5 (1994).

252. Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981).

253. Fourteen states have adopted the Model Act approach. MODEL BUS. CORP. ACT § 7.44, at 7-355 (2008) (statutory comparison). Florida and Georgia provide that the court "may" dismiss under these circumstances, without specifying whether the courts should apply the business judgment rule of deference or exercise their own business judgment. *Id.* The injunction that the court "shall dismiss" was followed in *Madvig v. Gaither*, 461 F. Supp. 2d 398 (W.D.N.C. 2006).

254. J. Robert Brown, Jr., *Disloyalty Without Limits: "Independent" Directors and the Elimination of the Duty of Loyalty*, 95 KY. L.J. 53, 56 (2006). Vice Chancellor Strine has conceded that "it would be less than candid if I did not admit that Delaware courts have applied these general standards in a manner that has been less than wholly consistent. . . . In this opinion, I will not venture to do what I believe to be impossible: attempt to rationalize all these cases in their specifics." *In re* Oracle Corp. Derivative Litig., 824 A.2d 917, 939 (Del. Ch. 2003).

255. Brown, *supra* note 254, at 81 n.138 (citing Chesapeake Corp. v. Shore, 771 A.2d 293, 299 (Del. Ch. 2000) (where Vice Chancellor Strine stated that "*Unitrin* defines an independent director as one who can base her judgments on the corporate merits without being influenced by extraneous influences, such as personal relationships the director has with management or a controlling stockholder")); *see also* Rales v. Blasband, 634 A.2d 927 (Del. 1993) (plaintiff "must show that the directors are 'beholden' to the Rales brothers or so under their influence that their discretion would be sterilized"); *Oracle*, 824 A.2d at 938 (allegations of a personal relationship and acquiescence in the challenged transaction raised doubts about a director's independence). Here the Model Act is not the model of clarity that it is when directors' conflict of interest transactions are involved. The special litigation committee must consist of "qualified" directors, who are defined in section 1.43 as those who do not have a material interest (defined in terms of benefits or detriments, presumably a quantitative test) or a material relationship with a person who has a material interest. MODEL BUS. CORP. ACT § 7.44(b)(1) (2008). Here the definition is more open, including "a familial, financial, professional,

The Model Act's focus in the context of conflict-of-interest transactions is largely on financial ties—where a director or a related person had a material financial, rather than personal, interest.[256] Most of the cases Professor Brown reviews are in the context of derivative litigation, but there are cases involving fairness in freezeouts that go beyond the bright lines to consider expectancies: whether past dealings might lead a director to expect future benefits from the dominant shareholder.[257]

D. The General Corporation Law—A Nice Statute in 1967

1. Statutory Change and Uniformity: Is Delaware an Outlier?

The story of Delaware's emergence as the preeminent state in the corporate chartering competition is a familiar one briefly recited in Part I. As Cary stated, "By 1915, the Delaware corporation law was commonly regarded as a modern and 'liberal' act."[258] Even Cary, the most prominent critic of Delaware, conceded that "many of the amendments have been salutary: They have effected simplification and flexibility and have eliminated unnecessary and vestigial procedures."[259]

But other states have not stood still. The American Bar Association's Committee on Corporate Laws has been engaged in a continuous revision of the Model Business Corporation Act, which forms the basis for corporate laws in a majority of the states. Romano was the first to observe that Delaware was not so much an innovator as a prompt adopter of the innovations of others.[260] The uniformity of American corporate law is strong, although it is subject to variations as innovations diffuse through the states.[261] Georgia, for example, has a standing bar committee on corporate law revision that reviews not only changes in the

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employment or other relationship that would reasonably be expected to impair the objectivity of the director's judgment." MODEL BUS. CORP. ACT § 1.43(b)(1).

256. MODEL BUS. CORP. ACT § 8.60(1). "Related person" is defined with bright line rules, both family and those living in the director's house, as well as entities controlled by the director or a related person, or entities for which the director is a fiduciary. *Id.* § 8.60(5). "Interest" is defined in section 1.40(13A) of the Model Business Corporation Act as the right to receive distributions or to vote.

257. *See* Kahn v. Tremont Corp., 694 A.2d 422, 426 (Del. 1997) (rejecting a lawyer who had previously worked for the corporation, a person previously employed by the dominant shareholder in connection with a takeover battle, and a person previously nominated as a prospective director in that battle, all of whom had received fees for their efforts). In *In re Emerging Communications, Inc. Shareholders Litigation*, No. CIV. A. 16415, 2004 WL 1305745, at *35 (Del. Ch. 2004), Justice Jacobs, sitting by designation, noted the generous directors' fees received by committee members for their service, which he said, without more, would not necessarily constitute a disabling financial interest, but coupled with their expectation of continued service on the post-freezeout board, were vitiate to destroy their independence.

258. Cary, *supra* note 1, at 664–65.

259. *Id*. at 666. An account of the development of Delaware law can be found in Andrew G.T. Moore II, *A Brief History of the General Corporation Law of the State of Delaware and the Amendatory Process*, *in* THE DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS H-1 (3d ed., Supp. 2001).

260. Romano, *Law as a Product*, *supra* note 23, at 240.

261. Carney, *Production*, *supra* note 46.

Model Act, but also changes in Delaware law, to determine which ones to recommend to the Georgia General Assembly for adoption. This cannot be an aberration in states of any commercial importance. The result is continuing adoption of significant changes emanating from both Delaware and the Model Act, and occasionally from other states.[262] In addition, only those long familiar with the Delaware statute can comfortably navigate its shoals: as a general corporation law it contains provisions relating to corporations of all kinds—nonprofit as well as for-profit. Few would argue that this structure is superior to that of Model Act states, most of which have adopted a separate Model Nonprofit Corporation Act.[263]

2. *Delaware's Struggles to Retain Preeminence*

We now examine how differences in corporate laws have changed over time. In 1968, shortly after Delaware's major revision of its statute, Professor Stanley Kaplan was able to identify rather large and significant advances in Delaware law, including

> greater freedom to pay dividends and make distributions; greater ease of charter amendment and less restrictions upon selling assets, mortgaging, leasing, and merging, due to the lower percentage of shareholder approval required and also by virtue of lesser rights of appraisal for dissenting minority shareholders; freedom from mandatory cumulative voting; permission to have staggered boards of directors; lesser pre-emptive rights for shareholders; clearer rights of indemnification for directors and officers; [and] greater freedom of action in many crucial respects for management.[264]

What Kaplan failed to note in his remarks was that the Model Act had kept up to date with Delaware modernizations.[265] Indeed, some of the modernizations preceded Delaware's changes.[266] In the twenty years

262. While we cannot attribute any cause and effect to these changes, the adoption of strong language creating a quantitative safe harbor from required shareholder votes for asset sales and establishing exclusivity of appraisal in sections 12.02(a) and 13.02(d) of the Model Business Corporations Act was preceded by similar changes in Georgia in title 14, sections 1202 and 1302(b) of the Georgia Code.

263. REVISED MODEL NONPROFIT CORP. ACT (1988).

264. Stanley A. Kaplan, *Foreign Corporations and Local Corporate Policy*, 21 VAND. L. REV. 433, 436 (1968).

265. Many of these advantages were obtainable in 1968 through adoption of the second edition of the Model Business Corporation Act. Section 45 of the Model Act was amended in 1965, adding Alternative A to permit nimble dividends. MODEL BUS. CORP. ACT § 45 cmt. at 891 (2d ed. 1971). Additionally, the required vote for approval of asset sales was reduced from two-thirds to a majority in 1962, and requirements for shareholder votes on mortgages were eliminated at the same time. *Id.* §§ 78–79 cmt. at 416–17 (2d ed. 1971). Cumulative voting was provided on an opt-out basis in section 33. The Model Act and Delaware indemnification provisions were revised along parallel lines at the time of Delaware's 1967 revision of its statute. *Compare id.* § 5, *with* DEL. CODE ANN. tit. 8, § 145 (2001). The Model Act version "was developed in consultation with the Delaware Corporation Law Revision Committee and is substantially identical with Section 145 of the New Delaware General Corporation Law of 1967." MODEL BUS. CORP. ACT § 5 (2d ed. 1971).

266. See the changes in the Model Business Corporation Act cited *supra* note 265.

following World War II, over thirty states had modernized their statutes.[267] Of these, sixteen states had adopted the Model Act by 1967, while seven others had drawn heavily from it in their revisions.[268] Delaware's franchise fee revenues had been falling during the 1960s as its statute fell behind those of other jurisdictions.[269] Its vaunted court system and inventory of judicial decisions did not serve to stem these losses.

Both Delaware law and the Model Act have been the subject of constant revisions since 1967–68. Most notably, the Model Act underwent a structural revision in 1984, and now represents the modern approach of a code.[270] Delaware has not undertaken such a revision, preferring to patch a statute that, being a general corporation statute covering both business and nonprofit corporations, was hardly a model of clarity. Things have deteriorated over that period. Even the briefest comparison of the Delaware statute's language with the Model Act's language demonstrates the Model Act's much greater clarity and precision. For example, consider the Delaware statute's provision that deals with holding company mergers. The first sentence of this subsection contains 952 words, set out below. It is virtually impossible to read.[271] Unlike the

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267. Moore, *supra* note 259, at H-9.

268. MODEL BUS. CORP. ACT § 4 (2d ed. 1971).

269. While corporate revenues had provided 42.5% of state revenues in 1929, by 1955 these had shrunk to 7.2%. Moore, *supra* note 259, at H-9. By 1963 franchise taxes produced only 6.6% of state revenues, and new corporate filings dropped 19% in the first six months of 1963, all of which led the Secretary of State to seek funds to finance a study for the revision of the Delaware Act. Joel Seidman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 DEL. J. CORP. L. 249, 280 (1976).

270. *See* Elliot Goldstein, *The Revised Model Business Corporation Act*, 63 TEX. L. REV. 1471, 1472 (1985).

271. DEL. CODE ANN. tit. 8, § 251(g) (Supp. 2007):

> Notwithstanding the requirements of subsection (c) of this section, unless expressly required by its certificate of incorporation, no vote of stockholders of a constituent corporation shall be necessary to authorize a merger with or into a single direct or indirect wholly-owned subsidiary of such constituent corporation if: (1) such constituent corporation and the direct or indirect wholly-owned subsidiary of such constituent corporation are the only constituent entities to the merger; (2) each share or fraction of a share of the capital stock of the constituent corporation outstanding immediately prior to the effective time of the merger is converted in the merger into a share or equal fraction of share of capital stock of a holding company having the same designations, rights, powers and preferences, and the qualifications, limitations and restrictions thereof, as the share of stock of the constituent corporation being converted in the merger; (3) the holding company and the constituent corporation are corporations of this State and the direct or indirect wholly-owned subsidiary that is the other constituent entity to the merger is a corporation or limited liability company of this State; (4) the certificate of incorporation and by-laws of the holding company immediately following the effective time of the merger contain provisions identical to the certificate of incorporation and by-laws of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or incorporators, the corporate name, the registered office and agent, the initial board of directors and the initial subscribers for shares and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination, or cancellation has become effective); (5) as a result of the merger the constituent corporation or its successor becomes or remains a direct or indirect wholly-owned subsidiary of the holding company; (6) the directors of the constituent corporation become or remain the directors of the holding company upon the effective time of the merger; (7) the organizational documents of the surviving entity immediately following the effective time of the merger contain provisions identical to the certificate of incorporation of the constituent corporation immediately prior to the effective time of the merger (other than provisions, if any, regarding the incorporator or in-

Model Act, the Delaware Statute is not visually broken down into clauses that make comprehension relatively manageable.

We will not attempt a systematic catalog of Delaware's relative rank as a "modern" or "enabling" jurisdiction over time. Romano used four important sets of laws to measure the responsiveness of states to legal change, including indemnification of directors, exemption for voting requirements for short-form mergers, the market exception to appraisal rights, and the first generation of antitakeover statutes.[272] She found that Delaware was the most responsive state, being the first to adopt one of the innovations, and adopting the other three within four to seven years of their first adoption in another state.[273]

However, Romano's results may have been unduly affected by her specific choices of innovations. The four innovations that she studied all happened to be ones that Delaware adopted quickly.

corporators, the corporate or entity name, the registered office and agent, the initial board of directors and the initial subscribers for shares, references to members rather than stockholders or shareholders, references to interests, units or the like rather than stock or shares, references to managers, managing members or other members of the governing body rather than directors and such provisions contained in any amendment to the certificate of incorporation as were necessary to effect a change, exchange, reclassification, subdivision, combination or cancellation of stock, if such change, exchange, reclassification, subdivision, combination or cancellation has become effective); provided, however, that (i) if the organizational documents of the surviving entity do not contain the following provisions, they shall be amended in the merger to contain provisions requiring that (A) any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, that requires for its adoption under this chapter or its organizational documents the approval of the stockholders or members of the surviving entity shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; provided, however, that for purposes of this clause (i)(A), any surviving entity that is not a corporation shall include in such amendment a requirement that the approval of the stockholders of the holding company be obtained for any act or transaction by or involving the surviving entity, other than the election or removal of directors or managers, managing members or other members of the governing body of the surviving entity, which would require the approval of the stockholders of the surviving entity if the surviving entity were a corporation subject to this chapter; (B) any amendment of the organizational documents of a surviving entity that is not a corporation, which amendment would, if adopted by a corporation subject to this chapter, be required to be included in the certificate of incorporation of such corporation, shall, by specific reference to this subsection, require, in addition, the approval of the stockholders of the holding company (or any successor by merger), by the same vote as is required by this chapter and/or by the organizational documents of the surviving entity; and (C) the business and affairs of a surviving entity that is not a corporation shall be managed by or under the direction of a board of directors, board of managers or other governing body consisting of individuals who are subject to the same fiduciary duties applicable to, and who are liable for breach of such duties to the same extent as, directors of a corporation subject to this chapter; and (ii) the organizational documents of the surviving entity may be amended in the merger (A) to reduce the number of classes and shares of capital stock or other equity interests or units that the surviving entity is authorized to issue and (B) to eliminate any provision authorized by subsection (d) of [section] 141 of this title; and (8) the stockholders of the constituent corporation do not recognize gain or loss for United States federal income tax purposes as determined by the board of directors of the constituent corporation. Neither subdivision (g)(7)(i) of this section nor any provision of a surviving entity's organizational documents required by subdivision (g)(7)(i) shall be deemed or construed to require approval of the stockholders of the holding company to elect or remove directors or managers, managing members or other members of the governing body of the surviving entity.

272. Romano, *Law as a Product*, *supra* note 23, at 234.

273. *Id.* at 240.

Later, in 1998, one of this Article's authors published a survey of corporate law changes, in which the author found a number of instances where Delaware failed to adopt significant Model Act innovations.[274] In 1979, the ABA's Committee on Corporate Laws made major changes in legal capital provisions of the Model Act, which eliminated the use of legal capital as a regulatory device to protect creditors and holders of senior securities (similar to the restrictions of the Second Company Law Directive).[275] Recent Model Act changes have made it easier to secure shareholder approval for a fundamental corporate change, such as a charter amendment,[276] sale of substantially all assets,[277] or a merger[278] by requiring approval of a plurality of a quorum rather than approval of a majority of shares entitled to vote.[279] Therefore, although Delaware law continues to require approval of a majority of all shares entitled to vote on such transactions, the Model Act now requires only approval of a plurality of shares at a meeting at which a quorum is present.[280] Indeed, Delaware has failed to follow a number of Model Act changes described as important by the Committee on Corporate Laws.[281] We include the tabulation of those results here:

274. Carney, *Production*, *supra* note 46, at 742 tbl.1. For a comparison of the evolution of the duty of care in Delaware and under the Model Act, see Edward Rock & Michael Wachter, *Dangerous Liaisons: Corporate Law, Trust Law, and Interdoctrinal Legal Transplants*, 96 NW. U. L. REV. 651, 657–67 (2002).

275. Committee on Corporate Laws, American Bar Association, *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867 (1979). For a comparison of the operation of Model Act and Delaware provisions, see Michael P. Dooley & Michael D. Goldman, *Some Comparisons Between the Model Business Corporation Act and the Delaware General Corporation Law*, 56 BUS. LAW. 737, 739–42 (2001). For a critical view of the Second Directive's provisions, see Luca Enriques & Jonathan R. Macey, *Creditors Versus Capital Formation: The Case Against the European Legal Capital Rules*, 86 CORNELL L. REV. 1165, 1184–1202 (2001).

276. *Compare* MODEL BUS. CORP. ACT § 10.03(e) (2008), *with* DEL. CODE ANN. tit. 8, § 242(b)(1) (2001).

277. *Compare* MODEL BUS. CORP. ACT § 12.02(e), *with* DEL. CODE ANN. tit. 8, § 271(a).

278. *Compare* MODEL BUS. CORP. ACT § 11.04(e), *with* DEL. CODE ANN. tit. 8, § 251(c).

279. *See* MODEL BUS. CORP. ACT §§ 7.25–.26, 11.04(e) cmt. at 3.

280. *See* Dooley & Goldman, *supra* note 275, at 749–50.

281. MODEL BUS. CORP. ACT ANN. (4th ed. 2008) (Introduction). The Model Act identifies elimination of legal capital rules (section 2.02), dissenters' rights (section 13.02), and share exchanges (section 11.03) as significant changes. In hindsight, the share exchange provisions did not represent a successful innovation, despite their widespread adoption, because of their infrequent usage. Kahan, *supra* note 40, at 343–44, identifies a different set of rules as important in jurisdictional choice: (1) the shift from two-thirds to majority voting on mergers; (2) limits on personal liability of directors; (3) elimination of mandatory cumulative voting; and (4) authorization of loans to officers and directors. Our difficulty with this set is that states still employing the older rules tend not to be large commercial states; the two-thirds voting requirement for mergers is still found in Alaska, the District of Columbia, Maryland, and Missouri—or are states that for one reason or another are outliers—New York (which changed its law after 1997) or Texas. The departures from limited liability for directors only involve complete lack of authority in the District of Columbia; another four states have simply not gone as far as Delaware, while one, West Virginia, changed its statute after 1997. Authorization of officer loans has become irrelevant for public companies, in view of their prohibition in the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 402 (codified at 15 U.S.C. § 78m(k)).

TABLE 1
DELAWARE'S RANK IN ADOPTING CORPORATE LAW CHANGES
(From year of first adoption by any state)

	Year
Authorization of electronic proxies	1st
Authorization of certificates of merger	1st
Limits on director liability	1st
Indemnification of directors	2nd
Stock market exception to appraisal	2nd
Adoption of second generation takeover statute	6th
Authorization of short-form mergers	9th
Authorization of plurality voting for shareholders	No[282]
Elimination of legal capital rules	No[283]
Authorization of share exchanges	No
Providing that dissenters' rights are exclusive	No

Updated results demonstrate that Delaware still has failed to adopt three important changes included in the Model Act: elimination of legal capital rules, plurality voting, and the exclusivity of dissenters' rights. Table 2 sets forth the states that have adopted these Model Act reforms and the years of adoption.

TABLE 2
DATES OF ADOPTION OF STATUTES

State	Legal Capital	Plurali-ty Voting	Exclusivity of Dissenters' Rights
Alabama	1994	1994	1994
Alaska			
Arizona	1994	1994	1994
Arkansas	1987	1997	1987
California	1975		1975

(*Continued on next page*)

282. While Delaware permits plurality voting to elect directors, it otherwise requires a majority of a quorum, subject to variation in the certificate of incorporation. DEL. CODE ANN. tit. 8, § 216 (2001). A vote of a majority of all shares entitled to vote is required to approve a merger. DEL. CODE ANN. tit. 8, § 251(c). While the Model Business Corporation Act also provides for plurality voting for directors in section 7.28(a), it provides a similar voting rule for shareholder actions generally in section 7.25(c). The Model Act only requires a majority of a quorum (consisting of a majority) to approve a merger, unless provisions have been made for supermajority voting. MODEL BUS. CORP. ACT § 11.04(e).

283. Title 8, section 160(a) of the Delaware Code allows a corporation to repurchase its shares so long as it doesn't impair capital. *See* Klang v. Smith's Food & Drug Ctrs., Inc., 702 A.2d 150 (Del. 1997). Section 170(a) prohibits dividends that would impair capital, and permits payments of dividends only out of "surplus." DEL. CODE ANN. tit. 8, § 170(a) (2001).

TABLE 2—*Continued*

State	Legal Capital	Plurali-ty Voting	Exclusivity of Dissenters' Rights
Colorado	1993	1993	1977
Connecticut	1994	1994	1959
Delaware			
Florida	1989	1989	1989
Georgia	1988	1988	1988
Hawaii	1983	2000	1983
Idaho	1997	1997	1979
Illinois	1983		1983
Indiana	1986	1986	1986
Iowa	1989	1989	1989
Kansas			
Kentucky	1988	1988	1988
Louisiana			
Maine	2003	2003	2003
Maryland	1988		
Massachusetts	1964	2004	1964
Michigan	1989		1989
Minnesota	1981		1981
Mississippi	1987	1987	1987
Missouri			1990
Montana	1991	1991	1991
Nebraska	1995	1995	1981
Nevada	1991		1991
New Hampshire	1992	1992	1981
New Jersey	1988		1968
New Mexico	1983		1983
New York		1963	1961
North Carolina	1989	1989	1989
North Dakota	1985		1985
Ohio			
Oklahoma			
Oregon	1987	1987	1987
Pennsylvania	1988		1988

(*Continued on next page*)

TABLE 2—*Continued*

State	Legal Capital	Plurality Voting	Exclusivity of Dissenters' Rights
Rhode Island	1982		
South Carolina	1981	1988	
South Dakota	2005	2005	1985
Tennessee	1986	1986	1986
Texas			1967
Utah	1992	1992	1992
Vermont	1995	1993	1993
Virginia	1985	1986	1985
Washington	1989	1989	1989
West Virginia	2002	2002	
Wisconsin	1989	1989	1989
Wyoming	1989	1989	1989

These reforms have been broadly adopted. Over the years, forty-one states have adopted the legal capital reforms, thirty-one have adopted plurality voting, and forty have enacted exclusivity of dissenters' rights.

These results conform to the lessons from the 1998 article. That article found a high degree of uniformity among corporate laws, with average adoption rates of at least 75% of all Model Act rules and higher rates for more significant provisions.[284] The lack of more complete uniformity was largely explained by the lag in diffusion of innovations to all states.[285] The breadth of change suggests that Delaware is unlikely to have a long-term advantage over many states. When Delaware reforms first, other states follow quickly. However, Delaware often is slow to reform when others adapt. One study placed Delaware seventh on the list of states for speed and comprehensiveness in adopting statutes that are deemed to be desired by management.[286]

3. *Is the Model Act Superior?*

We turn now to a brief comparison with the Model Act, on the theory that for descriptive purposes the Model Act is fairly representa-

284. Carney, *Production*, *supra* note 46, at 731.
285. *Id.* at 734–36.
286. Stephen P. Ferris et al., *The Influence of State Legal Environments on Firm Incorporation Decisions and Values* 11, 27 tbl.1 (Contracting and Orgs. Research Inst., Working Paper No. 2004-13, 2004), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=612341. The authors find this is a determinant of a state's ability to attract and retain incorporations.

tive of many competing statutes. Detailing all of the advantages of the Model Act over Delaware law would unduly extend this Article.[287] We note, as others have, that there are large areas of similarity in all American corporate laws, of which many provisions are default rules.[288] This has led Bernard Black to question whether corporate law is trivial.[289] We can readily concede that much of it is, although enabling laws that provide flexibility are hardly trivial considerations for corporate officials and their attorneys. Even conceding Black's argument, we assert that at the margin differences are important, especially in mandatory rules of the kind made by judges, discussed above. Nonetheless, we conclude that in areas where corporate law is not trivial but mandatory or regulatory, the Model Act is superior to Delaware in ways that Romano's respondents apparently regarded as important in 1985.[290]

We owe an explanation of why our comparison is with the Model Act rather than with the laws of a single state, perhaps one of the large industrial states that does not follow the Model Act, such as California, Illinois, New York, Ohio, Pennsylvania, or Texas. First, the Model Act attempts to incorporate innovations from all states in its attempt to maximize flexibility. Second, it represents the most widely adopted legislative pattern in corporate law. Table 2, above, documents its success. As of 2005, only five states had failed to adopt at least one of the reforms listed in Table 2. On the other hand, twenty-seven states had adopted all three of them.[291] Ohio, one of the large industrial states listed above, has adopted none of them.[292] Texas has adopted only one of them, while the other three large states, California, New York, and Pennsylvania, have

287. For a more complete account, see Dooley & Goldman, *supra* note 275. These authors argue that criticism of Delaware's indeterminacy is overstated. *Id*. at 766 n.145. But they also conclude that "[t]he most significant difference that emerges from the preceding discussion is the more directive, 'bright line' approach the Model Act adopts in some instances. Delaware, on the other hand, has preferred to state its statutory standards in more general terms, leaving counsel and courts to fill in the interstices." *Id*. at 764–65.

288. Carney, *Production*, *supra* note 46; Dooley & Goldman, *supra* note 275 (noting similarities of the Model Act and Delaware law).

289. Black, *supra* note 50. Black's argument is even stronger—he claims that even rules that appear mandatory may be trivial either because they mimic what markets would demand, will quickly be amended if they are at odds with markets, or can be avoided by selecting another jurisdiction.

290. Romano found evidence to support her hypothesis that

> firms changed their state of domicile [because] they anticipated engaging in transactions that could be more cheaply undertaken in the destination state. The cost savings could be either direct—the destination state's laws reduced the cost of specific transaction—or indirect—the firm's new activities were more likely to bring it into contact with the legal system than before, that is, they were activities that tend to generate minority shareholder litigation, and hence a legal system offering greater certainty of results would be desirable.

Romano, *Law as a Product*, *supra* note 23, at 249. She "found that most reincorporations preceded or coincided with a series of distinct and identifiable transactions, the most frequent being a public offering . . . , the initiation or expansion of an active mergers and acquisitions program, and antitakeover defensive maneuvering." *Id.* at 250.

291. A broader view of the adoption of Model Act provisions is found in Carney, *Production*, *supra* note 46, at 731–34, 741–49. Because Delaware has only a small number of public companies located in the state, its overall dominance does not bias the overall average retention of 38.1%. *Id.*

292. *Id.* at 744.

adopted two.[293] According to Romano, these states have been large exporters of incorporations since at least 1985.[294] Using more recent data, California is the largest exporter of incorporations, exporting 981 firms, while retaining only 21.77% versus an overall average of 38.1%.[295] Illinois is near the bottom in retentions, with only 11.2%.[296] New York does only slightly better, retaining 24.48%.[297] Until a recent push to modernize its corporate laws, Texas was not a competitor.[298] Texas retains a below-average number of incorporations for firms located in the state, 23.72%.[299] Pennsylvania, on the other hand, retains slightly more than the average percentage of its firms, 39.52% versus 38.10% overall.[300] Ohio is the standout in this group, retaining 54.69%.[301] Several of these states have suffered set-backs in the modernization process because other political interests have intervened.[302] Bebchuk, Cohen, and Ferrell offer antitakeover statutes as a partial explanation of these differences, with California having no such statutes and Pennsylvania and Ohio offering a panoply of bidder-unfriendly laws.[303] For these reasons, none of those states' statutes seem representative of the general range of corporation laws in the United States.

The Model Act has made an effort to provide greater clarity for a variety of transactions through bright line rules and safe harbors. In short, it has favored bright line rules and well defined property rights over an *ex post* judicial consideration of where rights and duties lie. If success in markets is a signal about product superiority, its widespread adoption signals some kind of victory, at least in some markets, for the Model Act approach. Only a few states have copied Delaware's law.[304]

293. *Id.* at 743–44.

294. Romano, *Law as a Product*, *supra* note 23, at 247 tbl.3.

295. Bebchuk et al., *supra* note 47, at 1811–12 tbl.3.

296. *Id.* at 1811.

297. *Id.* at 1812. Both Illinois (241) and New York (576) have smaller numbers of firms with headquarters located in the state than California.

298. "Texas, while not yet nationally known as an up-and-comer in the market for corporate charters, is also making a push to capture newly incorporated and reincorporated companies." David Mace Roberts & Rob Pivnick, *Tale of the Corporate Tape: Delaware, Nevada and Texas*, 52 BAYLOR L. REV. 45, 47 (2000); *see also* Byron F. Egan & Curtis W. Huff, *Choice of State of Incorporation—Texas Versus Delaware: Is It Now Time to Rethink Traditional Notions?*, 54 SMU L. REV. 249, 250–52 (2001) (suggesting that Texas law had been modernized over the preceding fifteen years, and provides more bright-line solutions than Delaware's judge-made law).

299. Bebchuk et al., *supra* note 47, at 1812 tbl.3.

300. *Id.*

301. *Id.*

302. Kahan & Kamar, *supra* note 47, at 731–32 (describing resistance in the Illinois legislature to permitting exculpatory provisions for directors after *Transunion* that delayed passage of legislation widely adopted elsewhere and the New York Bar's failure to obtain repeal of provisions making large shareholders liable for wage claims).

303. Bebchuk et al., *supra* note 47, at 1812–15; *see also* Subramanian, *supra* note 19, at 1801 ("find[ing] managers 26% more likely to remain in their headquarters state" if the state has strong antitakeover legislation).

304. Kansas and Oklahoma have copied the Delaware statute.

The Model Act has abandoned older rules that required a shareholder vote for the sale of all or substantially all assets if the sale was not in the ordinary course of business—a relatively murky qualitative standard. Delaware courts have become mired in arcane decisions about what is the "real" business of a multidivision corporation, at best an irrelevance in these days of shifting corporate investments.[305] The Model Act now creates a bright line safe harbor, so that no shareholder vote is required if the corporation is left with a significant continuing business activity and no more than 75% of assets, measured by value and revenues produced, are sold.[306] In the area of derivative suits, the Model Act abandoned earlier rules that provided that a shareholder demand for corrective action need not be made if one could show that such a demand would be futile in favor of a rule of universal demand, thereby eliminating extensive litigation over the demand excused issue and reducing litigation costs.[307] The Model Act requires dismissal of an action where dismissal is sought in good faith, after a reasonable investigation by a disinterested group, either the board, a special litigation committee, or special masters appointed by the court at the request of the corporation.[308] In contrast, Delaware courts insist that they displace these decision makers and exercise their own independent "business judgment" about the advisability of dismissal.[309]

Model Act language on directors' conflicting interest transactions[310] creates a bright-line safe harbor for a limited set of transactions approved in a specified manner.[311] It provides a bright-line definition of

305. The Delaware courts have turned a quantitative standard, requiring a shareholder vote for the sale of "all or substantially all" assets into a qualitative one that cannot be easily specified, since it seems to depend on such factors as whether the sold assets are operating or investment assets and whether the sale was or was not one "in the ordinary and usual course of business." *See, e.g.*, Katz v. Bregman, 431 A.2d 1274 (Del. Ch. 1981); Gimbel v. Signal Cos., 316 A.2d 599, 606 (Del. Ch.), *aff'd*, 316 A.2d 619 (Del. 1974). Experienced practitioners have observed that there is a broad area, probably involving asset sales of between 25% and 75% of assets, where predicting whether a shareholder vote is required in Delaware is extremely difficult. Leo Herzel et al., *supra* note 180, at 25. Vice Chancellor Strine's recent struggles with the doctrine in the *Hollinger* case are detailed *supra* note 180.

306. MODEL BUS. CORP. ACT § 12.02(a) (2008).

307. MODEL BUS. CORP. ACT § 7.42.

308. MODEL BUS. CORP. ACT § 7.44.

309. Zapata Corp. v. Maldonado, 430 A.2d 779, 785 (Del. 1981) (court may examine the reasonableness of the special litigation committee's decision in the exercise of its own business judgment). There are indications of greater judicial deference to board decisions in a demand excused case. *See* Grobow v. Perot, 539 A.2d 180, 187 (Del. 1988) (requiring pleadings to allege with particularity either the interests or bad faith of the board, or the lack of adequate inquiry prior to a decision to demonstrate that the board decision was not entitled to the protection of the business judgment rule); *cf.* Auerbach v. Bennett, 393 N.E.2d 994, 1000 (N.Y. 1979) (deferring to the business judgment of the special litigation committee).

310. The proposed language has been published for comment by the Committee on Corporate Laws, in *Changes in the Model Business Corporation Act—Amendments Pertaining to Director's Conflicting Interest Transactions*, 43 BUS. LAW. 691 (1988).

311. MODEL BUS. CORP. ACT § 8.60–.63. Delaware law is described as more complex in this area, with less clarity about whether independent ratification totally restores the business judgment rule or simply shifts the burden of proving unfairness to the complaining shareholder. Dooley & Goldman, *supra* note 275, at 743–44.

those conflicting interest transactions that are subject to challenge on the basis of such conflicts. This bright-line definition explicitly protects transactions with the corporation that fall outside the definition from any challenge based upon the director's interest.[312] It also protects those conflicting interest transactions approved by either disinterested directors or disinterested shareholders.[313] The procedures for such approval are spelled out in detail in the Act to assure both full disclosure and disinterested decision makers.[314] Other transactions not approved in this manner can be saved by proof of fairness, as under Delaware law, or, in the case of directors' compensation, by proof that the transaction was not unfair.[315] In any event, the Model Act makes clear that a conflicting interest transaction may be validated by any one of the alternative bodies provided—disinterested directors, shareholders, or a court—upon a showing of fairness.[316]

In contrast, some Delaware decisions have taken the position that approval by disinterested directors or shareholders does not preclude a judicial inquiry into fairness but merely shifts the burden of proof.[317] While Delaware's statute on directors' conflicting interest transactions generally takes the same approach as the Model Act's, it is cited far less frequently by the Delaware courts in such cases, especially *Weinberger* and its progeny, thus freeing the Delaware courts from the constraints of a statute that, like the Model Act, appears to permit validation in alternative ways and so precludes the courts from engaging in a fairness review.[318]

Finally, for purposes of this summary review, the Model Act limits equitable actions about fairness of fundamental corporate changes far more than Delaware law. Where Delaware only provides the appraisal

312. MODEL BUS. CORP. ACT § 8.61(a). These provisions do not apply to duty of loyalty issues outside directors' transactions with the corporation, such as business opportunity questions, which remain subject to judicial development, as they are in Delaware.

313. MODEL BUS. CORP. ACT § 8.61(b)(1)–(2). The notion of disinterested shareholders is something of an oxymoron, since co-owners are inherently adversaries when dealing with each other.

314. MODEL BUS. CORP. ACT § 8.62–.63. The provisions for "required disclosure" are modified for directors' action where a director has dueling fiduciary duties, such that full disclosure to one party would involve a breach of duty to the other. MODEL BUS. CORP. ACT § 8.62(b). For an example of the application of this provision, see *Fisher v. State Mutual Insurance Co.*, 290 F.3d 1256 (11th Cir. 2002).

315. MODEL BUS. CORP. ACT § 861(b)(3).

316. Directors will be subject to the duties to act in good faith in a manner believed to be in the corporation's best interests, with ordinary care, under section 8.30(a) of the Model Business Corporation Act, and shareholders will be subject to the doctrine that they cannot ratify waste.

317. Subramanian, *supra* note 108, at 15. Even where independent committees are employed, Delaware courts may give them little credence. *See, e.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116 (Del. 1984) (independent directors' decision held to have been coerced by a dominant shareholder); *In re* JCC Holding Co. S'holders Litig., 843 A.2d 713, 722–23 (Del. Ch. 2003) (approval of merger by majority of minority shareholders did not preclude a challenge because minority shareholders were not presumed to have truly acquiesced in a merger with a majority shareholder).

318. DEL. CODE ANN. tit. 8, § 144 (2001). The failure of Delaware courts to discuss a statute that seems on its face to govern many transactions reviewed for fairness by the courts is discussed, *supra*, in text accompanying note 98.

remedy for mergers, the Model Act provides it for any fundamental change that could have disparate impacts on various shareholders.[319] As Bayless Manning once wrote, appraisal is a means for giving the majority permission to engage in a transaction, by "play[ing] for the rebound in history."[320] The Model Act now precludes the extensive litigation that has occurred in Delaware about the fairness of freezeout mergers, where appraisal is an available remedy, by expressly providing that under such circumstances appraisal is the exclusive remedy.[321] The importance of this provision can only be appreciated when the *Weinberger* doctrine is considered.

We note that other authors claim that the Minnesota statute, which is a composite of provisions drawn from other corporate statutes or created specifically for Minnesota, is superior to Delaware's statute.[322] In addition to the ways in which the Model Act is superior to Delaware, these authors claim superiority with respect to the formal requirements for board actions,[323] short-form mergers with indirect subsidiaries,[324] and inclusion of nonmembers on board committees.[325]

4. Trivial Pursuits? Delaware's Race for Mechanical Advantage

As corporate statutory law in the United States has converged in most material respects, what is left of Delaware's advantage? At the margin, can Delaware make life easier for corporate lawyers? We believe the desire to retain such an advantage is the driving force that explains most modern changes in Delaware law. We may be the first law professors to stoop to this level of detail, but we believe it is all that is left for Delaware in its attempt to retain its advantages. Appendix A sets forth our findings. We have omitted many technical amendments deal-

319. *Compare* DEL. CODE ANN. tit. 8, § 262 (2001), *with* MODEL BUS. CORP. ACT § 13.02(a). Both statutes exclude the appraisal remedy where the shares are widely traded and are exchanged for other widely traded shares, although the Model Act could be seen as more protective of minorities, because this "market exception" does not apply to freezeout mergers. MODEL BUS. CORP. ACT § 130.2(b)(4). The market exception does not apply to short-form mergers in Delaware under title 8, sections 253(d) and (e) of the Delaware Code.

320. Manning, *supra* note 67, at 229.

321. MODEL BUS. CORP. ACT § 13.02(d). For applications of this approach, see, for example, *Szaloczi v. John R. Behrmann Revocable Trust*, 90 P.3d 835 (Colo. 2004); *Grace Bros. v. Farley Indus., Inc.*, 450 S.E.2d 814 (Ga. 1994); *Werner v. Alexander*, 502 S.E.2d 897 (N.C. Ct. App. 1998); *Bingham Consolidation Co. v. Groesbeck*, 105 P.3d 365 (Utah Ct. App. 2004). This is one of the more widely adopted Model Act provisions, having been adopted in forty states.

322. Garon et al., *supra* note 92, at 771. One author describes it as based in large part on the Model Act as it stood in 1979. Bryn Vaaler, *Scrap the Minnesota Business Corporation Act!*, 28 WM. MITCHELL L. REV. 1365, 1370 (2002).

323. Garon et al., *supra* note 92, at 777.

324. *Id.* at 778.

325. *Id.* at 779. These authors concede that there are ways in which Delaware law may be superior to Minnesota law. Vaaler, *supra* note 322, at 1379–80, argues that some of the most troublesome provisions in the Minnesota act stem from excessive concern over minority shareholders, at the expense of clarity, predictability, and certainty. This critique parallels our critique of *Weinberger* and its progeny.

ing with cross references, filing fees, and franchise fees and some clarifying amendments that effected no substantive changes. We have also omitted changes in the laws governing nonstock corporations.

We reviewed changes in Delaware law from 1992 through 2006 and compared these changes with the current Model Business Corporation Act. Although comparing 1992 Delaware changes with the 2005 version of the Model Act may not give Delaware credit for some innovations, to the extent that the Model Act quickly followed any such changes, and they were then dispersed among the states, suggests that Delaware may not achieve any advantage for a significant period of time. The more notable changes are set forth below:

- In 1995, Delaware permitted holding company mergers without stockholder approval, a change not yet reflected in the Model Act.[326]

- In 2000, Delaware permitted stockholders meetings to be held solely by remote transmission, which may be convenient for close corporations but is of little value for publicly held firms.[327]

- In the same year, Delaware expressly authorized corporations to provide for renunciation of classes of business opportunities in their charters. However, because the Model Act permits charters to provide for limits on corporate purposes and to define, limit, and regulate the powers of the corporation and its directors, it is not clear that the same result cannot be obtained through a Model Act corporation's charter provision.[328]

- In 2001, Delaware permitted directors to authorize officers to award stock options, a change not followed in the Model Act.[329] In view of the fact that the Model Act authorizes one-director committees, which could be any officer sitting on the board, this advance seems minor.[330]

- In 2003, Delaware provided that a board committee may recommend election or removal of directors to the stockholders, and

326. Act of June 23, 1995, ch. 79, secs. 15–16, §§ 251, 262(b)(1), 70 Del. Laws 118, 120–21. This is less important than it first appears because section 12.01 of the Model Business Corporation Act permits a corporation to sell all of its assets to a wholly-owned subsidiary without a shareholder vote.

327. Act of June 23, 2000, ch. 343, sec. 7, § 211(a), 72 Del. Laws 619, 619–20. Title 8, section 211(a)(2) of the Delaware Code requires the corporation to provide stockholders "a reasonable opportunity to participate in the meeting and to vote on matters submitted to the stockholders, including an opportunity to read or hear the proceedings of the meeting substantially concurrently with such proceedings."

328. *Compare id.* sec. 3, § 122, 72 Del. Laws 619, 619, *with* MODEL BUS. CORP. ACT § 3.01–.04 (2008).

329. Act of June 30, 2001, ch. 82, secs. 6–7, § 157, 73 Del. Laws 228, 229.

330. MODEL BUS. CORP. ACT § 8.25. In view of recent scandals over the back-dating of options by corporate officers, the Model Act approach may well be more prudential.

authorized board committees to create subcommittees, which the Model Act has not imitated.[331]

- In that same year, Delaware permitted a corporation to agree to submit a matter to a shareholder vote even if the board later determines that the action is no longer advisable and recommends against it. How much of an advance this is over a Model Act provision that does not require a board recommendation for submission of a matter for a shareholder vote is not entirely clear.[332]

- In 2005, Delaware amended its statute to provide that directors elected by separate classes of shareholders might have greater or lesser voting rights than directors elected by other classes.[333] The alternative, giving a class the ability to elect more directors, does not seem terribly onerous. In all likelihood this flexibility would only be used by close corporations.

We make three observations about these changes in Delaware law. First, they are quite modest and have not led to radical changes in corporate practice. Second, because of their technical nature, one can conclude that their purpose is largely to make life a little easier for those involved in corporate governance and representation. Third, their technical nature suggests that many of them would fly below the radar of bar committees in many competing states, although electronic transmission of notices to shareholders, proxies, and written consents have been widely adopted by other states.[334] And because of that, Delaware may still be able to claim some small advantages over most modern state corporation statutes. In fairness, we anticipate that a number of states will imitate these provisions to maximize technical flexibility for their corporations. Finally, we should note, as others have, that Delaware has provided assurance that ill-thought-out legislative changes will not be

331. Act of July 6, 2004, ch. 326, sec. 2, § 141(c)(2), 74 Del. Laws 813, 813; Act of June 30, 2003, ch. 84, sec. 2, § 141(c), 74 Del. Laws 214, 214.

332. Act of June 30, 2003, ch. 84, sec. 3, § 146, 74 Del. Laws 214, 214. This replaces the second sentence of title 8, section 251(c) of the Delaware Code, which was deleted in the same bill. Section 11.04(b) of the Model Business Corporation Act permits a board to submit a merger to a shareholder vote without a recommendation but is silent on the power of the board to bind the corporation to a shareholder vote. It is possible the Model Act drafters thought this authorization was unnecessary, since virtually all merger agreements bind the company and the board to use its best efforts to secure shareholder approval.

333. Act of May 17, 2005, ch. 30, sec. 1, § 141(d), 75 Del. Laws 21, 21.

334. Section 1.41 of the Model Business Corporation Act, as amended in 1997, authorizes electronic notices, and thirty-seven states were reported to have directly comparable provisions in the comments to section 1.41. Electronic proxies are authorized in section 7.22, as amended in 1996, and forty-three states were reported to have such provisions in the comments to section 7.22. The comment to section 7.04 provides that shareholder consents to act without a meeting may be delivered to the corporation electronically.

adopted through a constitutional provision requiring a two-thirds vote of the legislature to amend the corporation law.[335]

E. Franchise Fees Are Higher in Delaware

Others have written about the incentives of Delaware and the Delaware bar to provide attractive corporate laws and to maximize the fees earned by Delaware corporate lawyers.[336] Because of its small size, chartering revenues constitute a significant part of Delaware's annual budget: between 15% and 20%.[337] Delaware's franchise tax involves a somewhat complicated calculation.[338] Assume a company engaging in an IPO with 20 million shares of $1.00 par value stock outstanding, with a market capitalization of $200 million—a fairly typical assumption for a company completing an IPO. In this case the Delaware franchise tax would be slightly over $50,000.[339] If we assume that the company has an equal number of authorized but unissued shares, which are often desirable for future follow-on offerings or acquisitions, the franchise tax will double to about $100,000 per year. Capitalized at 10%, this represents a market value loss of nearly $1 million, or .5% of the value of the company. Many other states have much lower taxes. Georgia's franchise taxes, for example, are based on the net worth of corporations and reach a ceiling of $5,000;[340] Kansas charges only $40.[341] Some other states use complex combinations of income, capital, and assets to determine the tax.[342]

III. CAN INDETERMINACY BE RECONCILED WITH EXCELLENCE?

The natural reaction of many economists and law professors with economics training is to conclude that, because Delaware has dominated the market for incorporations for eight decades, it must be better. We confess that we have held this view in the past. Economists are trained to assume that, absent a legally protected monopoly, the firm that dominates a market does so because it provides the best product or service at a price that captures this market share given the elasticities of demand that it faces from buyers, although this understanding is now qualified by knowledge of the first mover advantage and path dependence. Thus, the corporate literature that we review below contains what we characterize

335. DEL. CONST. art. IX, § 1; *see* ROMANO, GENIUS, *supra* note 41, at 41.

336. *See, e.g.*, Cary, *supra* note 1, at 668; Macey & Miller, *supra* note 3, at 472.

337. Romano, *Law as a Product*, *supra* note 23, at 242.

338. DEL. CODE ANN. tit. 8, § 503 (2001).

339. This assumes the value of the firm's gross assets, including goodwill, is equal to market value. If a company incurs substantial indebtedness, this minimum franchise fee calculation could double under the formula contained in the Delaware statute. The Delaware tax is presently capped at $165,000. *Id.* § 503(c).

340. GA. CODE ANN. § 48-13-73 (2008).

341. KY. REV. STAT. ANN. § 17-7503 (West 2007). No annual franchise fees are imposed by Minnesota. Garon et al., *supra* note 92, at 774.

342. *See, e.g.*, OHIO REV. CODE ANN. § 5733.05 (West 2006).

as the "Apologists'" explanations of how, despite appearances, Delaware law must be superior. They attempt to show that although many aspects of Delaware law might seem troublingly complex and uncertain, if examined closely enough, or through the lens of various theories about behavior, it must be superior. For example, Jill Fisch argues that Delaware's indeterminacy is efficient because it permits judges to adapt to new circumstances quickly.[343] Fisch also suggests that an article by Ayres and Talley illustrates how Delaware law's muddy property rules might induce people to negotiate their own, more efficient arrangements.[344] Edward Rock ignores the doctrinal complexity to characterize Delaware opinions as parables about morality to educate directors and officers.[345] Ehud Kamar suggests that Delaware's indeterminate law is a clever means for increasing its market share by making imitation by other jurisdictions difficult.[346] In another article, Kamar, with Marcel Kahan, has conceded that though Delaware law is superior because of its wealth of legal precedents, it could be clearer.[347]

A. *The Dubious Benefits of Indeterminacy*

As we have noted, the difficulties with Delaware law that we have recited have been observed by others. These difficulties create what we describe as the mystery of Delaware law: why it retains its dominant position in the face of what we argue is apparent inferiority. The commentators mentioned have offered possible explanations, all of which we find unconvincing. We review their arguments in detail here. We should note that Rock does not treat the indeterminacy we have described, nor does he argue for Delaware's superiority, but his description of Delaware opinions offers a possible justification for the style of Delaware law.

Jill Fisch has recited many of the difficulties treated here.[348] Fisch begins her analysis by acknowledging that the Delaware courts play an unusual role in lawmaking: substantial parts of Delaware law (one might

343. Fisch, *supra* note 84, at 1085–86.

344. *Id.* at 1083.

345. Edward B. Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1016 (1997).

346. Kamar, *supra* note 84. Chief Justice Steele's reaction is to the contrary. Rejecting Kamar's argument that this indeterminacy is a purposeful competitive response, he admits that "this indeterminacy [acts] as a natural drawback to the tension between efficiency and predictability that plagues all courts of equity." Steele & Verret, *supra* note 22, at 192. The footnote quotes John Selden, who stated:

> Equity is a rougish [sic] thing. For Law we have to measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is equity. 'Tis all one as if they should make the standard for the measure we call a "foot" a chancellor's foot; what an uncertain measure this would be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience.

The Chief Justice then claims that some of the public activities of Delaware Judges are undertaken to minimize this uncertainty. *Id.* at 192 n.9.

347. Kahan & Kamar, *supra* note 161, at 1214.

348. Fisch, *supra* note 84, at 1071.

say the most interesting parts) are made by the courts rather than by the legislature.[349] In arguing that this can be wealth-enhancing despite the indeterminacy that Delaware courts have created, she employs a model resembling an older law-and-economics argument stemming from early writings that the common law is efficient.[350] She argues that judge-made law is generally more stable and consistent than legislation, which is affected by politics, and that courts are limited in the scope of the changes they can effect by the nature of the cases brought before them.[351]

To this we offer several responses. First, Mark Roe has argued that Delaware judges are responsive to political forces, including threat of federalization of corporation law.[352] Second, David Skeel has argued that Delaware case law is unstable because of the unanimity norm employed by the Delaware Supreme Court, which masks disagreements until a coalition breaks down in a subsequent decision.[353] Third, Delaware judges have created law-making opportunities for themselves by creating indeterminate standards that invite further litigation.[354] Finally, Delaware avoids many of the pitfalls of political pressures with a constitutional requirement of a supermajority to amend the General Corporation Law.[355]

Fisch argues that judge-made law is inherently more conservative in the nature of its changes than legislation because of the constraints imposed by *stare decisis* and the need to explain departures from prior decisions.[356] At the same time, she observes that Delaware courts seem only lightly constrained by *stare decisis*.[357] At least as troubling is the fact that

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349. *Id.* at 1071–72.

350. *See, e.g.*, George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65, 65 (1977); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 61 (1977).

351. Fisch, *supra* note 84, at 1072. Fisch ignores reasons why statutory law might be stable and consistent, such as Delaware's supermajority voting rule for legislative changes, to protect its chartering revenues, and competitive pressures from other jurisdictions that prevent much interest group pressure on legislatures. On the latter point, see Carney, *supra* note 6, at 309.

352. Mark J. Roe, *Delaware's Competition*, 117 HARV. L. REV. 588, 597 (2003). *But see* Roberta Romano, *Is Regulatory Competition a Problem or Irrelevant for Corporate Governance?*, 21 OXFORD REV. ECON. POL'Y 212, 213 (2005) (challenging Roe's conclusions).

353. David A. Skeel, Jr., *The Unanimity Norm in Delaware Corporate Law*, 83 VA. L. REV. 127, 137–38 (1997).

354. Fisch acknowledges that indeterminacy generates more litigation but argues that much of this litigation is settled at an early stage. Fisch, *supra* note 84, at 1083. Unfortunately, we have no basis for comparing settlements in Delaware with settlements in other jurisdictions where more certainty may exist.

355. DEL. CONST. art. IX, § 1.

356. Fisch, *supra* note 84, at 1072.

357. *Id.* at 1078–79. This point has been resoundingly made by Lawrence A. Cunningham and Charles M. Yablon in *Delaware Fiduciary Duty Law After* QVC *and* Technicolor*: A Unified Standard (and the End of* Revlon *Duties?)*, 49 BUS. LAW. 1593, 1626 (1994), where the authors wrote:

> Trying to discern the future path of Delaware corporate law from such judicial banter is undoubtedly folly, but predicting developments in Delaware law has always been a somewhat foolish enterprise. Many learned commentators have written careful and lucid analyses predicting the trend of Delaware case law, only to have doctrinal prognostications shattered by the next big case. Predicting the course of Delaware law from prior case law is like watching clouds. They seem, at times, to take on recognizable shapes and forms, even to resemble something familiar. But you know that whatever shapes you think you see can vanish in a puff of wind.

these courts apply legal standards "in a fact and case specific manner," which leads to the proliferation of categories of judicial review we have diagramed above.[358] The result begins to look more like rules than standards, leaving judges with only the task of fitting the transaction into the correct category or creating a new one. In some cases, Fisch describes this method of judging as "flexible" and explains that "[t]he nature of equity jurisprudence contributes to the flexibility [one might say variability or unpredictability] in Delaware corporate law."[359] In a similar vein, Rock describes a group of management buyout cases in which the courts denied relief to plaintiffs as "fact-intensive, process-oriented, and deeply and persistently judgmental of managerial conduct."[360] These characterizations are consistent with those of Vice Chancellor Strine, who stated, in the context of the uncertainty created by a judicially created qualitative gloss on the quantitative language of section 271's requirement for a shareholder vote on the sale of "substantially all" corporate assets: "This interpretative choice necessarily involved a policy preference for doing equity in specific cases over the value of providing clear guidelines for transactional lawyers structuring transactions for the corporations they advise."[361]

Fisch then reviews the arguments in favor of standards over rules, illustrating how standards allow a much more tailored and nuanced approach to difficult legal issues, such as when to permit management resistance to takeovers and to what extent.[362] Rock's argument is similar: that with modern open-ended enabling statutes such as Delaware's, the range of potential misbehavior is wide and unpredictable, so judges must be charged with developing norms *ex post.*[363] Unlike Rock, who relies on norms and shaming to constrain managers, Fisch relies on a law and economics literature that claims that in some cases reliance on *ex post* gap filling by courts is more efficient than *ex ante* rules and that muddy rules may facilitate bargaining.[364]

Once again, there are several responses. First, uncertain legal rules that can be contracted around may not impose huge costs on actors. When, however, the standards are mandatory, as in the case of rules governing behavior in both hostile takeovers and negotiated transactions,

358. Fisch, *supra* note 84, at 1076; Fig. 1, *supra*.

359. Fisch, *supra* note 84, at 1077; *see also* William T. Quillen, *Constitutional Equity and the Innovative Tradition*, LAW & CONTEMP. PROBS., Summer 1993, at 29; Rock, *supra* note 345, at 1101 (citing William T. Allen, *Speculations on the Bicentennial: What Is Distinctive About Our Court of Chancery?*, *in* COURT OF CHANCERY OF THE STATE OF DELAWARE 1792–1992, at 13 (1992)).

360. Rock, *supra* note 345, at 1100.

361. *In re* Gen. Motors Class H S'holders Litig., 734 A.2d 611, 623 (Del. Ch. 1999).

362. Fisch, *supra* note 84, at 1082–83.

363. Rock, *supra* note 345, at 1101–02.

364. Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1033 (1995); Fisch, *supra* note 84, at 1082–83 (citing Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1404 (1992)); Jason Scott Johnston, *Bargaining Under Rules Versus Standards*, 11 J.L. ECON. & ORG. 256, 267 (1995).

the uncertain standards become mandatory rules that are inalienable, and litigation costs are increased because of the greater number of suits and the greater uncertainty of result.[365] As we pointed out earlier, using the virus metaphor, more frequent litigation may lead to more aberrant decisions. Second, there is considerable evidence that the relevant actors would prefer greater certainty, and in some cases a rules-based regime, over the present system of standards in Delaware.[366] Examples include various statutes that have validated or authorized certain takeover defenses in many jurisdictions; the exclusivity of appraisal as the remedy in mergers rather than the broad-based fairness inquiry employed by the Delaware courts; the quantitative rule governing required shareholder votes on asset sales in contrast to Delaware's more qualitative and uncertain rule; and private ordering through exculpatory clauses in corporate charters that free directors from the threat of civil liability from judicial second-guessing.[367]

Finance offers some suggestions about the cost of Delaware rules. The Delaware courts have made it clear that when a selling corporation's board enters into an arm's length bargain subject to a stockholder vote of approval, the enforceability of the bargain is qualified by the board's duty to inform shareholders of superior offers or other changed circumstances. This, of course, is the rule in every jurisdiction. The important distinction is that in Delaware the board cannot commit not to talk to other prospective buyers, nor can it commit to submit the matter to a stockholder vote, even when a better offer comes along if controlling shareholders have committed themselves to vote for the transaction.[368] As a result, a buyer has no assurance that what it believes to be a good deal for the sellers will result in a sale because of the lag between signing a merger or sale agreement and closing. In effect, the selling corporation has a "put" that it can exercise if no better offer comes along. The result of this curious set of rules of contract formation has been to require sellers to pay buyers for this put, in the form of break-up fees, stock op-

365. For discussion of the difficulties of contractual specification of managers' duties in this area, see William J. Carney, *Controlling Management Opportunism in the Market for Corporate Control: An Agency Cost Model*, 1988 WIS. L. REV. 385, 402–13.

366. Here we must caution that in many areas investors prefer granting broad discretion to managers, *id.* at 410–13, subject only to the constraints of the business judgment rule, absent disloyalty. *Id*. at 432–33.

367. *E.g.*, MODEL BUS. CORP. ACT § 2.02(b)(4) (2008); DEL. CODE ANN. tit. 8, § 102(b)(7) (2001).

368. Omnicare, Inc. v. NCS Healthcare, Inc., 818 A.2d 914, 936 (Del. 2003); ACE Ltd. v. Capital Re Corp., 747 A.2d 95, 108 (Del. Ch. 1999); Phelps Dodge Corp. v. Cyprus Amax Minerals Co., 1999 WL 1054255, at *2 (Del. Ch. Sept. 27, 1999). *But see In re* IXC Commc'ns, Inc. S'holders Litig., 1999 WL 1009174, at *6 (Del. Ch. Oct. 27, 1999) (permitting a no-talk clause at the end of an auction, a result probably rejected by *Omnicare*). In fairness, the target board approved the shareholder voting agreements in *Omnicare* in order to avoid the blocking effect of Delaware's "business combination" statute. DEL. CODE ANN. tit. 8, § 203. Recently Vice Chancellor Noble has suggested that accepting a "no-shop" clause may create an action against directors for breach of the duty of good faith, thus stripping directors of the shield of exculpatory provisions and indemnification rights. Ryan v. Lyondell Chem. Co., No. 3176-VCN, 2008 WL 2923427 (Del. Ch. July 29, 2008).

tions, and similar arrangements.[369] Currently, break-up fees average about 3% of the value of the transaction.[370] These fees are paid, of course, only in those cases in which the deal is not consummated because the seller received a better offer that it later accepted. Buyers forced to live with the uncertainty of having sold a put until the expected closing may also compensate themselves in other ways, such as a reduction in the acquisition price, if the size of the negotiated break-up fee is constrained by fear of judicial disapproval.[371] Because this adjustment is not visible to outsiders, this cost is often ignored. But it is real and no doubt substantial—an uncertainty tax on all mergers and acquisitions with Delaware corporations.

Fisch argues that judges can respond to changes, such as the development of hostile takeovers and defenses in the 1970s and 1980s, more rapidly than legislatures.[372] Again, there are several responses. First, courts are reactive; they must await a case suitable to announce new rules, while legislators can act once the phenomenon appears anywhere, not just in their jurisdiction, as most did in reacting to the *Transunion* decision.[373] Second, in most cases courts confine themselves to ruling on the facts before them, which limits their ability to announce broad new rules, although Delaware courts have not hesitated to provide broad dicta suggesting new rules will be adopted prospectively.[374] Third, courts are forced to act under circumstances they may not fully understand, where legislators may be forced to conduct hearings, engage in public debate, receive information from lobbyists on all sides, and act with the threat of a gubernatorial veto if they overreact. Rock makes the same form of argument, that there are examples of inappropriate judicial decisions exhibiting a lack of understanding. Many critics would single out *Transunion* for its poor understanding of board processes and ignorance of the role of the market in valuing companies, and *Unocal* for its characterization of a bidder as a "threat" and sanctioning of a wealth-destroying self-tender that coerced stockholder acceptance.[375] The poor quality of the

369. *See* Guhan Subramanian, *Go-Shops v. No-Shops in Private Equity Deals: Evidence and Implications*, 63 BUS. LAW. 729 (2008).

370. HOULIHAN LOKEY HOWARD & ZUKIN, 2005 TRANSACTION TERMINATION FEE STUDY 4 (2006).

371. *See generally* Subramanian, *supra* note 369.

372. Fisch, *supra* note 84, at 1085–88.

373. Delaware amended its statute within a year of *Transunion* to allow exculpation of directors for breaches of the duty of care, and within two years, forty-one states had also reacted. Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160 (1990) [hereinafter Romano, *Corporate Governance*]; *see also* Carney, *Production*, *supra* note 46, at 733–34.

374. *See, e.g.*, Hollinger Inc. v. Hollinger Int'l, Inc., 858 A.2d 342 (Del. Ch. 2004); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959 (Del. Ch. 1996); Rock, *supra* note 345.

375. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985); Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). For criticisms of these decisions, see Daniel R. Fischel, *The Business Judgment Rule and the Trans Union Case*, 40 BUS. LAW. 1437, 1455 (1985) (calling *Van Gorkom* "one of the worst decisions in the history of corporate law"); Michael C. Jensen, *When Unocal Won Over Pickens, Shareholders and Society Lost*, FINANCIER, Nov. 1985, at 50, 51 (1985) (calculating that Unocal's de-

Transunion decision was further evidenced by the rapid increase in premiums for directors' and officers' liability insurance and the loss of coverage by many directors.[376] More recently, the *Omnicare* decision was sufficiently troubling that it provoked that most unusual of Delaware phenomena—a dissent in the Delaware Supreme Court. Chief Justice Steele, in explaining the use of dicta to clarify some areas of Delaware law, conceded that under the current legal regime, deal lawyers "face overwhelming uncertainty of the line that divides measures protected by the business judgment rule from those that violate fiduciary duties."[377]

Fisch's speed argument also misses the numerous legislative responses that occurred during this era. The *Transunion* decision was met with legislation protecting directors from personal liability in Delaware within the year, and in other states in rapid succession.[378] While these other states had not been the subject of a similar judicial ruling, it was clear that the relevant actors wanted no part of such a liability rule for directors. Similarly, legislatures reacted with considerable speed in adopting laws, for better or for worse, governing takeover defenses.[379] In contrast, in many instances the Delaware courts had to await a case before they could announce a particular rule. Appendix A demonstrates the ability of the Delaware General Assembly to deal almost continuously with corporate law issues, both large and (mostly) small.

If Fisch's argument boils down to an assertion that decisions by Delaware judges are superior to legislation because the common law tends toward efficiency, she is wrong for another reason. Even if the common law tends towards efficiency over the long term, an idea which many dispute,[380] the doctrine of *stare decisis* will cause the law to be unintelligible and misleading during the period in which the law gropes toward the efficient rule.[381] Suppose that, in deciding a case, a lower court judge re-

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fenses cost its shareholders about $1.1 billion, and noting that a $72 buyback offer was coercive when the post-buyback value of Unocal's stock was $35); *see also* Bayless Manning, *The Business Judgment Rule and the Director's Duty of Attention: Time for Reality*, 39 BUS. LAW. 1477 (1984). The Court of Chancery may have corrected the supreme court's errors in *Unocal* in its decision in *AC Acquisitions Corp. v. Anderson, Clayton & Co.*, 519 A.2d 103, 113 (Del. Ch. 1986), where it struck down a defensive self-tender offer as coercive.

376. Romano, *Corporate Governance*, *supra* note 373, at 1155, 1158–60 (describing the directors' and officers' liability insurance crisis as beginning in 1984 before the 1985 *Van Gorkom* decision).

377. Steele & Verret, *supra* note 22, at 209–10 (citing La. Mun. Police Employees' Ret. Sys. v. Crawford, 918 A.2d 1172, 1181–82 (Del. Ch. 2007)).

378. Romano, *Corporate Governance*, *supra* note 373, at 1160. In contrast, the Delaware Supreme Court reaffirmed its *Van Gorkom* mistake in *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345 (Del. 1993).

379. Carney, *Production*, *supra* note 46, at 739, 749–54.

380. *See* Robert Cooter & Lewis Kornhauser, *Can Litigation Improve the Law Without the Help of Judges?*, 9 J. LEGAL STUD. 139 (1980). Those who originally argued that the common law is efficient have reconsidered. George L. Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284 (1981); Paul H. Rubin, *Common Law and Statute Law*, 11 J. LEGAL STUD. 205 (1982).

381. *See supra* note 101 (tracing the history of the exclusivity of appraisal in short-form mergers); Subramanian, *supra* note 108, at 8–10 (tracing the confusing history of the effect of a special committee on burdens and presumptions in freezeout mergers).

cognizes that an existing precedent is wrong or inefficient. The judge cannot simply change the rule; that would violate *stare decisis*. Instead, the judge must either apply the bad rule or attempt to argue that there is some distinction between the facts of the precedent case and the facts of the new case, so that the precedent should not apply. That is, later judges who disagree with a precedent may claim that the facts before them are substantially different from those in the case that created the precedent even when they really are not; their sole goal is to dream up some distinction, any distinction, so that they can avoid applying the bad rule.

This is a standard means by which a bad precedent is overturned. One by one, later judges will distinguish the facts of the old case from the facts of the cases that the judges are deciding. The defective precedent dies the slow death of being incrementally distinguished away. Eventually, the bad precedent becomes, as judges put it, "distinguished to its facts," so that the bad rule applies only in situations that have exactly the same facts as the first case.[382] That is, the old precedent has been overturned without the later judges admitting what they have done. Eventually, perhaps after many decades, a later court will go ahead and officially overturn the precedent, recognizing officially what has already happened long ago in fact.[383]

Inherent in this process is a deceptive claim that prior decisions were binding because they were good law. Later judges distinguish a disfavored precedent while claiming that they are respecting its binding authority. Perhaps it is the only way to reconcile the demands of *stare decisis* with the desire to fix mistaken law. Nonetheless, it appears that, from long familiarity with this process, judges and lawyers no longer recognize that it is both counterproductive and disingenuous.

The process produces large harms. During the period in which the courts are distinguishing the old precedent rather than directly reversing it, the law will be in disarray. Different rules will apply in factual situations that seem identical in substance if not exactly in form.

This appears to have happened frequently in Delaware corporate law. The Delaware Supreme Court will err in a decision. Then for the next decades, both lower Delaware courts and the Delaware Supreme Court will create different rules in factual situations that seem similar to the facts in the first imperfect decision. Eventually, after decades the original decision will be distinguished to its facts, and the Delaware Supreme Court may finally officially reverse it. Until then, the law is in dis-

382. For discussions of the process by which later courts tacitly overrule disfavored precedent by distinguishing the precedent to its facts, see Michael Gerhardt, *The Role of Precedent*, 60 GEO. WASH. L. REV. 68, 106–09 (1991); Frederick Schauer, *Precedent*, 39 STAN. L. REV 571, 577–95 (1987).

383. Of course, in some cases, supreme courts expressly overrule earlier decisions, as the Delaware Supreme Court did in *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983), when it overruled *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), a decision made only six years before.

array.[384] A similar process may occur among the judges of the Delaware Court of Chancery who may disagree with each other, as in the case of current differences over disclosure obligations discussed in Part II.C.6, and the issue of whether directors' failure to comply with their duty to be informed in sale situations can constitute a breach of the duty of good faith.[385]

This process may well explain a substantial part of the proliferation of modes of review after *Transunion*, *Unocal*, and *Weinberger*. Rather than concede that any of these decisions were wrongly decided and overturn them, courts have distinguished the decisions, creating new modes of review in factual settings that might otherwise seem to merit application of the original modes of review. Indeed, Chief Justice Veasey has stated that most reversals occur not because of Court of Chancery error, but "when the Supreme Court sees a new direction for the law."[386] It is impossible to know if this is what is occurring in any given opinion; of course, the opinions would not admit it.[387] However, Justice Veasey's characterization is confirmed where it is clear that later decisions have interpreted the breadth of the earlier decisions narrowly. Given the relatively high reversal rate for Court of Chancery decisions, one can infer that Delaware law is frequently a changing target.[388]

If this de facto overruling is what is occurring, the process is costly for those seeking certainty in transactions. Until the Delaware Supreme Court eliminates the fine distinctions that make its laws appear more like rules than standards and restrains itself from modifying existing rules at what appears to be a rapid rate for common-law judges, both litigants and those attempting to order their business affairs are faced with the jumbled law that Figure 1 depicts. Increasing the number of situations in which the Delaware courts decline to presume directors' good faith further increases judicial intrusion into the decision-making process and exacerbates the uncertainty problem.

Even if Delaware's judge-made corporate law tends toward efficiency in the long term, the doctrine of *stare decisis* guarantees that the law will be a mess during the process.[389] *Stare decisis* will retard, if not

384. For example, in 1979, the rule in *Stauffer v. Standard Brands Inc.*, 187 A.2d 78 (Del. 1962), was overruled by *Roland International Corp. v. Najjar*, 407 A.2d 1032 (Del. 1979), only to be restored in *Glassman v. Unocal Exploration Corp.*, 777 A.2d 242 (Del. 2001).

385. *See supra* note 88 and accompanying text.

386. Veasey et al., *supra* note 85, at 135.

387. The "Three Chancellors" have noted this process in the distinctions made between "mergers of equals" and "sales." Allen et al., *supra* note 178, at 879–90.

388. Ironically, the 2002 Statistical Report of the Delaware Judiciary is titled "Justice on the Move." ADMIN. OFFICE OF THE COURTS, 2002 STATISTICAL REPORT OF THE DELAWARE JUDICIARY.

389. One example of a quick turn-around was the move from *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977) (adopting a business purpose test for freezeout mergers in 1977), to *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983) (overruling *Singer* in 1983). For a list of changing rules, many involving fact distinctions, see *supra* note 91. We could add one more: The move from the "auctioneering" duty of a board in a sale of control in *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1985), to the deference to a "merger of equals" decision in *Paramount Communi-*

negate, any tendency of the law toward efficiency if the starting point is an erroneous decision. Even if the law eventually ends up being efficient, the law's defective state during the process may render the process not worth it.[390] Statutory amendments have the virtue of clarity, if well drafted.[391] But the Delaware legislature has not addressed the muddle.

B. Because Indeterminacy Induces Negotiations in Lieu of Litigation

Fisch's arguments about the value of indeterminate standards in corporate law also rely in part on the work of Ian Ayres and Eric Talley concerning indeterminate property rights.[392] She writes:

> Muddy rules may have particular utility in the business context because of their effect on the bargaining process. Ian Ayres and Eric Talley characterize muddy rules as an example of divided entitlements, in which each party has a probabilistic claim. They then use game theory to demonstrate that muddy rules may facilitate bargaining. First, in the absence of the ability to predict a winner if the dispute results in litigation, the parties may be more willing to negotiate. Second, muddy rules can reduce the incentives to engage in strategic behavior by forcing parties to reveal information during negotiations.
>
> Rules that encourage negotiation instead of litigation are especially valuable in corporate transactions, in which litigation costs can be large and create a deadweight loss for shareholders and society.[393]

Fisch then asserts that many takeover battles are settled rather than litigated. However, she fails to show how Delaware's muddy laws encourage negotiation and settlement, or how they reduce litigation costs more than brighter line rules where liability or its absence is clear, and

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cations, Inc. v. Time Inc., 571 A.2d 1140 (Del. 1989), and then to *Paramount Communications Inc. v. QVC Network Inc*., 637 A.2d 34 (Del. 1994) (holding that a stock merger that produces a controlling shareholder is not a "merger of equals" and does not obtain the same deference).

390. This would not have been a problem until the eighteenth century. As Todd Zywicki has noted, the doctrine of *stare decisis* did not develop until the eighteenth and nineteenth centuries. Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551, 1568–69 (2003). Not coincidentally, commentators have suggested that the common law tended most toward efficiency before *stare decisis* was adopted. *Id.* at 1579. Because *stare decisis* makes correction of mistakes difficult, its introduction may have stopped the efficiency-producing process. Judges recognized that trying to make the law better, even if the effort were eventually successful, would create disarray for decades during the sham process of distinguishing the existing precedent to its facts.

391. Delaware's processes of constitutional requirements of supermajority legislative approval and the use of a bar committee as a gatekeeper provide assurance against interest groups that might lessen the appeal of its law to incorporators. Bar committees serve as gatekeepers in other jurisdictions and, in at least one case with which the authors are familiar, have gained the respect of the legislature.

392. Fisch, *supra* note 84, at 1083.

393. *Id.*

where litigation may never begin.[394] The recent studies of litigation in the Delaware Court of Chancery seem to reject her argument, showing both large numbers of cases and generous fee awards in class action cases, regardless of the merits. The Ayres and Talley argument suffers from a failure to address some of the early studies of litigation that suggest that uncertainty breeds litigation rather than negotiations.[395] Ayres and Talley acknowledge that muddy property rights are seen as exacerbating strategic behavior,[396] and it is difficult to think of a more striking example than the studies of litigation over acquisitions and the resulting fees in Delaware. In the Ayres and Talley example, property rights are muddy but alienable.

In the case of fiduciary duties, where advance specification on a fully contingent basis is prohibitively costly and litigation *ex post* is driven by attorneys who maximize fees by continuing to litigate, the situation is quite different. Property rights are frequently both muddy and inalienable. If shareholder litigation were driven by real shareholders, then the analysis of Ayres and Talley, which focuses on joint owners of private entitlements, might have some relevance, although it is difficult in the litigation context to see management and shareholders as co-owners. But when one party is a plaintiffs' law firm with only nominal clients, the analogy disappears entirely and fuzzy rules simply lead to the rent-seeking evidenced in the litigation studies and predicted by Macey, Miller, and Branson.

C. Because Indeterminacy, in Decisions that Contain Extended Narratives, Creates Powerful Norms that Inform Actors

Edward Rock has offered an alternative view of the value of Delaware law. Arguing that it is standard-based rather than rule-based, he

394. *See* Ayres & Talley, *supra* note 364, at 1035 n.27 ("*See, e.g.*, Clifford G. Holderness, *A Legal Foundation for Exchange*, 14 J. LEGAL STUD. 321, 344 (1985) (arguing that 'a unique definition and assignment [of property rights] is essential to a well-ordered system [of social interactions]'); Thomas W. Merrill, *Trespass, Nuisance, and the Costs of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14 (1985) ('[W]hen the costs of transacting are low, the legal system will gravitate toward rules that determine entitlements at low cost—such as the strict liability rule of trespass.'); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 590 (1988) (discussing several articles claiming that 'precise entitlements facilitate the efficient allocation of goods, they allow us to identify rightholders and to organize trades with them until all goods arrive in the hands of those who value them most') . . . ."); *see also* William J. Carney, *The ALI's Corporate Governance Project: The Death of Property Rights?*, 61 GEO. WASH. L. REV. 898, 902 nn.20–21 (1993) (citing, *inter alia*, Michael C. Jensen et al., *Analysis of Alternative Standing Doctrines*, 6 INT'L REV. L. & ECON. 205, 211 (1986)).

395. George Priest and Ben Klein have argued that other things being equal, the cases selected for litigation are likely to be those in which the probability of plaintiff success approaches 50%. Cases where plaintiff and defendant each has a roughly 50% probability of success are likely to be those that present the greatest uncertainty and therefore are most likely to be selected for litigation. George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 5 (1984). Ayres and Talley fail to show that their model predicts any behavior in the real world and is thus falsifiable, a fatal defect for any positive economic description of phenomena.

396. Ayres & Talley, *supra* note 364, at 1029.

suggests that the core rule governing directors of Delaware corporations is that they act in good faith. That empty core, as he describes it, is filled out by the Delaware courts "through fact-intensive, normatively saturated descriptions of manager, director, and lawyer conduct."[397] He describes Delaware decisions, taken as a whole, "as providing a set of parables—instructive tales—of good managers and bad managers, of good lawyers and bad lawyers, that, in combination, fill out the normative job description of these critical players."[398] No reader of Delaware decisions could seriously quarrel with this characterization. Casebook editors are sometimes daunted by the prospect of taking these rich and lengthy morality tales and reducing them to casebook-appropriate length.

Rock's second claim is a causal claim that he admits he can only begin to defend: that these standards of conduct are communicated to managers by corporate counsel.[399] We agree that this is a much more problematic assertion. Indeed, given the reversal rate of Court of Chancery opinions, it has been difficult for judges to translate these standards into rules for each specific case. How much harder must it be for attorneys to communicate the nuances of these standards (if they correctly predict them) to corporate officers and directors, often orally, or, at best, in a legal memo that contains an executive summary? We argue above that the series of distinctions drawn by the Delaware courts have caused these broad standards to evolve into a set of rules, each narrowly drawn to fit the particular circumstance of a case in which a court declined to follow precedent.

Rock's argument fails to address one essential factor: are norms more effectively communicated to corporate actors through indeterminate standards than through a combination of such standards and bright-line rules where feasible? This underlines our earlier observation that Rock is not defending the efficiency of Delaware law, but is only offering observations on how the Delaware style of judging might be useful. In one sense, he is describing a system of norms communicated by parable.

IV. CONCLUSION

We confess that we were daunted by the prospect of arguing that Delaware corporate law no longer possessed many of the qualities long identified as explaining its dominant market position. Market failure arguments do not come easily to those trained in economics. Our purpose here is only to make a serious attempt to persuade that Delaware law no longer possesses the qualities that Romano's respondents identified as reasons to reincorporate there. We have identified a legal system dominated by notions of equity, eschewing presumptions of directors' good

397. Rock, *supra* note 345, at 1015.
398. *Id.* at 1016.
399. *Id.* at 1017.

faith, where fine distinctions in the modes of judicial review have developed to the point at which they have the qualities of rules rather than standards. At the same time, equity's demands for justice in individual cases leave room for courts to roam broadly to enunciate new modes of review, or new "rules." All of this increases the costs for corporations attempting to comply with the uncertain body of law that has resulted.

We leave for another day an exploration of the reasons for these developments. There are two great puzzles here: how could the law have developed in the way it has, and why have market actors not responded more dramatically to these changes?

APPENDIX A

RECENT AMENDMENTS TO DELAWARE LAW

Coding Key:

(1) Amendments that correct or conform cross references and cure inconsistencies.

(2) Amendments that make corporate filings simpler and easier.

(3) Amendments that respond to judicial decisions.

(4) Amendments not needed in the Model Act because of its structure or wording.

(5) Amendments that add provisions already covered in the Model Act.

(6) Clarifying amendments.

(7) Amendments that were followed by similar changes in the Model Act.

2006:

(6) Amend section 102(a)(1) to provide that the name of a Delaware corporation must be such as to distinguish it from the names of other domestic entities and clarifies who may reserve a name.[400]

Amend section 141(b) to add a new provision that a resignation may be made effective upon the happening of a future event or events, coupled with authority granted in the same section to make certain resignations irrevocable.[401]

(6) Amend the first sentence of section 141(d) to clarify that the classified terms of directors commence after the classification of the board of directors becomes effective, thereby expressly permitting certificate of incorporation or bylaw provisions that provide for classification effective at a point in time after such provisions are adopted.[402]

(5) Amend section 216 to provide that a bylaw adopted by a vote of stockholders that prescribes the required vote for the election of directors may not be altered or repealed by the board of directors.[403]

400. Act of June 27, 2006, ch. 306, sec. 1, § 102(a)(1), 75 Del. Laws 399, 399.
401. *Id.* sec. 3, § 141(b), 75 Del. Laws 399, 399.
402. *Id.* sec. 4, § 141(d), 75 Del. Laws 399, 400.
403. *Id.* sec. 5, § 216, 75 Del. Laws 399, 400; *cf.* MODEL BUS. CORP. ACT § 10.21(a)(1) (2008).

(1) Amend section 371(c) to provide that before a foreign corporation shall have the right to do business in Delaware, the name of such foreign corporation must be such as to distinguish it from the names of each other domestic or foreign entity.[404]

Amend section 391(a)(24) concerning filings for franchise taxes.[405]

Amend section 132 to expand the types of entities that may serve as registered agents and prescribe the duties of a registered agent.[406]

Amend section 312 concerning filings for renewal and revival of expired certificates of incorporation.[407]

Amend sections 502, 503, 510, 511, 514, and 517 to require Delaware corporations to file a complete annual franchise tax report.[408]

2005:

Amend section 141(d) to substitute "separately by the holders of any class or series of stock" for "in the manner so provided in the certificate of incorporation" in the third sentence; to add a new fourth sentence, "In addition, the certificate of incorporation may confer upon one or more directors, whether or not elected separately by the holders of any class or series of stock, voting powers greater than or less than those of other directors.";[409] and, in the last sentence, to substitute "one or more directors" for "directors elected by the holders of a class or series of stock."[410]

(6) Amend section 158, third sentence, by deleting "Notwithstanding the adoption of such a resolution by the board of directors" from the beginning and deleting "and upon request every holder of uncertificated shares" following "represented by certificates."[411]

(6) Amend section 251 by adding subsection (g)(7)(ii)(B), relating to organizational documents of surviving entities that are not corporations.[412]

404. Act of June 27, 2006, ch. 306, sec. 6, § 371(c), 75 Del. Laws 399, 400.
405. *Id.* sec. 7, § 391(a)(24), 75 Del. Laws 399, 400.
406. *Id.* secs. 9–10, § 132, 75 Del. Laws 399, 400–02.
407. *Id.* secs. 11–16, § 312, 75 Del. Laws 399, 402–03.
408. *Id.* secs. 18–26, §§ 502, 503, 510, 511, 514, 517, 75 Del. Laws 399, 403–04.
409. Act of May 17, 2005, ch. 30, sec. 1, § 141(d), 75 Del. Laws 21, 21. While section 8.04 of the Model Business Corporation Act provides for election of directors by holders of separate classes of shares, it does not provide the additional features of Delaware law. *See* MODEL BUS. CORP. ACT § 8.04 (2008).
410. Act of May 17, 2005, sec. 1, § 141(d), 75 Del. Laws 21, 21.
411. *Id.* sec. 2, § 158, 75 Del. Laws 21, 21.
412. *Id.* sec. 3, § 251(g), 75 Del. Laws 21, 21.

(5) Amend section 265, to allow conversion of foreign corporations and other entities into domestic corporations.[413]

(5) Amend section 266 to allow domestic corporations to convert into other entities or foreign corporations.[414]

(4) Amend section 271 by adding subsection (c), adding the property of subsidiaries to the property of the parent for purposes of determining when a sale is of all or substantially all its property, thus requiring a shareholder vote.[415]

(1) Amend section 388, dealing with domestication of non-U.S. entities, to replace "corporation" with "entity."[416]

(1) Amend section 389, dealing with temporary transfer of domicile of non-U.S. entities, to replace "corporation" with "entity."[417]

(1) Amend section 390, dealing with domestication of Delaware corporations in other jurisdictions, by making stylistic changes.[418]

2004:

(1) Amend section 102 by adding subsection (d), which provides that any provision of the certificate of incorporation may be made dependent upon facts ascertainable outside the instrument.[419]

Amend section 141(c)(2) to insert "other than election or removal of directors" in the first sentence.[420]

(5) Amend section 152, second and third sentences, eliminating the implicit exclusion of promises of future services for shares and require-

413. *Id.* secs. 4–5, § 265, 75 Del. Laws 21, 21–22.; *cf.* MODEL BUS. CORP. ACT § 9.50(d) (allowing foreign unincorporated entities to convert). While the Model Act does not provide for conversion of foreign corporations into domestic corporations, it does allow domestication of foreign corporations. MODEL BUS. CORP. ACT § 9.20(a).

414. Act of May 17, 2005, ch. 30, secs. 19–27, § 266, 75 Del. Laws 21, 22–24; *cf.* MODEL BUS. CORP. ACT §§ 9.20(b), 9.50(b) (addressing domestication into foreign corporations and permitting conversion of domestic corporations into foreign unincorporated entities, respectively).

415. Act of May 17, 2005, ch. 30. sec. 28, § 271, 75 Del. Laws 21, 24. While section 12.01(3) of the Model Business Corporation Act exempts transfers of assets to a wholly owned subsidiary, the comment to that section states that it "may not be used as a device to avoid a vote of shareholders by a multi-step transaction." MODEL BUS. CORP. ACT § 12.02(3).

416. Act of May 17, 2005, ch. 30, sec. 30, § 388(a), 75 Del. Laws 21, 24.

417. *Id.* sec. 55, § 389(c)(4), 75 Del. Laws 21, 26.

418. *Id.* secs. 67–79, § 390, 75 Del. Laws 21, 27–28.

419. Act of July 6, 2004, ch. 326, sec. 1, § 102, 74 Del. Laws 813, 813; *cf.* MODEL BUS. CORP. ACT § 2.02(d).

420. Act of July 6, 2004, ch. 326, sec. 2, § 141(c)(2), 74 Del. Laws 813, 813.

ments that not less than the amount of consideration determined to be capital under section 154 has been received.[421]

(1) Amend section 154, third sentence by substituting "consideration" for "property."[422]

(1) Amend section 157(a) and (b) by substituting "acquired" for "purchased," amend subsections (b) and (d) by substituting "consideration" for "price" or "prices," and amend subsection (d) by adding "have a value" before "not less."[423]

(4) (6) Amend section 303 to clarify that its provisions apply to any sort of bankruptcy proceeding and that the validity of corporate action undertaken pursuant to this statute is not dependent upon the existence or pendency of a confirmed plan of reorganization.[424]

2003:

(1) (2) Amend section 103(c)(3) to add that upon delivery of documents and tender of the required taxes and fees, the Secretary of State shall certify the filing.[425]

(2) Amend section 103(c) by deleting paragraph 6, renumbering paragraphs 4 and 5 to become paragraphs 5 and 6, and adding a new paragraph 4 that permits the Secretary of State to establish a delayed filing date upon request and provide for use of the original filing date for instruments rejected due to an error, if filed in timely fashion after notice.[426]

(2) Add a new subsection (7) to section 103(c), that authorizes the Secretary of State to grant direct access to the Delaware Corporation Information System to registered agents that execute an operating agreement, so they can enter information into the system.[427]

(2) Add a new subsection (i) to section 103, permitting establishment of an earlier filing date if an affidavit establishes such earlier unsuccessful attempt to file because of an extraordinary condition.[428]

Amend section 111 to expand the jurisdiction of the Court of Chancery.[429]

421. *Id.* sec. 3, § 152, 74 Del. Laws 813, 813; *cf.* MODEL BUS. CORP. ACT § 611(b).
422. Act of July 6, 2004, ch. 326, sec. 4, § 154, 74 Del. Laws 813, 813.
423. *Id.* secs. 5–7, § 157, 74 Del. Laws 813, 813.
424. *Id.* sec. 8, § 303, 74 Del. Laws 813, 813–14; *see* MODEL BUS. CORP. ACT § 10.08(a).
425. Act of Feb. 21, 2003, ch. 9, sec. 3, § 103(c)(3), 74 Del. Laws 5, 5–6.
426. *Id.* sec. 4, § 103(c), 74 Del. Laws 5, 6.
427. *Id.* sec. 6, § 103(c), 74 Del. Laws 5, 6.
428. *Id.* sec. 7, § 103, 74 Del. Laws 5, 6–7.

Amend section 141(c) to authorize board committees to create subcommittees.[430]

(6) Add a new section 146 that authorizes a corporation to agree to submit a matter to a stockholder vote even though the board later determines that the matter is no longer advisable and recommends against approval.[431]

(5) Amend sections 219 and 220 to clarify stockholder rights of inspection of books and records, e.g., the stockholder list is the only evidence of who are stockholders, that rights of inspection apply to subsidiary corporations, and that directors' demands for inspection are presumed to be proper.[432]

Amend section 225(a) to clarify the Court of Chancery's jurisdiction over rights of persons to continue to hold corporate office, regardless of whether the controversy arose from an election.[433]

Amend section 251(c) to delete the second sentence, which authorizes a corporation to agree to submit a matter to a stockholder vote even though the board later determines that the matter is no longer advisable and recommends against approval.[434]

(6) Amend sections 251, 252, 253, 254, 255, 256, 257, 263 and 264 to clarify that shares may be converted, cancelled, or unaffected by a merger.[435]

(6) Amend section 266(c) to provide that corporations converting to LLCs or other entities must also comply with the applicable statutory provisions for formation of those entities.[436]

2002:

(6) Amend section 158 by adding a new sentence: "A corporation shall not have power to issue a [stock] certificate in bearer form."[437]

429. Act of June 30, 2003, ch. 84, sec. 1, § 111, 74 Del. Laws 214, 214.

430. *Id.* sec. 2, § 141(c), 74 Del. Laws 214, 214.

431. *Id.* sec. 3, § 146, 74 Del. Laws 214, 214. Title 8, section 146 of the Delaware Code embodies what was previously stated in the second sentence of section 251(c), which was deleted in the same bill. Section 11.04(b) of the Model Business Corporation Act permits a board to submit a merger to a shareholder vote without a recommendation, but is silent on the power of the board to bind the corporation to a shareholder vote. MODEL BUS. CORP. ACT § 11.04(b) (2008). It is possible the Model Act drafters thought this authorization was unnecessary, since virtually all merger agreements bind the company and the board to use its best efforts to secure shareholder approval.

432. Act of June 30, 2003, ch. 84, secs. 4–8, §§ 219–220, 74 Del. Laws 214, 214–15. This is similar to MODEL BUS. CORP. ACT § 16.05(b).

433. Act of June 30, 2003, ch. 84, sec. 9, § 225(a), 74 Del. Laws 214, 215.

434. *Id.* sec. 11, § 251(c), 74 Del. Laws 214, 215.

435. *Id.* secs. 10–19, §§ 251–257, 263–264, 74 Del. Laws 214, 215–17.

436. *Id.* sec. 20, § 266(c), 74 Del. Laws 214, 217.

437. Act of June 20, 2002, ch. 298, sec. 3, § 158, 73 Del. Laws 786, 786.

(6) Amend section 203(a)(2) by adding a clarifying phrase "(but not the outstanding voting stock owned by the interested stockholder)" for purposes of determining shares outstanding under the Business Combination Act.[438]

(6) Amend section 203(c)(8) by adding a clarifying sentence: "Every reference to a percentage of voting stock shall refer to such percentage of the votes of such voting stock."[439]

(2) Add a new section 233 that permits corporations to send a single written notice to shareholders sharing an address.[440]

(6) Amend section 311, dealing with revocation of voluntary dissolution, by adding a new subsection (c) dealing with the obligation to hold annual meetings after issuance of a certificate of revocation of dissolution.[441]

Revise section 512, dealing with publication of lists of corporations whose charters were revoked for failure to pay franchise taxes.[442]

2001:

Amend section 102(a)(1)(ii) to require that names be distinguishable from other types of business entities that file with the Secretary of State.[443]

(2) Amend section 134 to clarify procedures for changing the address of a registered agent.[444]

(6) Amend section 157 by adding "(a)" before the first paragraph.[445]

(6) Amend section 157 by adding a "(b)" before the second paragraph and providing for the use of a formula to determine the exercise price of stock options.[446]

438. *Id.* sec. 4, § 203(a)(2), 73 Del. Laws 786, 786.
439. *Id.* sec. 6, § 203(c)(8), 73 Del. Laws 786, 786.
440. *Id.* sec. 9, § 233, 73 Del. Laws 786, 786–87.
441. *Id.* sec. 11, § 311, 73 Del. Laws 786, 787.
442. *Id.* sec. 15, § 512, 73 Del. Laws 786, 787.
443. Act of June 30, 2001, ch. 82, sec. 1, § 102(a)(1), 73 Del. Laws 228, 228. The Model Act only covers the requirement that names be distinguishable from corporate names. MODEL BUS. CORP. ACT §§ 4–14 (2008). Five other states have already provided for names of other entities. *See, e.g.*, GA. CODE ANN. § 14-2-401(b)(5), (6) (2008) (covering limited partnerships, professional associations and limited liability companies).
444. Act of June 30, 2001, ch. 82, secs. 2–3, § 134, 73 Del. Laws 228, 228–29.
445. *Id.* sec. 4, § 157, 73 Del. Laws 228, 229.
446. *Id.* sec. 5, § 157, 73 Del. Laws 228, 229.

Amend section 157 by adding subsection (c) that authorizes the board of directors to authorize officers of the company to award stock options, and renumber the following paragraph as "(d)."[447]

(1) Amend section 245(c), dealing with restatements of certificates of incorporation, to add the words "subdivision, cancellation" to the provisions dealing with changes in shares, to conform with 1996 amendments to section 242.[448]

(5) Amend section 251(g)(1) and (3) to allow mergers of domestic corporations with other entities (limited liability companies) organized in the state.[449]

(5) (6) Amend section 251(g)(4), by adding the words "subdivision, cancellation" to the provisions dealing with changes in shares, to conform with 1996 amendments to section 242.[450]

(5) Amend section 251(g)(7) to expand the list of entities that can be the surviving corporation in a holding company merger to include limited liability companies.[451]

(6) Amend section 251(g) to clarify that subsection (7)(i) does not require approval of the stockholders of the surviving holding company to elect or remove directors or managers, managing members, or other members of the governing body of the surviving entity.[452]

Amend section 251(g) to preserve stockholder rights to a derivative action after a holding company merger.[453]

(5) (partial) Amend section 262(d), dealing with appraisal rights, in either a merger approved by written shareholder consent or a short-form merger, to permit notice of the merger and of appraisal rights to be given by the surviving corporation, either before or after consummation of the merger.[454]

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447. *Id.* secs. 6–7, § 157, 73 Del. Laws 228, 229.

448. *Id.* sec. 13, § 245(c), 73 Del. Laws 228, 230.

449. *Id.* secs. 14–15, § 251(g)(1)–(g)(3), 73 Del. Laws 228, 230; *see* MODEL BUS. CORP. ACT § 11.02 (2008) (allowing mergers with eligible entities, defined in section 1.40(7)(b) of the Model Business Corporation Act as including unincorporated entities or nonprofit corporations).

450. Act of June 30, 2001, ch. 82, sec. 16, § 251(g)(4), 73 Del. Laws 228, 230; *see* MODEL BUS. CORP. ACT § 10.04(a)(4) (covering subdivisions).

451. Act of June 30, 2001, ch. 82, sec. 18, § 251(g)(7), 73 Del. Laws 228, 230–31. Section 11.02(c)(1) of the Model Business Corporation Act allows "eligible entities" to be the survivors.

452. *Id.* sec. 19, § 251(g), 73 Del. Laws 228, 231.

453. *Id.* sec. 20, § 251(g), 73 Del. Laws 228, 231.

454. *Id.* sec. 21, § 262(d)(2), 73 Del. Laws 228, 231. Section 13.20(b) of the Model Business Corporation Act permits notice after a short-form merger, but where written consent is used, notice must be sent with the meeting.

(1) Change numerous cross references to include limited liability partnerships and limited liability limited partnerships.[455]

(5) Amend section 311(a) to clarify that stockholders have a right to vote on revocation of dissolution.[456]

(1) Amend section 312(i) to eliminate the requirement of calling a meeting of stockholders immediately after renewal or revival of the certificate of incorporation, which might otherwise be required by section 211(c).[457]

2000:

(1) Amend section 102(a)(1), clause (ii) to provide that corporate names must be distinguishable from the names of limited liability companies and business trusts, as well as the entities previously mentioned.[458]

(2) Amend section 103(a)(1) to permit agents to execute certificates of incorporation on behalf of incorporators.[459]

Add a new paragraph 17 to section 122, dealing with corporate powers, to enable corporations to renounce in the certificate of incorporation classes of business opportunities.[460]

(5) Amend section 141(b), dealing with resignation of directors, to permit notice of resignation to be given by electronic transmission.[461]

(5) Amend section 141(f), dealing with written consents of directors in lieu of meetings, to permit such consents to be by electronic transmission.[462]

Amend section 211(a) to authorize stockholders' meetings to be held solely by remote transmission rather than at a place.[463]

(5) Amend section 211(e) to authorize elections of directors to be held by ballots submitted by electronic transmission in addition to written ballots.[464]

455. *Id.* secs. 22–32, §§ 263, 265, 266, 73 Del. Laws 228, 231–32.
456. *Id.* secs. 33–34, § 311(a), 73 Del. Laws 228, 232; *see* MODEL BUS. CORP. ACT § 14.04(b) (2008).
457. Act of June 30, 2001, ch. 82, sec. 35, § 312(i), 73 Del. Laws 228, 232.
458. Act of June 23, 2000, ch. 343, sec. 1, § 102(a)(1), 72 Del. Laws 619, 619.
459. *Id.* sec. 2, § 103(a)(1), 72 Del. Laws 619, 619.
460. *Id.* sec. 3, § 122, 72 Del. Laws 619, 619.
461. *Id.* sec. 4, § 141(b), 72 Del. Laws 619, 619; *see also* MODEL BUS. CORP. ACT § 1.41(a).
462. *Id.* sec. 5, § 141(f), 72 Del. Laws 619, 619; *see also* MODEL BUS. CORP. ACT § 141(a).
463. Act of June 23, 2000, ch. 343, sec. 7, § 211(a), 72 Del. Laws 619, 619–20. While this appears to be innovative, it is only useful for close corporations.

(4) (5) Amend section 219(a) and (b), concerning maintenance of a stockholder list before a meeting, to clarify that the list need not contain electronic addresses and that the list may be maintained in an accessible electronic network.[465]

(4) Amend section 224 to add other methods to the forms in which corporate records may be kept.[466]

Amend section 228, concerning written consents of stockholders in lieu of meetings, to permit use of electronic transmissions.[467]

(5) Add section 232, authorizing electronic notice to stockholders who consent to such notice.[468]

1999:

(1) Amend section 102(a)(1) to eliminate specified abbreviations of full names of entities.[469]

Add section 111, to grant the Court of Chancery jurisdiction over litigation over certificates of incorporation or bylaws.[470]

(5) Amend section 202 to provide for the enforceability of reasonable restrictions on transfers of shares (specifically including rights of first refusal), enforce a buy-sell agreement, require consent of the corporation or shareholders to any transfer, obligate holders to sell part or all of their securities to the corporation, and provide that reasonable purposes include retaining tax status, regulatory advantage, or other lawful purposes.[471]

Amend section 251(g), concerning holding company mergers, to clarify that a vote of the holding company's stockholders is not required to elect or remove directors of a surviving subsidiary corporation.[472]

Amend section 253(a), dealing with short-form mergers, to provide that the 90% ownership requirement only applies to voting shares out-

464. *Id.* sec. 8, § 211(e), 72 Del. Laws 619, 620; *see also* MODEL BUS. CORP. ACT § 7.22(b) (allowing proxy voting by electronic transmission).

465. Act of June 23, 2000, ch. 343, secs. 9–10, § 219(a)–(b), 72 Del. Laws 619, 620; *cf.* MODEL BUS. CORP. ACT § 16.01(a)–(b).

466. Act of June 23, 2000, ch. 343, sec. 14, § 224, 72 Del. Laws 619, 621; *see also* MODEL BUS. CORP. ACT § 16.01(d).

467. Act of June 23, 2000, ch. 343, sec. 15, § 228, 72 Del. Laws 619, 621. Not needed in the Model Act because shareholder action can only be taken at a meeting or by unanimous written consent.

468. *Id.* sec. 19, § 232, 72 Del. Laws 619, 622; *see also* MODEL BUS. CORP. ACT § 1.41(a).

469. Act of July 2, 1999, ch. 123, sec. 1, § 102(a)(1), 72 Del. Laws 173, 173.

470. *Id.* sec. 2, § 111, 72 Del. Laws 173, 173.

471. *Id.* sec. 4, § 202, 72 Del. Laws 173, 174–75; *see also* MODEL BUS. CORP. ACT § 6.27. But title 8, section 202(c)(4) of the Delaware Code is not covered by the Model Act.

472. Act of July 2, 1999, ch. 123, sec. 7, § 251(g), 72 Del. Laws 173, 175.

standing, and not any outstanding shares that would not have a right to vote on the merger.[473]

(5) Add section 265, which provides that LLCs, LPs, and business trusts organized in Delaware may convert to a corporation.[474]

(5) Add section 266, which provides that any Delaware corporation may convert to a LLC, LP, or business trust.[475]

1998:

Remove gender references from the statute.[476]

(6) Amend section 151(b) to clarify that some, but not necessarily all of the shares of a class may be redeemed, and changes the time at which a remaining class or classes with full voting powers must remain from the time of redemption to immediately after redemption.[477]

(5) (6) Amend section 216 to clarify that where a separation of a class or series is required, the quorum requirements apply separately to the shares of that class or series.[478]

(4) (5) Amend section 251(b) to require the board not only to approve a merger but also to declare its advisability.[479]

(4) Amend section 251(c) to provide that the merger agreement may provide for submission to stockholder vote even if the board reverses its judgment about the advisability of the merger.[480]

Amend section 324, dealing with attachment of and execution against shares, to establish that it is only available for securities of a debtor identified on the books of the corporation and, with respect to certificated shares, only upon presentation of stock certificates.[481]

473. *Id.* sec. 8, § 253(a), 72 Del. Laws 173, 175.

474. *Id.* sec. 10, § 265, 72 Del. Laws 173, 175–76; *cf.* MODEL BUS. CORP. ACT § 9.50(c).

475. Act of July 2, 1999, sec. 11, § 266, 72 Del. Laws 173, 176–77; *cf.* MODEL BUS. CORP. ACT § 9.50(a).

476. Act of June 29, 1998, ch. 339, 71 Del. Laws 870.

477. *Id.* sec. 18, § 151(b), 71 Del. Laws 870, 871.

478. *Id.* secs. 34–35, § 216, 71 Del. Laws 870, 872; *cf.* MODEL BUS. CORP. ACT § 7.25.

479. Act of June 29, 1998, ch. 339, sec. 43, § 215(b), 71 Del. Laws 870, 872; *cf.* MODEL BUS. CORP. ACT § 11.04(b).

480. *Id.* sec. 44, § 251(c), 71 Del. Laws 870, 872–73. Section 11.04(b) of the Model Act Business Corporation Act permits a board to submit a merger to a shareholder vote without a recommendation but is silent on the power of the board to bind the corporation to a shareholder vote. MODEL BUS. CORP. ACT § 11.04(b). It is possible Model Act drafters thought this authorization was unnecessary, since virtually all merger agreements bind the company and the board to use its best efforts to secure shareholder approval.

481. Act of June 29, 1998, ch. 339, secs. 68–70, § 324, 71 Del. Laws 870, 874–75.

1997:

(4) (5) Amend section 102(a)(1) to codify the practice of permitting only regulated banks to use the word "bank" in their names.[482]

Amend section 132(a) to clarify that registered agents must keep normal business hours in which to accept service of process.[483]

Amend multiple sections to eliminate gender references.[484]

(5) (6) Amend section 145(c) to clarify that both present as well as former officers are covered by rights to indemnification when successful in defending a suit.[485]

(5) Amend section 145(d) to provide that determinations of whether indemnification is proper may be made by a committee of directors who are not parties to the suit, where the committee is designated by majority vote of all nonparty directors, even though less than a quorum of the board.[486]

(3) Amend section 211(b) to "address issues relating to the relationship between sections 228 and 211 that have arisen in recent decisions by the Court of Chancery," to provide that action by written consent to elect directors pursuant to section 228 can be a substitute for an annual meeting but that, unless such action is unanimous, it will fulfill the annual meeting requirement only if all directorships that could be filled at an annual meeting are filled and only if at such effective time all such directorships are vacant.[487]

(3) Amend section 211(c) to provide that the remedy for failure to hold an annual meeting will not be available if action by written consent has been taken within the required time periods.[488]

(1) Amend section 254(e) to conform it to other sections relating to mergers by requiring a non-Delaware or joint stock or other association

482. Act of June 30, 1997, ch. 120, sec. 1, § 102(a)(1), 71 Del. Laws 232, 232. This is accomplished indirectly in the Model Act: section 3.01(b) prohibits incorporation of a type of business subject to regulation only if so permitted by the regulatory statute, and section 4.01(a)(2) prohibits use of a name implying it is organized for a purpose not permitted by section 3.01. MODEL BUS. CORP. ACT §§ 3.01(b), 4.01(a)(2).

483. Act of June 30, 1997, ch. 120, sec. 2, § 132(a), 71 Del. Laws 232, 232.

484. *Id.* secs. 3–4, 7–11, § 145, 71 Del. Laws 232, 232–33.

485. *Id.* sec. 5, § 145(c), 71 Del. Laws 232, 232. Section 8.50 of the Model Business Corporation Act defines "director" or "officer" to include a person "who is or was a director or officer."

486. *Id.* sec. 6, § 145(d), 71 Del. Laws 232, 232–33; *cf.* MODEL BUS. CORP. ACT § 8.55(b)(1) (referring to "disinterested directors," which is defined to mean nonparty directors).

487. Act of June 30, 1997, ch. 120, sec. 12, § 211(b), 71 Del. Laws 232, 233. This overrules *Hoschett v. TSI International Software, Ltd.*, 683 A.2d 43 (Del. Ch. 1996), which held that written consent of shareholders does not satisfy the requirement for an annual meeting.

488. Act of June 30, 1997, ch. 120, sec. 13, § 211(c), 71 Del. Laws 232, 233.

surviving a merger to appoint the Secretary of State as agent for service of process after the merger.[489]

Amend section 262(b)(1) to clarify that appraisal rights are not available for shares held by a depositary if in the merger the shares held by the depositary are to be converted into or exchanged for shares of another corporation, the depositary receipts for which will be widely traded.[490]

(5) (6) Amend section 281(a) & (b) to clarify that distributions in kind to shareholders of a dissolving corporation are not prohibited.[491]

(2) Amend section 377(b) to provide that a resigning registered agent of a foreign corporation must give thirty days' notice to the corporation, and eliminating the requirement that the Secretary of State give such notice.[492]

Amend sections 390 and 391 to permit a Delaware corporation transferring to a jurisdiction outside the United States to continue its existence as a Delaware corporation.[493]

1996:

(2) Amend sections 101, 103, 105, 133–135, 151, 241, 242, 245, 251–257, 263, 264, 303, 311–313, 344, 388, 392, and 512 to eliminate references to filing requirements with county offices, to coordinate with 1992 amendments.[494]

Amend section 103(c)(6) to authorize the Secretary of State to keep a database of information in filings, and to retain electronic copies of instruments filed.[495]

(2) (4) Amend section 103(d) to provide a procedure by which corporations may terminate or amend filings which have future effective dates or times by filing a certificate of amendment or termination before the future effective date or time.[496]

489. *Id.* sec. 14, § 254(e), 71 Del. Laws 232, 233.
490. *Id.* sec. 15, § 262(b)(2)b, 71 Del. Laws 232, 233.
491. *Id.* secs. 17–18, § 281, 71 Del. Laws 232, 234; *cf.* MODEL BUS. CORP. ACT § 14.05(a)(4) (authorizing a dissolving corporation to distribute "its remaining property among its shareholders").
492. Act of June 30, 1997, ch. 120, sec. 19, § 377(b), 71 Del. Laws 232, 234.
493. *Id.* secs. 20–29, 31, §§ 390, 391(a)(24), 71 Del. Laws 232, 234–35.
494. Act of July 25, 1996, ch. 587, 70 Del. Laws 1402.
495. *Id.* sec. 4, § 103, 70 Del. Laws 1402, 1402.
496. Act of May 23, 1996, ch. 349, sec. 1, § 103(d), 70 Del. Laws 775, 775. Section 1.23(b) of the Model Business Corporation Act permits delayed effective dates, and section 1.24 permits corrections (but not terminations) of filings that become effective on the date of the document they correct.

(2) Amend section 136, dealing with resignations of registered agents, to eliminate requirements that corporate notice be sent by certified or registered mail and that notice be sent to the clerk and recorder.[497]

(5) Amend section 141(c) to simplify the process of creating board committees by eliminating the requirement that committees only be created by a majority of the whole board.[498]

(4) Amend section 160(a)(1) to permit a corporation to purchase shares of its common stock out of capital if no shares of preferred stock are outstanding and the shares will be retired upon acquisition and the capital of the corporation reduced according to sections 243 and 244.[499]

(4) Amend section 228(d) to eliminate the requirement that, prior to filing a certificate under another section of the statute to effectuate an action taken by written consent, the notice of such action must be given in writing to nonconsenting stockholders.[500]

(5) Amend section 242 to clarify that an amendment to the certificate of incorporation is necessary for a forward or reverse stock split.[501]

(1) Amend sections 251(b), 252(b), 254(c), 255(b), 256(b), 257(b), 263(b). and 264(b) to conform with 1994 amendments to section 151(a) to clarify that a "fact" can include an event or determination or action by any person or body, including an event or determination within the control of the corporation or a person or body affiliated with the corporation, such as decision by the board or an officer or agent.[502]

(1) Amend section 253(a), dealing with holding company mergers, to conform with the 1974 amendment to section 251(b) and the 1994 amendment to section 151(a) by clarifying that the merger may be made dependent upon facts outside the board's merger resolution, and conform the meaning of the term "fact" to that described immediately above.[503]

497. Act of July 25, 1996, ch. 587, sec. 11, § 136, 70 Del. Laws 1402, 1404.

498. Act of May 23, 1996, ch. 349, sec. 2, § 141(c), 70 Del. Laws 775, 775; *cf.*. MODEL BUS. CORP. ACT §§ 8.24, 8.25(b) (2008) (setting board action for creation of committees at a majority of the whole board, but allowing creation by the number required by articles or bylaws to take action under section 8.24, which sets a quorum at a majority of the board and permits action by a majority of a quorum).

499. Act of May 23, 1996, ch. 349, sec. 3, § 160(a)(1), 70 Del. Laws 775, 775. There are no legal capital rules in the Model Act.

500. *Id.* sec. 4, § 228(d), 70 Del. Laws 775, 775. Not needed in the Model Act, because shareholder action can only be taken at a meeting or by unanimous written consent.

501. *Id.* secs. 5–6, § 242(a), 70 Del. Laws 775, 776. Section 10.04(a)(1) of the Model Business Corporation Act provides that stock splits require amendment of the articles of incorporation.

502. *Id.* secs. 8–9, 11–16, §§ 251(b), 252(b), 254(c), 255(b), 256(b), 257(b), 263(b), 264(b), 70 Del. Laws 775, 776.

503. *Id.* sec. 10, § 253(a), 70 Del. Laws 775, 776.

(2) (4) Amend sections 251(c)(6), 252(c)(6), 254(d)(6), 263(d)(6), and 264(c)(6) to eliminate the requirement, where a certificate of merger rather than the actual merger agreement is filed with the Secretary of State, that the merger agreement be on file at the principal place of business of the surviving corporation, and provides only that it must be on file at any office of the surviving corporation.[504]

(2) (4) Amend sections 253(a) and 262(b), dealing with holding company reorganizations, to prevent circumvention of the protections accorded by section 251(g)(7)(1) through a short-form merger with an intermediate parent and to implement the stated objective of 1995 amendments that appraisal rights not be available for holding company mergers.[505]

(2) Amend section 262(d) to permit sending separate notices with respect to (a) the approval and (b) the effective date of a merger, in order to permit the start of the twenty-day period for appraisal demands where the effective date is not known at the time the notice of approval is sent.[506]

1995:

(2) Amend section 102(a)(1), concerning the content and form of corporate names, to permit the Secretary of State to waive the requirement that the name contain an indication of corporate status if the corporation has minimum assets of $10 million.[507]

(2) (4) Amend section 103(d) to allow for termination of a certificate of merger before the effective date by filing a certificate of termination.[508]

(2) Amend section 136 to allow registered agents to resign after giving notice by mail or delivery without use of certified or registered mail.[509]

(4) Amend section 141(c) to extend the requirement that the entire board, not a committee, must approve a merger, to mergers with non-stock corporations and other business entities.[510]

504. *Id.* secs. 17–21, §§ 251(c)(6), 252(c)(6), 254(d)(6), 263(c)(6), 264(c)(6), 70 Del. Laws 775, 776–77. The Model Act does not authorize certificates of merger. *See* GA. CODE. ANN. § 14-2-1105(b) (2008).

505. Act of Feb. 1, 1996, ch. 299, secs. 1–3, §§ 253(a), 262(b), 70 Del. Laws 711, 711. The Model Act does not have similar provisions for holding company mergers.

506. Act of May 23, 1996, ch. 349, sec. 22, § 262(d)(2), 70 Del. Laws 775, 777.

507. Act of June 23, 1995, ch. 79, secs. 1–3, § 102(a)(1), 70 Del. Laws 118, 118.

508. *Id.* sec. 4, § 103(d), 70 Del. Laws 118, 118.

509. *Id.* secs. 5–6, § 136, 70 Del. Laws 118, 118.

510. *Id.* sec. 7, § 141(c), 70 Del. Laws 118, 118–19. Section 8.25(e)(2) of the Model Business Corporation Act provides that committees cannot approve any action that requires shareholder approval.

(3) Amend section 203(a) of the business combinations statute to change "date" to "time" to conform to recent case law interpreting the statute in this way.[511]

(6) Amend section 203(b) to provide expressly that corporations that have never been subject to section 203 may elect not to be governed by it without being subject to a waiting period, that a person who inadvertently becomes an interested stockholder may divest itself of shares owned in any manner in order to avoid application of the statutory restrictions, and grandfathering stockholders who become interested when the corporation is not subject to the act so they will not become subject to it when the corporation becomes covered by the act.[512]

(6) Amend section 203(c) to make clear that (1) mergers with noncorporate entities may not be used to evade the statute, (2) that holding company mergers are not "business combinations" subject to the statute, and (3) providing coordinating grandfather provisions.[513]

(6) Amend section 251(d) to permit termination or amendment of a merger agreement prior to the effective time of the merger, rather than the time of filing the agreement with the Secretary of State.[514]

(4) Add a new section 251(g) to permit a holding company merger without stockholder approval, provided no substantial rights are changed.[515]

(1) Amend section 381(a) to conform requirements for execution of a certificate of withdrawal of a foreign corporation with those of section 103.[516]

(2) Add section 390 to simplify domestication of Delaware corporations in jurisdictions outside the United States, upon approval by 100% of the shareholders.[517]

1994:

(5) (2) Amend section 103(a)(2)(a), governing signature requirements on filings, to eliminate references to specific officers and refer simply to "any authorized officer of the corporation."[518]

511. *Id.* sec. 8, § 203(a), 70 Del. Laws 118, 119.
512. *Id.* sec. 9, § 203(b), 70 Del. Laws 118, 119.
513. *Id.* sec. 10, § 203(c), 70 Del. Laws 118, 119–20.
514. *Id.* secs. 13–14, § 251(d), 70 Del. Laws 118, 120.
515. *Id.* secs. 15–16, §§ 251, 262(b)(1), 70 Del. Laws 118, 120–21. There are no provisions for holding company mergers in the Model Act, except for short-form mergers (90%+ ownership).
516. *Id.* sec. 18, § 381(a)(1), 70 Del. Laws 118, 122.
517. *Id.* sec. 20, § 390, 70 Del. Laws 118, 122. Sections 9.20–9.25 of the Model Business Corporation Act, adopted in 2002, permits similar domestications.

(2) Amend section 103(c)(5), excepting from filings with county recorders certificates of dissolution under section 391.[519]

(2) Amend section 103(f) to provide that in lieu of a certificate of correction, a corrected instrument may be filed provided that it specifically identifies the inaccuracy or mistake to be corrected.[520]

(2) (5) Amend section 103(h) to allow, in addition to facsimile signatures, conformed or electronically transmitted signatures.[521]

(2) (4) Amend section 133, governing changes in the location of a registered office or registered agent, to eliminate the requirement that a notice be recorded in the county of the former location of the agent or office.[522]

(2) (5) Amend section 136(a) by reducing the advance notice to the Secretary of State required of a resigning registered agent from sixty to thirty days.[523]

(4) Amend section 136(a) to provide that notice to the corporate agent can be sent by an "authorized officer" rather than the president, vice president, or secretary of a corporate registered agent, and if registered mail notice is not sent, that the registered agent has previously mailed notices to the corporation that were returned as undeliverable on at least two occasions.[524]

(4) Amend section 145(d), concerning determination that a director has met the applicable standard for indemnification, to permit use of an opinion of counsel without approval of a majority of disinterested directors.[525]

Add a new subsection (k) to section 145 to grant jurisdiction to the Court of Chancery to hear all actions for advancement of expenses or indemnification.[526]

518. Act of May 27, 1994, ch. 235, sec. 1, § 103(a)(2)(a), 69 Del. Laws 458, 458 (1993); *cf.* MODEL BUS. CORP. ACT § 1.20(f)(1) (2008).

519. Act of May 10, 1994, ch. 221, sec. 1, § 103(c)(5), 69 Del. Laws 445, 445.

520. Act of May 27, 1994, ch. 235, sec. 2, § 103(f), 69 Del. Laws 458, 458.

521. *Id.* sec. 3, § 103(h), 69 Del. Laws 458, 458. Section 1.40(22A) of the Model Business Corporation Act defines "signature" to facsimile or electronic signatures.

522. *Id.* sec. 4, § 133, 69 Del. Laws 458, 458.

523. Act of May 27, 1994, ch. 233, sec. 1, § 136(a), 69 Del. Laws 457, 457. Section 5.03(c) of the Model Business Corporation Act provides that resignation is effective on the thirty-first day after the date on which a notice of resignation was filed.

524. *Id.* sec. 2, § 136(a), 69 Del. Laws 457, 457; *cf.* MODEL BUS. CORP. ACT § 5.03 (2008).

525. Act of June 27, 1994, ch. 261, sec. 1, § 145(d), 69 Del. Laws 522, 522; *cf.* MODEL BUS. CORP. ACT § 8.55(b).

526. Act of June 27, 1994, ch. 261, sec. 2, § 145, 69 Del. Laws 522, 522.

(2) (4) Amend section 251(c) by eliminating the requirement that the merger agreement be recorded in each county where the registered office of a merging corporation is located, and only requiring recording where the registered office of the surviving corporation is located.[527]

Amend section 262 to broaden the existing "market out" from appraisal rights to cover situations where shares are represented by depository receipts that are widely held.[528]

(4) (5) Amend section 371(c), dealing with qualification of foreign corporations, to permit use of a name that conflicts with an existing filing if the corporation adopts an assumed name for use in Delaware.[529]

1993:

(2) (4) Amend section 103(c)(5), excepting from filings with county recorders certificates of dissolution under section 391.[530]

(4) Amend section 170(a)(1) to provide for the validity of a corporate note given with respect to shares if the corporation met the legal capital rules at the time of the delivery of the note.[531]

(4) Amend section 252(d), dealing with mergers with non-U.S. corporations, and section 253, dealing with parent-subsidiary mergers, to eliminate the requirement that the surviving corporation must be a Delaware corporation.[532]

Amend section 254(a), dealing with mergers with other entities, to add limited liability companies.[533]

Add section 264, authorizing mergers with limited liability companies.[534]

1992:

527. Act of May 27, 1994, ch. 235, sec. 5, § 251(c), 69 Del. Laws 458, 458.

528. Act of June 27, 1994, ch. 262, secs. 1–9, § 262(a)–(b)(2), 69 Del. Laws 523, 523.

529. Act of May 27, 1994, ch. 234, sec. 1, § 371(c), 69 Del. Laws 457, 457; *cf.* MODEL BUS. CORP. ACT §§ 4.03, 15.06.

530. Act of May 10, 1994, ch. 221, sec. 1, § 103(c), 69 Del. Laws 445, 445.

531. Act of July 1, 1993, ch. 61, sec. 3, § 170(a), 69 Del. Laws 54, 54; *cf.* MODEL BUS. CORP. ACT § 6.21(b) (permitting receipt of notes as consideration for shares).

532. Act of July 1, 1993, ch. 61, secs. 4–8, §§ 252–53, 69 Del. Laws 54, 54; *cf.* MODEL BUS. CORP. ACT § 11.07 (permitting a foreign corporation to be the survivor); MODEL BUS. CORP. ACT § 1.40(10) (including non-U.S. corporations within the definition of a foreign corporation).

533. Act of July 1, 1993, sec. 9, § 254(a), 69 Del. Laws 54, 54. Sections 1.40(7B) and 11.02 of the Model Business Corporation Act were amended to reflect these changes after Delaware's adoption.

534. *Id.* sec. 11, § 264, 69 Del. Laws 54, 55–56. Sections 1.40(7B) and 11.02 of the Model Business Corporation Act were amended to reflect these changes after Delaware's adoption.

(2) (4) Amend section 103 to eliminate the requirements for corporations to file with county offices.[535]

(7) Amend sections 251(b)(5) and 252(b)(3) to clarify that shares of a constituent corporation in a merger may be converted into the right to receive property, rights, or other securities of entities other than corporations, conforming this to earlier changes allowing mergers with such entities.[536]

(7) Amend section 262(b)(1), dealing with the market out exception from appraisal rights, to extend it to classes of securities traded on the Nasdaq National Market System.[537]

535. Act of Feb. 11, 1992, ch. 211, secs. 1–4, § 103, 68 Del. Laws 778, 778.

536. Act of July 8, 1992, ch. 337, secs. 1–2, §§ 251(b)(5), 252(b)(3), 68 Del. Laws 1159, 1159. Section 11.02(c)(3) of the Model Business Corporation Act was amended to reflect these changes after Delaware's adoption.

537. *Id.* secs. 3–4, § 262, 68 Del. Laws 1159, 1159. Section 13.02(b)(1)(I) of the Model Business Corporation Act was amended to reflect these changes after Delaware's adoption.