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ARTICLE

HOW TO EVALUATE NON-MAJORITY CONTROL: WHAT HISTORY AND STATUTES TELL US

PART ONE: THE HISTORICAL DOMINANCE OF FUNCTIONALISM

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INTRODUCTION

Under American law, a person who controls a corporation is a fiduciary. Since the nineteenth century, American law has treated a person who wields a majority of the voting power as having control. For almost as long, American law has recognized that holding a majority of the voting power is sufficient but not necessary for control.

During the past two decades in Delaware, two schools of thought co-existed regarding non-majority control. One school took a formal approach that (i) shifted from examining control over the business affairs of the enterprise to control over the board, (ii) discounted sources of influence other than stock ownership, and (iii) elevated the threshold at which voting power would become significant. Decisions applying those principles dismissed cases frequently at the pleading stage after concluding

it was not reasonably conceivable that a non-majority stockholder could exercise control. Another school persisted in applying a functional approach that (i) continued to examine control over the business affairs of the enterprise, (ii) considered multiple sources of influence when evaluating control, and (iii) recognized that lower levels of voting power could support control. Decisions applying those principles dismissed cases less frequently at the pleading stage. After a group of influential commentators attacked the functional approach as novel and anomalous, the Delaware legislature amended the Delaware General Corporation Law to define the term "controlling stockholder" in formal terms (the "Safe Harbor Definition").

This Article and a companion piece explore the claims of the two schools. This Article examines the approaches that courts have historically taken when evaluating non-majority control (the "Historical Article"). The companion piece looks to statutory definitions of control (the "Statutory Article"). Those sources show that the functional approach was neither novel nor anomalous.

This Article begins by discussing a 1912 decision by the Supreme Court of the United States that used a functional approach to hold that a minority stockholder exercised control.[1] It then reviews commentators' calls during the 1920s and early 1930s for recognizing control based on blocks of shares that the formal school would claim were too small to carry significance.

This Article next examines cases in which the Supreme Court of the United States interpreted the concept of control under a series of statutes enacted by the New Deal Congress.[2] Those decisions rejected core tenets of the formal school, such as the argument that non-majority control could not exist without at least one-third of the voting power. The Supreme Court of the United States further enshrined the functional approach in a 1957 decision finding that DuPont had the ability to exercise non-majority control over General Motors.[3] Those opinions and related lower court decisions made the functional approach the dominant method for assessing non-majority control.

1. United States v. Union Pac. R.R. Co., 226 U.S. 61 (1912).

2. Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939); Nat. Gas Pipeline Co. Am. v. Slattery, 302 U.S. 300 (1937).

3. United States v. E.I du Pont de Nemours & Co., 353 U.S. 586 (1957).

This Article then turns to Delaware law. Unlike commentators who have prioritized recent caselaw, this Article starts in the 1930s, when Delaware courts first recognized the existence of non-majority control using a functional test. The functional approach remained Delaware's prevailing methodology until 2006, when two decisions introduced the premises that would underpin the formal school. Later, between 2012 and 2018, the formal school emerged through a series of decisions that combined those concepts to dismiss complaints alleging non-majority control.

Meanwhile, and particularly between 2018 and 2024, other decisions persisted in using functional principles. Those rulings elicited a response from influential commentators who offered lockstep criticisms of the functional school. That advocacy contributed to the adoption of Safe Harbor Definition, which codified a formal approach.

Having conducted a detailed historical review, this Article identifies the claims of the formal and functional schools and examines the approaches taken to non-majority control during various historical periods. That analysis reveals that the functional school reflects the historically dominant approach to non-majority control. The formal school, not the functional school, is the new kid on the block.

I. THE FUNCTIONAL MAINSTREAM

American law originally limited fiduciary status to directors and officers.[4] Starting in the late nineteenth century, courts began to recognize that the holder of a majority of the voting power exercised control over the corporation as a practical matter and

4. *See generally* Jerry B. Helwig, Note, *The Fiduciary Duty of Controlling Shareholders*, 7 CASE W. RSRV. L. REV. 467, 469 (1956) ("[T]he early view promulgated by the equity courts was that stockholders of a corporation, unlike directors, were not in any sense trustees for the other stockholders."). As late as 1902, a court asserted in a decision adhering to that formal approach that only directors or officers were fiduciaries, and no basis existed to assert that a "stockholder is in any sense a trustee for other stockholders, or that he is to be barred from voting on his stock according to what he may conceive to be his interest, or in a way which may result in a benefit to himself, and which other stockholders may not enjoy." Windmuller v. Standard Distilling & Distrib. Co., 114 F. 491, 494 (C.C.D.N.J. 1902). That contention was out of date, because courts had already started to impose fiduciary duties on stockholders who exercised control. *See infra* note 5.

should be treated as a fiduciary.[5] During the first three decades of the twentieth century, fiduciary status based on majority control became settled,[6] and early treatises documented the black letter

5. *See* Wheeler v. Abilene Nat'l Bank Bldg. Co., 159 F. 391, 393 (8th Cir. 1908) (holding that a dominant stockholder's "power to control and direct the action of the corporation places him in the shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock"); Ervin v. Or. Ry. & Nav. Co., 27 F. 625, 631 (C.C.S.D.N.Y. 1886) ("When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que* trust."); Glengary Consol. Min. Co. v. Boehmer, 62 P. 839, 839 (Colo. 1900) ("So far as the rights of the minority are concerned, the majority, in furtherance of their plan to reap a benefit to themselves through a transaction in which the minority do not participate, become the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."); Farmers' Loan & Tr. Co. v. New York & N. Ry. Co., 44 N.E. 1043, 1047–49 (N.Y. 1896) (collecting cases); Peabody v. Flint, 88 Mass. 52, 55 (1863) (rejecting argument that minority stockholders could not sue majority for breach of duty); *see also* Hawes v. City of Oakland, 104 U.S. 450, 460 (1881) (noting that a stockholder can sue for breach of duty "where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of other shareholders, and which can only be restrained by the aid of a court of equity.").

6. *See* S. Pac. Co. v. Bogert, 250 U.S. 483, 487–88 (1919) ("The rule of corporation law and of equity invoked is well settled and has been often applied. The majority has the right to control; but when it does so, it occupies a fiduciary relation toward the minority."); Hyams v. Calumet & Hecla Mining Co., 221 F. 529, 537 (6th Cir. 1915) ("[T]he rule, independently of state or national anti-trust statutes, is fundamental that one in control of a majority of the stock and of the board of directors of a corporation occupies a fiduciary relation towards the minority stockholders, and is charged with the duty of exercising a high degree of good faith, care, and diligence for the protection of such minority interests. Every act in its own interest to the detriment of the holders of minority stock becomes a breach of duty and of trust, and entitles to plenary relief from a court of equity."); *Wheeler*, 159 F. at 394 ("This devolution of unlimited power imposes on a single holder of the majority of the stock a correlative duty, the duty of a fiduciary or agent, to the holders of the minority of the stock, who can act only through him, the duty to exercise good faith, care, and diligence to make the property of the corporation produce the largest possible amount, to protect the interests of the holders of the minority of the stock, and to secure and pay over to them their just proportion of the income and of the proceeds of the corporate property."); Jones v. Missouri-Edison Elec. Co., 144 F. 765, 771

rule.[7] In 1923, Chancellor Josiah Wolcott brought the rule to Delaware, viewing the principle as "clear" and citing authorities from across jurisdictions.[8] Some initial decisions insisted that the

(8th Cir. 1906) ("Such a majority of the holders of stock owe to the minority the duty to exercise good faith, care, and diligence to make the property of the corporation in their charge produce the largest possible amount to protect the interests of the holders of the minority of the stock and to secure and deliver to them their just proportion of the income and of the proceeds of the property."); Kavanaugh v. Kavanaugh Knitting Co., 123 N.E. 148, 151–52 (N.Y. 1919) ("The stockholders are bound to determine and control this particular part of the corporate affairs [i.e., a vote on dissolution], in regard to which they occupy a relation of trust as between themselves and the corporation, and are burdened and restricted by fiduciary obligations. When a number of stockholders constitute themselves, or are by the law constituted, the managers of corporate affairs or interest, they stand in much the same attitude towards the other or minority stockholders that the directors sustain generally towards all the stockholders, and the law requires of them the utmost good faith.").

7. *See* 3 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 662, at 2543 (8th ed. 1923) ("The law requires of the majority of the stockholders the utmost good faith in their control and management of the corporation as regards the minority, and in this respect the majority stand in much the same attitude towards the minority that the directors sustain towards all the stockholders. Thus, where the majority are interested in another corporation, and the two corporations have contracts between them, it is fraudulent for that majority to manage the affairs of the first corporation for the benefit of the second. A court of equity will intervene and protect the minority, upon an application by the latter."); WILLIAM L. CLARK, HANDBOOK ON THE LAW OF PRIVATE CORPORATIONS (1916) ("There are numerous recent instances where courts of equity have intervened to prevent the tyranny of majorities which need restraint." (collecting cases)); 2 ARTHUR W. MACHEN, JR., A TREATISE ON THE MODERN LAW OF CORPORATIONS § 1306 (1908) (citing the "commendable tendency" to hold "that when a number of shareholders combine to constitute themselves a majority of the company and to control its management, or where one person owns a majority of the shares, they occupy a fiduciary relation to the minority."); 1 CHARLES FISK BEACH, COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 70 (1891) (discussing "circumstances under which a quasi trust relation has been held to exist, and . . . to restrain majority of the company from overriding a dissenting minority."); 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS § 477 (2d ed. 1886) ("The majority may legally control the company's business . . . but in taking control, they assume the duty of exercising diligence and of administering the company's affairs with the utmost good faith and fairness to the minority."); *id.* § 529 ("Nothing can be more unjustifiable and dishonorable than an attempt on the part of those holding a majority of the shares of the corporation to place their nominees in control of the company and then to use their control the purpose of obtaining advantages to themselves . . . .").

8. Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 491 (Del. Ch. 1923) (Wolcott, Jos., C.) ("No one, of course questions the fiduciary character of the

majority stockholder engage in an act of domination before fiduciary duties would arise, but cases soon imposed fiduciary status based on a majority stockholder's functional ability to exercise control.[9] Those early decisions evolved into a broad and stable consensus that the ability to exercise a majority of the voting power equated to control and concomitant fiduciary duties.[10]

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relationship which the directors bear to the corporation. The same considerations of fundamental justice which impose a fiduciary character upon the relationship of the directors to the stockholders will also impose, in a proper case, a like character upon the relationship which the majority of the stockholders bear to the minority. When the majority of stockholders [vote], they are, for the moment, the corporation. Unless the majority in such situations are to be regarded as owing a duty to the minority such as is owed by the directors to all, then the minority are in a situation that exposes them to the grossest frauds and subjects them to most outrageous wrongs."). As support, Chancellor Wolcott cited *Hyams*, 221 F. 529; *Wheeler*, 159 F. 391; *Missouri–Edison Electric Co.*, 144 F. 765; *Ervin*, 27 F. 625; Miner v. Belle Isle Ice Co., 53 N.W. 218 (Mich. 1892); *Kavanaugh*, 123 N. E. 148; and *Farmers' Loan & Trust Co.*, 44 N. E. 1043. Chancellor Wolcott thus looked to federal and state authorities that addressed control in different contexts; he did not regard the test for imposing fiduciary duties on a dominant stockholder as requiring a unique approach to control. 120 A. at 491.

9. Helwig, *supra* note 4, at 472–73, 475. The focus on majority ownership did not reflect a normative determination that only majority ownership could constitute control. The courts dealt with the cases that came before them, and in the late nineteenth century, corporations often operated with unified ownership and control based on majority ownership. *E.g.*, JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES 1780–1970, at 76–77 (1970) (explaining that many corporations were of small or modest capitalization with few outside stockholders); *see also* Chester Rohrlich, *Suits in Equity by Minority Stockholders as a Means of Corporate Control*, 81 U. PA. L. REV. 692, 727 (1933) (citing nineteenth century decisions and noting that "[i]n the past, decisions have been strongly influenced by the fact that the majority which controlled also had the largest financial interest in the corporation.")..

10. *See, e.g.*, Bangor Punta Operations, Inc. v. Bangor & Aroostock R.R. Co., 417 U.S. 703, 716 n.13 (1974) (describing the fiduciary duties owned stockholder controllers as "settled law."); Superintendent of Ins. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) ("The controlling stockholder owes the corporation a fiduciary obligation—one designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders.") (internal quotation marks omitted); Consol. Rock Prods. Co. v. Du Bois, 312 U.S. 510, 522 (1941) ("[E]quity will not permit a holding company, which has dominated and controlled its subsidiaries, to escape or reduce its liability to those subsidiaries by reliance upon self-serving contracts which it has imposed on them. A holding company, as well as others in dominating or controlling positions, has fiduciary duties to security holders of its system which will be strictly enforced." (citations omitted)); Pepper v. Litton, 308 U.S. 295, 306 (1939) ("A director is a fiduciary. So is a

Today, majority ownership is sufficient but not necessary for control.[11] But unlike control based on majority ownership, control without majority ownership lacks a self-evident brightline indicator. That ambiguity has generated persistent questions. What test should a court use to evaluate whether non-majority control exists? What sources of power count? Because majority control turns on 51% stock ownership, should control always require some level of stock ownership? Is there a minimum level of voting power that a non-majority controller must possess?

Courts have addressed these questions for over a century. Throughout that period, courts deployed a functional approach, and for the vast majority of that time, Delaware courts did too.

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dominant or controlling stockholder or group of stockholders." (citations omitted)). In a law review article analyzing the various forms of control and their implications, Adolf Berle called majority control "outright or absolute control." Adolf A. Berle, Jr., *"Control" In Corporate Law*, 58 COLUM. L. REV. 1212, 1213 (1958). He also observed that control over a substantial plurality of voting power, albeit less than a majority, could function as outright control in a widely held corporation: "Forty per cent ownership may be no less absolute if the remaining sixty per cent is split among hundreds or thousands of small stockholders." *Id.*; *accord* Henry L. Purdy, CORPORATE CONCENTRATION AND PUBLIC POLICY 80-81 (1942) ("The possibilities of control by a minority interest become more apparent when it is realized that at an annual meeting of a corporation a quorum does not necessarily require the presence of a majority of the stockholders or a majority of the voting shares. . . . Since this is so, the minority control under discussion assumes greater stature.").

11. *E.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113 (Del. 1994) (imposing fiduciary duties on a stockholder who "owns a majority interest in or *exercises control* over the business affairs of the corporation.") (internal quotation marks omitted); Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989) (imposing fiduciary duties on a majority stockholder or a minority stockholder who exercises "actual control of corporate conduct." (citations omitted)); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."). In his law review article analyzing the various forms of control, Berle referred to non-majority control as "working control." Berle, *supra* note 10, at 1213. He identified two forms. One was non-majority control based on a significant block of stock, although it typically also involved some form of boardroom or managerial influence. *Id.* Another was management control, which rested on the incumbent board's control over the director-nomination process and the proxy machinery. *Id.* The two existed along a continuum. Berle also acknowledged that the level of influence necessary to keep control was lower than the level necessary to gain it. *Id.*

A. Early Recognition of Non-Majority Control

Late nineteenth and early twentieth century decisions imposed fiduciary duties on majority stockholders based on their functional ability to exercise control over the corporation. Technically, the holder of a majority of the voting power has no direct authority over the corporation. The holder can elect and remove directors and adopt bylaws. The holder can also veto major transactions that the board initiates and that require stockholder approval. But that's it. The majority stockholder's power is largely indirect and flows from the ability to intervene and replace directors who do not sufficiently accommodate the majority stockholder's preferences. Although the iron fist of potential removal lurks within the velvet glove of influence, that formal exercise of removal power is a blunt instrument. Influence—not raw power—is the coin of the realm.[12] When imposing fiduciary duties on majority stockholders, courts relied

12. Deborah A. DeMott, *The Mechanisms of Control*, 13 CONN. J. INT'L L. 233, 236 (1999) ("Shareholders' control is often latent and indirect in form. . . . Holding a majority of voting power does not in itself place a shareholder in a position of active control. If the shareholder assumes no additional role within the corporation, the shareholder is not a direct participant in operational decisions or in the formulation of strategic policy. Nonetheless, shareholders hold power to control in a latent form because they may be able to remove directors, and in all events may replace the incumbents if they resign or when their terms expire."); *see* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1296–97 (2008) ("It is a mistake to view the idea of shareholder control as an all-or-nothing inquiry (either a shareholder has complete 'control' or it has none). Shareholder power and influence can depend on context. At one extreme lies the sole shareholder who holds 100% of a firm's outstanding voting stock and enjoys virtually complete authority over every decision made by the firm's board of directors. At the other extreme is the rationally apathetic, atomized individual investor who has no influence over anything and indeed cannot be bothered to return a proxy by mail. Between these two extremes lies a vast range of possible allocations of power between individual shareholders and directors. Indeed, more than one shareholder or shareholder group can be said to "control" the firm in some fashion or another." (footnote omitted)); Helwig, *supra* note 4, at 468 n.2 ("The doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustees for the minority, does not rest upon technical distinctions."); *id.* at 478 ("[M]ost courts have begun to place greater emphasis upon the power of majority stockholders to control corporate property and affairs by virtue of their stock ownership, and no longer require actual domination on the part of directors before a fiduciary relation will be recognized.").

on the practical ability of a majority stockholder to exercise control, not its formal legal authority.[13]

With courts attentive to the functional realities of internal governance, it did not take long for a court to conclude that an influential minority stockholder exercised control. In 1912, the Supreme Court of the United States took that step.[14]

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13. *E.g.*, *Wheeler*, 159 F. at 393–94 ("The holder of the majority of a stock of a corporation has the power, by the election of biddable directors and by the vote of his stock, to do everything that the corporation can do. His power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock."); United States v. N. Sec. Co., 120 F. 721, 725 (C.C. D. Minn. 1903) ("It will not do to say that, so long as each railroad company has its own board of directors, they operate independently, and are not controlled by the owner of the majority of their stock. It is the common experience of mankind that the acts of corporations are dictated and that their police is controlled by those who own the majority of their stock."), *aff'd*, 193 U.S. 197 (1904); People *ex rel.* Peabody v. Chi. Gas Tr. Co., 22 N.E. 798, 802 (Ill. 1889) ("What results must necessarily follow from such ownership of a majority of the shares of stock of these four companies? One result is that the Chicago Gas Trust Company can control the four other companies. The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred. . . . It cannot be denied that the appellee, as owner of the majority of the shares of stock of these four companies, can control them, in the exercise of all their corporate powers, through a board of managers of its own selection."); Farmers' Loan & Tr. Co. v. N.Y. & N. Ry. Co., 44 N.E. 1043, 1046 (N.Y. 1896) ("The clear and legitimate inference to be drawn from the circumstances proved in this case is that, after the New York Central & Hudson River Railroad Company purchased a majority of the stock and bonds of the New York & Northern Railway Company, it controlled its officers and directors as fully and completely as though they had been elected by its votes.").

14. United States v. Union Pac. R.R. Co., 226 U.S. 61, 86 (1912). In two earlier decisions, the justices touched on the concept of non-majority control. One decision involved demand futility, with the justices holding that any effort by derivative action plaintiffs to obtain stockholder approval for a lawsuit would have been futile where the incumbent directors who were hostile to the suit owned 8,840 shares out of 35,000 outstanding, or 25%. Del. & Hudson Co. v. Albany & Susquehanna R.R. Co., 213 U.S. 435, 452 (1909). The Court observed that "[t]he control in the case at bar, therefore, may not have been as direct as in *Doctor v. Harrington* [where Harrington controlled a majority of the voting power], but it was practically efficient." *Id.* The other was a dissenting opinion in which Justice White, joined by Justice Holmes and two other justices, acknowledged that the owner of approximately one-third of a railroad's equity wielded control. N. Sec. Co. v. United States, 193 U.S. 197, 411 (1904) (White, J., dissenting) ("Mr. Hill and others associated with him owned, in the same manner, about one third of the capital stock of the Great Northern Railway Company, the balance of the stock being distributed among about eighteen hundred stockholders. Although Mr. Hill and his immediate associates

Under antitrust law as it then existed, a railroad could not acquire a competing railroad and operate them together to eliminate competition.[15] The federal government sued the Union Pacific Railroad Company, claiming it had acquired control of the Southern Pacific Company. The Supreme Court rejected the argument that 100% ownership was required for control, explaining that "[a] more effectual form of combination to secure the control of a competing railroad than for one road to acquire a dominating stock interest in the other could hardly be conceived."[16]

More important for present purposes, the Supreme Court rejected the argument that a "dominating stock interest" required a majority stake. The justices held instead that Union Pacific gained control after initially acquiring 37.5% of the shares, then later increasing its ownership to 46%.[17] When finding control, the justices also considered evidence that Union Pacific set out to control Southern Pacific's operations and had purchased the block "for the purpose of getting a dominating interest."[18] And the justices considered that after the purchase, "Mr. Harriman, who dominated the affairs of the Union Pacific, became president and chairman of the executive committee of Southern Pacific, with the same ample power which he held in like positions in the Union Pacific Company and companies owned and controlled by it."[19]

Union Pacific extended the functional approach of control to a non-majority stockholder. Nothing distinguished control for antitrust purposes from control for fiduciary analysis.[20] Control was control, making *Union Pacific* significant across the board.

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owned only one third of the stock, the confidence reposed in Mr. Hill was such that, through proxies, his influence was dominant in the affairs of that company."). Mr. Hill was James J. Hill, a railroad executive who built the Great Northern Railway and served as its CEO. *See James H. Hill*, WIKIPEDIA (Nov. 11, 2025) https://en.wikipedia.org/wiki/James_J._Hill [https://perma.cc/D86E-L9QM]

15. *See* Sidney P. Simpson, *The Interstate Commerce Commission and Railroad Consolidation*, 43 HARV. L. REV. 192, 192–93 (1929).

16. *Union Pac. R.R. Co.*, 226 U.S. at 86.

17. *Id.* at 79.

18. *Id.* at 95.

19. *Id.*

20. *E.g.*, Union Pac. R.R. Co. v. Frank, 226 F. 906 (8th Cir. 1915) (conducting single analysis of control for purposes of state antitrust law and fiduciary law); Jones v. Missouri-

In *Union Pacific,* the justices treated control as an issue of fact. When evaluating whether control existed, the court considered multiple sources of influence (the "Multiple Sources Principle"). Those sources included not just stock ownership, but also executive authority and boardroom roles ("Powerful Roles") and the history of the relationship between the entities ("Historical Evidence"). Each would persist as a key tenet of the functional school.

B. Commentators Call for a Functional Approach

During the 1920s and early 1930s, commentators called for a functional approach that acknowledged non-majority control. Adolf A. Berle, Jr., then in the early stages of his career, made significant contributions to the debate. His landmark work with Gardiner Means, *The Modern Corporation and Private Property*,[21] argued for the functional approach.

During the 1920s, key corporate law treatises recognized a blockholder's ability to maintain control with far less than a majority of the voting power. A 1923 treatise observed that "[o]ften a minority interest is a controlling interest; and, in fact, most great corporations are controlled by those who own only a minority interest, and often a very small minority interest."[22] A 1927 treatise commented that "not infrequently a minority elects the board of directors and thus controls the corporation."[23] According to the authors, "[n]o less an authority than the late E.H. Harriman"—the same executive from *Union Pacific*—"admitted in the course of the Alton investigation that the ownership, control, or cooperation of 20% of the stock of a railroad was sufficient to secure its absolute control."[24] That treatise cited an investment bank's assessment that "15% or 20% of stock in friendly hands, will under ordinary conditions assure control when the remaining stock is well

Edison Elec. Co., 144 F. 765 (8th Cir. 1906) (same); Strout v. United Shoe Mach. Co., 208 F. 646, 652–53 (D. Mass. 1913) (same), *aff'd*, 225 F. 1022 (1st Cir. 1915); Manington v. Hocking Valley Ry. Co., 20 Ohio Dec. 468 (Ohio Com. Pl. 1910) (same).

21. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

22. 2 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 317, at 1079–80 (8th ed. 1923).

23. THOMAS CONYNGTON & R.J. BENNETT, CORPORATION PROCEDURE 398 (1927).

24. *Id.* (citation omitted).

scattered."[25] The authors acknowledged that "[i]n case of opposition, a larger percentage would be necessary to control, but even then much less than 50% would ordinarily be sufficient."[26] Another 1927 treatise offered similar comments.[27]

Berle shared these views. In 1926, he observed that "[c]ontrol of American corporations by holders of a minority of the capital stock is no novelty to business men or lawyers."[28] In 1928, he noted that "corporations having widely distributed stockholders are commonly dominated by the holders of a concentrated minority without legal device of any sort."[29]

Six years later, Berle and Means published *The Modern Corporation and Private Property*.[30] Remembered today primarily for its discussion of the separation of ownership from control, Berle and Means sought initially to demonstrate how control was exercised such that dispersed stockholders lacked it.[31] They argued that control should be recognized as "as something apart from ownership on the one hand and management on the other" and that "[l]ike sovereignty, its counterparty in the political system, it is an elusive concept, for power can rarely be sharply segregated or clearly defined."[32]

Berle and Means identified five major types of control: (1) almost complete ownership, (2) majority control, (3) control through a legal device without majority ownership, such as stock pyramiding, shares with disparate voting rights, or a voting trust (4) minority control, and (5) management control. The first three depended on legal rights, primarily the right to vote shares. The

25. *Id.* (citing Dillon, Read & Co, *Investment Review* (Jan.–Mar. 1926)).

26. *Id.*

27. WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 95 (1927) ("Corporations have always been susceptible to control by concentration of voting power. Far less than half of the capital stock may be as effective for such control as possession of an actual majority. But it is elemental—requiring no proof—that the larger the number of shareholders, the more easily may a small, concentrated block of minority shares exercise sway over all the rest. . . . With 300,000 scattered holdings, a possible 15 or 20 per cent of the votes can never be overmatched at an election.").

28. Adolf A. Berle, Jr., *Nonvoting Stock and "Banker's Control"*, 39 HARV. L. REV. 673, 673 (1926).

29. ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATE FINANCE 43 (1928).

30. BERLE & MEANS, *supra* note 21.

31. *Id.* at 7.

32. *Id.*

latter two were "extralegal, resting on a factual rather than a legal base."[33] As they explained, "[s]uch control is less clearly defined than the legal forms, is more precarious, and more subject to accident and change. It is, however, none the less actual."[34] The factual forms could be "maintained over a long period of years," and would tend "towards a position of impregnability comparable to that of legal control."[35]

Berle and Means accepted that generally, control would rest with the individual or group having "the actual power to select the board of directors, (or its majority)."[36] But they noted that "[o]ccasionally a measure of control is exercised not through the selection of directors, but through dictation to the management, as where a bank determines the policy of a corporation seriously indebted to it."[37] In that setting, control might be achieved through "an external circumstance important to the conduct of the enterprise," such as a key relationship.[38] In other words, non-majority control was not inherently tied to stockholder status: "Conceivably it can be exercised without any such interest."[39]

When discussing non-majority control, Berle and Means recognized that control over a large corporation "can be and is being exercised with a minimum of ownership interest."[40] They explained that with friendly management, a relatively small block could exercise control, although control could be contested if management and the blockholder disagreed. Even then, a relatively small blockholder could prevail.

As an example, Berle and Means discussed a then-recent proxy fight waged by John D. Rockefeller, Jr., for control over the Standard Oil Company of Indiana, an event that influenced discussions of non-majority control for decades.[41] Rockefeller

33. *Id.* at 70.
34. *Id.*
35. *Id.* at 79–80.
36. *Id.* at 69–70.
37. *Id.* at 69–70.
38. *Id.* at 79.
39. *Id.* at 69.
40. *Id.*
41. *See, e.g.*, Comment, *Termination of Management Contracts under the Investment Company Act of 1940*, 63 COLUM. L. REV. 733, 746 n.92 (1963) (discussing the contest as exemplifying how "historic associations" between a company and an individual could

"had been in substantial control of the company for years" through a combination of his cooperative relationship with management, his 14.9% stake, and "less tangible factors" such as his "prestige and financial power."[42] But when disagreements arose between Rockefeller and the CEO, Rockefeller launched a proxy contest.

Rockefeller prevailed in the contest, carrying 65% of the votes cast and 59% of the votes outstanding. The fight had seemed close until the end, and Berle and Means attributed Rockefeller's victory to the nucleus of votes from his block of stock, his standing in the community, and the merits of his proposals. For them, the Standard Oil case "probably marks the dividing line between non-majority control and management control."[43] Below 15% ownership, a stockholder could not achieve or maintain control without the support of management. Above that level, control would likely rest with the stockholder.[44]

Berle and Means then analyzed the 200 largest American corporations to determine the locus of control. They treated an ownership block of 20% or more as sufficiently dominant to confer control, and a block of 5% to 20% as indicating joint control

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support a finding of control); George W. Stocking, *The DuPont-General Motors Case and the Sherman Act*, 44 VA. L. REV. 1, 7 (1958) (using Rockefeller contest as an example of minority control, stating "It is a well recognized principle of corporate economics that the larger the number of shareholders and the smaller their holdings the easier it is for a group with a substantial block of stock to control the corporation. When the group has a will to do so, it can hardly be stopped."); Richard W. Duesenberg, *The Proxy Rules and the Proxy Fight*, 5 BUFF. L. REV. 286, 289 (1956) ("The most notable case of success was the seizure of control of the Standard Oil Company of Indiana by John D. Rockefeller in 1929. But it is generally asserted that the standing of Rockefeller in the financial community was more than an incidental factor in his success. The point to be made is that to upset management was a task only the most formidable could achieve." (footnotes omitted)); JOHN CALHOUN BAKER, DIRECTORS AND THEIR FUNCTIONS: A PRELIMINARY STUDY 3 (1945) (citing Rockefeller's dominance of Standard Oil of Indiana as an example of how "key executives or a small controlling group, rather than stockholders as a whole, selected and induced individuals to serve as directors"); HARRY L. PURDY ET AL. CORPORATE CONCENTRATION AND PUBLIC POLICY 81 n.9 (1942) (citing Rockefeller's proxy contest as "[t]he outstanding case" in which a blockholder successfully took on management).

42. BERLE & MEANS, *supra* note 21, at 82, 84.

43. *Id.* at 83.

44. *Id.*; *accord* ADOLF A. BERLE, JR., ECONOMIC POWER AND THE FREE SOCIETY 9–10 (1958); WILLIAM J. GRANGE, CORPORATION LAW FOR OFFICERS AND DIRECTORS 267 (1935) (endorsing Berle's analysis and agreement that a 15 to 20% stake would generally be sufficient to control a public corporation).

held by the blockholder and management.[45] They found that forty-six of the 200 companies were subject to non-majority control or joint minority-management control.[46] They concluded that "the most common condition" for public companies was "wide ownership of the bulk of the stock with a substantial minority held by a single interest."[47]

Having established the prevalence of non-majority control, Berle and Means turned to its legal implications. They explained that although a stockholder without control could vote as he pleased, "the doctrine of [the] dominant stockholder" demanded that a stockholder with control vote in the interests of the corporation.[48] They also cited Judge Benjamin Cardozo's comment that "[a] dominating influence may be exercised in other ways than by a vote,"[49] and Judge Learned Hand's comment that "authority may rest in *pais* [fact], and one may have authority to act for a corporation without the formal action of its board of directors."[50] They concluded that "[t]he device used for 'control' seems to be immaterial—whether it be voting trust, domination by a stockholder, or possibly even domination by a creditor."[51]

Berle and the other commentators from the 1920s and early 1930s were functionalists. They viewed the existence of non-majority control as an issue of fact and endorsed the Multiple Sources Principle. Control did not depend on a narrow class of legal rights, such as the right to vote shares (although a sufficient stake could provide control). They recognized that a person or group exercising control usually would be a stockholder, but stockholder status was not required, particularly if the party controlled a key corporate input or held powerful contract rights ("Contractual Control"). And they perceived that non-majority

45. BERLE & MEANS, *supra* note 21, at 93.

46. *See id.* at 98–116.

47. *Id.* at 48.

48. *Id.* at 235 (citing Central Tr. Co. v. Bridges, 57 F. 753, 755 (6th Cir. 1893)). For the same proposition, they later cited Kavanaugh v. Kavanaugh Knitting Co., 123 N.E. 148 (N.Y. 1919), and Outwater v. Public Serv. Corp., 143 A. 729 (N.J. 1928). *See* BERLE & MEANS, *supra* 21, at 242.

49. Globe Woolen Co. v. Utica Gas & Elec. Co., 121 N.E. 378, 379–80 (1918) (cited in BERLE & MEANS, *supra* note 21, at 237).

50. N.Y. Tr. Co. v. Bermuda-Atl. S.S. Co., 211 F. 989, 998 (S.D.N.Y. 1913)

51. BERLE & MEANS, *supra* note 21, at 239–40.

control was relatively easy to maintain, particularly when a small blockholder aligned with management ("Small Block Control").

C. The New Deal's Functionalism

After the election of Franklin Delano Roosevelt in 1932, Berle went to Washington as a top advisor to the new President.[52] His functional approach to control profoundly influenced the law.[53] *The Modern Corporation and Private Property* became the "Economic Bible" for New Deal policymakers.[54]

Confronting the Great Depression and in response to the Crash of 1929, Roosevelt and the New Deal Congress enacted statutes designed to change market practices.[55] All of the statutes followed Berle and Means in using a "functional standard of 'control.'"[56] Litigation over that approach soon reached the Supreme Court of the United States, which weighed in with back-to-back decisions in 1937 and 1938. Both upheld the functional approach and rejected the argument that non-majority control

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52. *See* JORDAN SWARTZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 71–72 (1987).

53. Robert Hessen, *The Modern Corporation and Private Property: A Reappraisal*, 26 J.L. & ECON. 273, 281 (1983); *see* John W. Cioffi, *Fiduciaries, Federalization, and Finance Capitalism: Berle's Ambiguous Legacy and the Collapse of Countervailing Power*, 34 SEATTLE U. L. REV. 1081, 1084 (2011) ("Berle was a member of the Roosevelt 'brain trust' and one of the most influential architects and defenders of the New Deal from its earliest--and most explicitly corporatist—incarnation.").

54. Cioffi, *supra* note 53, at 1083.

55. *See, e.g.*, H.R. REP. NO. 73-1383, at 3 (1934) ("The lesson of 1921–29 is that without changes [the securities market] cannot endure.").

56. Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 608–09 (2005) ("[E]ntity law had proven a well-nigh insuperable barrier to effective federal regulation of the railroads, the pioneer area in American government regulation of industry. Prompted by this disastrous history, the Franklin Roosevelt administration in its first great wave of major reform statutes commencing in 1933 abandoned 'entity' as the legal standard. In one of the outstanding developments in American jurisprudence, the draftsmen of the 'New Deal' statutes and administrative regulations turned away from traditional corporate theory and adopted enterprise concepts and the functional standard of 'control[,]' [i]n major legislation including the Emergency Transportation Act, the Securities Acts of 1933 and 1934, the Public Utility Holding Company Act, the National Labor Relations Act, and the Investment Company Act of 1940, the National Labor Relations Act, and the Investment Company Act of 1940.").

required owning at least one-third of the voting power (the "One-Third Floor").

1. *Slattery*

Slattery did not arise out of a New Deal statute, but rather an Illinois statute that gave a state regulator the ability to obtain records from a controlled subsidiary.[57] The parent company owned 26.6% of the subsidiary's common stock and appointed two members of a nine (sometimes eight) member board. The parent argued that only majority ownership could support a finding of control. As a fallback, the parent argued for the One-Third Floor.

The justices treated control as an issue of fact and refused to adopt a brightline rule. They explained that:

> [T]here are other methods of control of a corporation than through [majority] ownership. Common management of corporations through officers or directors, or common ownership of a substantial amount, though less than a majority of their stock, gives such indication of unified control as to call for close scrutiny of a contract between them whenever the reasonableness of its terms is the subject of inquiry. In these circumstances, appellant can hardly object to the attempted inquiry into the fairness of the price.[58]

Rejecting the One-Third Floor, the justices agreed that ownership of 26.6% of the subsidiary's common stock plus electing two out of nine (sometimes eight) directors was sufficient to support the district court's finding.[59] The justices thus endorsed the Multiple Sources Principle, Small Block Control, and the salience of Powerful Roles.

2. *Rochester*

Rochester interpreted the Federal Communications Act of 1934,[60] a statute that exemplified the New Deal approach by

57. Nat. Gas Pipeline Co. of Am. v. Slattery, 302 U.S. 300 (1937).

58. *Id.* at 307–08.

59. *Id.* at 308.

60. Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939)

deploying the concept of control extensively without defining it. As the legislative history explained:

> No attempt is made to define "control", since it is difficult to do this without limiting the meaning of the term in an unfortunate manner. Where reference is made to control the intention is to include actual control as well as what has been called legally enforceable control. It would be difficult, if not impossible, to enumerate or to anticipate the many ways in which actual control may be exerted. A few examples of the methods used are stock ownership, leasing, contract, and agency.[61]

A provision of the statute deprived the FCC of jurisdiction over any carrier "engaged in interstate or foreign communication solely through physical connection with the facilities of another carrier not directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carrier."

In *Rochester*, the FCC asserted jurisdiction over Rochester Telephone Company ("Rochester") on the grounds that New York Telephone Company ("New York") controlled it. The evidence of control included New York's participation in Rochester's formation, its ownership of 33.5% of the common stock and 100% of a junior issuance of preferred stock, its ability to elect five out of fifteen members of the Rochester board, its two representatives on a five-member executive committee, and its ability to block any stockholder vote. After considering "the circumstances under which the Rochester came into being, the manner in which it was financed, the operation of the voting trust, and the stake of the New York in the Rochester," the FCC found that New York, "through stock ownership, is the dominant financial factor in the respondent company" and "that this, taken together with their contractual arrangements and other pertinent facts and circumstances appearing in the record, unquestionably gives [New York] power to control the functions of the Rochester."[62]

On appeal, Rochester echoed the appellant in *Slattery* by arguing for the One-Third Floor, claiming it should be "conclusive of [a] lack of control."[63] The Supreme Court disagreed, finding that Rochester's argument "disregards actualities in such

61. H.R. REP. NO. 73-1850, at 5 (1934).

62. *Rochester*, 307 U.S. at 145.

63. *Id.* at 146.

intercorporate relations."[64] The justices treated control as "an issue of fact to be determined by the special circumstances of each case" and affirmed the FCC's finding.[65]

Like *Slattery*, the *Rochester* decision took a functional approach to non-majority control. It applied the Multiple Sources Principle, highlighted the importance of Powerful Roles, Historical Evidence, and recognized Small Block Control. Like *Slattery*, *Rochester* rejected the One-Third Floor.

3. Securities Law Decisions

Like the Federal Communications Act, the Securities Act of 1933 (the "Securities Act" or the "1933 Act") and the Securities Exchange Act of 1934 (the "Exchange Act" or the "1934 Act") deployed the concept of control without defining it. Those statutes charged the Securities & Exchange Commission ("SEC") with interpreting and enforcing their provisions. When doing so, the SEC took a functional approach to control and successfully defended that approach in court.

In a 1940 ruling that cited *Rochester*, *Slattery*, and *Union Pacific*, the SEC explained that:

> The question of "control" is a factual question. "Control" is not synonymous with ownership of 51 percent of the voting stock of a corporation. When power exists to direct the management and policies of a corporation, "control" within the meaning of Section 2(11) [of the Securities Act] exists even though the persons who possess the power do not own a majority of the corporation's voting stock.[66]

The SEC determined that an 18% stockholder exercised control where he "was in complete charge of [the issuer's] affairs," and "for years had managed the issuer and formulated its policies."[67] In another ruling, the SEC determined that a 27% stockholder controlled a corporation by dominating the officers and the

64. *Id.*

65. *Id.* at 145.

66. *In re* Thompson Ross Sec., Exchange Act Release No. 34-2455, 1940 WL 36371, *6–7 (1940) (citing United States v. Union Pacific R.R. Co., 226 U. S. 61 (1912); Nat'l Gas Co. v. Slattery, 302 U. S. 300 (1937); Rochester Tel. Corp. v. United States, 307 U. S. 125 (1939)).

67. *Id.*

executive committee.[68] Those rulings applied the Multiple Sources Principle, recognized Small Block Control, accounted for Powerful Roles, and gave weight to Historical Evidence.

Other SEC rulings found non-majority control to exist under other structures, including:

- a person who had the sole power to approve withdrawals from the corporation's only bank account,[69]
- an underwriting agreement that conferred the power to name a majority of the directors,[70]
- an underwriting agreement that conferred the power to direct the senior officer of the corporation,[71]
- a person who had contributed the vast majority of the corporation's capital and could effectively shut down its business,[72]
- a person who chose the members of the executive committee where the board had a history of deferring to the executive committee's decisions,[73] and
- a person who actually ran the corporation, even though not a director, officer, or stockholder.[74]

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68. *In re* Res. Corp. Int'l, Securities Act Release No. 33-2294, 1940 WL 36427 (1940).

69. Exchange Act Release No. 34-3285A, 1942 WL 76430, at *13–14 (1942) (finding indirect control when controller made "payments through a controlled subsidiary for the benefit of the registrant" and when the control was "safeguarded by an agreement providing that all funds received by the enterprise should be deposited in a bank account in [an employee's] name but with [controller] having the sole power to draw on the account").

70. *In re* Canusa Gold Mines, Ltd., 1937 WL 32794, at *7 (1937) (finding control where an underwriter entered into an agreement with major stockholders to name a majority of board of directors).

71. *In re* Reiter-Foster Oil Corp., Securities Act Release No. 33-2201, 1940 WL 36362, at *1, *13 (1940) (finding the underwriters controlled issuer "when underwriters selected a new president for the registrant, paid him part of his compensation, instructed him to report to them, gave him instructions as to the operation of the business of the registrant and required him to furnish 'good news' of field operations to aid in the distribution of underwritten securities . . .").

72. *In re* Walston & Co., Exchange Act Release No. 34-2603, 1940 WL 36454, at *7 (1940) (finding control "[w]here a person had contributed 92 percent of brokerage firm's stated capital, and large sums of additional working capital; received 90 percent of the profits and was similarly responsible for the losses, where he could acquire legal title to any portion of the firm he did not own through the exercise of options; could force out any or all of the partners, and could cut off firm's chief source of business . . .").

73. *In re Res. Corp. Int'l*, 1940 WL 36427, at *18–19.

74. SEC v. Franklin Atlas Corp., 154 F. Supp. 395, 401 (S.D.N.Y. 1957).

Those rulings took a functional approach to non-majority control, applied the Multiple Sources Principle, recognized Small Block Control and Contractual Control, and gave weight to Powerful Roles and Historical Evidence.

4. *DuPont*

The New Deal era made the functional approach dominant.[75] In 1957, another bellwether decision from the Supreme Court of the United States applied the functional approach.[76] It remains the justices' last significant statement on non-majority control.[77]

The *DuPont* case was "one of the most important antitrust cases ever to be heard."[78] Section 7 of the Clayton Act prohibits any company from acquiring stock in another corporation if the effect

75. *E.g.*, N. Am. Co. v. SEC, 327 U.S. 686, 693 (1946) ("Historical ties and associations, combined with strategic holdings of stock, can on occasion serve as a potent substitute for the more obvious modes of control. Domination may spring as readily from subtle or unexercised power as from arbitrary imposition of command. To conclude otherwise is to ignore the realities of intercorporate relationships." (citations omitted)); Guttman v. Ill. Cent. R.R. Co., 189 F.2d 927, 928 n.2 (2d Cir. 1951) ("The Union Pacific Railroad holds about 25% of the outstanding common stock [of Central] . . . and was therefore pretty obviously in control of the Board of Directors."), *cert. denied*, 342 U.S. 867 (1951); Gratz v. Claughton, 187 F.2d 46, 49–50 (2d Cir.), *cert. denied,* 341 U.S. 920 (1951) ("We take judicial notice that an effective control over the affairs of a corporation often does not require anything approaching a majority of the shares; and this is particularly true in the case of those corporations whose shares are dealt in upon national exchanges."); Morgan Stanley & Co. v. SEC, 126 F.2d 325, 328 (2d Cir. 1942) ("Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia. We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient."); *id.* at 333 (Hand, J., concurring) ("I think we can take judicial notice of the fact that the ownership of twenty per cent of the voting power of a company makes the owner 'liable' to have practical control.").

76. United States v. E.I du Pont de Nemours & Co., 353 U.S. 586 (1957).

77. *Cf.* Denv. & Rio Grande W. R.R. Co. v. United States, 387 U.S. 485, 499 (1967) (noting that the "proposed issuance of a 20% stock interest to Greyhound undoubtedly raised a serious question whether control of its operations might pass to Greyhound. Control . . . must be judged realistically, and is a matter of degree." (citing Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939))).

78. George W. Stocking, *The DuPont-General Motors Case and the Sherman Act*, 44 VA. L. REV. 1, 1 (1958).

may be to substantially lessen competition.[79] In 1917, E.I. du Pont de Nemours and Company ("DuPont") acquired a 23% stock interest in General Motors Corporation ("GM"). The justices held that DuPont acquired control of GM through its stock ownership, which enabled DuPont to secure the lion's share of GM's purchases for certain products.

The Supreme Court applied the Multiple Sources Principle, starting with Historical Evidence. William C. Durant had formed GM in 1910 by rolling up automobile brands with the support of a banking syndicate, but Durant and the syndicate deadlocked in 1915. They resolved the deadlock by adding four new directors: Pierre S. du Pont, the President of DuPont; John J. Raskob, DuPont's treasurer; and two outsiders.

DuPont had capital to deploy, and Durant encouraged DuPont to invest in GM. Those discussions led to the 1917 purchase. Afterward, du Pont and Raskob joined the GM Finance Committee and assumed primary responsibility for GM's finances. Durant continued to handle operations until J.A. Haskell, a former DuPont sales manager, became head of GM's operations committee. From that position, Haskell arranged for GM to purchase a dominant share of its chemical inputs from DuPont.[80]

The justices treated control as a question of fact, but disagreed with the district court's finding of no control. They found the evidence to be "overwhelming that [DuPont's] commanding position was promoted by its stock interest and was not gained solely on competitive merit."[81] That holding applied the Multiple Sources Principle and recognized Small Block Control, while giving weight to Powerful Roles and Historical Evidence.

DuPont reinforced the functional approach to non-majority control. After *DuPont*, decisions continued to treat non-majority control as a question of fact and follow the Multiple Sources Principle.[82] Consistent with Small Block Control, courts held that

79. 15 U.S.C. § 18 (2018).

80. *See* 353 U.S. at 600–04.

81. *Id.* at 605. *See* Joel B. Dirlam & Irwin M. Stelzer, *The Du Pont-General Motors Decision: In the Antitrust Grain*, 58 COLUM. L. REV. 24, 29–34 (1958) (collecting evidence that supported a finding of control).

82. *See* Gilbertville Trucking Co. v. United States, 371 U.S. 115, 125 (1962) (explaining that the concept of control would "encompass every type of control in fact" and

stakes substantially below a majority could support non-majority control, particularly in conjunction with Powerful Roles.[83]

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identifying informal methods of control popular in the transportation agency); *see also* United States v. Re, 336 F.2d 306, 316 (2d Cir. 1964) (agreeing that the meaning of "control" was as no different than its normal everyday usage), *cert. denied*, 379 U.S. 904 (1964); Klampmeir v. Telecheck Int'l Inc., 315 F. Supp. 1360, 1361 (D. Minn. 1970) ("The issue 'of control' is a complex fact question which requires an examination of the relationships of the various alleged 'controlling persons' to the person or entity which transacted the sale of securities alleged to have violated the Act, an examination of which cannot be limited to a cursory review of their proportionate equity positions, employment or director status on the relevant dates."); SEC v. Am. Beryllium & Oil Corp., 303 F. Supp. 912, 915 (S.D.N.Y. 1969) (explaining that evaluating control required "a factual determination which cannot be resolved by the use of mathematical formulae; rather, resolution of the issue of control depends upon a careful appraisal of the overall effect of the various relationships and other circumstances present in the particular case.").

83. *See, e.g.*, First Interstate Bank of Denv., N.A. v. Pring, 969 F.2d 81, 898 (10th Cir. 1992) (reversing grant of summary judgment finding no control; holding that fact dispute existed regarding control where general partner controlled partnership that owned 20% of corporation), *rev'd on other grounds sub nom.* Central Bank of Denv., N.A. v. First Interstate Bank of Denv., N.A., 511 U.S. 164 (1994); Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1225 (4th Cir. 1980) (inferring that Schedule 13D was false where it claimed acquisition was solely for investment purposes) ("[T]he defendants are looking to the purchase of approximately twenty percent of the outstanding equity stock in Dan River. Such an accumulation of stock in a publicly held corporation frequently is regarded as control of a corporation."); Gulf & Western Indus. v. Great Atl. & Pac. Tea Co., 476 F.2d 687, 695 (2d Cir. 1973) (citing 19% stock ownership as sufficient basis to infer control for antitrust purposes); Essex Universal Corp. v. Yates, 305 F.2d 572, 575 (2d Cir. 1962) (treating president, chairman, and holder of 28.3% of stock as "dominant stockholder" and fiduciary; observing that "it is commonly known that equivalent power [to a majority] usually accrues to the owner of 28.3% of the stock"); *id.* at 579 (placing the burden on the 28.3% holder to prove a lack of control) ("Although in the case at bar only 28.3 per cent of the stock was involved, it is commonly known that a person or group owning so large a percentage of the voting stock of a corporation which, like Republic, has at least the 1,500 shareholders normally requisite to listing on the New York Stock Exchange, is almost certain to have share control as a practical matter"); Perlman v. Feldmann, 219 F.2d 173, 175 (2d Cir. 1955) (treating director, officer, and 33% stockholder as "dominant stockholder" and fiduciary); G.A. Thompson & Co. v. Partridge, 636 F.2d 945, 958 & n.24 (5th Cir. 1981) (holding that officer and director who was involved in day-to-day operations and held 24% of the stock had the "requisite power to directly or indirectly control or influence corporate policy"); Vanadium Corp. of Am. v. Susquehanna Corp., 203 F. Supp. 686, 693–94 (D. Del. 1962) (citing 19.7% stock ownership as supporting inference of non-majority control for antitrust purposes); Insuranshares Corp. of Del. v. N. Fiscal Corp., 35 F. Supp. 22, 25, 28 (E.D. Pa. 1940) (addressing duty of controlling stockholder not to sell its block to a looter and treating 28% ownership as "minority, but

Based on the case law, a practitioner consensus about non-majority control emerged. As a rule of thumb, practitioners presumed that a 10% stockholder exercised control over a widely held issuer,[84] but only where there was alignment with management.[85] That rule of thumb applied the Multiple Sources Principle and recognized Small Block Control, particularly when aligned with Powerful Roles.

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controlling, interest" and noting that control may arise "either through majority stock ownership, ownership of large blocks of stock less than a majority, officeholding, management contracts, or otherwise"); *see also* United States v. General Dynamics Corp., 415 U.S. 486, 489 (1974) (noting the acquiring firm owned 34% of the acquired company's shares and that the parties agreed there was "effective control."). *See generally* Matina Kesaris, *Antitrust Standing of Target Corporations to Enjoin Hostile Takeovers Under Section 16 of the Clayton Act*, 55 FORDHAM L. REV. 1039, 1054 (1987) ("Although there are no bright line tests to determine 'legal control,' ownership of fifteen to twenty percent of the target's voting stock can give the acquiror significant influence over the operating and financial decisions of the company."). That did not mean the inference of control from a meaningful block of stock was always sufficient; courts continued to reject findings of control where the evidence did not support it. *See* United States v. Johns-Manville Corp., 237 F. Supp. 885, 891 (E.D. Pa. 1964) (rejecting argument that parent's beneficial ownership of 20% of subsidiary's stock gave it control).

84. A.A. Sommer, Jr., *Who's "In Control"?—S.E.C.*, 21 BUS. LAW. 559, 568 (1966) ("Initially, record or beneficial ownership of (or right to vote) 10% or more of the voting stock of a corporation has become something of a benchmark and when this is encountered a red warning flag should run up. . . . While there is nothing in the statutes or the regulations or rulings by the Commission which says such a holder is *ipso facto* a controlling person, generally such degree of ownership should create caution and might be regarded as creating a rebuttable presumption of control, especially if such holdings are combined with executive office, membership on the board, or wide dispersion of the remainder of the stock."); *id.* at 568–69 ("a person with less than 10% may alone be a controlling person; generally to be such his ownership would have to be combined with dominant executive office and fairly wide dispersion of the remainder of the voting power"); N. Thomas Gilroy, Jr., Carlos L. Israels, & William J. McDonald, Jr., *Who Is A Controlling Stockholder in* PLI FORUM ON S.E.C. PROBLEMS OF CONTROLLING STOCKHOLDERS AND IN UNDERWRITINGS 7–8 (1962) ("In Form S-1 we are required to list holders of 10% or more of the voting securities of an issuer. We can fairly assume that anybody who holds 10% or more of the voting securities of an issuer is a controlling person. When you get down below 10% is there a line? . . . We must recognize that it goes back to the concept in Rule 405 of a person who, either as an individual or as a member of a group, is capable of controlling management and policies of an issuer. In large corporations the holdings of stockholders who are able to accomplish this directly through the management are relatively small.").

85. Sommer, *supra* note 84, at 569–70.

D. Delaware's Functionalism

This Article now turns to Delaware corporate law. That law has evolved through multiple eras, each shaped by larger cultural forces.[86] During the first era—the Charter-Mongering Era—the Delaware courts did not issue any significant decisions on control. During the next four eras and for much of a fifth, Delaware courts took a functional approach when assessing non-majority control.

1. The Quiet Era

The Quiet Era lasted from 1913 until 1963. During that lengthy period, "[m]uch of the work of corporate governance happened on the national level, including the enactment of the federal securities laws."[87] In Delaware, judicial luminaries like Josiah O. Wolcott (Chancellor 1921–38) and Collins J. Seitz (Vice Chancellor 1946–50, Chancellor 1950–66) put the Court of Chancery on the map as a venue for corporate disputes. During the Quiet Era, three decisions addressed non-majority control. Each used a functional approach.

The first was *Guth v. Loft, Inc.*,[88] the landmark case about whether Charles G. Guth, the President and Chairman of Loft, usurped a corporate opportunity from Loft by purchasing the company that owned the formula for Pepsi Cola. Guth argued that the Loft board of directors had approved his actions, allowing him to take the opportunity for himself. Chancellor Wolcott found that any board approval could not have been effective given Guth's control:

> Guth was in an unquestioned position of dominance in the affairs of Loft. He had won control of the corporation after an intense and bitter contest for proxies from the stockholders in March of 1930. He is a man of great force and determination—one who having obtained control was not likely to relinquish a particle of it to others. With the exception of Patton and Dr. Sullivan, who came on the board in 1930 and 1934 respectively,

86. *See* J. Travis Laster, *An Eras Tour of Delaware Corporate Law*, 50 J. CORP. L. 1189 (2025).

87. *Id.* at 1192.

88. Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939).

> I doubt if there was a single director who would have ventured to question not to say oppose any action which Guth favored.[89]

That paragraph shows Wolcott applying the Multiple Sources Principle. He considered Powerful Roles (Guth's status as a director and CEO), as well as Guth's forceful personality and his relationships with other directors. Later in the decision, Wolcott considered Transactional Evidence by looking at the terms of transaction being challenged and noting that "[t]he extent to which [Guth] availed himself of Loft's funds in advances to himself individually and . . . his own personal company (Pepsi) emphasizes the absoluteness of his sway."[90]

The one source of influence that Wolcott did not discuss was stock ownership. None of the various *Guth*-related decisions identify how many shares Guth owned, but the percentage had to be low. In 1929, Guth sold his company to Loft for 50,629 shares of stock.[91] Guth became a vice president, then waged a proxy contest for control in 1930.[92] The incumbent CEO held proxies for 232,840 shares,[93] but Guth's faction prevailed on the first ballot. That required approval from a majority of the voting power present, so Guth's faction had to hold proxies for at least one additional share. Adding the two factions' shares implies at least 465,681 shares present at the meeting. Using that figure, Guth's 50,629 shares represented a 11% stake. That estimate is likely high, because some of the outstanding voting power was undoubtedly not present at the meeting. It means, however, that Wolcott found, and the Delaware Supreme Court affirmed, that Guth controlled Loft through his status as president, a director, and an 11%

89. Loft, Inc. v. Guth, 2 A.2d 225, 237 (Del. Ch. 1938), *aff'd*, 5 A.2d 503 (Del. 1939); *accord id.* at 238 ("Guth was not only a director of Loft. He was also its president. He was dominant in its affairs, so much so that the belief is warranted that in actual practice he handled its affairs and directed its management as though he were its sole proprietor.").

90. *Id.* at 237. The Chancellor took a dim view of the former directors who testified that Guth had acted properly, observing that "if it be accepted, demonstrate thereby the unrestricted dominance of Guth over the board and their own willingness to subordinate the interests of Loft to those of Guth and his individual enterprises." *Id.* at 237–38.

91. *See* Miller v. Loft, Inc., 153 A. 861, 861 (Del. Ch. 1931). As the decision recites, Loft paid total consideration of $595,631 in the form of shares issued at an agreed-upon price of $11.75 per share. *Id.*

92. *See* Duffy v. Loft, Inc., 151 A. 223, 225, *aff'd*, 152 A. 849, 851 (Del. 1930).

93. *Id.* at 226.

stockholder. *Guth* stands as a powerful example of Small Block Control based on a functional approach.

The next decision was *Burry Biscuit,* issued in 1948.[94] Then-Vice Chancellor Seitz credited that George W. Burry, the corporation's founder, president, and CEO, a director, and a 10% stockholder, exercised control. A stockholder sued to invalidate a large equity grant to Burry, and Seitz inferred for pleading-stage purposes that "a controlled board of directors" approved the grant.[95] Applying the Multiple Sources Principle, he considered both Powerful Roles and Historical Evidence, noting that Burry had "selected, dominated and controlled the board of four directors at all times since the organization of the corporation."[96] He also considered Transactional Evidence, such as the terms of the grant and Burry's domination of the board's deliberations.[97] Although he cited Burry's 10% stockholding, he did not afford it outsized significance. The inference of control resulted in the denial of the motion to dismiss.[98] *Burry Biscuit* provides another powerful example of Small Block Control.

The last Quiet Era decision was *Greene v. Allen,*[99] which shaped up as a replay of *Guth.* The plaintiff alleged the taking of a corporate opportunity by the corporation's president, who was also a director and 29% stockholder.[100] The four other directors consisted of one insider, two lawyers who represented the company, and an outsider.[101] The defendants argued that the board declined the corporate opportunity. Chancellor Seitz applied the Multiple Sources Principle and found it "perfectly evident" that the CEO "dominated and controlled those members of [the] board" who made the decision.[102]

> My conclusion is drawn from the inter-play of several circumstances; some tangible and others intangible: The two

94. Rosenthal v. Burry Biscuit Corp., 60 A.2d 106 (Del. Ch. 1948).

95. *Id.* at 109.

96. *Id.* at 107.

97. *Id.* at 108.

98. *Id.* at 109.

99. Greene v. Allen, 114 A.2d 916 (Del. Ch. 1955), *rev'd sub nom.* Johnston v. Greene, 121 A.2d 919 (Del. 1956).

100. *Id.* at 917.

101. *Id.* at 918.

102. *Id.* at 920.

> directors who voted to reject the offer are both, realistically speaking, beholden to [the CEO]; [the CEO] was and is [the corporation's] president and a member of its board; the manner in which the corporate affairs were handled as among the board members showed that realistically this was a one-man board . . . . Nor is my conclusion affected by the subsequent director ratification. And I emphasize that my conclusion is based not merely on the manner in which the various director relationships were created but on the cumulative effect of the trial record.[103]

That paragraph references Powerful Roles, Transactional Evidence, and Historical Evidence. On appeal, the Delaware Supreme Court reversed and entered judgment in favor of the defendants, finding that because the offer had come to the CEO in his personal capacity, the corporation had no interest in it.[104]

The three Quiet Era decisions used the functional approach. Each applied the Multiple Sources Principle and took into account Powerful Roles, Historical Evidence, and Transactional Evidence. Consistent with Small Block Control, each found control to exist where the senior manager in question held a block of 10%, not more than 11%, and 29%.

2. The Responding Era

Next came the Responding Era, which ran from 1963 to 1977. During those years, the Delaware courts issued four decisions addressing non-majority control. All used the functional approach.

The first decision was *Cheff v. Mathes*,[105] the only ruling from the Delaware Supreme Court during either the Quiet Era or the Responding Era. The defendant directors had repurchased a 20% block owned by a potential acquirer at an above-market price. The Court of Chancery held after trial that the potential acquirer had not posed a meaningful threat to the corporation and that the directors purchased the block at a premium to entrench themselves.[106] After weighing the evidence differently, the

103. *Id.*
104. *Johnston*, 121 A.2d at 925.
105. Cheff v. Mathes, 199 A.2d 548 (Del. 1964).
106. *Id.* at 553.

Delaware Supreme Court reversed. The justices found that the board acted properly in repurchasing the block at a premium, because "a substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a 'control premium.'"[107] The Delaware Supreme Court's ruling implicitly recognized Small Block Control by holding that a 20% block could command a control premium.

The next two Responding Era decisions arrived in 1971. In *Kaplan v. Centrex Inc.*,[108] a minority investor challenged transactions between a commercial lender and two construction companies that worked together on a series of joint ventures. The construction companies jointly owned 20% of the lender's stock and had nominees on its board. In a post-trial decision, the Court of Chancery treated control as an issue of fact, stating that it would apply the term's "ordinary meaning," which contemplated "direction of corporate conduct in such a way as to comport with the wishes or interests of the corporation (or persons) doing the controlling."[109] The court also noted that "[t]here is no mystic number of shares which in itself can be deemed to constitute corporate control . . . where control is claimed to depend on less than a majority holding."[110] Giving heavy weight to Transactional Evidence, the court found after trial that the plaintiff failed to prove that the construction companies acted as dominant stockholders for purposes of the transaction at issue. Instead, the evidence convinced the court that the board exercised independent judgment.[111] The functional approach thus produced a finding of non-control—at least for the specific transaction in question.

The other 1971 decision was *Puma v. Marriott Corp.*[112] In a post-trial decision, the Court of Chancery found that the plaintiff failed to prove that members of the Marriott family exercised

107. *Id.*

108. 284 A.2d 119 (Del. Ch. 1971).

109. *Id.* at 123.

110. Liboff v. Allen, 1975 WL 1961, at *5 (Del. Ch. Jan. 14, 1975) (cleaned up) (rejecting argument on summary judgment that ownership of 28.5% of the stock, standing alone, supported an inference of control).

111. *Id.*

112. 283 A.2d 693 (Del. Ch. 1971).

control for purposes of a squeeze-out transaction.[113] The family collectively owned 46% of the stock, but had negotiated the squeeze-out transaction with a committee of independent directors. Giving heavy weight to Transactional Evidence, the Court of Chancery held that the Marriott family had not dominated the negotiations and applied the business judgment rule. The functional approach again produced a finding of non-control—at least for the specific transaction in question.

The last Responding Era decision was *Liboff v. Allen*, issued in 1975.[114] There, the Court of Chancery granted summary judgment for the defendants, holding that the evidence failed to create a dispute of fact on the issue of control. Through an unsolicited tender offer, an acquirer bought 28.5% of the target's stock. At the target's next annual meeting, the acquirer made no effort to elect nominees to the board. The acquirer then engaged in merger negotiations with the target, and the parties entered into a transaction. A plaintiff sued, alleging the acquirer obtained control through its purchases. After seven years of discovery, and with the parties ready for trial, the defendants moved for summary judgment. The plaintiff pointed to nothing other than the block of stock and the eventual transaction, and the court saw no evidence of domination. The court therefore applied the business judgment rule and ruled for the defendants.[115] The functional approach produced yet another finding of non-control.

The four Responding Era cases show the continuing dominance of the functional approach. They also demonstrate that its use need not lead to a finding of control. None of the decisions were rendered at the pleading stage, implying that the

113. A squeeze-out is a transaction that forces out the non-controlling holders, eliminating them from the enterprise. *See* BYRON E. FOX & ELEANOR M. FOX, 1 CORPORATE ACQUISITIONS AND MERGERS § 5E.08 (2025) (describing a squeeze-out as a transaction "in which a group of shareholders, usually a minority group, of a corporation exchanges its shares for cash, securities, or some other consideration while another group of shareholders receives the entire equity interest in the corporation"). The vast majority of squeeze-outs today are effectuated through mergers, but before Delaware liberalized its merger statutes in the mid-twentieth century, controllers effectuated squeeze-outs by selling the corporation's assets to an affiliate, then dissolving the sell-side corporation and distributing the consideration to its stockholders. *See* Stream TV Networks, Inc. v. SeeCubic, Inc., 250 A.3d 1016, 1034 (Del. Ch. 2020).

114. 1975 WL 1961, at *3.

115. *Id.* at *6.

parties viewed the control allegations as sufficient to survive a motion to dismiss. At trial (and in *Liboff* on a pre-trial motion for summary judgment), the court treated control as a question of fact. Consistent with Small Block Control, the *Kaplan* court explained that there was "no mystic number" of shares at which control arose. In all four decisions, the Court of Chancery relied principally on Transactional Evidence to find that control did not exist—at least for purposes of the specific transaction being challenged. It was only on appeal in *Cheff* that the Delaware Supreme Court held that a 20% block could confer control, consistent with the concept of Small Block Control.

3. The Reformation Era

The Reformation Era began in 1977[116] when the Supreme Court of the United States issued its decision in *Santa Fe Industries v. Green.*[117] The justices held that Rule 10b-5 could not be used as a framework for reviewing the substantive merits of squeeze-out transactions, leaving those issues to state law, but the decision also cautioned that federal preemption might prove necessary if state law did not provide sufficient protection for investors.[118] During the Reformation Era, the Delaware Supreme Court sought to respond to that challenge while remaking Delaware law across a range of significant issues. After strong practitioner pushback to Court of Chancery decisions that applied the Delaware Supreme Court's innovations to limit defensive responses to unsolicited takeover bids, the Delaware courts retreated and the Reformation Era drew to a close.[119]

Although doctrinally revolutionary in many areas, the Reformation Era did not change the law on non-majority control. Consistent with the functional approach, Delaware courts continued to treat control as a question of fact. The test continued to be whether a person could exercise "actual control of corporate

116. *Eras Tour, supra* note 86, at 1199.

117. *See* Santa Fe Indus., Inc. v. Green, 430 U.S. 462 (1977).

118. *See Eras Tour, supra* note 86, at 1199–1200.

119. *Id.* at 1213–16.

conduct" (the "Conduct Control Test").[120] When applying that test, the decisions analyzed whether the person could exercise control over "the business affairs of the corporation."[121]

Also consistent with the functional approach, Delaware cases continued to recognize Small Block Control. In *Moran*, the Delaware Supreme Court affirmed a post-trial ruling that approved the use of a stockholder rights plan with a 20% trigger.[122] The trial court found that "[t]he significance of the 20% figure whether for ownership or voting purposes is its recognized threshold for measuring control of a publicly held corporation."[123]

In *Robbins*, the parties to an appraisal proceeding asked then-Vice Chancellor Berger to address whether ownership of a 31% block in a publicly traded company conferred control.[124] She explained that "[t]his Court and others have recognized that substantial minority interests ranging from 20% to 40% often

120. *See* Citron v. Fairchild Camera & Instr. Corp., 569 A.2d 53, 70 (Del. 1989); *accord* Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del. Ch. 1984) ("For controlling stock ownership to exist in the absence of a numerical majority there must be domination by a minority shareholder through actual exercise of direction over corporate conduct."), *aff'd*, 575 A.2d 1131 (Del. 1990).

121. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) ("Under Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation."); *see In re* Sea-Land Corp. S'holders Litig., 1988 WL 49126, at *3 (Del. Ch. May 13, 1988) ("A stockholder is not deemed controlling unless it owns a majority of the stock or has exercised actual domination and control in directing the corporation's business affairs.").

122. Moran v. Household Int'l, Inc., 500 A.2d 1346, 1348 (Del. 1985).

123. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985). For support, the trial court decision cited a federal court of appeals opinion which observed that a 20% holding "in a publicly held corporation frequently is regarded as control." Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1225 (4th Cir. 1980). Outside of Delaware, during the same year, the SEC noted the "widely held belief that the ownership of 20% voting power in a widely held company in most instances constitutes control." Order Approving Proposed Rule Change and Accelerated Approval of Amendments No. 1 and No. 2 of Proposed Rule Change Relating to the Shareholder Approval Policy, Exchange Act Release No. 34-27035, 54 Fed. Reg. 30490, 30429 n.23 (July 14, 1989); *see also* Deborah A. Demott, *Down the Rabbit-Hole and Into the Nineties: Issues of Accountability in the Wake of Eighties-Style Transactions in Control*, 61 GEO. WASH. L. REV. 1130, 1135–37 (1993) (discussing case study that treated 15% stock ownership as conferring control); Victor Brudney, *Equal Treatment of Shareholders in Corporate Distributions and Reorganizations*, 71 CAL. L. REV. 1072, 1073 n.2 (1983) ("The owner of 5% or 10% of the outstanding voting power may possess control.").

124. Robbins & Co. v. A. C. Israel Enters., Inc., 1985 WL 149627 (Del. Ch. Oct. 2, 1985).

provide the holder with working control."[125] As support, she cited (1) a case interpreting control under the federal securities laws,[126] (2) a case that relied on the *DuPont* decision,[127] (3) *Cheff*,[128] and (4) *Moran*.[129] Her reliance on the first two decisions illustrated the generally applicable nature of the concept of non-majority control, because she did not distinguish between control for Delaware law purposes and control under the federal securities laws or antitrust laws. She concluded that the combination of the 31% block plus the ability to elect two members of a ten-member board, one of whom served as the Chairman, constituted non-majority control and supported a control premium.[130] She thus applied the Multiple Sources Principle, recognized Small Block Control, and accounted for Powerful Roles.

Other decisions from the Reformation Era illustrate how the functional approach can generate a finding of no control. In *Sea-Land*, the court declined to draw a pleading-stage inference of control and dismissed a claim alleging that a 39.5% stockholder had breached its fiduciary duties as a controller by extracting a premium for its shares.[131] That might sound like a significant

125. *Id.* at *5.

126. *Id.* (citing Essex Universal Corp. v. Yates, 305 F.2d 572, 579 (2nd Cir. 1962) for the proposition that a 28.3% holder was "almost certain to have share control as a practical matter.").

127. *Id.* (citing Gottesman v. General Motors Corp., 279 F. Supp. 361, 368 (S.D.N.Y. 1967), *aff'd*, 436 F.2d 1205 (2d Cir. 1971), for the proposition that "23% ownership constitutes control where balance is widely held"). In *Gottesman*, stockholders asserted a derivative claim against the board of GM and DuPont based on the interested transactions at issue in the *DuPont* case. The United States District Court for the Southern District of New York entered judgment for the defendants. In a post-trial ruling, the district court accepted the finding of control from the *DuPont* case, questioned whether the legal principles imposing fiduciary duties on a dominant stockholder might require a greater showing, and assumed for purposes of analysis that DuPont was a controlling stockholder. *See Gottesman*, 279 F. Supp. at 384. The court held that no duty had been breached because GM paid DuPont market prices, rendering the transactions entirely fair. *Id.*

128. *Robbins*, 1985 WL 149627, at *5 (citing Cheff v. Mathes, 199 A.2d 548, 555 (Del. 1964), as "recognizing, inference to buy back of just under 20% of company's stock that a substantial block of stock will normally command a control premium").

129. *Id.* (citing Moran v. Household Int'l, Inc., 490 A.2d 1059 (1985), for the statement "20% ownership recognized as threshold for measuring control").

130. *Id.*

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

rejection of Small Block Control and the endorsement of a high stock ownership floor before non-majority control could exist, but the facts do not support that interpretation. The Simmons Group had "decided to seek control of Sea-Land" and acquired the 39.5% block through a creeping takeover.[132] In response, the board launched a sale process. When another bidder emerged, Simmons extracted a 7% premium for its shares.[133] A stockholder plaintiff sued, claiming Simmons breached its fiduciary duties as a controlling stockholder by bargaining for the premium, while at the same time conceding that Simmons "did not control the business affairs of Sea-Land or its Board."[134] The claim boiled down to an allegation that securing a control premium was improper.

The court credited that "39.5% ownership of a publicly traded, widely held corporation made [Simmons] indispensable to . . . the success . . . of any bid" and gave Simmons "leverage to determine who would be the acquiror of Sea-Land."[135] The court nonetheless dismissed the claim, finding that Simmons' "leverage" in that situation did not amount to control sufficient to trigger entire fairness review.[136] Far from suggesting that a 39.5% block was insignificant and could not support control, the decision accounted for the factual nuances of Simmons' position as an unsolicited acquirer attempting a creeping takeover. The case took a functional approach and relied on Historical Evidence and Transactional Evidence to reject an inference of non-majority control.[137]

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132. *Id.* at *1.

133. According to the decision, Simmons received a total of $800 million, with $50 million representing a premium over what it would have received above the base transaction price. *Id.*

134. *Id.* at *3.

135. *Id.* at *1 (internal quotation marks omitted).

136. *Id.* at *3 ("As a hostile bidder and a large stockholder that did not exercise actual control over the corporate affairs of the target corporation (Sea-Land), LLC owed no direct duty of a fiduciary nature to Sea-Land's stockholders.").

137. The *Sea-Land* ruling on control was ultimately superfluous. Even if the court had credited that Simmons owed a duty to the corporation and its stockholders, Delaware law would have permitted Simmons to refuse to sell its block except on terms that included a control premium, as long as Simmons did not sell to a looter knowingly or with gross negligence. *See* J. Travis Laster, *The Distinctive Fiduciary Duties That Stockholder Controllers Owe*, 20 N.Y.U. J.L. & BUS. 461, 500 (2024).

Ivanhoe was another factually complex Reformation Era decision. The Delaware Supreme Court held that the board of directors of Newmont Mining Corporation had not breached its fiduciary duties when defending against T. Boone Pickens' "coercive partial tender offer and inadequate bid,"[138] The defense involved the Newmont board declaring a dividend to facilitate a street sweep of its shares by Gold Fields, a white knight. As part of the defensive transaction, the board obtained a standstill agreement that capped Gold Fields' ownership at 49.9% and its board membership at 40%. The Delaware Supreme Court found that the standstill agreement guaranteed Newmont's continuation as an independent company "under a board consisting of 40% Gold Fields directors, 40% independent directors and 20% management nominated directors" and "protected Newmont's public shareholders from being squeezed out by an unbridled majority shareholder."[139]

Pickens tried to paint the street sweep as an interested transaction between Newmont and Gold Fields, a controlling stockholder, but the justices viewed the Newmont board as having negotiated at arm's length to defuse a takeover threat. The response also ensured the defeat of a hostile bid by someone the justices had previously described as "a corporate raider with a national reputation as a 'greenmailer.'"[140] When the justices referred to Newmont securing its ability to "remain independent," they meant as an independent corporation, not necessarily independent from Gold Fields for purposes of a future non-ratable transaction.

Skilled advocates have sometimes presented *Ivanhoe* as holding that a 49% stockholder with substantial board representation does not exercise non-majority control, and one Chancery opinion interpreted the decision that way.[141] When Gold Fields engaged in the street sweep, it was a 26% stockholder and was subject to a standstill agreement that capped its ownership

138. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1342 (Del. 1987).

139. *Id.* at 1343.

140. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985).

141. *E.g.*, *In re* W. Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192, at *8 (Del. Ch. May 22, 2000) (assuming incorrectly that Gold Fields was a 49.7% stockholder at the time of the street sweep).

and board representation at one-third.[142] Demonstrating that *Ivanhoe* did not reset the floor for control at a majority of the voting power, the Delaware Supreme Court recognized two years later that senior managers who could exercise 39% of the voting power would exercise control.[143]

The Reformation Era cases show the continued dominance of the functional approach. Control continued to be an issue of fact to be adjudicated primarily after the pleading stage using the Conduct Control Test. The principal pleading-stage dismissal was *Sea-Land*, where unique factual allegations involving Historical and Transactional Evidence foreclosed a pleading-stage inference that a 39.5% stockholder could exercise control. In post-trial decisions, *Moran* and *Robbins* recognized Small Block Control, and *Robbins* also took into account Powerful Roles.

4. The Moderating Era

In 1989, the Moderating Era began, during which the Delaware Supreme Court sought to integrate the revolutionary rulings from the Reformation Era.[144] On the issue of non-majority control, the Moderating Era proved more consequential than its predecessor.

The Moderating Era ruling in *Kahn v. Lynch Communication Systems, Inc.*[145] continues to stand as the Delaware Supreme Court's most significant decision on non-majority control. Alcatel owned 43.3% of the common stock of Lynch and was contractually limited to owning no more than 45%. The same contract guaranteed Alcatel proportionate representation on the Lynch board, and Alcatel representatives comprised five of eleven directors, two of three executive committee members, and two of four compensation committee members. During a meeting on August 1, 1986, Alcatel used its influence to prevent Lynch from pursuing a target it wanted to buy.[146] Alcatel also used its influence

142. 535 A.2d at 1343.

143. Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1270 (Del. 1989).

144. *Eras Tour*, *supra* note 86, at 1217.

145. 638 A.2d 1110 (Del. 1994).

146. *Id.* at 1112.

to prevent the board from approving management compensation agreements that the non-Alcatel directors favored.[147]

Alcatel later eliminated the Lynch minority through a squeeze-out merger. In the resulting litigation, a threshold question was whether Alcatel controlled Lynch. Reiterating the Conduct Control Test, the Delaware Supreme Court defined non-majority control as turning on whether a person "exercises control over the business affairs of the corporation."[148] In a post-trial decision, Chancellor Allen found that "Alcatel did control the Lynch board, at least with respect to the matters under consideration at its August 1, 1986 board meeting."[149] He also found that the non-Alcatel directors deferred to Alcatel "because of its position as a significant stockholder and not because they decided . . . that Alcatel's position was correct."[150] The Delaware Supreme Court affirmed that finding as supported by the evidence. The justices applied the Multiple Sources Principle, citing Alcatel's board representation, committee representation, and its block of stock without characterizing any as either necessary or irrelevant. The justices also considered Transactional Evidence by looking at the negotiation of the squeeze-out itself.

Two other decisions confirmed the continuing dominance of the functional approach. In *Rales*, the Delaware Supreme Court inferred at the pleading stage that two brothers exercised control over a company where one brother served as Chairman of the Board, the other served as Chairman of the Executive Committee, and they together owned 44% of the corporation's stock.[151] In *Friedman*, Chancellor Allen remarked that where a Chairman, President, and CEO held 36% of the company's stock, "[f]rom a practical perspective, this confluence of voting control with directorial and official decision making authority . . . is . . . itself

147. *Id.* at 1114.

148. *Id.* at 1113 (quoting Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987)).

149. *Id.* at 1114 (quoting trial court decision). Looking for the presence or absence of transaction-specific control has a long pedigree in Delaware. Like *Guth* and *Burry Biscuit*, *Lynch* relied on Transactional Evidence to support a finding of transaction-specific control. Other cases such as *Kaplan* and *Puma* relied on Transactional Evidence to support the opposite conclusion: a transaction-specific finding that control was absent.

150. *Id.* at 1115 (quoting trial court decision).

151. *See* Rales v. Blasband, 634 A.2d 927, 937 (Del. 1993).

quite consistent with control of the board."[152] Each decision applied the Multiple Sources Principle and considered Powerful Roles to draw an inference of non-majority control.

II. THE TURN TOWARD FORMALISM

The next two eras of Delaware law track the judicial career of Leo E. Strine, Jr., who joined the Court of Chancery as a Vice Chancellor in 1998. With his brilliant intellect, sharp wit, and outspoken nature, he quickly became Delaware's leading voice. His considerable influence grew when he became Chancellor in 2011, and he gained greater authority when he became Chief Justice in 2014. No one has approached his impact on Delaware's corporate law.[153]

The Generative Era covers Strine's time on the Court of Chancery. His arrival was part of a changing of the guard that included then-Vice Chancellor William B. Chandler III, taking over as Chancellor in 1997. During the Generative Era, Strine, Chandler, and their colleagues argued for significant doctrinal changes. Many of them did not initially catch on but later became law during the Implementing Era, which covers Strine's time as Chief Justice.[154]

The rise of the formal approach to non-majority control followed that pattern. Initially, Strine and his colleagues continued to use the functional approach to non-majority control. But as the Generative Era went on, lawyers representing stockholders on contingency filed more and more lawsuits of dubious merit. Many of those lawsuits attacked transactions involving alleged controlling stockholders, prompted by legal innovations that favored challenges to those types of transactions and by an increasing number of companies where control could credibly be alleged.[155] In 2006, two Court of Chancery decisions—one by Strine—introduced the premises that would underpin the

152. Friedman v. Beningson, Civ. A. No. 12232, 1995 WL 716762, at *5 (Del. Ch. Dec. 4, 1995).

153. *See Eras Tour*, *supra* note 86, at 1227–28.

154. *See id.*

155. *See* Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1987-2005 (2019).

formal school. Starting in 2014, after Strine became Chief Justice, the formal school emerged.

A. The Initial Continuation of Functionalism

During the early years of the Generative Era, the Court of Chancery continued to deploy a functional approach to non-majority control. Some decisions, such as *Mizel* and *Cysive*, fell clearly within the functional tradition, with *Mizel* drawing an inference of non-majority control and *Cysive* finding that it existed. One decision—*Western National*—held that the plaintiff failed to introduce evidence that was sufficient to create a dispute of fact about the existence of non-majority control, but nevertheless took a functional approach.

Mizel was then-Vice Chancellor Strine's first decision on non-majority control.[156] The defendants moved to dismiss a derivative action on the theory that the board could impartially consider a demand to assert claims against the Chairman, President, and CEO, who was also the largest stockholder with a 32.7% block. Two of the five directors were insiders and one was the Chairman's grandson. While those relationships were likely sufficient to render demand futile, Strine observed that the CEO's block of stock "powerfully strengthens the inference that he—as [the directors'] boss—exerts 'considerable influence'" over them sufficient to compromise their independence.[157] In a footnote, Strine offered a nuanced analysis of the likely voting outcomes in a contested election:

> To prevail in a President Casinos' stockholder vote involving a 100% turnout, Connelly need only persuade 17.31% of the remaining 62.3% of the votes to vote with him (that is, he need obtain less than one-third of the remaining votes). In a vote involving only a 90% turnout (*e.g.*, to elect directors) where only a plurality of the quorum is required, Connelly's burden would be even lighter.[158]

Continuing, Strine acknowledged that a 32.7% block "*may* not be sufficient to constitute control for certain corporation law

156. Mizel v. Connelly, No. Civ.A. 16638, 1999 WL 550369 (Del. Ch. July 22, 1999).

157. *Id.* at *3.

158. *Id.* at *3 n.1.

purposes," citing *QVC* for as indicating when a transaction would give rise to a change in control for purposes of enhanced scrutiny.[159] But he observed that a "pragmatic, realist approach . . . requires me to accord great weight to the practical power wielded by a stockholder controlling such a block and to the impression of such power likely to be harbored by the stockholder's fellow directors."[160] He concluded demand was futile and denied the motion to dismiss.

The *Mizel* decision illustrates functional principles. It applied the Multiple Sources Principle, considered Powerful Roles, and drew an inference of Small Block Control after taking into account the pragmatic workings of a stockholder vote.[161]

Chancellor Chandler's decision the following year in *Western National*[162] reflected different intuitions about non-majority control, but also took a functional approach. That decision did not address control at the pleading stage but rather on the defendants' motion for summary judgment. Chandler granted the motion, holding that the evidence was not sufficient to create a dispute of fact over whether American General exercised non-majority

159. *Id.* (citing Paramount Comm'ns Inc. v. QVC Network Inc., 637 A.2d 34, 44 (Del. 1994), for the proposition that "a transaction would effect a 'change in control' from disaggregated stockholders to a single stockholder with the unilateral power to, *inter alia*, elect directors, cause a corporate break-up, or effect a merger").

160. *Id.* (citing Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1388 (Del. 1995), for the proposition that "a 25% block of stock in insider hands was not preclusive of a proxy fight").

161. The *Ply Gem* decision reached a similar outcome. *In re* Ply Gem Indus., Inc. S'holders Litig., No. CIV. A. 15779, 2001 WL 755133 (Del. Ch. June 26, 2001). The plaintiffs contended that directors could not act independently when considering a demand to sue the company's Chairman and CEO who also owned a 25% block. *Id.* at *7. Vice Chancelor Noble drew an inference that the CEO controlled the company and that two directors who were also officers could not act independently of the Chairman. *Id.* at *8. By contrast, in *Paxon*, Chancellor Chandler decided to draw an inference of control based on seemingly stronger allegations. *In re* Paxson Commc'n Corp. S'holders Litig., No. Civ.A. 17568, 2001 WL 812028, at *3 (Del. Ch. July 12, 2001). The plaintiff contended that two directors who were also officers could not act independently of a Chairman and CEO who owned 75% of the stock. Chancellor Chandler declined to grant the inference, labeling the allegations conclusory. *Id.*

162. *In re* W. Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192 (Del. Ch. May 22, 2000).

control, either generally or for purposes of the challenged squeeze-out merger.[163]

The close analysis of the record in *Western National* resembled a post-trial opinion. Western National needed capital, but American General, its 46% stockholder, preferred to acquire 100% ownership.[164] When Western National's management proposed a third-party sale, American General refused to sell its block or support a competing transaction.[165] American General then proposed a no-premium deal at the market price of $28.19 per share. A Western National special committee countered at $32, and the parties compromised at $29.75.[166] Minority stockholders filed suit. With the case ready for trial, the defendants moved for summary judgment.

Chandler applied the Conduct Control Test, framing the inquiry as whether American General exercised control over Western National's business affairs.[167] He gave little weight to American General's 46% ownership stake, positing that "substantial non-majority stock ownership, without more, does not indicate control."[168] The plaintiffs pointed to American General's ability to buy shares in the open market and obtain a majority, but Chandler stated flatly that the ability to achieve majority control easily did not support an inference of control.[169]

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163. *Id.* at *1.

164. *Id.* at *3.

165. *Id.*

166. *Id.* at *5.

167. *Id.* at *1, *6.

168. *Id.* at *6.

169. *Id.* Those aspects of Chancellor Chandler's ruling in *Western National* contrast with a contemporaneous pleading-stage ruling in O'Reilly v. Transworld Healthcare, Inc., 745 A.2d 902 (Del. Ch. 1999). An acquiror (Transworld) agreed to buy 49% of the stock of a financially ailing corporation (HMI), plus an option to acquire another 2% of its shares. *O'Reilly*, 745 A.2d at 908–09. Transworld also agreed to assume all of its debt and to engage in a merger that would eliminate the remaining stockholders for $2 per share. *Id.* at 910. After HMI announced adverse results, Transworld renegotiated the merger price to $1.50 per share, then closed on its purchase of the 49% block. *Id.* After buying that interest, Transworld renegotiated the merger price down to $0.30 per share. *Id.* Transworld also exercised its rights under the merger agreement as a 49% holder to block HMI from negotiating with a competing acquirer. *Id.* at 908. Transworld then entered into an agreement to sell HMI's assets to the acquirer and consummated both the merger and the sale. *Id.* at 911. A stockholder challenged the merger as an interested transaction. *Id.* at

He also rejected the argument that exercising the power to veto competing transactions could support an inference of control.[170]

Chandler gave close attention to the business relationships between American General and Western National, including a standstill agreement that limited American General to nominating two of eight directors. He noted that no American General executives served on the Western National board and cited the historical absence of any participation by American General in Western National board meetings.[171] Chandler acknowledged that Western National's CEO had spent twenty-three years as an American General executive and that he continued to have "close social and professional ties with his colleagues there," but declined to view those relationships as compromising.[172] Chandler also discounted relatively weak evidence of relationships between five of the Western National outside directors and American General.[173] Chandler ultimately analogized the facts to *Puma*[174] and applied the business judgment rule.[175]

The formal school subsequently embraced *Western National* as rejecting Small Block Control, but the decision reflects a functional approach. The court applied the Multiple Sources Principle, recognized the potential for Small Block Control, and considered Powerful Roles, Historical Evidence, and Transactional Evidence. The procedural stage of the case was also

911–12. The defendants moved to dismiss, arguing that Transworld did not exercise control. *Id.* at 912–13. Then-Vice Chancellor Steele credited that Transworld had gained control when it acquired the 49% block and HMI's debt, after which it was able to use "its position as a large stockholder and creditor to dictate the terms of the Merger to HMI's board, to prevent the HMI board from negotiating with [the competing bidder], [and] to force the HMI board to approve the Merger." *Id.* at 913.

170. *W. Nat'l*, 2000 WL 710192, at *8. When discussing *Ivanhoe*, *Western National* misinterpreted that decision as holding that a 49.9% stockholder with substantial board representation does not exercise non-majority control. *See id.* (assuming incorrectly that Gold Fields was a 49.7% stockholder at the time of the street sweep). When Gold Fields engaged in the street sweep, it was a 26% stockholder and subject to a standstill agreement that capped its ownership and board representation at one-third. Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1338 (Del. 1987).

171. *W. Nat'l*, 2000 WL 710192, at *11.

172. *Id.* at *12–14.

173. *Id.* at *16–20.

174. 283 A.2d 693 (Del. Ch. 1971).

175. *W. Nat'l*, 2000 WL 710192, at *27.

consistent with the functional approach, in that it involved a post-discovery ruling on a detailed factual record. Like Quiet Era decisions like *Puma,* the court used a functional approach to find that non-majority control did not exist.

Although then-Vice Chancellor Strine would later praise *Western National* as "thoughtful,"[176] he implicitly rejected its analysis in his post-trial decision in *Cysive*.[177] There, a corporation's Chairman, CEO, and 35% stockholder negotiated with a special committee and reached an agreement on a going-private merger. With his managerial subordinates and close family members, the CEO could count on 36% of the voting power and held options on another 4%, which Strine treated as a 40% equity stake (*Western National* had discounted the implications of options).[178] Relying on *Western National,* the defendants argued that the CEO could not have exercised control because a majority of the board was independent and disinterested and the board had formed a special committee. They asserted that the business judgment rule should apply.

Focusing initially on the CEO's stock ownership, Strine wrote:

> Candidly, I think it would be naïve for me to conclude that [the CEO] does not possess the attributes of control that motivate the *Lynch* doctrine. Although it is true that he does not control a majority of the company's voting power, that was also true of the controlling stockholder in *Lynch* itself, which only controlled 43.3% of the votes. Moreover, in *Lynch* the stockholder held to have control was (in simplified terms) limited contractually to naming no more than five of the company's eleven directors.[179]

Continuing, he observed that "[i]n practical terms," the CEO's 35% block was "large enough . . . to be the dominant force in any contested Cysive election,"[180] and that was "especially so when one considers the practical realities of his voting power, which must take into account the votes of his subordinate . . . and family

176. *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. Aug. 18, 2006).

177. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 535 (Del. Ch. 2003).

178. *Id.* at 535.

179. *Id.* at 551.

180. *Id.* at 551–52.

members."[181] As he had in *Mizel*, Strine considered the dynamics of voter turnout, observing that "a 100% turn-out is unlikely even in a contested election" and that "[a] 40% block is very potent in view of that reality."[182] He concluded that if the CEO "becomes dissatisfied with the independent directors, his voting power positions him well to elect a new slate more to his liking without having to attract much, if any, support from public stockholders."[183]

Strine next observed that his finding of control was "reinforced when one takes into account the fact that Carbonell is Chairman and CEO of Cysive, and a hands-on one, to boot."[184] Strine found that the CEO was "involved in all aspects of the company's business, was the company's creator, and has been its inspirational force."[185] He also employed two family members at the company.[186] Strine thus considered Powerful Roles, including the CEO's status as founder, chief executive, inspirational leader, and director.

Strine declined to follow *Western National* in focusing on whether the CEO interfered with the committee. As he explained:

> Given these factors, it cannot be that the mere fact that [the CEO] did not interfere with the special committee is a reason to conclude that he is not a controlling stockholder. A controlling stockholder — even one who owns a majority of the shares — may, one hopes, conduct herself admirably, by electing independent directors in the first place and giving them due authority and respect in the context of a particular transaction, such as a management buy-out. That good conduct is evidence of fiduciary compliance and fair dealing. It cannot rationally be the basis for determining the judicial standard of review that applies . . . .[187]

The question of control, he explained, "must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that

181. *Id.* at 552.
182. *Id.* at 552 n.30.
183. *Id.* at 552.
184. *Id.*
185. *Id.*
186. *Id.* at 535, 552.
187. *Id.* at 552.

enables him to control the corporation, if he so wishes."[188] Strine found that the CEO "has that capability and would be perceived as having such capability by rational independent directors, public stockholders, and other market participants."[189]

The *Cysive* decision openly articulated the premises of the functional school. Strine treated control as an issue of fact and applied the Conduct Control Test. He recognized that, like majority control, non-majority control exists regardless of whether the holder affirmatively uses it. Taking a pragmatic view, he explained how non-majority control could rest on the rights associated with stock ownership and must take into account the dynamics of a stockholder vote, not just abstract numbers. He also considered Powerful Roles, such as director status, an executive position, and the informal influence wielded by a founder and inspirational corporate leader. *Cysive* marked the last meaningful expression of functional principles before the formal turn.

B. Introducing Formal Premises

The first decade of the 2000s witnessed growing concern about stockholder litigation. Commentators focused on *Kahn v. Lynch Communication Systems, Inc.*[190] and its holding that the entire fairness test applied to an interested transaction with a controlling stockholder without any prospect for business judgment review. Commentators worried that by foreclosing the possibility of pleading-stage dismissal under the business judgment rule, Delaware law facilitated rent-seeking by stockholder plaintiffs.[191] Then-Vice Chancellor Strine was a prominent proponent of that view, which appeared in a 2001 article co-authored with then-Vice Chancellor Jacobs and former Chancellor Allen.[192] As part of a to-do list of reforms, they criticized *Lynch* and argued that the

188. *Id.* at 553.

189. *Id.*

190. 638 A.2d 1110 (Del. 1994).

191. *See, e.g.*, Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2 (2005); Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 BUS. L. 25 (2005); 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).

192. William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 58 BUS. L. 1287 (2001).

business judgment rule should apply if a squeeze-out merger was conditioned on either approval by a special negotiating committee of disinterested directors or approval by a majority-of-the-minority vote from the disinterested stockholders.[193] Strine regularly criticized *Lynch* in his opinions, including *Pure Resources* in 2002,[194] *Cysive* in 2003,[195] and *Cox Communications* in 2005.[196]

Although the concerns with *Lynch* principally involved the standard of review, the skepticism spilled over into the analysis of non-majority control. As Strine explained in *Cysive*, "[b]ecause the question of whether a large block holder is so powerful as to have obtained the status of a 'controlling stockholder' is intensely factual, it is a difficult one to resolve on the pleadings."[197] He thus recognized that whether non-majority control existed was a question of fact that typically required considering multiple sources of influence and an evidentiary hearing to resolve.

Not only that, but *Cysive* also acknowledged that the analysis of control was "intertwined with" the facts surrounding the challenged transaction and whether the directors had acted independently or as "supine servants of an overweening master."[198] In other words, it required consideration of Transactional Evidence.

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193. *Id.* at 1317.

194. *In re* Pure Res., Inc., S'holders Litig., 808 A.2d 421, 435–47 (Del. Ch. 2002)

195. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 547–51 (Del. Ch. 2003)

196. *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 643–44 (Del. Ch. 2005). In *Cox Communications*, then-Chancellor Strine proposed restoring the business judgment rule if the squeeze-out merger was conditioned on and received both approval from a special negotiating committee of disinterested directors and approval by a majority-of-the-minority vote from the disinterested stockholders. He implemented that proposal in 2013 in his landmark decision in *MFW*. *In re* MFW S'holders Litig., 67 A.3d 496, 536 (Del. Ch. 2013), *aff'd sub nom.* Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). The Delaware Supreme Court adopted a version of it in March 2014, two months after Strine took office as Chief Justice. *See Historical List of Delaware Supreme Court Justices*, DEL. CTS., https://courts.delaware.gov/supreme/history/justicespast.aspx [https://perma.cc/4979-LTPP] (last visited Nov. 12, 2025).

197. *In re Cysive*, 836 A.2d at 550–51.

198. *Id.* at 551; *see id.* ("In cases when the determination of whether control exists turns on disputed facts, it is impossible to determine whether a large block holder is a controlling stockholder until an evidentiary hearing is held. Because the proof of that question overlaps with the trial evidence regarding the fairness of the merger process, it will rarely, if ever, be efficient to hold such a hearing before trial. Rather, it will be

Creating a path to pleading-stage dismissals in controller transactions would require a more formal approach. Two cases in 2006 laid the foundation: *PNB Holding*[199] and *Superior Vision.*[200] Their innovations, however, initially lay dormant. It took another six years before the concepts they introduced became dominant and generated the pleading-stage dismissals that marked the formal school.

1. *PNB Holding*

PNB Holding involved a small, privately held bank where the members of its board and their families controlled 33.5% of the voting power. The directors decided to convert the bank into an S-corporation, which required reducing the number of stockholders. They approved and recommended a merger to accomplish the reduction, and the continuing holders delivered the vote.

Non-continuing holders sued and argued that entire fairness applied because the directors constituted a control group. Vice Chancellor Strine disagreed, although he applied the entire fairness standard because the merger was a self-interested transaction. In rejecting the control group theory, however, *PNB Holding* made three broader assertions that would become core tenets of the formal school.

a. The Hard-To-Show Concept

First, *PNB Holding* posited that the test for non-majority control "is not an easy one to satisfy and stockholders with very potent clout have been deemed, in thoughtful decisions, to fall

efficient for all concerned to try the questions at the same time because the defendants' attempt to show that the independent directors acted freely and assertively in the corporation's best interests without being controlled by the large block holder is evidence both that the large block holder was not in control and that the merger was negotiated fairly.").

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

200. Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., No. CIV.A. 1668-N, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006).

short of the mark" (the "Hard-To-Show Concept").[201] That was a novel claim.

One sign of the claim's novelty was the weakness of the proffered support. *PNB Holding* did not quote from or reference any Court of Chancery decision that had said anything similar. The decision cited two Chancery precedents: *Western National* and *Citron v. Steego Corp.*[202]

This Article has discussed *Western National*, which was an early Generative Era decision that conducted a holistic analysis consistent with the Multiple Sources Principle. Chancellor Chandler reasoned through myriad factors that could have created a dispute of fact on the issue of non-majority control and explained why each was not sufficient. Rather than suggesting that non-majority control was hard to show, *Western National* suggested that, in that case, an inference of non-majority control was hard to reject.[203]

Steego was a decision from 1988 about whether a 48.8% stockholder owed a fiduciary duty to offer a fair price to the minority when making a tender offer. Chancellor Allen held that the controller did not owe a fair-price duty unless the controller interfered with the stockholders' ability to accept or reject the offer freely, which had not happened.[204] *Steego* was not about whether control was hard to show.

Prior Delaware decisions had not asserted that control was either easy or hard to show. Control was a question of fact. Proving a fact requires a preponderance of the evidence, so whether a fact is easy or difficult to prove depends on the evidence. If there is ample evidence, the fact is easy to prove. If there is little evidence, the fact is hard to prove. To claim that a fact generally will be difficult to prove either makes an empirical claim about how much evidence usually will exist or operates as a rhetorical claim about how a court should approach the evidence.

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201. *In re PNB Holding*, 2006 WL 2403999, at *9 (citation omitted).

202. *Id.* at *9 n.40 (citing *In re* W. Nat'l Corp. S'holders Litig., 2000 WL 710192 (Del. Ch. May 22, 2000); Citron v. Steego, 1988 WL 94738 (Del. Ch. Sep. 9, 1988)).

203. *See supra* Part II.A.

204. *Steego*, 1988 WL 94738, at *6. Consistent with that reasoning, Chancellor Allen later held that a controlling stockholder making a tender offer was not subject to entire fairness review on the facts of the case. *See* Solomon v. Pathe Commc'ns Corp., CIV.A. 12563, 1995 WL 250374, at *1 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996).

Judges sometimes make broad statements. It was not unfair for *PNB Holding* to interpret prior cases as implying that non-majority control was hard to show and summarize them with the Hard-To-Show Concept. But later cases interpreted the Hard-To-Show Concept as calling for a skeptical approach to non-majority control.

b. Majority Equivalence and Retributive Capacity

Second, *PNB Holding* asserted that non-majority control should exist only when the minority has "such formidable voting and managerial power that they, as a practical matter, are no differently situated than if they had majority voting control" ("Majority Equivalence").[205] The decision did not cite authority for that assertion, and no prior Delaware case had set Majority Equivalence as the floor for control. It was another novel move.

By requiring Majority Equivalence, *PNB Holding* tightened the test for non-majority control. The Conduct Control Test examined the ability to control the business affairs of the corporation. Adding Majority Equivalence introduced a further showing. Under *PNB Holding*, that showing required some degree of "managerial power" and could become a means of foreclosing the existence of non-majority control when that dimension did not exist.

Moreover, as framed in *PNB Holding*, Majority Equivalence required the ability to engage in retribution against independent directors or minority stockholders ("Retributive Capacity"). According to *PNB Holding*:

> Delaware case law in this area (that is, the *Lynch* line of jurisprudence) has been premised on the notion that when a controller wants the rest of the shares, the controller's power is so potent that independent directors and minority stockholders cannot freely exercise their judgment, fearing retribution from the controller. For this reason (which is in

205. 2006 WL 2403999, at *9. By reasoning that way, *PNB Holding* committed the fallacy of illicit contraposition. That fallacy arises when the subject and premise are switched and negated, thus starting with "If X then Y" and inferring "If -X then -Y." Logically, the fact that possessing majority voting power establishes control does not mean that it marks the lower bound for control; it could be that the floor is lower and majority control easily clears it.

> great tension with other aspects of our law), the jurisprudence has required that such transactions always be subject to fairness review.[206]

Retributive Capacity thus became a further showing that a party seeking to establish non-majority control would have to make. That too was a novel move.

c. The One-Third-Is-Low Concept

Third, *PNB Holding* described a 33.5% block as "an overall level of ownership that is relatively low" (the "One-Third-Is-Low Concept").[207] That too was a novel claim.

The innovative nature of the One-Third-Is-Low Concept can be seen in its contrast with prior Delaware decisions that had treated smaller blocks as significant, including *Burry Biscuit* (10%),[208] *Guth* (11%),[209] *Williamson* (17.5%),[210] *Cheff* (20%),[211] *Moran* (20%),[212] *Robbins* (31%),[213] and *Mizel* (32.7%).[214] Outside of Delaware, many decisions had treated one-third and smaller blocks as significant.[215]

The innovative nature of the One-Third-Is-Low Concept can also be seen in its tension with then-Vice Chancellor Strine's analysis of a 32.7% block in *Mizel.* There, Strine had explained why a 32.7% block was significant, noting in a footnote that its

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206. *Id.* at *9 (internal citations omitted).

207. *Id.* at *10.

208. Rosenthal v. Burry Biscuit Corp., 60 A.2d 106, 110 (Del. Ch. 1948).

209. As discussed previously, none of the *Guth*-related decisions expressly state the percentage of stock that Guth held, but it could not have exceeded 11%. *See supra* Part I.D.1.

210. Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006).

211. Cheff v. Mathes, 199 A.2d 548, 553 (Del. 1964) (treating a 20% block of stock as "a substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a 'control premium.'").

212. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch.) ("The significance of the 20% figure whether for ownership or voting purposes is its recognized threshold for measuring control of a publicly held corporation."), *aff'd*, 500 A.2d 1346 (Del. 1985).

213. Robbins & Co. v. A. C. Israel Enters., Inc., Civ. A. No. 7919, 1985 WL 149627, at *5 (Del. Ch. Oct. 2, 1985).

214. Mizel v. Connelly, No. Civ.A. 16638, 1999 WL 550369, at *1 & n.1 (Del. Ch. July 22, 1999).

215. *See supra* Parts I.A, C & D.

holder "need only persuade 17.31% of the remaining 62.3% of the votes to vote with him."[216] Put differently, the blockholder would only need to obtain 28% of the unaffiliated vote, while anyone opposing the blockholder would have to poll at a supermajority rate of 82%. The *Mizel* decision also observed that in a vote involving only a 90% turnout, the blockholder's burden would be even easier. The *Mizel* decision concluded that a "pragmatic, realist approach . . . requires me to accord great weight to the practical power wielded by such a stockholder controlling such a block and to the impression of power likely to be harbored by the stockholder's fellow directors."[217] *PNB Holding* asserted the opposite.

To support the One-Third-Is-Low Concept, *PNB Holding* summarized the facts of *Cysive*, stressing that the Chairman and CEO owned 35% of the shares, held an option to purchase another 0.5% to 1.0%, could rely on the support of brother and brother-in-law who were company employees and owned another 0.5% of the stock, and wielded influence over a second director who owned another 1% with an option to purchase 3-4% more.[218] That was true, but *Cysive* had not purported to establish a floor for non-majority control such that any level of voting power below what was present in *Cysive* would be "relatively low."

Like the Hard-To-Show Concept, Majority Equivalence, and Retributive Capacity, the One-Third-Is-Low Concept was novel. All four assertions were directionally consistent: they sought to increase the showing required to establish non-majority control, while introducing quasi-brightline tests. All would become foundational premises for the formal school.

2. *Superior Vision*

The other foundational case was *Superior Vision*.[219] It introduced a new test by framing non-majority control in terms of control over the board. It also rejected the concept of Contractual

216. Mizel v. Connelly, 1999 WL 550369, at *3 (Del. Ch. July 22, 1999).

217. *Id.* at *3.

218. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 552 (Del. Ch. 2003).

219. Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., No. Civ.A. 1668-N, 2006 WL 2521426, at *4 (Del. Ch. Aug. 25, 2006).

Control, asserting instead that contract rights were generally irrelevant to assessing control.

Like *PNB Holding*, *Superior Vision* involved a privately held company. A governance agreement signed by all of its stockholders required the approval of two-thirds of the outstanding voting power for any dividend. The board approved a dividend, but the corporation's largest stockholder—holding a 44% stake—refused to consent, allegedly because it wanted to force a sale. The corporation filed suit, contending that the 44% stockholder exercised control over the dividend decision and had a fiduciary duty to consent if the dividend was in the best interests of the corporation and its stockholders.[220] The 44% stockholder moved for dismissal, contending that control could only exist where a minority stockholder controlled the board, and it was not reasonably conceivable that the 44% stockholder could control the board. The 44% stockholder also argued that the contractual approval right could not give it control over the dividend decision.

a. The Board Control Test

Superior Vision began by accepting the 44% stockholder's argument that non-majority control required board control. According to the decision, "Delaware case law has focused on control of the board" (the "Board Control Test").[221] That assertion aligned the concept of control with Delaware's then-board-centric regime,[222] but for purposes of framing the test for control, it was a novel claim.

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220. *Id.* at *2.

221. *Id.*

222. In 2006, when *Superior Vision* was issued, the policy of board centrism animated Delaware corporate law. *E.g.*, Paramount Commc'ns Inc. v. Time Inc., C.A. Nos. 10866, 10670, 10935, 1989 WL 79880, * 30 (Del. Ch. July 14, 1989) (Allen, C.) ("[T]he financial vitality of the corporation and the value of the company's shares is in the hands of the directors and managers of the firm. The corporation law does not operate on the theory that directors, in exercising their powers to manage the firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm."), *aff'd*, 571 A.2d 1140 (Del. 1990); TW Servs., Inc. v. SWT Acquisition Corp., CIV. A. Nos. 10427, 10298, 1989 WL 20290, at *8 n.14 (Del. Ch. Mar. 2, 1989) (Allen, C.) ("[A] corporation is not a New England town meeting; directors, not shareholders, have responsibilities to manage the business and affairs of the corporation,

Here too, the novelty of the assertion can be seen in the nature of the supporting authority. *Superior Vision* cited *Lynch*,[223] *Western National*,[224] and *Williamson*, a decision by Chancellor Chandler from 2005.[225] None supported the Board Control Test.

This Article has discussed *Lynch*, where the Delaware Supreme Court applied the Conduct Control Test by asking whether "Alcatel exercised control over Lynch's business

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subject however to a fiduciary obligation."); *see generally* William T. Allen, Jack B. Jacobs, & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L. REV. 1067, 1086 (2002) ("[C]ases such as *Moran v. Household International, Inc.* and *Unocal* upheld the primacy of directorial power in [responding to tender offers] over fifteen years ago, leaving open only issues concerning the proper exercise of that authority in specific circumstances." (footnotes omitted)); Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. 1, 27–29 (2002) (explaining the director-centric nature of Delaware law and the statutory, decisional, and policy-based justifications for the primacy of the target board's role in responding to tender offers). In 2024, the General Assembly authorized governance agreements that can override the board. The new statute provides that "[n]otwithstanding § 141(a),"a governance agreement can contain provisions that "(a) restrict or prohibit [the corporation] from taking actions specified in the contract, (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation), and (c) covenant that the corporation or one or more persons or bodies will take, or refrain from taking, actions specified in the contract (which persons or bodies may include the board of directors or one or more current or future directors, stockholders or beneficial owners of stock of the corporation)." DEL. CODE ANN. tit. 8, § 122(18) (2025). The amendment arguably shifts away from board-centrism and introduces "a new cardinal precept in corporate law: freedom of contract." Mohsen Manesh, *A New Cardinal Precept in Corporate Law*, 86 LA. L. REV. 1, 2 (2025); *see id.* at 76 (arguing that under Section 122(18), "[a] board may now contract away its power to manage the corporation; the fiduciary duties owed by directors may now operate in only a narrow range of decisions left for the board to make; and internal corporate claims, including fiduciary duty claims, may now sidestep the courts of Delaware and be resolved by private arbitration."); Gabriel Rauterberg & Sarath Sanga, *Altering Rules: The New Frontier for Corporate Governance*, 42 YALE J. ON REG. 291, 299–300 (2025) ("Section 122(18) . . . allows boards to delegate sweeping decision-making powers to select shareholders by contract—without requiring the firm-wide processes traditionally mandated for such major governance changes.").

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

224. *In re* W. Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192 (Del. Ch. May 22, 2000).

225. Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375 (Del. Ch. June 5, 2006).

affairs."[226] The justices affirmed Chancellor Allen's post-trial finding that Alcatel exercised actual control. In making that finding, Allen applied the Multiple Sources Principle by considering Alcatel's 43.3% block of stock, the Powerful Roles associated with its substantial board representation, and Historical Evidence showing that the directors deferred to Alcatel. The *Lynch* decision thus demonstrated that non-majority control could result from board-level influence, but it did not reduce the test to control over the board. Instead, the Delaware Supreme Court affirmed the finding that Alcatel "exercise[d] actual control over Lynch by dominating its corporate affairs."[227]

Western National also did not speak in terms of board control. Like *Lynch*, *Western National* applied the Conduct Control Test by stating that non-majority control required "a judicial finding of actual control over the *business and affairs of the corporation*."[228] The decision applied the Multiple Sources Principle by considering (i) American General's 46% block,[229] (ii) a standstill agreement that limited American General to two out of eight directors, (iii) the absence of any American General employees on the Western National board,[230] and (iv) the absence of evidence that American General involved itself in Western National's day-to-day business.[231] The decision also considered joint ventures between the two companies,[232] American General's successful opposition to an acquisition that Western National wanted to pursue,[233] and American General's relationships with Western National's outside directors,[234] the advisors to a special committee,[235] and Western National's officers.[236] It was a functional and holistic analysis.

The *Williamson* case did not fixate on board control either. The court applied the Conduct Control Test by examining whether

226. *Lynch*, 638 A.2d at 1114.
227. *Id.* at 1115.
228. *In re W. Nat'l*, 2000 WL 710192, at *20 (emphasis in original).
229. *Id.* at *6.
230. *Id.* at *10.
231. *Id.*
232. *Id.* at *6–7.
233. *Id.* at *8.
234. *Id.* at *15–16, *18–20.
235. *Id.* at *17–18, *21–24.
236. *Id.* at *11–15.

two large minority stockholders exercised "'control over the business and affairs of the corporation.'"[237] The court considered multiple sources, including (i) the large stockholder' ability to appoint two directors to a five member board, (ii) the corporation's dependence on the stockholders as significant customers, and (iii) the stockholders' contractual veto rights over business transactions that gave them "the ability to shut down the effective operation of the [the company] by vetoing board actions."[238] The court stressed that the analysis was "highly contextualized" and that no single factor was determinative.[239] The decision was functional and holistic, drawing a pleading stage inference of control based on "a nexus of facts."[240]

In addition to the three cases, *Superior Vision* cited the linguistic similarity between control over the "business affairs of the corporation" and Section 141(a) of the DGCL, which states that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[241] The court concluded that because the language of the Conduct Control Test was similar to Section 141(a), "questions of control by a significant stockholder should be assessed at the board level."[242]

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237. Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006) (quoting Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113–14 (Del. 1994)).

238. *Id.* at *4–5.

239. *Id.* at *6.

240. *Id.* Although the *Superior Vision* court did not cite it, then-Vice Chancellor Strine issued a decision in July 2006, one month before *Superior Vision*, which asserted that "the premise for the contending that controlling stockholder owes fiduciary duties in its capacity as a stockholder is that the controller exerts its will over the enterprise in the manner of the board itself." Abraham v. Emerson Radio Corp., 901 A.2d 751, 759 (Del. Ch. 2006). The *Abraham* decision did not provide any authority for that assertion, treating it as self-evident. The *Abraham* decision introduced the concept when arguing for rejecting the "sale to a looter" doctrine, which holds that a blockholder can be liable for selling its block to a looter in breach of its duty of care. *See generally* Laster, *supra* note 137, at 501–03 (describing the "sale to a looter" case law, including *Abraham*). *Abraham* thus also introduced a version of the Board Control Test, although *Superior Vision* does not openly reflect any awareness of the earlier ruling.

241. Superior Vision Servs., Inc. v. Reliastar Life Ins. Co., No. Civ.A. 1668-N, 2006 WL 2521426, at *20 n.38 (citing DEL. CODE. ANN. tit. 8 § 141(a) (2006)); *see W. Nat'l*, 2000 WL 710192, at *8 (making similar observation).

242. *Superior Vision*, 2006 WL 2521426, at *20 n.38.

That reasoning was novel in its departure from precedent applying the Conduct Control Test. It was also debatable from the standpoint of equity. Section 141(a) allocates legal authority; it does not prevent another party from exercising control by other means. Citing Section 141(a) arguably elevated the formality of legal authority over equity's concern with the reality of power. Under prior precedent applying the Conduct Control Test, board control could result in non-majority control, but a lack of board control did not inherently defeat non-majority control. Under *Superior Vision*'s Board Control Test, a lack of board control would defeat non-majority control.[243]

The Board Control Test was new. It would become a core premise of the formal school.

b. Contractual Irrelevance

Superior Vision also addressed whether a contract right could amount to non-majority control. The court in *Superior Vision* credited that the stockholder controlled the dividend decision, but refused to consider whether that control gave rise to any fiduciary duty in equity. Instead, the court stated broadly that "a significant shareholder, who exercises a duly-obtained contractual right that somehow limits or restricts the actions that a corporation otherwise would take, does not become, without more, a 'controlling shareholder' for that particular purpose."[244] That assertion posited that contract rights generally cannot establish control and are irrelevant to the analysis (the "Contractual Irrelevance").

In fairness, *Superior Vision* did not go so far as complete Contractual Irrelevance. The court acknowledged that:

> There may be circumstances where the holding of contractual rights, coupled with a significant equity position and other factors, will support the finding that a particular shareholder

243. By reasoning that way, *Superior Vision* also committed the fallacy of illicit contraposition. *See supra* note 205. To reiterate, that fallacy arises when the subject and premise are switched and negated, thus starting with "If X then Y" and inferring "If -X then -Y." Logically, the fact that possessing board control (or substantial board influence) establishes non-majority control does not mean that lacking board control inherently defeats non-majority control.

244. *Superior Vision*, 2006 WL 2521426, at *5.

> is, indeed, a "controlling shareholder," especially if those contractual rights are used to induce or to coerce the board of directors to approve (or refrain from approving) certain actions.[245]

But that concession itself reflects the type of partially formed reasoning associated with a new idea. For example, the court did not explain what "a significant equity position" would add to its hypothetical, other than to preserve a tie to the controlling "stockholder" nomenclature. More broadly, the court did not consider that stockholder voting rights are themselves contract rights, undermining the distinction between a contractual consent right and the sources of stockholder power.[246]

Before *Superior Vision*, extant authority did not support Contract Irrelevance. Berle and Means had recognized the possibility of Contractual Control. The securities laws envisioned the possibility of Contractual Control. *Superior Vision* went in the opposite direction. Contract Irrelevance would become a core tenet of the formal school.

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245. *Id.*

246. There is an implicit contradiction in distinguishing between stockholder voting rights (which can support control) and other contractual governance rights (which allegedly cannot). Delaware law treats the certificate of incorporation and the incorporated sections of the DGCL as a contract. *See, e.g.*, Boilermakers Loc. 154 Ret. Fund v. Chevron Corp., 73 A.3d 934, 940 (Del. Ch. 2013) ("[O]ur Supreme Court has long noted that bylaws, together with the certificate of incorporation and the broader DGCL, form part of a flexible contract between corporations and stockholders, in the sense that the certificate of incorporation may authorize the board to amend the bylaws' terms and that stockholders who invest in such corporations assent to be bound by board-adopted bylaws when they buy stock in those corporations."); Shiftan v. Morgan Joseph Holdings, Inc., 57 A.3d 928, 934 (Del. Ch. 2012) ("A certificate of incorporation is a contract among the stockholders of the corporation to which the standard rules of contract interpretation apply."). Stockholder voting rights are therefore just one species of contract rights. If that species can give rise to control, others logically could too. Focusing on the legal source of the right departs from the core equitable principle of looking to the substance of the relation, rather than to the form. *E.g.*, Monroe Park v. Metro. Life Ins. Co., 457 A.2d 734, 737 (Del. 1983) ("[E]quity regards substance rather than form."); *In re* Carlisle Etcetera LLC, 114 A.3d 592, 607 (Del. Ch. 2015) (same); 2 John Norton Pomeroy, EQUITY JURISPRUDENCE § 378 (Spencer W. Symons ed., 5th ed. 1941) ("Equity always attempts to . . . ascertain, uphold, and enforce rights and duties which spring from the *real* relations of parties.").

C. Assembling the Pieces

The formal concepts in *PNB Holding* and *Superior Vision* did not immediately catch on.[247] For the next six years, Delaware cases cited *PNB Holding* and *Superior Vision*, but for other propositions. In 2012, however, a Chancery decision cited *PNB Holding* for the Hard-To-Show Concept and Majority Equivalence.[248] Then came *Morton's* and *KKR*, which brought those principles front and center.

1. *Morton's*

In 2013, then-Chancellor Strine assembled the elements of the formal approach in *Morton's*.[249] Stockholder plaintiffs had challenged the sale of a private equity firm's portfolio company to a third party, claiming the private equity sponsor controlled the portfolio company and favored an early and undervalued sale because it desired liquidity. The plaintiffs initially sought a preliminary injunction against the sale and obtained discovery. After the injunction was denied, they filed an amended complaint.

To support a pleading-stage inference of control, the plaintiffs argued for Small Block Control, supported by Powerful Roles and Historical Evidence. The private equity sponsor had taken the company public and sold down to a 27.7% block. The firm also had two of its executives on the board, one of whom served as the de facto chair.[250]

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247. In 2008, Strine issued another decision consistent with the functional approach when he held after trial that an investment fund exercised control through a 35.9% block of stock, by placing three of its executives on an eight member board, by having its principal serving as chair, having one of its advisors take over as CEO, and by taking large positions in the corporation's debt. *See In re* Loral Space & Commc'ns Inc., C.A. Nos. 2808-VCS, 3022-VCS, 2008 WL 4293781, at *21–22 (Del. Ch. Sep. 19, 2008) (finding post-trial that a stockholder owning 35.9% of the company's stock was a controller where the controller had rights to block important strategic initiatives, was a significant creditor that could unilaterally force redemption of notes, and maintained publicly that it controlled the board).

248. Zimmerman v. Crothall, No. CIV.A. 6001-VCP, 2012 WL 707238, at *11 (Del. Ch. Mar. 5, 2012). Two stockholders in Zimmermann controlled 66% of the voting power, making Zimmerman a control-group case, not a non-majority control case. *Id.* at *12.

249. *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656 (Del. Ch. 2013).

250. *Id.* at 660.

Chancellor Strine held that the allegations could not support a reasonable inference of control. Citing *PNB Holding*, he framed the standard in terms of Majority Equivalence and Retributive Capacity. Turning to what that required, he described *Cysive* as "perhaps, [this court's] most aggressive finding that a minority blockholder was a controlling stockholder."[251] He summarized *Cysive* as involving a blockholder who "held 35% of the company's stock," was "the company's visionary founder, CEO, and chairman," and who had appointed two of his family members to executive positions.[252]

With the test framed in this manner, the application was straightforward. Chancellor Strine concluded that the facts pled in *Morton's* "do not rise to the same level" as *Cysive*.[253] Assessing non-majority control had become a formal test with a floor that operated as a rule of law.

Using *Cysive* as a floor for non-majority control was novel (the "*Cysive*-As-Floor Concept"). The claim that *Cysive* represented the Delaware Court of Chancery's "most aggressive finding" of non-majority control was inaccurate. In *Mizel*, then-Vice Chancellor Strine drew a pleading-stage inference that a Chairman, President, CEO, and 32.7% blockholder exercised control.[254] In *Ply Gem*, Vice Chancellor Noble drew a pleading-stage inference that a Chairman, CEO, and 25% blockholder exercised control.[255] In *Williamson*, Chancellor Chandler credited that two stockholders holding 17.5% of the voting power plus charter-based blocking rights exercised control.[256] In *Moran*, then-Vice Chancellor Walsh found after trial that 20% ownership was a "recognized threshold for measuring control of a publicly held corporation."[257] In *Robbins*, then-Vice Chancellor Berger found after trial that a 31%

251. *Id.* at 665.

252. *Id.*

253. *Id.* at 666.

254. Mizel v. Connelly, No. Civ.A. 16638, 1999 WL 550369, at *3 (Del. Ch. July 22, 1999).

255. *In re* Ply Gem Indus., Inc. S'holders Litig., No. CIV.A. 15779-NC, 2001 WL 755133, at *7 (Del. Ch. June 26, 2001).

256. Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006).

257. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985).

stockholder exercised control.[258] In *Burry Biscuit*, then-Vice Chancellor Seitz drew a pleading-stage inference that a founder, Chairman, CEO, and 10% blockholder exercised control.[259] And in *Guth*, the granddaddy of Delaware non-majority control cases, Chancellor Wolcott found after trial that a Chairman, CEO, and not more than 11% stockholder exercised control.[260]

The *Cysive*-As-Floor Concept seemed to establish a brightline threshold below which non-majority control could not exist, and innumerable defense briefs cited the concept as if that were true. During the ascendancy of the formal school, Delaware decisions applied the *Cysive*-As-Floor Concept in that fashion, without exploring its accuracy.

2. *KKR*

Shortly after issuing *Morton's*, Strine became Chief Justice. The following year, the *KKR* decision followed the *Morton's* formula to reject a pleading-stage inference of control.[261]

The plaintiffs in *KKR* challenged a going-private transaction. The subsidiary, KFN, was an investment company that had no employees of its own and relied entirely on its parent, KKR, to manage its business under a management services agreement.[262] According to the plaintiffs, KFN could not even value its own assets. The management agreement renewed annually and could only be cancelled if KFN paid a termination fee equal to four times KKR's annual base compensation and incentive fee. KFN disclosed

258. Robbins & Co. v. A.C. Israel Enters., Inc., 1985 WL 149627, at *5 (Del. Ch. Oct. 2, 1985).

259. Rosenthal v. Burry Biscuit Corp., 60 A.2d 106, 108 (Del. Ch. 1948).

260. *See supra* Part I.D.4.

261. *In re* KKR Fin. Holdings LLC S'holder Litig., 101 A.3d 980, 991–93 (Del. Ch. 2014) (noting that the complaint's allegations demonstrated "KKR, through its affiliate, managed the day-to-day operations of KFN" but that they did "not support a reasonable inference that KKR controlled the KFN board—which is the operative question under Delaware law—such that the directors of KFN could not freely exercise their judgment in determining whether or not to approve and recommend to the stockholders a merger with KKR."), *aff'd sub nom*. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015). *KKR* was the trial level decision known on appeal as *Corwin*.

262. *Id.* at 986. The tasks governed by the services agreement included "(i) selecting, purchasing and selling KFN's investments; (ii) KFN's financing and risk management; and (iii) providing investment advisory services to KFN." *Id.*

in its public filings that it was "completely reliant on our Manager" and "may not be able to find a suitable replacement if our Manager terminates the Management Agreement."[263] One of KKR's senior executives served as the President, CEO, and a director of KFN.[264] But KKR only owned 1% of KFN's stock, and KFN had its own board of directors.

The plaintiffs alleged that KKR controlled KFN, relying on Contractual Control (the management services agreement) supported by Powerful Roles (the KKR senior executive) and Historical Evidence (KKR's creation of KFN and the KFN public disclosures). The defendants moved to dismiss, arguing that the pled facts did not support a reasonably conceivable inference of non-majority control.

Chancellor Bouchard granted the motion. Closely tracking the *Morton's* formula, he framed the test for non-majority control by citing *PNB Holding* for the Hard-To-Show Concept, then *Superior Vision* for the Board Control Test, then *PNB Holding* for the additional requirements of Majority Equivalence and Retributive Capacity. To frame what the test required, he cited *Morton's* for the *Cysive*-As-Floor Concept.[265] Tying those concepts together, he held that while the allegations demonstrated that "KKR, through its affiliate, managed the day-to-day operations of KFN, they do not support a reasonable inference that KKR *controlled the KFN board*—which is the operative question under Delaware law."[266]

On appeal, in a decision remembered as *Corwin*, Chief Justice Strine authored the first Delaware Supreme Court decision to introduce the Board Control Test and require Majority Equivalence.[267] *Corwin* stated that the Chancery decision properly looked for "a combination of potent voting power and management control such that the stockholder could be deemed to have effective control of the board without actually owning a majority of stock."[268] Revealing the novelty of the Delaware Supreme Court's endorsement of the Board Control Test, *Corwin*

263. *Id.* at 985.
264. *Id.* at 987.
265. *Id.* at 991–93.
266. *Id.* at 993.
267. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304, 307 (Del. 2015).
268. *Id.* at 307.

commended the trial court for applying that test "consistent with the instructions of this Court," but the decision did not cite any Delaware Supreme Court precedent giving that instruction.[269] The trial court had cited *Lynch* and *Ivanhoe* in its discussion of non-majority control, but both applied the Conduct Control Test that examines control over the business affairs of the corporation; neither instructed a trial court to focus on board-level control. The *KKR* decision also cited five Chancery-level precedents, but none constituted an instruction from the Delaware Supreme Court, and only one—*Superior Vision*—proposed and applied the Board Control Test.

Corwin also became the first Delaware Supreme Court decision to acknowledge the Hard-To-Show Concept and Majority Equivalence. In a footnote, *Corwin* cited *PNB Holding*, describing that opinion as "noting that the test for actual control 'is not an easy one to satisfy'" and that it "can only be met where 'stockholders who, although lacking a clear majority, have such formidable voting and managerial power that they, as a practical matter, are no differently situated than if they had majority voting control.'"[270]

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269. *Id.* For a similarly dubious assertion regarding the existence of high court precedent, *compare* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 24 (Del. 2017) (reversing the trial court's factual findings on valuation because they "ignored the efficient market hypothesis long endorsed by this court"), *with* Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. CV 11448-VCL, 2018 WL 2315943, at *8 & n.64 (Del. Ch. May 21, 2018) (noting that the "the Delaware Supreme Court's decisions in *Dell* and [DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (Del. 2017)] contained an unprecedented level of discussion of the efficient capital markets hypothesis," observing that the adjective "unprecedented" was used literally, and explaining "I personally have been unable to locate a single Delaware Supreme Court decision before *Dell* and *DFC* that mentioned the efficient capital markets hypothesis by name, much less cited it with approval."), *rev'd*, 210 A.3d 128 (Del. 2019); *see* Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521 (2002) (surveying Delaware takeover decisions and explaining their reliance on a theory of hidden value inconsistent with the efficient capital markets hypothesis); Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. PA. L. REV. 1, 8 (2007) ("Delaware appraisal law has never been particularly friendly to the idea that stock market prices always accurately represent a proportional share of the value of the enterprise as a going concern.").

270. *Corwin*, 125 A.3d at 307 n.8.

D. The Formal School

After *Corwin*, a series of Court of Chancery decisions treated *Morton's* and *KKR* as establishing a new formula for evaluating non-majority control. First, they deployed the Hard-To-Show Concept, with cases either quoting the statement directly or paraphrasing it.[271] Next, they invoked the Board Control Test,[272]

271. *E.g.*, *In re* Essendant, Inc. S'holder Litig., No. CV 2018-0789-JRS, 2019 WL 7290944, at *8 (Del. Ch. Dec. 30, 2019) ("For obvious reasons, the test for freighting a minority stockholder with the fiduciary obligations of a controlling stockholder is not an easy one to satisfy." (internal quotation marks omitted)); Donnelly v. Keryx Biopharmaceuticals, Inc., No. CV 2018-0892-SG, 2019 WL 5446015, at *5 (Del. Ch. Oct. 24, 2019) ("[D]emonstrating actual control by a minority blockholder is 'not easy'" (quoting *In re* Rouse Props., Inc., C.A. No. 12194-VCS, 2018 WL 1226015, at *11 (Del. Ch. Mar. 9, 2018))); Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447, at *13 (Del. Ch. Aug. 25, 2016) (asserting that to plead non-majority control "is no easy task").

272. *E.g.*, *Donnelly*, 2019 WL 5446015, at *5 ("Demonstrating control by a stockholder who owns less than 50% of a company requires showing the minority stockholder exercised actual domination and control over the directors." (internal quotation marks omitted)); *In re* USG Corp. S'holder Litig., C.A. No. 2018-0602-SG, 2020 WL 5126671, at *18 (Del. Ch. Aug. 31, 2020) ("The Plaintiffs have failed to plead facts from which I can reasonably infer that Knauf exercised actual control over USG's Board. Consequently, it is not reasonably conceivable that Knauf was a conflicted controller of USG."), *aff'd sub nom*. Anderson v. Leer, 265 A.3d 995 (Del. 2021); Thermopylae Cap. Partners, L.P. v. Simbol, Inc., C.A No. 10619-VCG, 2016 WL 368170, at *14 (Del. Ch. Jan. 29, 2016) ("[A] stockholder who—via majority stock ownership or through control of the board—operates the decision-making machinery of the corporation, is a classic fiduciary . . . ."); *In re* Crimson Expl. Inc. S'holder Litig., Civil Action No 8541-VCP, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014) ("[A] large blockholder will not be considered a controlling stockholder unless they actually control the board's decisions about the challenged transaction."); *see also* Klein v. Wasserman, C.A. No. 2017-0643-KSJM, 2019 WL 2296027, at *8 (Del. Ch. May 29, 2019) (citing "effective control of the board" as one way to establish general control). One Chancery decision reframed the board control inquiry to track the traditional two tests for showing control over the corporation, namely either transaction-specific control or pervasive control. That decision asserts that a plaintiff must plead and later prove that the blockholder "(1) actually dominated and controlled the corporation, its board or the deciding committee with respect to the challenged transaction; or (2) actually dominated and controlled the majority of the board generally." *In re Rouse*, 2018 WL 1226015, at *12. The court described the first situation as one where "the controller's presence is hard to ignore because he has injected himself as 'dominator' into the board's process while it considers the transaction and is, in that sense, actually 'in the board room.'" *Id.* The court viewed the second as a situation where "the controller's presence may be more of a 'looming' nature manifested by the board's awareness of his ability to make changes at the board level or to push other coercive levers should he be displeased with the board's

often with the additional requirements of Majority Equivalence and Retributive Capacity.[273] Then, they cited the *Cysive*-As-Floor Concept to assert that lesser levels of influence could not support a reasonable inference of control.[274] Sometimes they repeated the One-Third-Is-Low Concept, although with the *Cysive*-As-Floor Concept controlling the analysis, the One-Third-Is-Low Concept merely offered rhetorical support.[275]

These concepts produced a new recipe for pleading-stage dismissals. In 2014, the *Crimson Exploration* decision cited the Hard-To-Show Concept and the *Cysive*-as-Floor Concept. The court then expressed skepticism that a private equity firm that owned a 33.7% stake, was also the largest debt-holder, had three of its executives on a seven-member board, and led a merger process could conceivably exercise non-majority control.[276] After analyzing the control issue at length, the court dismissed the complaint because it was not reasonably conceivable that the alleged controller received a non-ratable benefit.[277]

In *Larkin*, a decision from 2016, the court found it was not reasonably conceivable that two venture capital funds could

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performance or decision making." *Id.* The court explained that in the later situation, "as a practical matter, [the controller] might as well be sitting at the head of the board room table." *Id.*

273. *See, e.g.*, *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG, 2023 WL 3408772, at *19 (Del. Ch. May 12, 2023), *aff'd*, 339 A.3d 1 (Del. 2025); *In re USG*, 2020 WL 5126671, at *14 (Del. Ch. Aug. 31, 2020), *aff'd sub nom. Anderson*, 265 A.3d 995; Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd., C.A No. 2018-0059-JRS, 2020 WL 881544, at *26 (Del. Ch. Feb. 24, 2020); *In re Essendant*, 2019 WL 7290944, at *7 (Del. Ch. Dec. 30, 2019); *In re* Zhongpin Inc. S'holders Litig., C.A. No. 7393, 2014 WL 6735457, at *6 (Del. Ch. Nov. 26, 2014), *rev'd on other grounds sub nom. In re* Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173 (Del. 2015); *In re* Sanchez Energy Derivative Litig., C.A. No. 9132-VCG, 2014 WL 6673895, at *8 (Del. Ch. Nov. 25, 2014), *rev'd sub nom.* Del. Cnty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017 (Del. 2015).

274. *E.g.*, *In re* GGP, Inc. S'holder Litig., C.A. No. 2018-0267-JRS, 2021 WL 2102326, at *23 n.244 (Del. Ch. May 25, 2021); Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152, at *18 (Del. Ch. May 31, 2017); *In re Rouse*, 2018 WL 1226015, at *19; *Larkin*, 2016 WL 4485447, at *14 (Del. Ch. Aug. 25, 2016); *Zhongpin*, 2014 WL 6735457, at *7; Veloric v. J.G. Wentworth, Inc., C.A. No. 9051-CB, 2014 WL 4639217, at *10 n.44 (Del. Ch. Sept. 18, 2014).

275. *In re GGP*, 2021 WL 2102326, at *20 (describing a 33.3% stake that could be increased to 45% as "not impressive"); *In re Rouse*, 2018 WL 1226015, at *18 (describing a 33.5% stake as "not impressive on its own").

276. *In re Crimson*, 2014 WL 5449419, at *10, *12, *16–17.

277. *Id.* at *17–19.

exercise control over a portfolio company despite having five of their executives serve on the company's nine-member board, having one of them serve as the company's president and CEO, and owning 23.1% of the common stock.[278] The decision cited the Hard-To-Show Concept,[279] the Board Control Test with Majority Equivalence,[280] and the *Cysive*-as-Floor Concept.[281] The court described the 23.1% stake as "a small block in controller contexts."[282] With the Board Control Test framing the analysis, the court looked for allegations that a majority of the directors were interested or that the venture capital directors "compromised or otherwise influenced other directors' free exercise of judgment."[283] Finding none, the court dismissed the complaint.[284]

Thermopylae Capital unfolded similarly.[285] There, a founder alleged that a venture capital firm obtained control by securing preferred stock containing a series of veto rights. The court framed the test in terms of the Board Control Test plus a requirement of Majority Equivalence and cited *Superior Vision* for the concept of Contractual Irrelevance.[286] The court then looked for facts suggesting that the board lacked a disinterested and independent majority.[287] Finding none, the court dismissed the case.

Liberty Broadband followed the same pattern.[288] The alleged controller had the right to name four directors to the eight-member board, placed two of its executives on the board, had ties

278. *Larkin*, 2016 WL 4485447, at *2.

279. *Id.* at *13 ("Making this showing is no easy task . . . .").

280. *Id.* (quoting *In re* Morton's Rest. Grp., Inc. S'holder Litig., 74 A.3d 656, 665 (Del. Ch. 2013), in turn quoting *In re* PNB Holding Co. S'holder Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *9 (Del. Ch. 2006)).

281. *Id.* at *14 ("More than once this court has invoked the facts of [*Cysive*] as a benchmark for the minimum degree of managerial clout needed to meet the actual control test where the alleged controller's holdings are well below 50% of a company's outstanding shares." (footnote omitted)).

282. *Id.*

283. *Id.*

284. *Id.* at *14–15, *21.

285. Thermopylae Cap. Partners, L.P. v. Simbol, Inc., C.A No. 10619-VCG, 2016 WL 368170 (Del. Ch. Jan. 29, 2016).

286. *Id.* at *13.

287. *Id.* at *14.

288. Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152 (Del. Ch. May 31, 2017).

with another three directors, had ties to senior management, and held a 26% stake in the company. The company's SEC filings stated that "by virtue of the size of its ownership stake . . . [the alleged controller] will be presumed to [have] control."[289] The court cited Hard-To-Show Concept and invoked the Board Control Test with a requirement of Majority Equivalence,[290] then applied the *Cysive*-As-Floor Concept to flesh out what those tests required.[291] In *Larkin* and *Thermopylae Capital*, the court then assessed non-majority control by examining whether a majority of the directors were independent from the alleged controller, but in *Liberty Broadband*, the court took the additional step of questioning whether a lack of independence on the part of a majority of the board could support an inference of non-majority control.[292] Placing heavy weight on a stockholders' agreement that prevented the alleged controller from acquiring more than a 40% stake, the court concluded that an inference of control was not reasonably conceivable.[293]

Comparable reasoning generated the outcome in *Rouse*. The plaintiffs alleged that a 33.5% stockholder who had three representatives on an eight-member board conceivably exercised control.[294] The plaintiff also pointed to the corporation's disclosure that the alleged controller "may exert influence over us that may be adverse to our best interests and those of our other stockholders."[295] The court started with the Hard-To-Show Concept, invoked the Board Control Test with a requirement of Majority Equivalence, then framed the analysis in terms of the *Cysive*-as-Floor Concept.[296] The court found that the allegations fell short of the indicia of control in *Cysive* and granted the motion to dismiss.[297]

These decisions exemplify the formal school. Each deployed comparatively formulaic reasoning to reject allegations of non-

289. *Id.* at *19.
290. *Id.* at *16.
291. *Id.* at *18.
292. *Id.*
293. *Id.* at *20.
294. *In re* Rouse Props., Inc., No. CV 12194-VCS, 2018 WL 1226015 (Del. Ch. Mar. 9, 2018).
295. *Id.* at *19.
296. *Id.* at *11, *18.
297. *Id.* at *18–19.

majority control at the pleading stage as a matter of law. During earlier eras, Delaware courts had not approached non-majority control from that perspective. Earlier decisions took a functional approach.

III. FUNCTIONALISM PERSISTS

As defendants sought to invoke formal concepts to obtain pleading-stage dismissals, some decisions persisted in using a functional approach. Multiple members of the Court of Chancery issued decisions that applied functional concepts to draw inferences of control, particularly at the pleading stage.[298] But the

298. *See* Blue v. Fireman, C.A No. 2021-0268-MTZ, 2022 WL 593899, at *16 (Del. Ch. Feb. 28, 2022) (Zurn, V.C.) (finding it reasonably conceivable that creditor controlled debtor where, despite not owning any stock, creditor held a proxy giving it the power to vote 83% of the outstanding voting power); Reith v. Lichtenstein, C.A No. 2018-0277-MTZ, 2019 WL 2714065, at *8 (Del. Ch. June 28, 2019) (Zurn, V.C.) (finding it reasonably conceivable that hedge fund exercised control through influence from 35.61% stock, demonstrated ability to change the size and composition of the board, a management services agreement, and relationships with one interim and two permanent executives); Firefighters' Pension Sys. of City of Kansas City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 258 (Del. Ch. 2021) (Laster, V.C.) ("Although Apollo no longer would designate a mathematical majority of the Board, Apollo still would control 42% of the Company's voting power, appoint four of nine directors, and retain a contractual veto right over any change in the CEO. This potent combination of rights would enable Apollo to maintain effective control over the Company, even without the ability to appoint a mathematical majority of the Board."); Berteau v. Glazek, C.A No. 2020-0873-PAF, 2021 WL 2711678, at *2, *27 (Del. Ch. June 30, 2021) (Fioravanti, V.C.) (drawing an inference of control where parent owned a 33.5% block, the subsidiary disclosed that the parent "will continue to be able to exert significant influence over our operations and business strategy," and where parent executives served as three of the seven directors on the board, with one also serving as Chairman and another as President and CEO); Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd., C.A. No. 2018-0059-JRS, 2020 WL 881544, at *26–27 (Del. Ch. Feb. 24, 2020) (Slights, V.C.) (drawing an inference of control where minority equity holders who owned 25% of the equity used their influence and a set of contractual blocking rights to force an entity into bankruptcy, where they were able to purchase its assets at a steep discount); Voigt v. Metcalf, C.A No. 2018-0828-JTL, 2020 WL 614999, at *1, *3–7 (Del. Ch. Feb. 10, 2020) (Laster, V.C.) (finding it reasonably conceivable that private equity firm exercised control over the portfolio company based indicia that included (i) ownership of 34.8% of its voting power, (iii) four private equity firm insiders on a twelve-member board, (iii) relationships of varying significance over another four directors, and (iv) a governance agreement that gave the private equity firm the right to select the board chair or its lead director and a host of veto rights actions the board otherwise could take unilaterally, plus (v) the private equity

functional approach did not always support an inference of control, and other decisions applied functional principles to reject an inference of control or to find at a later stage that control did not exist.[299] Four decisions illustrate the persistence of functionalism.

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firm's direction of the transaction process). Members of the Court of Chancery applied functional principles at other stages of litigation as well. *See In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2020 WL 553902, at *4 (Del. Ch. Feb. 4, 2020) (Slights, V.C.) (finding disputes of material fact existed precluding a grant of summary judgment finding that Elon Musk did not control Tesla); FrontFour Cap. Grp. LLC v. Taube, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at *21–25 (Del. Ch. Mar. 11, 2019) (McCormick, V.C.) (finding after trial that two brothers exercised control through their influence as founders and senior executives combined with evidence of actual domination of independent directors). Still other decisions used functional principles to find a credible basis to suspect wrongdoing sufficient to support a books-and-records inspection. Donnelly v. Keryx Biopharmaceuticals, Inc., C.A. No. 2018-0892-SG, 2019 WL 5446015, at *5 (Del. Ch. Oct. 24, 2019) (Glasscock, V.C.) (finding a credible basis to infer that owner of a 40% block with a director appointee and board observer "had significant influence on Keryx, as the company itself disclosed to stockholders, that it exercised direct influence on the Board through its appointees, that it revived the merger when it otherwise might have died, that its approval was a prerequisite for the merger, and that it obtained, in connection with the merger, a side-agreement valued at $20 million, a benefit not shared with unaffiliated stockholders"); Kosinski v. GGP Inc., 214 A.3d 944, 953 (Del. Ch. 2019) (McCormick, V.C.) (finding credible basis to suspect that stockholder exercised de facto control through a 34% voting interest, power to replace one-third of the board, and a level of influence warranting disclosure in company's public filings).

299. *See In re* Vaxart, Inc. S'holder Litig., C.A No. 2020-0767-PAF, 2021 WL 5858696, at *15 (Del. Ch. Nov. 30, 2021) (Fioravanti, V.C.) (finding it was not reasonably conceivable to infer control where 10% stockholder appointed two of eight directors and had prior ties to CEO); *In re* Essendant, Inc. S'holder Litig., C.A. No. 2018-0789-JRS, 2019 WL 7290944, at *8 (Del. Ch. Dec. 30, 2019) (Slights, V.C.) (declining to draw inference of control where private equity firm owned less than 12% of the stock, was the corporation's third-largest stockholder, did not nominate any directors, did not possess any contractual rights, and did not have any relationships with directors or officers); Klein v. Wasserman, C.A. No. 2017-0643-KSJM, 2019 WL 2296027, at *8–9 (Del. Ch. May 29, 2019) (McCormick, V.C.) (declining to draw inference of control where stockholders owned a 20% voting interest and possessed contractual blocking rights, but did not hold any officer, director, or managerial positions, had relationships with only one director, did not use blocking rights to channel the corporation into a particular outcome, and where another large and antagonistic blockholder existed). At least one decision rejected an inference of control using a more formal approach.

A. Tesla Motors

Vice Chancellor Slights's 2018 decision in *Tesla* was the first widely acknowledged decision to deviate from the formal school and persist in taking a functional approach.[300] The pleading-stage question was simple: Was it reasonably conceivable that Elon Musk controlled Tesla, either generally or for purposes of its acquisition of SolarCity, a company co-founded and controlled by Musk's brother and cousins? The plaintiffs alleged Musk's control flowed from being Tesla's largest stockholder with a 22.1% block, his roles as Chairman, CEO, and Chief Product Architect, and his status as perceived founder and the visionary public face of the company.[301] Tesla's disclosures acknowledged Musk's significance, stated that the company was "highly dependent on the services of Elon Musk" and that the loss of his services could "disrupt [Tesla's] operations, delay the development and introduction of [its] vehicles and services, and negatively impact [its] business, prospects, and operating results as well as cause [its] stock price to decline."[302] For his own part, Musk spoke of Tesla as his company, and the plaintiffs alleged that he pushed

300. *In re* Tesla Motors, Inc. S'holder Litig., No. CV 12711–VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018). Other post-*Morton*'s decisions before *Tesla* drew inferences of non-majority control at the pleading stage using a functional approach, but they did not attract significant attention. *See* Calesa Assocs. v. Am. Cap., Ltd., C.A. No. 10557-VCG, 2016 WL 770251, at *10–12 (Del. Ch. Feb. 29, 2016) (finding it reasonably conceivable on a motion to dismiss that a stockholder owning 26% of the company's stock exercised actual control where the plaintiff alleged instances of actual control beyond the fact that the stockholder "exercised duly obtained contractual rights to its benefit and to the detriment of the company" (emphasis in original)); *In re* Zhongpin Inc. S'holders Litig., C.A. No. 7393-VCN, 2014 WL 6735457, at *7–8 (Del. Ch. Nov. 26, 2014) (finding it reasonably conceivable on a motion to dismiss that a stockholder owning 17.3% of the company's stock was a controller because the stockholder was CEO and the company's 10-K stated that the stockholder effectively controlled the company), *rev'd on other grounds sub nom. In re* Cornerstone Therapeutics Inc. S'holder Litig., 115 A.3d 1173 (Del. 2015).

301. Technically, Musk did not found Tesla, although he has been credited for it. *See* Grace Kay, *Ousted Tesla Cofounder Martin Eberhard Sounds Off on Elon Musk, How the Company has Changed, and the EV Wars*, BUS. INSIDER (Feb. 18, 2023, at 06:30 ET), https://www.businessinsider.com/tesla-cofounder-martin-eberhard-interview-history-elon-musk-ev-market-2023-2 [https://perma.cc/SHG8-2MQT]; *but see* Tornetta v. Musk, 310 A.3d 430, 449 (Del. Ch. 2024) ("And although Musk was not at the helm of Tesla at its inception, he became the driving visionary responsible for Tesla's growth. He earned the title 'founder.'")

302. *In re* Tesla Motors, 2018 WL 1560293, at *2 (quoting Tesla SEC filings).

through the challenged SolarCity acquisition despite the board's concerns.[303]

There were thus multiple sources of influence that could support an inference of Small Block Control, particularly given Musk's Powerful Roles and the combination of Historical Evidence and Transactional Evidence. But even with those sources, the *Tesla* decision could have followed a formal script by starting with the Hard-To-Show Concept, invoking the Board Control Test with the additional requirements of Majority Equivalence and Retributive Capacity, and using the *Cysive*-as-Floor Concept to give content to the test. By taking those steps, the court might have ruled that Musk could not conceivably exercise non-majority control, akin to how other decisions from the formal school had approached the issue.

Instead, the *Tesla* decision quoted a different passage from *Cysive*: "[W]hether a large blockholder is so powerful as to have obtained the status of a 'controlling stockholder' is intensely factual [and] it is a difficult [question] to resolve on the pleadings."[304] The decision also stressed that the plaintiffs did not have to prove control, only "'show it is reasonably conceivable that [Musk] controlled [Tesla]."[305] After considering Musk's voting

303. *Id.* at *2, *6–7.

304. *Id.* at *13 & n.214 (quoting *In re* Cysive, Inc. S'holder Litig., 836 A.2d 531, 550–51 (Del. Ch. 2003), and citing Calesa Assocs., L.P. v. Am. Cap., Ltd., C.A. No. 10557-VCG, 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016) ("[T]here is no magic formula to find control; rather, it is a highly fact specific inquiry." (internal citation omitted)); *In re Zhongpin*, 2014 WL 6735457, at *6–7 (noting the inquiry of "whether or not a stockholder's voting power and managerial authority, when combined, enable him to control the corporation [] is not a formulaic endeavor and depends on the particular circumstances of a given case"), *rev'd on other grounds sub nom. In re Cornerstone Therapeutics*, 115 A.3d 1173 ; *id.* at *9 n.33 ("Whether or not a particular CEO and sizeable stockholder holds more practical power than is typical should not be decided at the motion to dismiss stage if a plaintiff pleads facts sufficient to raise the inference of control."); Williamson v. Cox Commc'n, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *6 ("The question whether a shareholder is a controlling one is highly contextualized and is difficult to resolve based solely on the complaint.")).

305. *In re* Tesla Motors, 2018 WL 1560293, at *13 & n.215 ("Here, Plaintiffs do not need to prove that [the alleged controller] was a controlling stockholder in order to withstand the motions to dismiss. Rather, Plaintiffs must plead facts raising the inference that [the alleged controller] could control [the company]." (quoting *In re* Crimson Expl. Inc. Stockholder Litig., Civil Action No 8541-VCP, 2014 WL 5449419, at *17 (Del. Ch. Oct. 24, 2014), and citing *In re Zhongpin*, 2014 WL 6735457, at *7)).

power, the presence of supermajority voting requirements in Tesla's bylaws that enhanced the significance his block, his demonstrated willingness to oust members of management who displeased him, his close relationships with multiple directors, his status as the public face of Tesla, the company's acknowledgement of his influence in its public filings, and his involvement in pushing through the challenged SolarCity transaction despite board reticence, Vice Chancellor Slights found it reasonably conceivable that Musk exercised non-majority control.[306]

Tesla applied functional principles. The decision considered multiple sources and recognized Small Block Control where supported by Powerful Roles, Historical Evidence, and Transactional Evidence. That was not a new approach. Those concepts had animated the *Union Pacific* decision in 1912, the *Rochester* and *Slattery* decisions in 1937 and 1938, the *DuPont* decision in 1957, the numerous cases interpreting control under the federal securities laws, and Delaware cases before the formal turn.

B. Basho

The post-trial decision in *Basho* from 2018 also took a functional approach.[307] A private equity firm had invested in an early-stage technology company, then led or co-led a series of preferred stock financings. Through the preferred stock, the private equity firm gained blocking rights that enabled it to control the company's access to capital. The private equity firm recognized in contemporaneous communications that the blocking rights conferred effective control over the company when it needed capital. The private equity firm used these rights to maneuver the company into a position of maximum financial distress, then forced through a transaction that was highly favorable to itself and unfair to the company and its other investors.

306. *Id.* at *13–19.

307. Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, C.A. No. 11802-VCL, 2018 WL 3326693 (Del. Ch. July 6, 2018), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019).

The plaintiffs argued that the private equity firm exercised non-majority control based on multiple sources. They argued for Contractual Control based on the preferred stock veto, supported by Powerful Roles, Historical Evidence, and Transactional Evidence.

The court found that the plaintiffs proved the existence of non-majority control. Returning to the Multiple Sources Principle, the decision stated:

> It is impossible to identify or foresee all of the possible sources of influence that could contribute to a finding of actual control over a particular decision. Examples include, but are not limited, to: (i) relationships with particular directors that compromise their disinterestedness or independence, (ii) relationships with key managers or advisors who play a critical role in presenting options, providing information, and making recommendations, (iii) the exercise of contractual rights to channel the corporation into a particular outcome by blocking or restricting other paths, and (iv) the existence of commercial relationships that provide the defendant with leverage over the corporation, such as status as a key customer or supplier. Lending relationships can be particularly potent sources of influence, to the point where courts have recognized a claim for lender liability when a lender exercises influence over a company that goes "beyond the domain of the usual money lender" and, while doing so, acts negligently or in bad faith.[308]

Continuing, the *Basho* decision added that:

> Broader indicia of effective control also play a role in evaluating whether a defendant exercised actual control over a decision. Examples of broader indicia include ownership of a significant equity stake (albeit less than a majority), the right to designate directors (albeit less than a majority), decisional rules in governing documents that enhance the power of a minority stockholder or board-level position, and the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder."[309]

The decision also recognized the importance of Transactional Evidence, such as "statements by participants or other contemporaneous evidence indicating that a defendant was in fact

308. *Id.* at *26 (footnotes omitted).

309. *Id.* at *27 (footnotes omitted).

exercising control over a decision" or "whether the defendant insisted on a particular course of action, whether there were indications of resistance or second thoughts from other fiduciaries, and whether the defendant's efforts to get its way extended beyond ordinary advocacy to encompass aggressive, threatening, disruptive, or punitive behavior."[310]

In *Basho*, those considerations supported a finding that the private equity firm had exercised Contractual Control by using its blocking rights to channel the company into a position where it had no alternative other than to accept the private equity firm's terms. That finding was supported by Transactional Evidence, including evidence showing that the private equity firm misrepresented the firm's intentions, interfered with management's efforts to find financing, and undermined the company's financial advisor. The finding of non-majority control also took into account Powerful Roles, such as the ability of the private equity firm's two board representatives to dominate the discussions.[311] Like *Tesla*, *Basho* applied functional principles.

C. Pattern Energy

Another illustrative decision is *Pattern Energy*, where the plaintiffs alleged that a group of officers and entities affiliated with a private equity firm could exercise non-majority control over a portfolio company. The officers had managerial authority and owned 10% of the stock, but the private equity firm's principal source of power was its affiliates' contract rights, including the ability to install officers and directors of its choosing and a consent right over any change of control. In addition, the private equity firm had created the corporation as a vehicle for conducting transactions, and, when selling the portfolio company, the private equity firm used its contract right to favor a buyer whose transaction fit with the private equity firm's goals.

The defendants argued that only controlling *stockholders* could owe fiduciary duties, so non-stockholder entities could not be part of a control group by definition (the "Stockholders-Only Rule"). Vice Chancellor Zurn acknowledged that Delaware cases had "traditionally evaluated whether stockholders wielded

310. *Id.* (footnotes omitted).

311. *See id.* at *28–35.

control over the corporation," but she rejected any brightline rule. Using the Board Control Test as the operative standard, she reasoned that "control manifests in whether an individual or entity has the power to displace the will of the board, and stock ownership is the original vehicle for such displacement."[312] She also recognized that stock ownership was only one possible source of authority and explained that for purposes of non-majority control, "fiduciary duties flow from aggregated sources of influence, including voting power and softer sources of power."[313]

Vice Chancellor Zurn credited at the pleading stage that the officer defendants could have worked together with the entity defendants, combining the former's managerial roles and 10% stock ownership with the latter's "contractual, operational, and structural pull."[314] She also considered the facts and circumstances surrounding the transaction, including statements made by the alleged controllers.[315] Considering the complaint's allegations as a whole, she found it reasonably conceivable that control existed.[316]

Pattern Energy thus took a functional approach. Vice Chancellor Zurn applied the Multiple Sources Principle and drew an inference of Contractual Control, supported by Powerful Roles, Historical Evidence, and Transactional Evidence.

D. Tornetta

The most prominent functional decision arrived in 2024 in the form of Chancellor McCormick's post-trial opinion in *Tornetta v. Musk*.[317] When challenging Musk's compensation from Tesla, a

312. *In re* Pattern Energy Grp. Inc. S'holders Litig., C.A. No. 2020-0357-MTZ, 2021 WL 1812674, at *37 (Del. Ch. May 6, 2021). By contrast, decisions taking a formal approach rejected out of hand the notion that persons lacking any stock ownership could exercise control or be part of a control group. *See* Klein v. H.I.G. Cap., L.L.C., C.A. No. 2017-0862-AGB, 2018 WL 6719717, at *13 (Del. Ch. Dec. 19, 2018) ("To say that Count VI is novel is an understatement. It is not alleged that Bain owned *any* stock of Surgery Partners until the Transactions closed and thus, by definition, Bain could not have been part of a 'group' of Company stockholders when the Transactions were negotiated.").

313. *In re* Pattern Energy, 2021 WL 1812674, at *37.

314. *Id.* at *38.

315. *Id.* at *43.

316. *Id.* at *46.

317. Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024).

stockholder plaintiff sought to prove that Musk exercised non-majority control over Tesla such that his compensation would be subject to entire fairness review. Chancellor McCormick applied the Multiple Sources Principle, listing factors from prior cases that could contribute to a finding of control, including:

- Ownership of a significant equity stake, albeit less than a majority;
- The right to designate directors, albeit less than a majority;
- Decisional rules in governing documents that enhance the power of a minority stockholder or board-level position;
- The ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder.[318]

As this Article has shown, courts have looked to those considerations to evaluate control since the *Union Pacific* case in 1912.

When analyzing Musk's 21.9% equity stake, Chancellor McCormick considered how that block would affect the outcome of a contested vote, as then-Vice Chancellor Strine had in *Mizel.* She noted that with an 80% turnout, Musk could prevail by capturing approximately one-in-three of the disinterested votes, while an opponent would have to poll at 71% or higher.[319] Requiring that level of success was significant. Writing while a Vice Chancellor, Stirne had described disinterested majorities of 60% and 66 2/3% as "more commonly associated with sham elections in dictatorships than contested elections in genuine republics."[320] Along similar lines, Chancellor Chandler had found in a post-trial ruling from 2011 that no insurgent had ever achieved a 67% vote and that polling votes at this level was not realistically attainable.[321]

Chancellor McCormick also cited Musk's Powerful Roles as CEO, Chairman, and quasi-founder. She observed that Musk wielded considerable power by virtue of his high-status roles to the point where the directors seemed to equate Musk and Tesla. That was consistent with many Delaware precedents, including then-Vice Chancellor Strine's analysis in *Cysive*, then-Vice

318. *See id.* at 500.

319. *Id.* at 502.

320. Chesapeake Corp. v. Shore, 771 A.2d 293, 342 (Del. Ch. 2000).

321. Air Prods. & Chems., Inc. v. Airgas, Inc., 16 A.3d 48, 117 (Del. Ch. 2011).

Chancellor Seitz's analysis in *Burry Biscuit*, and Chancellor Wolcott's analysis in *Guth*. She also cited Historical Evidence, including the company's disclosures about Musk's importance and his history of operating without meaningful board oversight or constraint.[322] As this Article has shown, Delaware courts regularly considered Historical Evidence when evaluating control, going back to the seminal *Guth* decision. Although Chancellor McCormick drew on a recent article that described a person having those types of attributes as a "Superstar CEO,"[323] nothing about the analysis was new except the label.

Chancellor McCormick also considered at length the Transactional Evidence of how the process for Musk's compensation arrangement unfolded.[324] That was not new either. Delaware cases dating back to *Guth* had considered Transactional Evidence, sometimes using it to support a finding of control and other times using it to negate a finding of control.

Based on this extensive analysis, Chancellor McCormick found that Musk exercised non-majority control over Tesla, at a minimum for purposes of the process leading to his compensation package.[325] She had not invented a new approach. Her analysis comported with how Delaware courts had approached non-majority control before the emergence of the formal school.

IV. THE REACTION

The persistence of functional decisions triggered a strident reaction. After Vice Chancellor Slights's pleading-stage ruling in *Tesla*, Strine (by that time retired from the bench) and two co-authors criticized the functional decisions as novel and unmoored from traditional analysis.[326] After Chancellor McCormick's post-trial decision in *Tornetta*, others joined in, generally repeating the

322. *Tornetta*, 310 A.3d at 504–05.

323. *Id.* at 507 (citing Assaf Hamdani & Kobi Kastiel, *Superstar CEOs and Corporate Law*, 100 WASH. U. L. REV. 1353 (2023)).

324. *Id.* at 508–20.

325. *Id.* at 520–21.

326. *See infra* Part IV.A.

points that Strine and his co-authors had made.[327] Their contentions that the functional decisions applied a new approach were not accurate.

A. The Optimizing *Article*

The initial critique of the functional response came from Strine, retired law professor Lawrence Hamermesh, and retired Vice Chancellor and Delaware Supreme Court Justice Jack Jacobs. In 2021, they posted an article titled *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, subsequently published in 2022.[328] The article criticized "problematic areas" of Delaware law, including what they described as a line of cases "[e]nlarging the definition of 'controlling stockholders' to include persons having little or no share voting power."[329] As this Article has shown, the functional cases had not enlarged anything. The functional cases applied longstanding principles that predated an effort that began during the mid-Generative Era to narrow and formalize the test for non-majority control.

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327. *See infra* Parts IV.B–D. For similar post-*Tornetta* criticisms, see Jonathan R. Macey, *Delaware Law Mid-Century: Far From Perfect But Not Leaving for Las Vegas Yet*, 50 J. CORP. L. 1111 (2025); Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations/ [http
s://perma.cc/5WCE-4X76]. Other scholars have expressed dissatisfaction with Delaware law in this area. For a proposal to use the Shapley Value from political theory to assess non-majority control based on the frequency with which the stockholder delivers the pivotal vote, see Moran Ofir, *Controlling Shareholders and Control-Enhancing Mechanisms*, 25 THEORETICAL INQUIRIES 187 (2024). Ofir's article also provides a helpful table of thirty-nine decisions that the Delaware courts issued between 1979 and 2021, coded for variables pertinent to control. *Id.* at app. 1 & 2. For a proposal to treat the power to elect a director as sufficient to renderthe director non-independent, see Franklin A. Guvurtz, *Corporate Rulers and the Councils: Are Directors Becket or Cromwell When Dealing With Controlling Stockholders*, 27 U. PA. J. BUS. L. 749 (2025).

328. Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. L. 321 (2022).

329. *Id.* at 325; *accord id.* at 344 (criticizing decisions for "expanding the definition of a 'controlling stockholder.'").

To support its assertion that the functional cases were new, the *Optimizing* article asserted that "it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder."[330] That was a version of the Hard-To-Show Concept.

The *Optimizing* article did not provide meaningful support for its version of the Hard-To-Show Concept. Notably, the article did not cite the two weakly supportive Chancery precedents that then-Vice Chancellor Strine had relied on when introducing the notion in *PNB Holding*. Instead, the *Optimizing* article cited only *Aronson v. Lewis,*[331] claiming that the Delaware Supreme Court had declined to infer control even though "the main defendant, the former CEO and chairman, controlled 47 percent of the vote, had close affiliations with several directors, and had an ongoing consulting arrangement."[332]

That was a different take on *Aronson.* Rather than interpreting that decision as having implausibly declined to draw a pleading-stage inference of control, Delaware decisions have viewed *Aronson* as acknowledging the dominant stockholder's control while holding that the existence of that control would not, standing alone, render outside directors unable to consider a demand.[333] The *Aronson* court did not assert that non-majority

330. *Id.* at 345.

331. Aronson v. Lewis, 473 A.2d 805 (Del. 1984), *overruled in part by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000), *and in different part by* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034 (Del. 2021).

332. Hamermesh, Jacobs & Strine, *supra* note 328, at 345.

333. *See, e.g.*, Beam *ex rel.* Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1054 (Del. 2004) (applying *Aronson*; holding that "Stewart's overwhelming voting control of MSO" did not render directors unable to consider a demand); Teamsters Union 25 Health Servs. & Ins. Plan v. Baiera, 119 A.3d 44, 66 (Del. Ch. 2015) (Bouchard, C.) ("Analyzing the plaintiff's allegations, the Supreme Court appeared to assume that Fink, with his 47% ownership interest, was Meyers's controlling stockholder. The Aronson Court nevertheless squarely rejected the notion that a controlling interest in a corporation is itself sufficient to overcome the directors' presumption of independence."); *In re* Cox Commc'ns, Inc. S'holders Litig., 879 A.2d 604, 646 (Del. Ch. 2005) (Strine, V.C.) (contrasting the entire fairness framework with the deference "illustrated by the landmark decision in *Aronson*, which presumes that independent directors can impartially decide whether to cause the company to sue a controlling stockholder" (footnote omitted)); *In re* Pure Res., Inc., S'holders Litig, 808 A.2d 421, 436 n.17 (Del. Ch.

control was hard to show, nor had any decision before *PNB Holding*. The *Optimizing* article thus did not provide meaningful support for its version of the Hard-To-Show Concept. That lack of support reinforced the novelty of the contention.

This Article's survey of the history of non-majority control shows that it was not necessarily difficult to plead or prove. Before 1988, only *Burry Biscuit* addressed non-majority control at the pleading stage, and that decision credited that a founder, president, CEO, director, and 10% stockholder could control the corporation for the purpose of a *Tornetta*-style challenge to a large equity grant.[334] The absence of pleading-stage rulings suggests that practitioners understood courts would draw a reasonable inference of control based on multiple sources and did not seek pleading-stage adjudications. A pleading-stage dismissal did not arrive until the Reformation Era decision in *Sea-Land*, and that case involved unique facts based on the controller having engaged in a creeping takeover that management opposed.[335]

To be sure, Delaware decisions like *Kaplan* and *Puma* relied on Transactional Evidence to hold after trial that the plaintiffs had failed to prove non-majority control for purposes of the transaction at issue,[336] but there were no cases before *PNB Holding* that claimed non-majority control was hard to prove. Whether non-majority control existed was a question of fact that turned on what the evidence showed. In *Guth*, the court found that a

2002) (Strine, V.C.) ("In this regard, *Lynch* is premised on a less trusting view of independent directors than is reflected in the important case of *Aronson v. Lewis* . . . which presumed that a majority of independent directors can impartially decide whether to sue a controlling stockholder." (internal citation omitted)); Stroud v. Milliken Enters., Inc., 585 A.2d 1306, 1307 (Del. Ch.1988) (applying *Aronson*; explaining that control of a corporation by a majority stockholder is not sufficient to raise a reasonable doubt about a director's independence). The *Aronson* decision held that even majority control would not undermine a director's disinterestedness, so there was no need for the Delaware Supreme Court to craft a special rule for non-majority control. *See Aronson*, 473 A.2d at 815 ("[I]n the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person.").

334. Rosenthal v. Burry Biscuit, 60 A.2d 106, 109 (Del Ch. 1948).

335. *In re* Sea-Land Corp. S'holders Litig., CIV. A. No. 8453, 1988 WL 49126, at *1–2 (Del. Ch. May 13, 1988).

336. *See supra* Part I.D.2.

Chairman and CEO who was also a 10% stockholder exercised non-majority control.[337] In *Green*, the court found that the corporation's president, who was also a director and owned 29% of the stock, exercised non-majority control.[338] In *Cheff*[339] and *Moran*,[340] the Delaware Supreme Court treated a 20% block as conferring control. In *Robbins,* the Delaware Court of Chancery "recognized that substantial minority interests ranging from 20% to 40% often provide the holder with working control."[341] A functional approach that applied the Multiple Sources Principle and credited an inference of Small Block Control was not novel, particularly where supported by Powerful Roles, Historical Evidence, and Contractual Evidence.

The *Optimizing* article also posited that *Lynch* departed from earlier cases and "took a more expansive view of the term 'controlling stockholder.'"[342] To justify that claim, the *Optimizing* article compared the facts of *Lynch* to the facts of *Aronson*. True, the non-majority controller in *Lynch* had fewer sources of influence and owned a smaller block than in *Aronson*, but *Lynch* did not depart from prior case law. Earlier cases had found control based on less, and the contemporary decisions in *Rales* and *Friedman* show that its control finding was mainstream.[343]

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337. *See supra* Part I.D.1.

338. Greene v. Allen, 114 A.2d 916, 917 (Del. Ch. 1955), *rev'd on other grounds sub nom.* Johnston v. Greene, 121 A.2d 919 (Del. 1956).

339. Cheff v. Mathes, 199 A.2d 548, 553 (Del. 1964) (treating a 20% block of stock as "a substantial block of stock will normally sell at a higher price than that prevailing on the open market, the increment being attributable to a 'control premium.'").

340. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch. 1985) ("The significance of the 20% figure whether for ownership or voting purposes is its recognized threshold for measuring control of a publicly held corporation."), *aff'd*, 500 A.2d 1346 (Del. 1985). For support, the trial court cited a federal court of appeals decision which observed that a 20% holding "in a publicly held corporation frequently is regarded as control." Dan River, Inc. v. Unitex Ltd., 624 F.2d 1216, 1225 (4th Cir. 1980).

341. Robbins & Co. v. A. C. Israel Enters., Inc., Civ. A. No. 7919, 1985 WL 149627, at *5 (Del. Ch. Oct. 2, 1985).

342. Hamermesh, Jacobs & Strine, *supra* note 328, at 345.

343. *See* Rales v. Blasband, 634 A.2d 927, 937 (Del. 1993) (inferring at the pleading stage that the Rales brothers exercised control where Steven Rales served as Chairman of the Board, Mitchell Rales served as Chairman of the Executive Committee, and the brothers together owned 44% of the corporation's stock); Friedman v. Beningson, Civ. A. No. 12232, 1995 WL 716762, at *4 (Del. Ch. Dec. 4, 1995) (Allen, C.) (observing that where the

The *Optimizing* article next invoked the *Cysive*-As-Floor Concept. To claim that concept represented settled Delaware law, the article cited *Morton's* and *KKR*, decisions from 2013 and 2014, respectively.[344] As this Article has shown, *Morton's* and *KKR* marked the beginning of the formal turn. Demonstrating that the *Cysive*-As-Floor Concept comported with prior law would require showing that earlier Delaware cases did not recognize control at lower levels. As this Article has shown, they did.

Rather than showing that the functional school was new, the *Optimizing* article proposed new rules of its own. It argued for the Stockholders-Only Rule, under which stockholder status would be a requirement for non-majority control. It did not provide support for that proposition. The article simply criticized *Pattern Energy* for drawing a pleading-stage inference that a control group could consist of managers holding 10% of the stock, plus non-stockholder entities that held critical veto rights.[345] Berle and Means had recognized in the 1930s that stockholder status would not be a requirement for non-majority control.[346] The federal securities laws contemplated that possibility as well.[347] *Pattern Energy*'s approach was not novel; the Stockholders-Only Rule was.

The *Optimizing* article also proposed rejecting the Multiple-Sources Principle, a method for assessing non-majority control that dates back to the *Union Pacific* decision from 1912, in favor of looking only to the alleged controller's level of stock ownership.[348]

Chairman, President, and CEO held 36% of the company's stock, "[f]rom a practical perspective, this confluence of voting control with directorial and official decision making authority . . . is . . . itself quite consistent with control of the board"). *See also* AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE § 1.10 (1994) (contemplating a presumption of controlling influence if a person "owns or has the power to vote more than 25 percent of the outstanding voting equity securities of a corporation").

344. Hamermesh, Jacobs & Strine, *supra* note 328, at 345 n.112.

345. *Id.* at 348 (criticizing *In re* Pattern Energy Grp. S'holder Litig., C.A. No. 2020-0357-MTZ, 2021 WL 1812674 (Del. Ch. May 6, 2021)).

346. BERLE & MEANS, *supra* note 21, at 69 ("Under the corporate system, control over industrial wealth can be and is being exercised with a minimum of ownership interest. Conceivably, it can be exercised without any such interest.").

347. *Id.*; *accord* Exchange Act Release No. 34-3285A, 1942 WL 76430, at *11 (Aug. 5, 1942).

348. Hamermesh, Jacobs & Strine, *supra* note 328, at 348 (quoting from and criticizing Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, C.A. No. 11802-VCL, 2018 WL 3326693 (Del. Ch. July 6, 2018), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019)).

Turning to contract rights, the article argued for a rule of Contract Irrelevance that rejected any "premise of control [that] involves circumstances that reflect garden variety commercial dealings."[349] Referring to "garden variety commercial dealings" was a straw man, because cases like *Basho* and *Pattern Energy* involved insiders using contractual governance rights, typically a veto over the corporation's ability to secure additional funding, to force the corporation into a self-dealing transaction. The Contract Irrelevance principle did not have a long pedigree; it could be traced only to the *Superior Vision* decision in 2006. By contrast, Berle and Means had acknowledged the possibility of Contractual Control in the 1930s[350] and the federal securities laws expressly contemplated it.[351]

The *Optimizing* article also proposed giving no weight to Powerful Roles. Addressing the pleading-stage ruling in *Tesla*,[352] the article asserted that Vice Chancellor Slights should not have taken into account "that Musk was so talented and visionary that the company could not succeed without him" because that "does not rationally imply that someone is a controlling stockholder."[353]

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349. *Id.*

350. BERLE & MEANS, *supra* note 21, at 69–70.

351. 17 C.F.R. § 240.12b-2 (2025) ("The term 'control' (including the terms 'controlling', 'controlled by' and 'under common control with') means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."); *accord* 17 C.F.R. § 230.405 (2025).

352. *See In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2018 WL 1560293, at *12 (Del. Ch. Mar. 28, 2018).

353. Hamermesh, Jacobs & Strine, *supra* note 328, at 346 ("Being valuable to the company does not make an executive a controlling stockholder, nor does it implicate the concerns underlying *Lynch*—namely, the potential to use affirmative voting power to unseat directors and implement transactions that the minority stockholders do not like, and use blocking voting power to impede other transactions."). As support, the *Optimizing* article cited the Supreme Court's decision in an appraisal case involving Dell, Inc. *Id.* at 346 n.115 (citing Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 25 (Del. 2017)). That decision merely noted in passing that the company "lacked a controlling stockholder." *Dell*, 177 A.3d at 25. The *Optimizing* article described that decision in a parenthetical as "rejecting argument that controller status could be grounded on the defendant's importance as a founder and successful CEO when he did not have close to voting control and had pledged to vote his shares in favor of a higher-priced transaction." Hamermesh, Jacobs & Strine, *supra* note 328, at 346 n.115. *Dell* was an appraisal case, not a fiduciary duty case, and controlling stockholder status was not in dispute. *Dell*, 177 A.3d at 9. The stockholder also held only 13.4% of the shares. *Id.*

The article did not justify that novel suggestion, which conflicted with a century of case law that considered Powerful Roles, starting with *Union Pacific*, continuing through Quiet Era decisions like *Guth* and *Burry Biscuit*, running through Moderating Era decisions like *Rales* and *Friedman,* and figuring prominently in then-Vice Chancellor Strine's own decisions in *Mizel* and *Cysive*.[354] *Tesla*'s consideration of Powerful Roles comported with settled law. The argument against considering Powerful Roles was new.

The *Optimizing* article ultimately called for a new rule that would limit a court's ability to consider "soft power" at the pleading stage.[355] In a brief statement, the article proposed "limiting the concept of 'controlling stockholder' to the situation where a stockholder's voting power gives it at least negative power over the company's future, in the sense of acting as a practical impediment to any change of control."[356] That test would differ from both the Conduct Control Test and the Board Control Test.

The *Optimizing* article thus erroneously criticized the functional approach as new while calling for a groundbreaking version of the formal approach. Its call to action did not gain immediate traction, but that would change after *Tornetta*.

B. The Discontents *Article*

In response to *Tornetta*, a chorus of commentators echoed the *Optimizing* article in attacking the functional school as anomalous. Chief among them were Professors Jill E. Fisch and

354. The *Optimizing* article sought to recast *Cysive* as focusing on stock ownership, contending that "the court's reasoning remained deeply tied to voting, not just managerial power[.]" Hamermesh, Jacobs & Strine, *supra* note 328, at 345. *Cysive* instead illustrates the Multiple Sources Principle, and the passage the *Optimizing* article cites states that "the analysis of whether a controlling stockholder exists must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes." *Id.* (quoting *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 553 (Del. Ch. 2003)). The decision elsewhere emphasized that the controller was "Chairman and CEO of Cysive, and a hands-on one, to boot," as well as that he was "involved in all aspects of the company's business, was the company's creator, and has been its inspirational force." *In re Cysive*, A.2d at 552–53. Those passages took a functional approach and spoke in terms of both voting power and managerial authority, consistent with the need to account for Powerful Roles when assessing non-majority control.

355. Hamermesh, Jacobs & Strine, *supra* note 328, at 348.

356. *Id.* at 325.

Steven Davidoff Solomon, who posted a draft article titled *Control and Its Discontents*, published in 2025.[357] The *Discontents* article characterized *Tesla* and other functional decisions as reflecting what they called the "new control."[358] Their piece contains many errors; this discussion focuses on their claim that the functional approach to non-majority control was new.

The *Discontents* article provided a misleadingly incomplete description of the history of non-majority control. The article started with the assertion that control was traditionally limited to majority stockholders, noting that "early cases used the terminology of 'majority shareholder' rather than 'controlling shareholder' and focused on situations in which shareholders owned a majority or near majority of the corporation's voting stock."[359] As support for its assertion about how "early cases" approached control, the article cited only the Delaware Supreme Court's 1987 decision in *Ivanhoe*. As shown by the deeper historical analysis that this Article has conducted, *Ivanhoe* was not an "early" case. It also involved unique and complex facts.[360] As this Article has shown, although early cases did begin by recognizing majority control, they relied on functional principles when doing so.[361]

The *Discontents* next acknowledged that "courts extended the concept of a majority shareholder not merely to those shareholders that held mathematical control—that is, more than fifty percent—but also to those that owned a substantial percentage of stock and exercised effective control."[362] As examples, it cited the Delaware Supreme Court's decisions in *Singer*[363] and *Tanzer*,[364] both from 1977.[365] But as this Article has explained, the first recognition of non-majority control dates back to the *Union Pacific* decision in 1912, over half a century earlier.

357. Jill E. Fisch & Steven D. Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025).

358. *Id.* at 655.

359. *Id.* at 658.

360. *See supra* Part I.D.3.

361. *See supra* Part I.A.

362. Fisch & Solomon, *supra* note 357, at 658.

363. Singer v. Magnavox Co., 380 A.2d 969, 979–80 (Del. 1977).

364. Tanzer v. International General Industries, Inc., 379 A.2d 1121, 1123 (Del. 1977).

365. The *Weinberger* decision overruled both cases in part on other grounds. *See* Weinberger v. UOP, Inc., 457 A.2d 701, 715 (Del. 1983). The *Discontents* article does not acknowledge that subsequent history.

The citations to *Singer* and *Tanzer* did not even involve non-majority control. In *Singer,* the controlling stockholder owned 84.1% of the subsidiary's stock,[366] and the cited pages discuss the short-lived business purpose test, not non-majority control.[367] In *Tanzer,* the controlling stockholder owned 81% of the subsidiary's stock,[368] and the cited pages again discuss the business purpose test.[369]

Having failed to accurately describe the history of non-majority control, the *Discontents* article mischaracterized the content of that law. The article asserted the non-majority control analysis traditionally reflected the Hard-To-Show Concept, but the *Discontents* article relied solely on the *Optimizing* article for that assertion.[370] As this Article has shown, the *Optimizing* article did not adequately justify that claim.[371] The *PNB Holding* decision introduced the Hard-To-Show Concept in 2006; it was not a longstanding principle.

Like the *Optimizing* article, the *Discontents* article pointed to *Lynch* as a turning point for non-majority control and contended that "[s]ubsequent cases expanded on *Lynch* to recognize that a large shareholder could exercise control without holding an absolute majority of the corporation's shares."[372] Its only support for that assertion was *Cysive*.[373] This Article has shown that *Lynch* and subsequent decisions did not expand the approach to non-majority control. Those decisions applied the historically dominant functional test.

In its effort to paint the functional school as new, the *Discontents* article even mischaracterized Chancellor McCormick's candid statement that by finding Musk exercised

366. 380 A.2d at 971.

367. *See id.* at 979–80.

368. 379 A.2d at 1122.

369. *See id.* at 1123. Elsewhere, the *Discontents* article mistakenly described *Puma* as a pleading-stage decision. Fisch & Solomon, *supra* note 357, at 660. The Court of Chancery rendered its decision after a "final hearing," *i.e.* a trial, where the directors testified. Puma v. Marriott, 283 A.2d 693, 694 (Del. Ch. 1971).

370. Fisch & Solomon, *supra* note 357, at 659 (asserting based on the *Optimizing* article that "[u]nder Delaware law, it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder").

371. *See supra* Part IV.A.

372. Fisch & Solomon, *supra* note 357, at 658–59.

373. *Id.* at 659 n.87.

control, "[t]his decision dares to 'boldly go where no man has gone before,' or at least where no Delaware court has tread."[374] The *Discontents* article claimed that Chancellor McCormick "recognized the novelty of [her] ruling" when holding that "Musk . . . was a controlling shareholder despite the fact that he owned only 21.9% of Tesla's voting stock."[375] The context of that statement shows that Chancellor McCormick was contrasting her finding with prior decisions that had *not* reached the question of whether Musk exercised control. In *Tesla,* Vice Chancellor Slights drew a pleading-stage inference of control,[376] but found it unnecessary to reach the issue after trial.[377] On appeal, the Delaware Supreme Court had not reached the issue either.[378] Chancellor McCormick's discussion of the operative legal principles for non-majority control—which the *Discontents* article did not cite—demonstrates that she did not regard the functional approach as novel, because she supported her control analysis with extensive citations to precedent.[379] To suggest that Chancellor McCormick conceded that the functional approach was new misrepresented her decision.

The *Discontents* article's assertions about the novelty of the functional school were not reliable. In lieu of an independent take, the article embraced the erroneous narrative that the *Optimizing* article had introduced.

C. The Course Correction *Article*

Also in 2024, Professor Stephen M. Bainbridge posted an article titled *A Course Correction for Controlling Shareholder Transactions,* published in 2025.[380] The *Course Correction* article

374. *Id.* at 643 (quoting Tornetta v. Musk, 310 A.3d 430, 446 (Del. Ch. 2024)).

375. *Id.* They later repeat the assertion, claiming that "[a]s the *Tornetta* court acknowledged, its treatment of Musk as a controlling stockholder was novel." *Id.* at 645.

376. *In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2018 WL 1560293, at *19 (Del. Ch. Mar. 28, 2018).

377. *In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2022 WL 1237185, at *2 (Del. Ch. Apr. 27, 2022), *aff'd,* 298 A.3d 667 (Del. 2023).

378. *In re* Tesla Motors, Inc. S'holder Litig., 298 A.3d 667 (Del. 2023).

379. *See Tornetta,* 310 A.3d at 497–520 (providing extensive citations to case authority for each element of the control analysis).

380. Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions,* 49 DEL. J. CORP. L. 525 (2025).

relied heavily on the *Optimizing* article, citing it thirty-seven times, and the *Discontents* article, citing it eighteen times. It accepted the assertions in both articles as true and departed from them only when making its normative recommendations. This Article has shown that the *Optimizing* and *Discontents* articles did not accurately describe the law governing non-majority control. The *Course Correction* article rested on a flawed foundation.

Like the *Optimizing* article and the *Discontents* article, the *Course Correction* article criticized what it characterized as an unjustified loosening of the standards for evaluating non-majority control. Citing only the *Optimizing* article, the article repeated the Hard-To-Show Concept and claimed that "[p]roving sufficient actual control over the corporation to satisfy that requirement has historically been difficult."[381] This Article has addressed that contention.

Unlike the prior articles, the *Course Correction* article tried to support the Hard-To-Show Concept by identifying four decisions that declined to make findings or draw inferences of control: *Sea-Land*, *Western National*, *PNB Holding*, and *Morton's*.[382] This Article has discussed each case.

PNB Holding introduced the Hard-To-Show Concept, and *Morton's* assembled the premises from *PNB Holding* and *Superior Vision* into the recipe that animated the formal school. They cannot establish what was historically true before the formal turn. *Sea-Land* declined to draw a pleading-stage inference of control, but the case did not involve an incumbent blockholder. The plaintiffs alleged that a potential acquirer who engaged in a creeping acquisition against the wishes of management nevertheless exercised control, and the court understandably declined to draw that inference.[383] *Western National* granted summary judgment against a finding of control, but the decision took a functional approach. The decision's laborious analysis shows how difficult it was to grant summary judgment on the basis that no evidence gave rise to a dispute of fact over the existence of non-majority control.[384]

381. *Id.* at 539.

382. *Id.* at 539–40.

383. *See supra* Part I.D.3.

384. *See supra* Part I.D.4.

Like the other articles, after attempting to criticize the functional decisions as novel, the *Course Correction* article proposed novel rules of its own. The article first endorsed the same new rules that the *Optimizing* article proposed. Without any additional analysis, the *Course Correction* asserted that courts should not take into account non-stock-based sources of power, such as managerial influence[385] or significant contract rights.[386] As this Article has explained, the Multiple Sources Principle dates back to *Union Pacific*, where the Supreme Court of the United States took into account both Powerful Roles and Historical Evidence. The concept of Contractual Control also has a lengthy history, dating back to Berle and Means in the 1930s and the federal securities laws.

The *Course Correction* article then called for a brightline test for control, contending that a brightline rule was required to provide certainty and predictability.[387] Yet the test for control under the federal securities laws lacks any brightline rules, and that test has not been too uncertain or unpredictable for generations of securities lawyers.[388] No court had ever imposed a brightline test, with the Supreme Court of the United States twice rejecting the One-Third Floor.[389]

The *Course Correction* article's call for a brightline test was also novel in its implicit rejection of the historical role of equity and the purpose of equitable doctrines like fiduciary duties. "[A] court of equity generally does not favor bright-line rules, instead using its discretion to make decisions on a case-by-case basis."[390] One of the traditional roles of equity has been to deploy fact-specific equitable doctrines to mitigate the sometimes harsh outcomes

385. Bainbridge, *supra* note 380, at 541–42, 550 (criticizing *Tornetta v. Musk* for taking into account Musk's influence as Tesla's visionary CEO).

386. *Id.* at 542 (criticizing *Voight v. Metcalf* for citing as potential considerations "the exercise of contractual rights to channel the corporation into a particular outcome" or "the existence of commercial relationships that provide the defendant with leverage over the corporation, such as status as a key customer or supplier"). Like the *Optimizing* article, the *Course Correction* article dismisses contractual rights as "garden variety commercial dealings." *Id.* at 550 (quoting Hamermesh, Jacobs & Strine, *supra* note 328, at 348).

387. *Id.* at 593.

388. *See supra* Part I.C.

389. *See id.*

390. Park Emps.' & Ret. Bd. Emps.' Annuity & Benefit Fund of Chi. v. Smith, 2016 WL 3223395, at *10 (Del. Ch. May 31, 2016), *aff'd*, 175 A.3d 621 (Del. 2017).

that a brightline rule of law can produce.[391] A lack of clarity is thus "to a large extent inherent in ex post fiduciary review and there is good reason to suppose it can be efficient."[392] Courts of equity imposed fiduciary duties based on non-majority control. It was an equitable analysis. The *Course Correction* article called for replacing equitable discretion with a law-like brightline rule.

Another novel argument that the *Course Correction* article advanced was to criticize the functional school for applying a more lenient test at the motion to dismiss stage and a more searching inquiry at later stages of the case, such as trial.[393] The novelty of that contention lies in its disregard for the rules of civil procedure. At the pleading stage, the governing standard asks whether it is reasonably conceivable that the plaintiff could prevail. When applying that standard, the court (i) accepts as true all well-pleaded factual allegations in the complaint, (ii) credits vague allegations if they give the opposing party notice of the claim, and (iii) draws all reasonable inferences in favor of the plaintiff.[394] Dismissal is inappropriate "unless the plaintiff would not be entitled to recover under any reasonably conceivable set of

391. Mentor Graphics Corp. v. Quickturn Design Sys., Inc., 728 A.2d 25, 52 n.105 (Del. Ch. 1998) ("[E]quitable and fiduciary principles . . . by their nature are highly fact specific and particularized . . . ."), *aff'd sub nom.* Quickturn Design Sys., Inc. v. Shapiro, 721 A.2d 1281 (Del. 1998); *accord* Holland v. Florida, 560 U.S. 631, 650 (2010) ("We have said that courts of equity must be governed by rules and precedents no less than the courts of law. But we have also made clear that often the exercise of a court's equity powers must be made on a case-by-case basis. In emphasizing the need for flexibility, for avoiding mechanical rules, we have followed a tradition in which courts of equity have sought to relieve hardships which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity." (internal citations omitted)). *See generally* Jill E. Martin, HANBURY & MARTIN ON MODERN EQUITY 3 (14th ed. 1993) (noting that equity assists in "[d]eveloped systems of law" by introducing "discretionary power to do justice in particular cases where the strict rules of law cause hardship.").

392. Equity-Linked Invs., L.P. v. Adams, 705 A.2d 1040, 1055 (Del. Ch. 1997).

393. *See* Bainbridge, *supra* note 380, at 545 ("There is also uncertainty as to whether the determination of a minority shareholder's control status depends on the procedural posture of the case. Many of the reported controlling shareholder opinions were issued at the motion to dismiss stage rather than after trial, leaving open the possibility that Delaware courts are applying a more lenient standard at the motion stage than they would after a full factual record is developed.").

394. Cent. Mortg. Co. v. Morgan Stanley Mortg. Cap. Holdings LLC, 27 A.3d 531, 535 (Del. 2011).

circumstances."[395] At trial, by contrast, a plaintiff must prove its factual assertions by a preponderance of the evidence, and the trial court can weigh different pieces of evidence when making a factual finding.[396] By design, pleading a claim is easier than proving a claim. The *Course Correction* article seems not to have understood those concepts.

The *Course Correction* article concluded with the novel proposal that the test for control turn solely on stockholder voting power. The article contended that "[w]here the shareholder owns less than a majority of the voting power, there should be a presumption that the shareholder does not exercise control."[397] The article then invoked Majority Equivalence by arguing that the only path to rebutting that presumption should be "showing that the shareholder's stock holdings are the equivalent of majority control."[398] But when applying that test, the *Course Correction* article contemplated that a sufficient level of evidence would exist only where a plaintiff showed the alleged controller owned enough shares to command a majority based on who would show up at a meeting. A plaintiff therefore could prove control, for example, by showing that only 80% of shares voted at an annual meeting, such that "a shareholder who owns 40 percent of the voting power should be practically certain of electing the board" and meet his test.[399] According to the *Course Correction* article, such a test was necessary to "restore the historical difficulty plaintiffs have had in establishing the requisite control."[400]

The *Course Correction* article's historical premise was not accurate. Rather than restoring prior law, the *Course Correction* article promoted a "practical certainty" concept that would go beyond the One-Third Floor rejected in *Rochester* and *Slattery* and beyond the *Cysive*-As-Floor Concept that the *Morton's* decision introduced. It would impose a new, *de facto* floor equal to a

395. *Id.*

396. Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, No. CV 11802-VCL, 2018 WL 3326693, at *2 (Del. Ch. July 6, 2018), *aff'd sub nom.* Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019).

397. Bainbridge, *supra* note 380, at 553.

398. *Id.*

399. *Id.* at 553.

400. *Id.* at 555.

majority of the anticipated voter turnout. That is a version of majority control.

The *Course Correction* article repeated the errors of the *Optimizing* and *Discontents* articles. It incorrectly asserted that the functional decisions introduced new concepts while ironically arguing for new rules of its own.

D. The Lost History *Article*

In the last 2024 entry, Professor Elizabeth Pollman and Vice Chancellor Lori Will posted a draft article titled *The Lost History of Transaction-Specific Control*, published in 2025.[401] Although predominantly directed at the use of Transactional Evidence to evaluate transaction-specific control (which they contend had not predated *Lynch*), the article made claims about the evolution of non-majority control that echoed and relied on the *Optimizing* article, the *Discontents* article, and the *Course Correction* article. This Article has addressed those claims when discussing prior articles, and the same criticisms apply.

Relying on the *Optimizing* article and *Cysive*, the *Lost History* article argued that Delaware courts historically applied a test for non-majority control in which "voting power was the key measure."[402] As this Article has shown, that is not accurate. Until 2014, Delaware law adhered to the Multiple Sources Principle. The *Lost History* article also noted that "[f]or a time, Delaware courts recognized *Cysive* as its [sic] 'most aggressive finding' of a non-majority controlling stockholder."[403] It is true that some cases said that, but the claim was erroneous. For the Delaware courts to have repeated the claim did not make it so. That the formal school rested on an erroneous assertion only weakens the persuasiveness of the formal approach.

Most significantly, the *Lost History* article contended that the concept of Small Block Control resulted from "recent

401. Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, 50 J. CORP. L. 1095 (2025).

402. *Id.* at 1101; *accord id.* at 1109 (asserting that the Safe Harbor Definition "restores an approach to control that is rooted in significant stock ownership plus general corporate influence that gives a minority stockholder the functionally-equivalent clout of a majority stockholder.").

403. *Id.* at 1102.

precedent."[404] As support, they cited the *Optimizing* article, the *Discontents* article, and the *Course Correction* article. Although each of those articles made that claim, this Article disconfirms it.

Moving beyond those articles, the *Lost History* article cited four cases to support the assertion that Small Block Control was new: *Aronson*, *Sea-Land*, *Steego*, and *Puma*. The article describes those decisions as involving "stockholders with more than 39% voting equity, none of which were found to be controllers."[405] Those decisions are more complex than that.

- *Aronson* did not find an absence of control over the corporation. *Aronson* held that the existence of a controlling stockholder, standing alone, did not render directors non-independent for purposes of a demand to sue the controlling stockholder.[406]
- *Sea-Land* declined to draw a pleading-stage inference of control, but the case did not involve an incumbent stockholder. The plaintiffs claimed that a potential acquirer engaging in a creeping acquisition opposed by incumbent management exercised control. The court understandably declined to draw that inference. The plaintiff also "conceded that the [stockholder] did not control the business affairs of Sea-Land or its Board."[407]
- *Steego* did not involve a finding of non-control.[408] Chancellor Allen held that the controller did not owe a fair-price duty when making a tender offer to the minority unless the controller interfered with the stockholders'

404. *Id.* at 1103 & n.46.

405. *Id.* at 1103.

406. *See* Aronson v. Lewis, 473 A.2d 805 (Del. 1984) ("[I]n the demand context even proof of majority ownership of a company does not strip the directors of the presumptions of independence, and that their acts have been taken in good faith and in the best interests of the corporation. There must be coupled with the allegation of control such facts as would demonstrate that through personal or other relationships the directors are beholden to the controlling person."), *overruled in part by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000), *and in different part by* United Food & Com. Workers Union & Participating Food Indus. Emps. Tri-State Pension Fund v. Zuckerberg, 262 A.3d 1034 (Del. 2021).

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

408. Citron v. Steego Corp., CIV. A. No. 10171, 1988 WL 94738 (Del. Ch. Sept. 9, 1988).

ability to accept or reject the offer, which had not happened.[409]

- *Puma* was a post-trial decision. Based on Transactional Evidence, the court found that a well-functioning committee defused the Marriott family's control for purposes of the squeeze-out merger at issue. The decision does not support a broader rule.[410]

As this Article has shown, other decisions dating back to *Guth* made findings or drew inferences of non-majority control consistent with Small Block Control, particularly when combined with Powerful Roles.

Like the prior articles, the *Lost History* article offered a new test of its own. The *Lost History* article asserted that Delaware cases found non-majority control "only when a stockholder has a significant voting stake plus corporate influence that renders the votes of others 'mere formalities'"[411] As this Article has shown, that is not historically accurate. Delaware courts took a functional approach that used the Multiple Sources Principle when applying the Conduct Control Test. Beginning with *Morton's* and *KKR*, decisions from the formal school shifted to the Board Control Test with a requirement of Majority Equivalence. Delaware courts have not applied a "mere formalities" test.[412]

Like the *Course Correction* article, the *Lost History* article argued for a formal test for non-majority control so that the issue could be determined as a matter of law.[413] That is a new concept,

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409. *Id.* at *6. Consistent with that reasoning, Chancellor Allen later held that a controlling stockholder making a tender offer was not subject to entire fairness review on the facts of the case. *See* Solomon v. Pathe Commc'ns Corp., CIV. A. 12563, 1995 WL 250374, at *1 (Del. Ch. Apr. 21, 1995), *aff'd*, 672 A.2d 35 (Del. 1996).

410. *See supra* Part I.D.2. *Puma*'s finding that transaction-specific control was absent illustrates that transaction-specific control mattered long before *Lynch*. Decisions like *Guth*, *Burry Biscuit*, and *Kaplan* also focused on transaction-specific control. *Guth* found after trial that it existed, and *Burry Biscuit* inferred its existencefor pleading purposes. *Kaplan* paralleled *Puma* in finding after trial that it did not exist. *See supra* Parts I.D.1 & 2.

411. Pollman & Will, *supra* note 401, at 1108.

412. As support for their test, the *Lost History* article cites only the 1994 decision in *QVC*. *Id.* at 1108 n.90 (citing Paramount Commc'ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994)). That case did not address non-majority control; it explained why enhanced scrutiny would apply to a change of control. *Paramount*, 637 A.2d at 42.

413. Pollman & Will, *supra* note 401, at 1099 ("A lack of clarity in defining controlling stockholder status as a matter of law undermines corporate actors' ability to fairly balance these competing considerations.").

because courts traditionally treated non-majority control as a question of fact. To support that new idea, the *Lost History* article echoed the *Course Correction* article by asserting that corporate actors must be able to "readily determine whether they will be deemed to have [control]"[414] and rejected the idea that the existence of control should be determined "after the fact in a Delaware court room."[415] As explained previously, that is not how fiduciary duty review works.[416] It is also not how the law of non-majority control traditionally worked. Instead, "whether a large blockholder is so powerful as to have obtained the status of a 'controlling stockholder'" was "intensely factual" and "difficult to resolve on the pleadings."[417]

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414. *Id.* at 1100.

415. *Id.* at 1110.

416. *See supra* Part IV.C. Although the *Lost History* article treated control transactions as a special case in which the standard of review may not be determined before trial, it is often true that factual findings at trial dictate the standard. For example, a court may not be able to determine, until making factual findings, whether the board has a disinterested and independent majority if directors; if not, then the standard of review elevates to the entire fairness test. *E.g.*, *In re* Trados Inc. S'holder Litig., 73 A.3d 17, 45 (Del. Ch. 2013) ("In this case, the plaintiff proved at trial that six of the seven Trados directors were not disinterested and independent, making entire fairness the operative standard."). Under some Delaware authorities, demand futility also can be litigated through summary judgment and trial, leaving that issue open throughout the case. *Compare In re* BGC Partners, Inc. Derivative Litig., C.A No. 2018-0722-LWW, 2021 WL 4271788, at *5 (Del. Ch. Sep. 20, 2021) (citing Kahn v. Tremont Corp., Civ. A. No. 12339, 1992 WL 205637, at *2 n.2 (Del. Ch. Aug. 21, 1992); Heineman v. Datapoint Corp., CIV. A. No. 7956, 1990 WL 154149, at *3 (Del. Ch. Oct. 9, 1990)), *with In re* McDonald's Corp. S'holder Derivative Litig., 291 A.3d 652, 698–700 (Del. Ch. 2023) (acknowledging possibility of evaluating demand futility on summary judgment while collecting authorities supporting a one-bite-at-the-apple principle).

417. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531, 550–51 (Del. Ch. 2003); *accord* Calesa Assocs., L.P. v. Am. Cap., Ltd., C.A. No. 10557-VCG, 2016 WL 770251, at *11 (Del. Ch. Feb. 29, 2016) ("[T]here is no magic formula to find control; rather, it is a highly fact specific inquiry."); *In re* Zhongpin Inc. S'holders Litig., 2014 WL 6735457, at *6–7 (Del. Ch. Nov. 26, 2014) (noting the inquiry of "whether or not a stockholder's voting power and managerial authority, when combined, enable him to control the corporation. . . . [I]s not a formulaic endeavor and depends on the particular circumstances of a given case."), *rev'd on other grounds sub nom. In re* Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173 (Del. 2015); *id.* at *9 n.33 ("Whether or not a particular CEO and sizeable stockholder holds more practical power than is typical should not be decided at the motion to dismiss stage if a plaintiff pleads facts sufficient to raise the inference of control."); Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *6

When addressing the law of non-majority control, the *Lost History* article followed the same path as the *Optimizing*, *Discontents*, and *Course Correction* articles. The article asserted that the functional school was a recent development while failing to justify that claim. At the same time, the article ironically argued for new rules of its own.

V. FORMALISM ENACTED

Despite its inaccuracies, the formal narrative took hold. In February 2025, Delaware State Senator Bryan Townsend introduced a bill that would accomplish "the most significant single-year revision of Delaware's corporate code since at least 1967."[418] The legislation created safe harbors for interested transactions, defined key terms, and limited the ability of stockholders to obtain corporate books and records.[419] Leading figures from the formal camp played prominent roles in the drafting process.[420] After heated but truncated debate, the General Assembly enacted the bill.

The amendment included the Safe Harbor Definition, which defined the term "controlling stockholder." For purposes of non-majority control, that definition states that a controlling stockholder is someone who:

> Has the power functionally equivalent to that of a stockholder that owns or controls a majority in voting power of the outstanding stock of the corporation entitled to vote generally

("The question whether a shareholder is a controlling one is highly contextualized and is difficult to resolve based solely on the complaint.").

418. Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform – Or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/ [https://perma.cc/M4RW-TWV6].

419. *See* Jacob Owens & Karl Baker, *Landmark Delaware Corporate Law Changes Aim to Stem Exits*, SPOTLIGHT DEL. (Feb. 19, 2025), https://spotlightdelaware.org/2025/02/19/delaware-corporate-law-change-sb-21/ [https://perma.cc/R9V7-XD2C].

420. *See id.*; Katie Tabeling, *Corporate Law Revision Bill Heads to Senate with Meyer's Endorsement*, DEL. BUS. TIMES (Mar. 12, 2025) [https://perma.cc/AC5Q-ARSH] ("SB 21, however, was drafted by lawmakers with input from Widener University Delaware School of Law Professor Lawrence Hamermesh and former Chancellors Leo Strine and William Chandler III."); *id.* (citing testimony from Simmerman in support of SB 21).

> in the election of directors by virtue of ownership or control of at least one-third in voting power of the outstanding stock of the corporation entitled to vote generally in the election of directors or in the election of directors who have a majority in voting power of the votes of all directors on the board of directors and power to exercise managerial authority over the business and affairs of the corporation.[421]

That dense prose suggests at least three requirements. First, the definition enacts the One-Third Floor by requiring ownership of shares carrying at least one-third of the outstanding voting power. By requiring at least one-third ownership, the One-Third Floor also enacts the Stockholders-Only Rule. Second, the definition enacts Majority Equivalence by requiring that a person must also have "power functionally equivalent to that of a stockholder that owns or controls a majority in voting power." Third, the definition requires that the person have the "power to exercise managerial authority over the business and affairs of the corporation." It remains unclear whether that aspect of the definition enacts the Conduct Control Test or the Board Control Test.

VI. THE COMPETING CLAIMS OF THE TWO SCHOOLS

This Article set out to evaluate the claims of the formal and functional schools with particular focus on the contention that the functional approach was novel and anomalous. The historical overview provides an ample basis to identify each school's claims and map their application over time. Table 1, below, identifies the competing claims that the two schools make about non-majority control.

TABLE 1. FORM AND FUNCTIONAL SCHOOL: COMPETING VIEWS ON NON-MAJORITY CONTROL

ISSUE	FORMAL SCHOOL	FUNCTIONAL SCHOOL
Issue of Fact or Law?	Treat as question of fact but with elements that can be applied as a matter of law	Question of fact

421. DEL. CODE ANN. tit. 8, § 144(e)(2)(c) (2025).

ISSUE	FORMAL SCHOOL	FUNCTIONAL SCHOOL
Test for Non-Majority Control	Board Control Test with control interpreted to require Majority Equivalence and Retributive Capacity	Conduct Control Test that uses the ordinary meaning of "control"
Rhetorical Framing	Hard-to-Show Concept	Neither hard nor easy to show; existence depends on evidence
Sources	Primarily Voting Power	Multiple Sources
Contractual Rights	Irrelevant	Relevant
Powerful Roles	Deemphasized or Irrelevant	Relevant
Historical Evidence	Deemphasized or Irrelevant	Relevant
Transactional Evidence	Deemphasized or Irrelevant	Relevant
Block Size	One-Third-Is-Low Concept *Cysive*-As-Floor Concept; One-Third Floor	Small Block Control

Table 2, below, identifies the factors that different eras considered when evaluating control. Table 2 shows what this Article has documented: the functional test has been historically dominant. The formal test and its tenets are recent innovations.

TABLE 2. CONTROL CRITERIA CONSIDERED AMONG DIFFERENT ERAS

ERA	FEATURES	FORMAL OR FUNCTIONAL
Union Pacific	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Powerful Roles; Historical Evidence	Functional
Berle & Means; Other Commentators During the 1920s and 1930s	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control (possibly without any stock); Contract Control; Powerful Roles; Historical Evidence	Functional

ERA	FEATURES	FORMAL OR FUNCTIONAL
New Deal Statutes, *Rochester*, *Slattery*, *DuPont*, and Related Cases	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control (possibly without any stock); Contract Rights Relevant; Powerful Roles; Historical Evidence; Transactional Evidence; Rejection of One-Third Floor	Functional
Delaware's Quiet Era (1913–1963)	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control; Powerful Roles; Historical Evidence Transactional Evidence; Adjudicated Post-Trial	Functional
Delaware's Responding Era (1963–1977)	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control Powerful Roles; Historical Evidence Transactional Evidence; Adjudicated Post-Trial	Functional
Delaware's Reformation Era (1977–1989)	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Blocks Control; Powerful Roles; Historical Evidence; Transactional Evidence; Generally adjudicated post-trial but sometimes on a preliminary injunction; one pleading-stage dismissal (*Sea-Land*)	Functional
Delaware Moderating Era (1989–1998)	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control; Powerful Roles; Historical Evidence Transactional Evidence; Generally adjudicated post-trial	Functional
Delaware's Early Generative Era (1998–2005)	Control as question of fact based on ordinary meaning; Multiple Sources Principle; Small Block Control; Powerful Roles; Transactional Evidence; adjudicated post-trial or on summary judgment (*Western National*)	Functional
Delaware's Mid-to-Late Generative Era (2006–2013)	Control as question of fact but with some premises that can be applied as a matter of law; Board Control Test, Majority Equivalence, and Retributive Capacity; Multiple Sources Principle; Hard-To-Show Concept; One-Third-Is-Low Concept; Generally adjudicated after trial or on preliminary injunctions; some pleading-stage dismissals	Blend
Delaware's Implementing Era (2014–2018)	Board Control Test with Majority Equivalence and Retributive Capacity; Hard-To-Show Concept; One-Third-Is-Low Concept; *Cysive*-As-Floor Concept; Rulings as a matter of law on motions to dismiss	Formal

ERA	FEATURES	FORMAL OR FUNCTIONAL
Delaware's Later Implementing Era and Current Era (2018–2025)	Functional Response Competing Approaches Formal Reaction	Blend
Safe Harbor Definition (2025)	One-Third Floor Majority Equivalence Test Possibly Conduct Control Test or Board Control Test	Formal

VII. THE LESSONS OF HISTORY

For over a century, the functional approach dominated the analysis of non-majority control. The formal approach did not begin to take shape until 2006, when *PNB Holding* and *Superior Vision* articulated its core premises. Even then, it took another seven years before decisions began combining those premises into a recipe for pleading-stage dismissals. Meanwhile, other decisions persisted in using a functional approach. The most notable were two high-profile opinions involving Elon Musk: Vice Chancellor Slight's *Tesla* decision in 2018, and Chancellor McCormick *Tornetta* decision in 2024. After those decisions, influential commentators attacked the functional approach as novel and anomalous, while ironically calling for new rules of their own.

The commentators' narrative was inaccurate. The formal school, not the functional school, is the recent innovation. Informed by the length and breadth of the historical arc of functionalism, policymakers should engage in principled debate over how to approach non-majority control. That debate should proceed on the merits, without efforts to delegitimize the functional approach or validate the formal approach based on false historical claims.