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Going Private at the Intersection of the Market and the Law

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Going Private at the Intersection of the Market and the Law

By Faith Stevelman*

Delaware's fiduciary doctrine governing going private transactions by controlling shareholders is presently in disarray. Controllers generally select between single step cash-out mergers and tender offers followed by short-form mergers to do these freezeouts, and they are subject to very different equitable standards depending on the format selected by the controller. Furthermore, the courts' longstanding commitment to applying strict scrutiny in the adjudication of freezeouts is in tension with the popular disfavor towards private class-action litigation. This disarray threatens minorities' interests in freezeouts and capital market values more generally. This Article reviews the foundations of freezeout doctrine and proposes that the Entire Fairness doctrine should apply as the standard of review in all freezeouts unless prior to accepting the controller's offer the target company's independent directors conducted an auction or market check to ascertain if better offers were available.

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INTRODUCTION

This Article analyzes the legal doctrines governing “freezeout” transactions. Freezeouts are a form of going private transaction1 in which a person or entity that

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1. Freezeouts are a subset of the broader going private phenomenon which is sweeping the corporate landscape. See, e.g., Kit R. Roane, The New Face of Capitalism, U.S. News & World Rep., Dec. 4,
has the status of a controlling shareholder at a company purchases its remaining publicly-traded shares. Minority shareholders usually receive cash for their shares in freezeouts, which terminates their financial interest in the corporation. The stakes for minorities are thus quite high. As for the target company, after the freezeout it will either continue to exist as a privately held entity owned by the controller, or be merged into another business entity owned by the controller, according to the controller's preference.

As recent headlines suggest, controllers stand to make substantial profits from purchasing minorities' shares in freezeouts. In contrast to the direction signaled in certain high profile decisions of the Delaware Court of Chancery, this Article...
contends that the "Entire Fairness" standard should govern, with one important exception, in all fiduciary claims filed against controllers in freezeouts. In future freezeout suits, as minorities present their claims of unfairness to the courts, the fundamental legal question will be whether the courts will employ the heightened fiduciary standards developed under the rubric of "Entire Fairness" to ensure that controllers do not profit at the expense of minorities in these transactions.

As a matter of legal structure, freezeouts occur most commonly through cash-out mergers or tender offers combined with short form mergers (a "tender offer freezeout"). These structural features of freezeouts are straightforward. In fact, the statutory consent requirements do not differentiate between controllers and third party acquirers. What makes freezeout transactions distinctive, and highly significant for corporate fiduciary law, is that controllers' formal and informal authority over the target's board—in conjunction with their other legal and market power advantages—effectively gives them the ability to operate at both sides of the freezeout transaction. That is, while controllers are buyers in freezeouts, they can also influence the sell side of the deal in their private interest.

Most importantly, under present law, controllers can inhibit the target company directors from initiating an auction to sell the company, and from pursuing other financial or transactional alternatives more consistent with the minorities' best interests. Controllers' dominating influence over the board is complemented by their legal powers to affect other corporate transactions. The result is that controllers can pressure minorities to sell in a freezeout through the omnipresent if implicit threat that they could be made worse off by the controller if they oppose the freezeout. Courts have named this concept "inherent coercion." Controllers' capacity for overreaching operates both in freezeouts based on tender offers and those structured as cash-out mergers. Both transactional forms present substantial

6. For discussion of the "Entire Fairness" standard for freezeouts, see infra notes 94-104 and accompanying text.
7. In Delaware, most corporate claims are heard as "equitable" claims brought before the court of chancery. As used herein "equity" or "equitable review" refers to the adjudication of corporate claims by the court of chancery consistent with principles of fiduciary duty. For further discussion of the chancery court's equity jurisdiction and the nature of equitable standards, see William T. Quillen and Michael Hanrahan, A Short History of the Delaware Court of Chancery, 1792-1992, 18 DEL. J. CORP. L. 819 (1993).
8. This Article exclusively discusses cash-out mergers by controlling shareholders. For this reason, the terms "controllers' cash-out mergers" and "cash-out merger freezeouts" are avoided for purposes of brevity.
9. Alternative mechanisms for freezeouts include reverse stock splits and asset sales, but these are far more uncommon. For further discussion of the mechanical aspects of going private, see e.g., Michael J. McGuinness & Timo Rehbock, Going-Private Transactions: A Practitioner's Guide, 30 DEL. J. CORP. L. 437 (2005).
10. See, e.g., In re Pure Res., Inc., S'holders Litig., 808 A.2d 421, 446 (Del. Ch. 2002) ("... the better rule is that there is no duty on [the controller's] part to permit the target board to block the bid through use of the pill. Nor is there any duty on the part of the independent directors to seek blocking power.").
11. See infra notes 84-88 and accompanying text.
12. See, e.g., Citron v. E. I. Du Pont de Nemours & Co. 584 A.2d 490, 500-02 (Del. Ch. 1990). For further discussion of the concept of inherent coercion, see infra text accompanying notes 121-27.
dangers of procedural and substantive unfairness—that is, coercion and over-reaching by controllers-as-insiders.\textsuperscript{13}

As a general matter, corporate law affords controllers discretion to pursue their self-interest in selling and voting their shares.\textsuperscript{14} However, once a controller's authority to manipulate the company's board is relevant to a corporate transaction, the courts depart from such deference and apply heightened fiduciary standards to the controller's conduct.\textsuperscript{15} Most significantly for this Article, the Delaware Supreme Court has adjudged controllers' opportunity for self-dealing in cash-out mergers as being so substantial it has mandated that the courts apply the "Entire Fairness" standard in reviewing minorities' claims of unfairness in these transactions ("the Lynch Doctrine").\textsuperscript{16} Nevertheless, because the Entire Fairness Standard, like other fiduciary standards, is inherently open-ended,\textsuperscript{17} and because freezeouts involve complex


\textsuperscript{14} See, e.g., Thorpe by Castleman v. CERBCO, Inc., 676 A.2d 436 (Del. 1996) (affirming controllers' right to vote against sale of substantially all assets consistent with their private interests); Bershad v. Curtis-Wright Corp., 535 A.2d 840, 845 (Del. 1987) ("clearly a stockholder is under no duty to sell its holdings in a corporation, even if it is a majority shareholder, merely because the sale would profit the minority."); Sinclair Oil Corp. v. Levien, 280 A.2d 717, 722 (Del. 1971) (allowing controller to shape dividend policy and corporate development plans of subsidiary in ways beneficial to it, irrespective of the minority's preference); Shlensky v. Wrigley, 237 N.E. 2d 776 (ILL. Ct. App. 1968) (applying business judgment rule broadly to accommodate controllers' view of company's best interest).

\textsuperscript{15} This limit on controllers' discretion rests on the axiom that the corporate board, and not any shareholder constituency, has authority over corporate-level transactions. As stated in the landmark case of Aronson v. Lewis, "A cardinal precept of the General Corporate Law of the State of Delaware is that directors, rather than shareholders, manage the business and affairs of the corporation. DEL. CODE ANN tit. 8, § 141(a)." Aronson v. Lewis, 473 A.2d 805, 811 (Del. 1984).

\textsuperscript{16} See Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110 (Del. 1994); Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983). For further discussion see infra Part I. With respect to the fiduciary standards applied to self-dealing transactions involving controllers outside of freezeouts, see, e.g., Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997); Emerald Partners v. Berlin, 787 A.2d 85, 93 n.52 (Del. 2001). The limitation on self-dealing by controllers is similar to but more idiosyncratic than that applied to directors and officers. On the latter, see e.g., Weinberger, 457 A.2d at 710 ("When directors of a Delaware corporation are on both sides of a transaction, they are required to demonstrate their utmost good faith and the most scrupulous inherent fairness of the bargain. The requirement of fairness is unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness sufficient to pass the test of careful scrutiny by the courts.") (citations omitted)). For the lesser fiduciary standards applied to controllers' tender offers, see Solomon v. Pathe Commc'n Corp., 672 A.2d 35 (Del. 1996), as discussed in depth infra Part III.

\textsuperscript{17} Much scholarly debate is inspired by the open-ended texture of corporate fiduciary standards. See, e.g., William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law, 56 BUS. LAW. 1287 (2001) (suggesting ways that corporate fiduciary doctrine should be streamlined and simplified); Ehud Kamar, A Regulatory Competition Theory of Indeterminacy in Corporate Law, 98 COLUM. L. REV. 1908 (1998) (describing the "network effects" that foster indeterminacy in corporate fiduciary law); Melvin Aron Eisenberg, The Divergence of Standards of Conduct and Standards of Review in Corporate Law, 62 FORDHAM L. REV. 437 (1993) (suggesting ways that the duality between standards of conduct and standards of review in corporate fiduciary law may be fruitful); Reza Dibadj, Delayering Corporate Law, 34 Hofstra L. REV. 469 (2006) (arguing that the duality between standards of conduct and standards of review produces unproductive complexity).
valuation disputes, \(^{18}\) their adjudication requires courts to address fundamental questions in corporate law. In particular, the courts must balance their historic obligation to protect vulnerable parties—minority shareholders in freezeouts—against the goal of facilitating wealth producing corporate transactions. \(^{19}\) The quality of the fiduciary doctrine governing freezeouts is especially important because it is primarily state corporate fiduciary law, \(^{20}\) rather than state statutory or federal law, \(^{21}\) that defines the scope of controllers’ rights and duties and minorities’ entitlements in freezeouts. And Delaware’s freezeout doctrine is preeminently influential because a majority of the largest U.S. public companies are incorporated in Delaware, \(^{22}\) and because many jurisdictions model their corporate laws on Delaware’s. \(^{23}\)

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\(^{18}\) See Gilson & Gordon, supra note 5, at 834 ("...the result is likely to be dueling experts, each applying the tools of modern finance to end up at vastly different valuations.").

\(^{19}\) The court in Pure expressly notes this tension and responsibility. Pure, 808 A.2d at 434 ("...judges must supplement the broadly enabling features of statutory corporation law with equitable principles sufficient to protect against abuse and unfairness, but not so rigid as to stifle useful transactions ...”). There is no more contentious subject in contemporary, “private” law than the definition of fairness and the role of the courts in promoting it. For a law-and-economics inspired critique of the problem, see Louis Kaplow & Steven Shavell, Fairness Versus Welfare (2002); compare e.g., Martha C. Nussbaum, Flawed Foundations: The Philosophical Critique of a (Particular Type of) Economics, 64 U. Chi. L. Rev. 1197 (1997) (arguing that the law and economics movement has failed adequately to account for the importance of nonpecuniary values in its consideration of “fairness”); Faith Stevelman Kahn, Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud and September 11, 2001, 76 Tulane L. Rev. 1579 (2002) (arguing that capital market regulation fails to take account of democratic notions of fairness at the peril of strong markets and a strong economy). The growing behavioral law and economics literature attempts a richer account of motivation that includes concerns over fairness. See, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 Stan. L. Rev. 1471 (1998).

\(^{20}\) Corporate legal scholars increasingly affirm the benefits of regulating controlling shareholders’ actions through the application of more flexible judge-made standards as opposed to more rigid statutory ones; as well as the importance of legal limits on controllers’ self-dealing as a foundation of strong capital markets. See Mark J. Roe, Legal Origins, Politics, and Modern Stock Markets, 120 Harv. L. Rev. 460, 470 (2006) ("The first link between legal origins and financial markets is said to be how the legal system protects small investors. ‘[C]ommon law countries protect shareholders better than do civil law countries and especially better than French civil law countries.’ If small investors fear that insiders could rob them, they will not invest in the insiders’ firms. If outsiders do not buy, then a deep stock market does not develop, and the big owners—foundling families and their successors—are locked in. Common law systems protect minority stockholders well via judge-made fiduciary duties, while civil law systems, the theory goes, are too rigid to protect minority stockholders.” (citations omitted)). For further refinements to this idea, see also Ronald J. Gilson, Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy (August 2005) (ECGI—Law Working Paper No. 49/2005), available at http://ssrn.com/abstract=878474 and Ronald J. Gilson, Background Paper: Corporate Governance, The Equity Contract and the Cost of Capital: Incremental and Accretive Reform Strategies (International Corporate Governance Meeting—Hanoi Vietnam, December 6, 2004), available at http://www.oecd.org/dataoecd/19/58/34081304.pdf.

\(^{21}\) The SEC initiated a program of rule-making that would have regulated the substantive fairness of freezeout transactions, but backed away from so doing in the end. For this history and discussion of the role of federal law (mostly in regulating disclosure) in freezeouts see infra Part 1, C.

\(^{22}\) The website for Delaware’s Division of Corporations states that: "[m]ore than half a million business entities have their legal home in Delaware including more than 50% of all U.S. publicly-traded companies and 60% of the Fortune 500." Del. Dep’t of State, Div. of Corps., Why Choose Delaware as Your Corporate Home?, available at http://www.corp.delaware.gov/default.shtml.

\(^{23}\) For evidence and analysis of Delaware law’s predominant influence on freezeouts, see, e.g., Guhan Subramanian, Post-Siliconix Freeze-Outs: Theory & Evidence (May 2005) (Harv. John M. Olin

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\(^{23}\) 23. For evidence and analysis of Delaware law’s predominant influence on freezeouts, see, e.g., Guhan Subramanian, Post-Siliconix Freeze-Outs: Theory & Evidence (May 2005) (Harv. John M. Olin
Nevertheless, Delaware's freezeout doctrine is presently in disarray. Courts apply the exacting Entire Fairness standard to controllers' cash-out mergers, consistent with the decisions in *Weinberger v. UOP, Inc.* ("*Weinberger*") and *Kahn v. Lynch Communications Systems, Inc.* ("*Lynch*"); while they apply far more minimal constraints on controllers in tender offer freezeouts—consistent with *Solomon v. Pathe Communications Corp.* ("*Solomon*") and *Glassman v. Unocal Exploration Corp.* ("*Glassman*"). Perhaps most significantly, consistent with these cases, controllers have a duty to pay a fair price to minorities in cash-out mergers, but not in tender offer freezeouts. These doctrinal traditions apply very different standards of fair process to these two forms of freezeouts. Moreover, these disparities have arisen without adequate judicial recognition that the two principal structures for freezeouts afford controllers similarly broad scope for coercion and overreaching. The disparities in the protections afforded minorities in these transactions is undermining the conceptual integrity of corporate fiduciary law, while it is also unsettling the ability of deal planners, the minorities, and the capital markets, to value minorities' interests.

Yet controllers stand to profit from these doctrinal irregularities, at least in the near term. To clarify, because controllers, rather than target boards or minority shareholders, initiate freezeout transactions, it is controllers who determine their formal structure. This means that controllers have broad leeway to arbitrage transactional structures and their attendant legal rules in their freezeout bids. Indeed, controllers can reconfigure the structure of the proposed freezeout even after the commencement of the transaction in order to obtain the maximum benefits. Given the complexity inherent in contemporary freezeout doctrine, and controllers' incentives and freedom to engage in structural arbitrage in freezeouts, it is likely that controllers are benefiting from some measure of market failure in their freezeouts. In this respect, the perpetuation of different equitable standards in freezeouts, and different legal price criteria especially, is


28. See infra Part II.
undermining minorities’ welfare and may even be increasing the costs of raising publicly traded equity stakes.30

The Delaware courts have become increasingly sensitive to the current disarray in freezeout doctrine, and in a recent trilogy of opinions the court of chancery has proposed sweeping reform.31 These decisions are In re Pure Resources, Inc. Shareholders Litigation (“Pure”),32 In re Cysive Inc. Shareholders Litigation (“Cysive”),33 and In re Cox Communications Inc. Shareholders Litigation (“Cox”).34 In Pure, Cysive and Cox the court of chancery has proposed unifying freezeout doctrine—a proposal also endorsed by this Article. More problematically however, the court of chancery also proposed that the controller-friendly, deferential “business judgment rule”35 standard of review should apply to both forms of freezeouts, so long as certain requirements have been met. In specific, if the proposals outlined in the Cox decision are followed by future courts, the Entire Fairness standard would apply only if the controller’s freezeout was rejected either by the independent directors or minority shareholders, and the controller nevertheless proceeded with the transaction (the “Cox Reforms”).36 The Cox opinion proposes that a freezeout’s receipt of the consent of both the target’s independent directors and a majority of the minority shares (“Dual Ratification”) constitutes adequate evidence of the

30. This insight has tremendous relevance to the going private phenomenon because the private equity funds that are purchasing formerly public companies will wish to profit from issuing minority equity stakes. Before purchasing such minority interests, however, outside investors should demand assurance regarding courts’ willingness to scrutinize controllers’ conduct in freezeouts and other self-dealing transactions.

31. Notably, the Pure, Cysive and Cox opinions, infra notes 32–34 were each authored by Vice-Chancellor Leo E. Strine, Jr., who is noted for his bold efforts to reshape Delaware corporate legal doctrine. Biographical data for Vice-Chancellor Strine is available at http://sec.gov/spotlight/proxyprocess/bio052507/lestrine.pdf. Although this Article is critical of the positions the Vice-Chancellor takes in Pure, Cysive and Cox, the attention it devotes to them reflects their likely seminal importance. In addition to deciding many high profile cases in his nearly ten years as a vice chancellor, and authoring numerable law review articles, Vice Chancellor Strine is teaching at Harvard Law School and has taught at University of Pennsylvania School of Law. In reviewing his remarkable achievements, the Financial Times referred to Vice-Chancellor Strine as the “Wunderkind of US Corporate Law.” John Gapper, Capitalist Punishment, FIN. TiMES, Jan. 29, 2005, available at http://search.ft.com/ftArticle?queryText=capitalist+punishment&sy=9&aje=true&nx=12&rid=050129000270.

32. Pure, 808 A.2d 421.


35. The business judgment rule is a protean concept in corporate law. As a presumption in favor of the challenged transaction in shareholder litigation, the business judgment rule mirrors the statutory principle that the business affairs of corporations should be run by or under the direction of the board. Del. Code tit. 8, § 141(a) (2007). So long as the plaintiffs have not demonstrated a material conflict of interest, a noncorporate motivation for the decision or egregious failure of attentiveness on the part of the decision-maker, the business judgment rule will insulate a challenged transaction from any searching (indeed virtually any meaningful) substantive judicial review. See, e.g., Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 360 (Del. 1993) (the business judgment rule “operates as both a procedural guide for litigants and a substantive rule of law”) [hereinafter “Cede II”]. For academic discussion, see, e.g., Stephen M. Bainbridge, The Business Judgment Rule as Abstention Doctrine, 57 VAND. L. REV. 83 (2004). The recent litigation involving the Disney’s board’s approval of Michael Ovitz’s termination package provides a fascinating, high stakes account of the application of the business judgment rule. See In re Walt Disney Co. Derivative Litig., 907 A.2d 693 (Del. Ch. 2005), aff’d, 906 A.2d 27 (Del. 2006).

36. See Cox, 879 A.2d at 606.
freezeout's fairness. So long as there has been Dual Ratification of the freezeout, Cox opines, strict scrutiny for fairness wastes valuable resources and invites abuse by plaintiffs' lawyers. A further, unstated assumption in the Cox opinion is that controllers will obtain Dual Ratification in almost all instances—otherwise the proposed reforms would not have the intended effect of reducing litigation against freezeouts. Hence, if the Cox Reforms are followed and ultimately made binding, freezeout doctrine will be “going private.” Freezouts will be subject to less frequent and less vigorous judicial review. Consistent with Cox's express objectives, most shareholder claims would be dismissed on the pleadings.

This Article devotes careful attention to the reasoning in Pure, Cysive, and Cox because these decisions are likely to have a profound influence on minorities' welfare in future freezeouts, and especially the relevance of the Entire Fairness standard therein. The Cox opinion contends that allowing deferential review in freezeouts that receive Dual Ratification will more squarely situate freezeout doctrine within the core framework of corporate law. The trilogy of cases highlighted herein also promote their reforms as pragmatic measures that will reduce

37. Id. at 646-47.
38. Id. at 643 ("...Lynch has generated perverse incentives for both defense and plaintiffs' counsel that cast doubt on the integrity of the representative litigation process.").
39. Within the academic discussion of corporate law, the superiority of "private ordering" to formal law is an important subject of debate. See, e.g., Gillian Hadfield & Eric Talley, On Public versus Private Provision of Corporate Law, 22 J. L. Econ. & Org. 414 (2006). The promulgation of new director independence criteria by the stock exchanges and NASD are examples of this favored, "privatized" mode of governance. See, e.g., NYSE LISTED COMPANY MANUAL §§ 303A.01-02 (2007).
40. As described and discussed in the text, promoting controllers' ability to obtain dismissals on the pleadings is an explicit objective of the Cox Reforms. See, e.g., Cox, 879 A.2d at 646 (arguing in favor of judicial deference in the review of claims in freezeouts because "...this incentive would enable transactional planners to know that they can structure transactions in a way that affords them the opportunity to obtain a dismissal on the complaint"); id. at 646 ("It was thought preferable in Pure Resources to keep the strands separate until there is an alteration in Lynch, lest the less than confidence inspiring pattern of "Lynch litigation" replicate itself across-the-board in all going private transactions, thereby deterring the procession of offers that provide valuable liquidity to minority stockholders and efficiency for the economy in general."). See also Leo E. Strine, Jr., The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face, 30 Del. J. Corp. L. 673, 678 (2005) ("Delaware tries to respect the business judgment of disinterested directors and stockholders. How? By invoking the protection of the business judgment rule if an interested transaction is approved by a majority of the independent directors or by a majority of the disinterested stockholders, after full disclosure. The idea, of course, is that the investment of ultimate power over the transaction in impartial directors or stockholders suffices to police the conflict. By this instrumental means, Delaware law can protect the resulting business decision without any loss of integrity, because the decision was made or ratified by persons whose interests were aligned with those of the corporation and its stockholders.").
41. On his blog, http://busmovie.typepad.com/ideoblog, Professor Larry E. Ribstein refers to the Cox opinion as a "classic-to-be"..."so interesting for so many reasons." 42. Cox, 879 A.2d at 646 ("In this way, the alteration [of the standard of review for freezeouts] brings this area of our law into harmony with the rest of Delaware corporate law that gives substantial deference to decisions made by disinterested, independent directors and approved by disinterested, non-coerced stockholders. That deference is consistent with the central notion of our law, which respects business judgments made by impartial directors and approved by unconflicted stockholders."). This line of reasoning fails adequately to grapple with the problem of coerced consents, and especially the difference between a director's ratification of a controller's transaction and an independent board's proposal of a transaction in the best interest of all shareholders.
meritless litigation,\textsuperscript{43} benefit minority investors,\textsuperscript{44} and strengthen the capital markets.\textsuperscript{45} However, as Part IV of this Article demonstrates, most of the criticisms of Entire Fairness review they present are exaggerated or even erroneous. These opinions also disregard many positive consequences that arise from applying the Entire Fairness standard to freezouts.

It is also important to note that the Cox Reforms coincide with two sweeping contemporary trends affecting corporate law and the capital markets. The first is the widespread acceptance of public companies—even major public companies—being taken private.\textsuperscript{46} The second is the widespread success of law reforms intended to curtail class actions against corporations.\textsuperscript{47} In just this vein, the Cox Reforms are expressly aimed at encouraging freezeout transactions and expressly hostile to shareholder class actions against freezeouts\textsuperscript{48} (as well as the members of

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43. See, e.g., Pure, 808 A.2d 443 (endorsing expanding Solomon's anti-coercion prohibitions to freezeouts because it "provides a relatively non-litigious way to effect going private transactions..."), Gysive, 836 A.2d at 549 ("These realities suggest that the Lynch doctrine, if it is to be perpetuated, could be usefully simplified."); Cox, 879 A.2d at 606 ("...it is most probable that the defendants settled simply because they had, under Lynch, no other economically efficient option for disposal of the lawsuit.").

44. Cox, 879 A.2d at 644 ("This alteration would promote the universal use of a transactional structure that is very favorable to minority stockholders..."); id. ("Importantly, this revised standard would not diminish the integrity enforcing potential of litigation in any material way, in my view").

45. Id. at 624 (doctrine that encourages freezeouts is favorable because it creates "more rationally organized corporations"); id. at 646 ("Lynch litigation" and review for Entire Fairness should be limited because they inhibit freezeouts that create "efficiency for the economy in general").

46. See, e.g., Roane, supra note 1, at 48 ("Time was, America's largest corporations would fight tooth and nail (and with poison pills) to remain public companies. No longer."); A Growing Aversion to Ticker Symbols, in DEALBOOK (Andrew Ross Sorkin, ed., N.Y. TIMES Jan. 29, 2007), available at http://dealbook.blogs.nytimes.com/2007/01/29/a-growing-aversion-to-ticker-symbols/ ("Everyone, it seems, is hopping on the buyout bandwagon these days. Even the big public companies once thought untouchable are now wistfully talking about the success of firms like the Blackstone Group."); Serena Ng, Gregory Zuckerman & Michael Hudson, Ready to Deal: $60 Billion in Two Days; A Spate of Mergers, Buyouts Announced Across the Globe; Borrowing Stretches Targets, WALL ST. J., Nov. 21, 2006, at C1.


48. Cox, 879 A.2d at 624 (praising reliance on Solomon standards rather than Lynch in recent court of chancery cases because this approach offers "the utility of providing a non-litigious route to effecting transactions that were often economically efficient both for the minority who received a premium and in a sense of creating more rationally organized corporations").
the plaintiffs' bar responsible for filing them).\textsuperscript{49} A comprehensive analysis of the Cox Reforms thus requires not only an understanding of contemporary freezeout doctrine, but also some consideration of the broader role of private litigation in shaping mergers and acquisitions ("M&As") and the capital markets.\textsuperscript{50}

The proper scope to be afforded investors' claims of fraud and overreaching has been a longstanding matter of controversy in corporate law.\textsuperscript{51} The contemporary push to limit shareholder class actions began at the national level with Congress' enactment of The Private Securities Litigation Reform Act of 1995 ("PSLRA").\textsuperscript{52} The PSLRA imposed significant procedural hurdles to plaintiffs' proceeding with securities class actions.\textsuperscript{53} Shortly thereafter, in the name of preventing savvy

\textsuperscript{49} Cox, 879 A.2d at 607 (proposing that its reforms would allow plaintiffs' lawyers to earn fees only by "actually prosecuting meritorious claims, and not by free riding on a special committee's work"). This negative view of the plaintiffs' bar was reinforced the summer after Cox was decided when the law firm Milberg Weiss Bershad & Shulman was indicted, along with two of its partners, for allegedly making payments to plaintiffs in class action suits. See, e.g., Anthony Lin, Milberg Weiss, Two Partners Indicted in Kickback Probe, 235 N.Y.L.J., May 19, 2006, at 1. That summer (2006) Congress also considered a bill that would have imposed increased sanctions in cases where plaintiffs' lawyers' conduct in class actions had been adjudged too aggressive. See Securities Litigation Attorney Accountability and Transparency Act, H.R. 5491, 109th Cong. (2006).

\textsuperscript{50} This general issue was present in Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S.Ct. 2499, 2510 (2007) decided by the Supreme Court on June 21, 2007 (To qualify as "strong," as required by the Private Securities Litigation Reform Act of 1995, an inference of scienter must be more than merely plausible or reasonable—it must be "cogent and at least as compelling as any opposing inference of nonfraudulent intent."). With respect to litigation touching on minorities' interests, there is substantial empirical evidence supporting a link between strong securities markets and robust legal protections for minorities. See, e.g., Michael S. Weisbach & Willam A. Reese, Jr., Protection of Minority Shareholder Interests, Cross Listings in the United States and Subsequent Equity Offerings, 66 J. Fin. Econ. 65 (2002); Bernard S. Black, The Legal and Institutional Preconditions for Strong Securities Markets, 48 U.C.L.A. L. Rev. 781 (2001); Rafael LaPorta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, Law and Finance, 106 J. Pol. Econ. 1113 (1998) (finding least developed capital markets in countries providing the weakest protection to investors and minority owners).

\textsuperscript{51} Both federal legislation and the Supreme Court's decisions have increasingly limited the scope of litigable claims by investors. See, e.g., Central Bank of Denver, N.A. v. First Interstate Bank, N.A., 511 U.S. 164, 201 (1994) (holding that no aiding and abetting liability applies under Rule 10b-5); Gustafson v. Alloy Co., 513 U.S. 561 (1995) (affirming a very limited understanding of the term "prospectus" and thus substantially limiting the scope of the cause of action under Section 12(a)(2) of the Securities Act); Dura Pharm., Inc. v. Broudo, 544 U.S. 336 (2005) (holding that plaintiffs' purchase of securities at inflated price is insufficient to demonstrate loss causation). According to Professors Thompson and Thomas, the "focus of policy debate" shifted to limiting federal securities litigation once efforts to limit derivative litigation had proven largely successful. See Robert B. Thompson & Randall S. Thomas, The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions, 57 Vand. L. Rev. 133, 136 (2004) [hereinafter "Thompson & Thomas II"].


\textsuperscript{53} For analysis of these hurdles, see, e.g., James D. Cox, Making Securities Fraud Class Actions Virtuous, 39 Ariz. L. Rev. 497, 519–20 (1997) ("The Reform Act's tightened pleading requirements and narrowed discovery rights more than any other feature probably account for any decline in the number of class action securities suits initiated since its enactment. As an effort to prevent the filing of a complaint from becoming the attorney's ticket to "flesh out" her pleadings through discovery, the Reform Act stays any discovery during the pendency of any motion to dismiss. The bar to discovery compounds the class action attorney's task in satisfying the Reform Act's heightened pleading standard."") (citations omitted)).
Going Private at the Intersection of the Market and the Law

plaintiffs' lawyers from circumventing the procedural requirements established by the PLSRA, Congress enacted The Securities Litigation Uniform Standards Act of 1998 ("SLUSA").\(^\text{54}\) SLUSA preempts most private investor class actions alleging misrepresentation under state securities law and common law fraud.\(^\text{55}\) And notwithstanding the sweeping corporate governance reforms it enacted in the Sarbanes-Oxley Act of 2002 ("SOX"),\(^\text{56}\) Congress eschewed provisions that might have increased investor class actions against corporations or corporate executives.\(^\text{57}\)

In SLUSA, Congress left intact state equitable (that is, fiduciary) actions for fraud, including shareholder claims alleging misrepresentation by controllers in freezeouts.\(^\text{58}\) Nevertheless, many commentators and legal scholars claim that shareholder suits impose gratuitous costs on corporations and the economy—so that they should be radically limited.\(^\text{59}\) They have argued that corporate fiduciary law can function adequately as an essentially hortatory normative force. On this rationale courts would impose concrete sanctions, or even allow claims to proceed to trial, only in the most egregious cases.\(^\text{60}\) In line with these sentiments, the


\(^\text{55}\) See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, 547 U.S. 71 (2006) (held that SLUSA bars class actions brought under state law even by persons claiming to have been misled into holding securities, as opposed to purchasing or selling them). For a thoughtful analysis of SLUSA's effects and the rationales invoked for its enactment, see Richard W. Painter, Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action, 84 CORNELL L. REV. 1 (1998).


\(^\text{57}\) The exception is that in SOX, Congress restored the former, slightly longer statute of limitations for class actions alleging securities fraud. See SOX, supra note 56, § 804, 116 Stat. at 801 (codified at 28 U.S.C. § 1658 (Supp. IV 2004)).

\(^\text{58}\) The so-called "Delaware carve-out" preserves state jurisdiction over corporate fiduciary misrepresentation claims where plaintiffs allege that disclosure was presented to them in connection with a shareholder vote, in response to a tender or exchange offer, or in a context where appraisal rights were available. See SLUSA, supra note 54, § 101(a)(1), 112 Stat. at 327–29 (codified at 15 U.S.C. § 77p (2000)) (amending section 16(d) of the 1933 Act). If Congress had not allowed for that safe harbor from preemption, then fiduciary suits against controllers for misrepresentation in freezeouts would not be litigable in equity.

\(^\text{59}\) For a thoughtful analysis of this mainstream, largely disapproving view of shareholder derivative actions, see Robert B. Thompson & Randall S. Thomas, The Public and Private Faces of Derivative Lawsuits, 57 VAND. L. REV. 1747 (2004) [hereinafter "Thompson & Thomas 1"]. For consideration of the relative paucity of traditional derivative claims as a portion of the docket of the Delaware court of chancery, and comparatively greater number of class action claims contesting acquisitions, see Thompson & Thomas II, supra note 51.

courts have increasingly limited shareholders' ability to pursue both derivative and direct class action suits under Delaware corporate law.\textsuperscript{61}

In sum, the jaundiced view of shareholder class actions and the lawyers who bring them reflected in the Cox opinion mirrors the popular viewpoint in which investors and markets are represented as being naturally "free" and apt to increase wealth with minimal legal "intrusion."\textsuperscript{62} Cox contends that the piece-work of equitable review is rarely worth the cost in freezeouts; its proposed reforms are intended to promote controllers' ability to have freezeout claims dismissed on the pleadings.\textsuperscript{63} In this regard the Cox Reforms seem inspired at least as much by this "pro-market/deregulatory" ideology than by hard empiricism or doctrinal pragmatism.\textsuperscript{64} For this reason—in the interest of minimizing the role of ideology or fads in corporate law—future courts and especially the Delaware Supreme Court should proceed cautiously before limiting application of the Entire Fairness standard in freezeouts.

In advocating in favor of retaining the Entire Fairness standard of review as the presumptive standards for freezeouts, this Article parts company with commentary that portrays shareholder suits in unqualifiedly negative terms. It rejects the

\textsuperscript{61} DEBORAH DEMOTT, SHAREHOLDER DERIVATIVE ACTIONS: LAW AND PRACTICE (West 1999 & Supp. 2007). See also Thompson & Thomas I, supra note 59; Beam ex rel. Martha Stewart Living Omnimedia, Inc. v. Stewart, 845 A.2d 1040, 1049–52 (Del. 2004) (pre-suit demand on board not excused on account of mere existence of personal or business relationships among directors); Orman v. Cullman, 794 A.2d 5 (Del. Ch. 2002) (allowing application of business judgment rule instead of Entire Fairness standard in the context of a merger with an unaffiliated third party notwithstanding the presence of a controlling shareholder at the seller and the controller's continued involvement in the post-merger firm); Harbor Fin. Partners v. Huizenga, 751 A.2d 879 (Del. Ch. 1999)(granting motion to dismiss in claim against corporation's acquisition through merger, notwithstanding that four of seven directors had a conflict of interest, on the rationale that disinterested shareholders had ratified the transaction and the complaint failed to allege facts that would constitute "waste"); In re Aquila, Inc. S'holders Litig., 805 A.2d 184 (Del. Ch. 2002) (allowing business judgment deference to apply to the tender offer freezeout because the shareholders could freely choose whether or not to tender to the controller, notwithstanding that they had no independent advocate negotiate on their behalf in the offer); In re Staples, Inc. S'holders Litig., 792 A.2d 934, 952 (Del. Ch. 2001) (denying permanent injunction against recategorization transaction involving conflicted directors, and affirming relevance of business judgment rule standard, but granting preliminary injunction to afford shareholders better disclosure).

\textsuperscript{62} The backlash against SOX is an expression of this policy perspective. See, e.g., Commission on the Regulation of U.S. Capital Markets in the 21st Century, REPORT AND RECOMMENDATIONS 27–28 (March 2007) (produced by a Commission established by the U.S. Chamber of Commerce). For an account of the unfolding policy debate over amending or repealing portions of SOX, see Greg Ip, Kara Scannell & Deborah Solomon, In Call to Deregulate Business, A Global Twist, WALL ST. J., Jan. 25, 2007, at A1. Even the Wall Street Journal noted the ambiguous evidence behind the claim that SOX is to blame for decreasing foreign listings on U.S. exchanges; the maturation of those foreign markets being a more plausible explanation.

\textsuperscript{63} Cox, 879 A.2d at 607 (proposed reforms would give "defendants the real option to get rid of cases on the pleadings...").

\textsuperscript{64} The reforms proposed in the trilogy of freezeout cases analyzed herein are consonant with the themes addressed in many of Vice Chancellor Strine's other judicial and academic writings, in which he appeals for streamlining corporate legal doctrine under the business judgment rule. See, e.g., Allen, Jacobs & Strine, supra note 17; Leo E. Strine, Jr., If Corporate Action is Lawful, Presumably There Are Circumstances in Which it is Equitable To Take That Action: The Implicit Corollary to the Rule of Schnell v. Chris-Craft, 60 BUS. LAW. 877 (2005); Leo E. Strine, Jr., The Inescapably Empirical Foundations of the Common Law of Corporations, 27 DEL. J. CORP. L. 499 (2002).
view that the M&A and capital markets would thrive under a system of minimal-
ist fiduciary safeguards and radically reduced room for shareholder suits. In the alternative, Delaware's seminal M&A jurisprudence has validated a set of best practices that have helped to balance the concerns and interests of controllers and minorities, and the welfare of bidders and targets in general. In the tradition for freezeouts established by Weinberger, the Delaware courts have validated the employment of special committees, independent legal and financial advisers, aides to accurate disclosure and other procedures intended to promote “fairness,” “candor,” impartial decision-making by boards and voluntary consent by minorities. In freezeouts, as in other high-profile M&A transactions, the courts have assumed the role of “transactional choreographers,” and this transactional choreography has the character of a public good.

Returning to doctrinal specifics: the transactional choreography applied in cash-out mergers and tender offer freezeouts represents different judicial responses to three related legal questions. These are (i) whether controllers have a legal duty to pay at least a minimum “fair price” for the minorities' shares in a freezeout, (ii) whether public stockholders have adequate freedom and ability to reject and defeat an unfair freezeout offer, and (iii) whether target directors are unduly constrained in their ability to act in minorities' interests in freezeouts. Furthermore, while Delaware decisions appears to endorse different approaches to these issues depending on the structure of the freezeout, both strands of the doctrine allow that if a controller has adhered to the established transactional choreography, it will receive more favorable judicial treatment if litigation ensues. This promise of comparatively more favorable (i.e. lenient) treatment in litigation provides the incentive for controllers to adhere to the transactional “steps” prescribed by the courts.

To recap, under doctrine evolving from the Solomon decision, in tender offer freezeouts so long as controllers refrain from affirmatively coercing or deceiving the minority shareholders, the transaction will be reviewable under the deferential business judgment rule standard. In the alternative, under doctrine evolving from the Weinberger and Lynch decisions, the courts allow controllers merely

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67. The term and concept are the author’s.

68. As defined in William J. Baumol & Alan S. Blinder, Economics: Principles and Policy 169 (7th ed. 1997), a public good is “a commodity or service whose benefits are not depleted by an additional user and for which it is generally difficult or impossible to exclude people from its benefits, even if the people are unwilling to pay for them.”

a beneficial shift in the burden of proof if the freezeout is approved by informed, disinterested directors or a majority of the minority shareholders.⁷⁰ Hence either form of ratification mandates that the plaintiffs must prove the unfairness of the freezeout in order to obtain a recovery, instead of the controller-defendant having to prove its fairness to avoid paying damages.⁷¹ However, this favorable shift in the burden of proof is the maximum benefit that controllers can obtain from disinterested ratification. Under the “Lynch Doctrine” the Entire Fairness standard will apply to the cash-out merger irrespective of such consent.⁷²

This Article contends that in endorsing business judgment deference for freezeouts that receive Dual Ratification, the court of chancery is allowing too relaxed an approach to controllers’ capacity to coerce unfair outcomes in freezeout negotiations. It recommends in favor of unifying freezeout doctrine, as do the recent court of chancery cases highlighted herein. However, it proposes that the Entire Fairness standard should apply to a freezeout unless the controller allowed an auction or market check to be conducted by the company’s independent directors, and agreed to be a seller rather than a buyer if its bid was bettered by a third party.⁷³

A controller should be able to proceed with a freezeout without following this new transactional choreography, but at the cost of facing the Entire Fairness standard if shareholder claims are filed against the freezeout.⁷⁴ If the controller was unwilling

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⁷⁰ Lynch, 638 A.2d at 1116 (“Entire fairness remains the proper focus of judicial analysis in examining an interested merger, irrespective of whether the burden of proof remains upon or is shifted away from the controlling or dominating shareholder, because the unchanging nature of the “interested” transaction requires careful scrutiny.”).

⁷¹ The usual rule, once self-dealing or other conflict of interest has been demonstrated by the plaintiff, is that the defendant has the burden of proof. See, e.g., Emerald Partners v. Berlin, 726 A.2d 1215, 1222 (Del. 1999) (“Once the entire fairness standard has been implicated, as here, the defendants, at least initially, bear the burden of demonstrating the two basic aspects of fair dealing and fair price.” (citation omitted)); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1989) (“When faced with such divided loyalties, directors have the burden of establishing the entire fairness of the transaction to survive careful scrutiny by the courts.”); Keenan v. Eshleman, 2 A.2d 904, 909 (Del. 1938) (“In the second place, dealing as they did with another corporation of which they were sole directors and officers, they assumed the burden of showing the entire fairness of the transaction.”).

⁷² Lynch, 638 A.2d at 1116; Rosenblatt v. Getty Oil Co., 493 A.2d 929 (Del. 1985) (holding that the informed vote by a majority of minority shares shifts the burden of proving the unfairness of the conflicted merger entirely to the plaintiffs).

⁷³ It is crucial that the directors conduct an auction of the entire company, otherwise they test only the value of the minority equity stake, rather than the company’s “full value” or “going concern value.” Importantly, this Article does not propose any new substantive regulations or limitations on freezeouts. The reforms it endorses, as described in Part VI infra, speak only to the standard of review that should apply—and hence the factors and incentives that will affect the parties’ choices in weighing either making or accepting a freezeout offer. If the controller has impeded an independent board’s evaluation and pursuit of alternatives to the controller’s offer, then the residual ambiguity surrounding the allocation of gains in the freezeout warrants imposing the burden of proving fairness on the controller. In the alternative, the Cox opinion presumes that with Dual Ratification there is only a minimal chance of unfairness, so that litigation is wasteful and unwarranted. See Cox, 879 A.2d at 647 (“If both the independent directors and the disinterested stockholders are given the ability to say no and do not, ought we not presumptively assume the transaction was fair?”). The parallel Cox draws between genuine arms'-length dealing and Dual Ratification in freezeouts does not comport with Weinberger’s tenets, however. Weinberger, 457 A.2d at 709 n.7 (action taken “as if” at arms'-length will serve merely as “strong” but not dispositive evidence of fairness in a cash-out merger).

⁷⁴ Proving entire fairness in such a circumstance is certainly possible. For cases in which the sale process was held defective but the transaction was deemed fair in its entirety, see Kahn v. Lynch
to agree to or failed to comply with these conditions, then it is unreasonable to presume that the transaction was beneficial to the minority. In such a case a controller should have to demonstrate the freezeout's fairness upon a shareholder challenge. Consistent with corporate law's role in protecting minority shareholders and reducing the agency costs of capital, the courts should not presume the fairness of a freezeout that has not been tested against genuine market forces.\(^7\)

Part I of this Article reviews the doctrinal framework for cash-out mergers established by Weinberger\(^6\) and Lynch,\(^7\) and then the alternative doctrinal framework for tender offer freezeouts developed from Solomon\(^8\) and Glassman.\(^9\) Part II elucidates the disparate legal price regimes relevant to freezeouts, and controllers' capacity to exploit them.\(^50\) Part III critiques the reforms to tender offer freezeout doctrine proposed in the Pure\(^51\) and Cox\(^52\) decisions. Part IV returns to the analysis of cash-out merger freezeout doctrine. It first describes the hyperbole and shortcomings in Cysive\(^53\) and Cox's criticisms of Entire Fairness review in cash-out mergers. Part IV next describes how the Cox Reforms would undermine minorities' bargaining leverage by marginalizing the relevance of the fair price standard in freezeout negotiations. Part IV's discussion concludes by examining the underpinnings of the Lynch Doctrine's concern about "fair dealings" and the presence or absence of valid consents in freezeouts. Part V presents this Article's proposals for unifying freezeout doctrine under the Entire Fairness standard of review.

I. FOUNDATIONS OF THE DOCTRINES GOVERNING FREEZEOUTS

A. WEINBERGER V. UOP ENDORSES THE ENTIRE FAIRNESS STANDARD FOR CASH-OUT MERGER FREEZEOUTS

The Delaware General Corporation Law ("DGCL") requires approval by a majority of a company's directors and a majority of its outstanding voting shares

\(^75\) At least they should not do so without scrutinizing the target board's rationale for accepting the freezeout over competing alternatives, as the best alternative for the minority. For recent law review articles contending that corporate law should protect minority shareholders in freezeouts, as part of its role in reducing the agency costs of capital, see Brett A. Margolin & Samuel J. Kursh, The Economics of Delaware Fair Value, 30 Del. J. Corp. L. 413, 414 (2004) (describing the importance of an expansive interpretation of "fair value" in appraisal actions); Lawrence A. Hamermesh & Michael L. Wachter, The Fair Value of Cornfields in Delaware Appraisal Law, 31 J. Corp. L. 119, 146-74 (2005) (noting the importance of the corporate opportunity doctrine as incorporated into the fiduciary doctrine applicable to freezeouts); Gilson & Gordon, supra note 5, at 837 ("...the concern is to ensure that the minority receives a premium that reflects a fair share of the synergy gains").

\(^76\) Weinberger, supra note 24.

\(^77\) Lynch, supra note 25.

\(^78\) Solomon, supra note 26.

\(^79\) Glassman, supra note 27.

\(^80\) As the risks of holding a minority equity stake increase, the cost of issuing minority equity stakes will increase for companies, unless the market is unaware of the true risks. See infra text accompanying notes 169-72.

\(^81\) Pure, supra note 32.

\(^82\) Cox, supra note 34.

\(^83\) Cysive, supra note 33.
as a condition to the company's sale through a merger. Because the controller owns the shares required to determine the outcome of director elections, the minority shareholders' voting power cannot stop a controller intent on effectuating a cash-out merger. The controller's stock ownership also affords it power to effectuate amendments to the bylaws, approvals (or disapprovals) of sales of substantially all corporate assets, and amendments to the certificates of incorporation. Hence, when a controller presents a freezeout proposal, its power to compel the transaction, or to take action injurious to the minority if it fails, is quite apparent to the target board and minority shareholders.

But it is the controller's power over the target's board that places freezeouts in the infamous category of self-dealing transactions. If the board operated with genuine independence from the controller, the controller would only be on the "purchase" side of the transaction, and the heightened fiduciary protections the courts apply to self-dealing transactions would be inapplicable. Corporate law provides that directors owe fiduciary duties of care and loyalty to all shareholders equally, not just those who elect them. But once a controller is present, the directors are in a difficult, fundamentally conflicted situation. If they act in ways that conflict with the controller's plans, their tenure on the board will probably be limited. Moreover, because people generally seek to avoid confrontations unless they have something concrete and significant to gain, most boards will have developed a cognitive bias in favor of approving a controller's offer.

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85. Del. Code tit. 8, § 216(3) (2007) ("Directors shall be elected by a plurality of the votes of the shares in person or represented by proxy at the meeting and entitled to vote on the election of directors...."). In any matter submitted to the shareholders for voting, because not all shares are voted, the outcome may often be determined by a shareholder owning less than a genuine majority of the outstanding voting stock—i.e. by a de facto controller.
86. Del. Code tit. 8, § 216(2) (2007) ("In all matters other than the election of directors, the affirmative vote of the majority of the shares present in person or represented by proxy at the meeting and entitled to vote on the subject matter shall be the act of the shareholders."); Del. Code Ann. tit. 8, § 109(a) (2007) ("...the power to adopt, amend or repeal by-laws shall be in the stockholders entitled to vote....").
87. Del. Code tit. 8, § 271(a) (2007) ("Any corporation may...sell, lease or exchange all or substantially all of its property or assets...as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon....").
89. See, e.g., McMullin v. Beran, 765 A.2d 910, 919 (Del. 2000) ("The...Board owed fiduciary duties of care, loyalty and good faith to all...shareholders."); Weinberger, 457 A.2d at 710 ("There is no dilution of this obligation where one holds dual or multiple directorships, as in a parent-subsidiary context."); Iman Anabtawi, Some Skepticism About Increasing Shareholder Power, 53 U.C.L.A. L. Rev. 561 (2006) (suggesting that intra-shareholder conflicts represent a further rationale for vesting primary decision-making authority in the board).
90. Consistent with the status quo bias and the overconfidence principle, most directors will rationalize that they are doing the right thing for the company by avoiding conflict with a controller, and maximizing their chance of remaining on the board. For scholarship applying the insights of behavioral psychology to corporate law, see, e.g., Donald C. Langevoort, Behavioral Theories of Judgment and Decision Making in Legal Scholarship: A Literature Review, 51 Vand. L. Rev. 1499 (1998) (applying behavioral psychology to different legal fields); Marileen A. O'Connor, The Enron Board: The Perils of Groupthink, 71 U. Cin. L. Rev. 1233 (2003) (documenting the psychological pressures to squelch...
Controllers' freedom to use cash-out mergers to force minority shareholders out of the corporation has been a persistently controversial question in corporate law. In the late 1970s the Delaware courts required a "business purpose" for cash-out mergers, in order to limit controllers' opportunity to use them to expropriate wealth from minorities. However in Weinberger, in 1983, the Delaware Supreme Court rejected the business purpose requirement as being too indeterminate to protect minorities from overbearing controllers. The court endorsed the Entire Fairness standard as the better approach to protecting minorities. Specifically, in Weinberger the court held that duties of "fair price" and "fair dealings"—hence, "Entire Fairness”—apply to controllers' cash-out mergers.

With respect to fair price, the Weinberger court held that controllers have a fiduciary duty to pay minorities at least their pro rata share of the company.

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91. As late as 1976 and 1977, in Delaware and elsewhere, mergers intended to eliminate minorities were presumptively wrongful. See, e.g., Kellogg v. Georgia Pac. Paper Corp., 227 F Supp. 719 (WD. Ark. 1964); Marshel v. AFW Fabric Corp., 533 F2d 1277 (2d Cir. 1976); Green v. Santa Fe Indus., Inc., 533 F2d 1283 (2d Cir. 1976), rev'd, on other grounds, 430 U.S. 462 (1977); Elliott J. Weiss, Balancing Interests in Cash-Out Mergers: The Promise of Weinberger v. UOP, Inc., 8 DEL. J. CORP. L. 1 (1983) (discussing progress from early legal prohibition on cash-out mergers to their gradual legitimization in the last several decades of the 20th century).


93. Weinberger, 457 A.2d at 715 ("In view of the fairness test which has long been applicable to parent-subsidiary mergers, the expanded appraisal remedy now available to shareholders, and the broad discretion of the Chancellor to fashion such relief as the facts of a given case may dictate, we do not believe that any additional meaningful protection is afforded minority shareholders by the business purpose requirement... Accordingly, such requirement shall no longer be of any force or effect." (citation omitted)).

94. The landmark definitions of "fair dealings" and "fair price," established in Weinberger, are as follows:

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company's stock. However, the test for fairness is not a bifurcated one as between fair dealings and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness. Weinberger, 457 A.2d at 711 (citations omitted). As the second appeal in Kahn v. Lynch clarified, courts have interpreted "Entire Fairness" to require that a transaction be "fair in its entirety" rather than "entirely fair in every respect." See Kahn v. Lynch Commn'c Sys., 669 A.2d 79, 90 (Del. 1995) (despite problems pertaining to the Special Committee's approval process, the disputed cash-out merger was judged beneficial to the shareholders, hence fair). See also Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1180 (Del. 1995) (hereinafter "Cede III") (despite problems with the sale process, including the absence of a market check and a rushed review by the board, the company's sale through the merger was fair).
valued as a going concern, as described further in Part II. And because fair price is not a finite sum but rather a range, Weinberger requires that controllers be accountable for the fairness of the process through which they effectuate a cash-out merger—i.e., "fair dealings" on their part. Weinberger’s fair dealings requirement encompasses factors relating to how the transaction was initiated, structured, and timed by the controller, as described further in Part IV. Despite the controller’s statutory authority to compel a cash-out merger, Weinberger exhorted controllers to allow some qualified, independent party to negotiate its key terms on the minority’s behalf—in order to approximate “arms’ length” dealings. And Weinberger emphasized controllers’ equitable obligation to make complete and truthful disclosures in freezeouts, especially because these disclosures also furnish the basis of minorities' decisions about whether or not to seek an appraisal.

Beyond providing a benchmark for liability ex post, Weinberger’s Entire Fairness standard has influenced controllers’ tactics in planning cash-out mergers. For example, as mentioned above, the Weinberger opinion has encouraged controllers to establish special committees of independent directors to negotiate for the minority shareholders, and in so doing it established what is still the formative

95. Weinberger, 457 A.2d at 713 (“Fair price obviously requires consideration of all relevant factors involving the value of a company...elements of future value, including the nature of the enterprise, which are known or susceptible of proof as of the date of the merger and are not the product of speculation, may be considered.”). The issue of which elements of future value should be excluded in equity and in an appraisal, are significant open questions. For commentary, see Hamermesh & Wachtler, supra note 75.

96. Weinberger, 457 A.2d at 711–12. See, e.g., Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1134, 1153 (Del. Ch. 1994), aff’d, 663 A.2d 1156 (Del. 1995) (“Thus in assessing overall (or entire) fairness in this instance the court must consider the process itself that the board followed, the quality of the result it achieved and the quality of the disclosures made to the shareholders to allow them to exercise such choice as the circumstances could provide.”).

97. Weinberger, 457 A.2d at 711–12. In actuality, the Entire Fairness standard was first endorsed for parent/subsidiary mergers by the Delaware Supreme Court in Sterling v. Mayflower, a case in which the parent acquired its subsidiary in a merger using its stock as consideration. See Sterling v. Mayflower Hotel Corp., 93 A.2d 107, 109–10 (Del. 1952).

98. See, e.g., Weinberger, 457 A.2d at 710–12; id. at 710 (“Given the absence of any attempt to structure this transaction on an arm’s length basis, Signal cannot escape the effects of the conflicts it faced, particularly when its designees on UOP’s board did not totally abstain from participation in the matter. There is no ‘safe harbor’ for such divided loyalties in Delaware.”); id. at 709 n.7 (“...the result here could have been entirely different if UOP had appointed an independent negotiating committee of its outside directors to deal with Signal at arm’s length.”).

99. Id. at 711 (“Part of fair dealing is the obvious duty of candor required by Lynch I...”); id. at 710 (“Completeness, not adequacy, is both the norm and the mandate under present circumstances.” (citing Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977))). Weinberger is crucially important in the evolution of the case law identified under the rubric of the “fiduciary duty of disclosure.” For commentary, see Lawrence A. Hamermesh, Calling Off the Lynch Mob: The Corporate Director’s Fiduciary Disclosure Duty, 49 Vand. L. Rev. 1087 (1996) (arguing that future courts should exercise caution in expanding the significance of “fiduciary disclosure duties”); Kahn, Transparency and Accountability, supra note 66 (arguing that corporate loyalty doctrine would be incoherent if it tolerated dissembling in communications between directors and shareholders).

100. For a discussion of the twin life of standards of conduct (affecting behavior ex ante), and standards of review (affecting remedies ex post), see Eisenberg, Divergence, supra note 17.

101. See Weinberger, 457 A.2d at 709 n.7.
transactional choreography for cash-out mergers.\textsuperscript{102} \textit{Weinberger} also encouraged what is now the accepted practice of having outside, independent financial and legal experts advise special committees during the pendency of the freezeout negotiations.\textsuperscript{103} And \textit{Weinberger}'s emphasis on full disclosure has encouraged controllers to facilitate the flow of accurate information in freezeouts.\textsuperscript{104}

As mentioned above, controllers' freedom to eliminate minorities through cash-out mergers has proven highly controversial at times.\textsuperscript{105} This "unsettledness" is evident in the recent \textit{Pure}, \textit{Cysive} and \textit{Cox} opinions, but was present even in the mid-20th century in the earliest litigation over freezeouts.\textsuperscript{106} This controversy sometimes flared into the public eye. During the bear market of 1973–74, for example, controversy arose over the losses suffered by minority shareholders in cash-out mergers and the issue achieved national attention. In a speech at the University of Notre Dame, SEC Commissioner A. A. Sommer denounced controllers' going private transactions as "serious, unfair, sometimes disgraceful, a perversion of the whole process of public financing and a course that inevitably is going to make the individual shareholder even more hostile to American corporate mores and the securities markets than he already is."\textsuperscript{107}

After announcing a public investigation, the SEC proposed two rules to protect minorities' interests in these deals. In contrast to federal securities regulation's usual disclosure oriented approach, both proposed rules encompassed substantive fairness standards for freezeouts. SEC Rule 13e-3A provided that a controller's offer must "constitute fair value as determined in good faith by the issuer... and shall be no lower than the consideration recommended jointly by two qualified independent persons."\textsuperscript{108} In addition to requiring that the offered consideration must be "fair," proposed Rule 13e-3B provided that controllers' cash-out mergers must be motivated by "a valid business purpose."\textsuperscript{109} The rules proposed by the

\begin{itemize}
  \item \textsuperscript{102} See id. For data attesting to the employment of special committees in freezeouts—even in tender offer freezeouts in many instances, see Subramanian, \textit{Theory & Evidence}, supra note 23.
  \item \textsuperscript{103} In \textit{Weinberger}, the court scrutinized the work done by the investment banker representing UOP (the target subsidiary), and was highly critical of its work. \textit{Weinberger}, 457 A.2d at 712 ("There was no disclosure of the circumstances surrounding the rather cursory preparation of the Lehman Brothers' fairness opinion. Instead, the impression was given UOP's minority that a careful study had been made, when in fact speed was the hallmark, and Mr. Glanville, Lehman's partner in charge of the matter, and also a UOP director, having spent the weekend in Vermont, brought a draft of the 'fairness opinion letter' to the UOP directors' meeting on March 6, 1978 with the price left blank.").
  \item \textsuperscript{104} See, e.g., Rosenblatt v. Getty Oil Co., 493 A.2d 929, 938–39 (Del. 1985); \textit{Cinerama}, 663 A.2d at 1174, 1176–77.
  \item \textsuperscript{105} See supra notes 91–92 and accompanying text. The following discussion benefited from the historical information provided in \textit{Arthur M. Borden & Joel A. Yunis, Going Private} (1982).
  \item \textsuperscript{106} Weiss, supra note 91.
  \item \textsuperscript{109} Id. at 7950. The "business purpose" requirement briefly endorsed by the Delaware courts was probably a direct outgrowth of this SEC proposal. For a discussion of the business purpose requirement, see citations in note 92, supra.
\end{itemize}
SEC also encompassed other safeguards of fairness, including a requirement that the target company's counsel opine that the cash-out merger met the fairness criteria applicable thereto under state fiduciary law. In sum, in the mid to late 1970s, the SEC was on the verge of imposing substantial limits on controllers' freedom to engage in freezeouts.

While the SEC was considering these rules, the overall shape of corporate "federalism" hung in the balance. Lawyers attending an ABA meeting on federal securities regulation in the summer of 1975 discussed a Yale Law Journal article recently published by Professor William Cary. Cary's article decried Delaware's excessively permissive approach to corporate law, and called for federal minimum standards to protect vulnerable public investors from abuse by powerful corporate insiders. Cary's claims are so famous that virtually all corporate legal academics are familiar with them, but few appear to recall that they coincided with and reflected broad-based disapproval of going private transactions and Delaware's lax response to protecting minorities' interests therein.

Most significantly for this discussion, no recollection of this tumult, or the near preemption of state fiduciary standards by federal regulations is reflected in the chancery court's recent freezeout cases or the law review articles discussing them. Nevertheless, the history is significant. First, it illuminates that both the popular and legal acceptance of freezeouts is recent. Second, it reinforces that excessively lenient state corporate legal standards invite federal regulation which may be more heavy-handed. Once freezeout doctrine is considered from this broader, historical perspective, it is harder to accept that loosening fiduciary standards for freezeouts is the best course for investors and corporate law.

In the end, the movement to federalize freezeout regulation was truncated. In its final going private rule, Rule 13e-3, the SEC backed away from its proposal to promulgate substantive fairness standards for freezeouts, and hewed to its narrower, disclosure-oriented approach. It may have been influenced to do so by the U.S. Supreme Court's 1976 decision in Santa Fe v. Green, which broadly reoriented federal securities law away from the substantive regulation of internal corporate affairs. In addition, the need for a federal "business purpose" requirement was

110. See 40 Fed. Reg. at 7951 (proposed rule 240.13e-3A(c)(1)(viii)).
111. BORDEN & YUNIS, supra note 105, at § 2.07.
113. See, e.g., Gilson & Gordon, supra note 5; Subramanian, Fixing Freezeouts, supra note 5; Peter V. Letsou & Steven M. Haas, The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware, 61 BUS. LAW. 25 (2005).
114. Consistent with Mark Roe's insights, freezeouts provide a fascinating context in which to analyze the interaction of federal and state legal regimes in corporate law. Roe, Delaware's Competition, supra note 23.
obviated by the Delaware courts' affirmation of a business purpose requirement for cash-out mergers by 1977. Although the movement to federalize freezeout regulation was side-lined even before Weinberger was decided, several crucially important questions regarding freezeout doctrine remained unresolved even thereafter.

In the early 1990s, for example, a split developed in the court of chancery over whether approval of a cash-out merger by the target's independent directors was sufficient guarantee of a freezeout's fairness to obviate the need for vigorous judicial oversight. Weinberger had suggested that Entire Fairness would apply irrespective of a controller's receipt of disinterested director consent to the freezeout, but not forcefully or expressly enough to preclude controversy.

B. KAHN v. LYNNH HOLDS THAT INHERENT COERCION MANDATES APPLYING ENTIRE FAIRNESS IN ALL CASH-OUT MERGER FREEZEOUT SUITS

This question was resolved by the Delaware Supreme Court in Lynch (Kahn v. Lynch Communications, Inc.). In its 1994 opinion in Lynch, the Delaware Supreme Court held that the coercive authority of controllers taints the reliability of even seemingly freely given consents in cash-out mergers. On this basis Lynch held that disinterested, informed consents by directors or minority shareholders are merely strong evidence of fairness, and will shift the burden of proving unfairness to the plaintiffs, but deferential judicial review along the lines of the business judgment rule is never appropriate in freezeouts. As stated earlier, this idea is referred to as "inherent coercion" (viz. that neither the independent directors' or minority shareholders' consents to a freezeout can legitimately be presumed freely given).

118. See supra note 92.
119. Compare In re Trans World Airlines, Inc. S'holders Litig., Civ. A. No. 9844, 1988 WL 111271, at *7 (Del. Ch. Oct. 21, 1988) (advocating the business judgment rule should apply to cash-out mergers if approval was obtained from a board with a majority of independent directors, a special committee, or a majority of the minority shares) with Citron, 584 A.2d at 499–502 (endorsing Entire Fairness as the universal standard of review for controllers' going private mergers on account of their implicit power to coerce such consents).
120. Weinberger, 457 A.2d at 703 ("However, where corporate action has been approved by an informed vote of a majority of the minority shareholders, we conclude that the burden entirely shifts to the plaintiff to show that the transaction was unfair to the minority."); id. at 709 n.7 ("Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arms' length is strong evidence that the transaction meets the test of fairness." (emphasis added; citations omitted.)).
121. Lynch, 638 A.2d at 1116.
122. For an in-depth discussion of inherent coercion and the Lynch Doctrine's concern about fair dealings and free consent in freezeouts, see infra Part IV, F. The concept of implicit coercion was first described at length in Citron, 584 A.2d 499–502. The relevant part of Citron is cited in Lynch, 638 A.2d at 1116–17 (citations omitted):

Parent subsidiary mergers...are proposed by a party that controls and will continue to control, the corporation, whether or not the minority stockholders vote to approve or reject the transaction. The controlling stockholder relationship has the potential to influence, however subtly, the vote of [ratifying] minority stockholders in a manner that is not likely to occur in a transaction with a non-controlling party. Even where no coercion is intended, shareholders voting on a parent subsidiary merger might perceive that their disapproval could risk retaliation of some kind.
The logic behind the inherent coercion concept is that even independent directors and the minority shareholders might consent to a freezeout offer at less than full going concern value out of fear that the controller could take action even more injurious to the minority if its freezeout was defeated. Validating principles earlier affirmed by the Delaware Supreme Court in Weinberger and Rosenblatt v. Getty Oil Co., held that Entire Fairness remains the appropriate standard of review irrespective of the receipt of such consents. In so doing, the court veered from court of chancery precedents that had allowed deferential review upon receipt of disinterested, informed approval to a cash-out merger, as well as cases addressing ordinary self dealing transactions where disinterested ratification was held to trigger deferential judicial review. Before Lynch, the court of chancery's opinion in Citron v. E.I. Du Pont de Nemours & Co. had affirmed this limited view of the effect of independent director or minority shareholder consent, and had expounded on the danger of inherent coercion. But it was the supreme court's definitive treatment of inherent coercion in Lynch that stuck—so that Entire Fairness has been applied in the equitable review of all cash-out mergers, even if controllers obtained seemingly valid, disinterested consents.

by the controlling stockholder. For example, the controlling stockholder might decide to stop dividend payments or to effect a subsequent cash out merger at a less favorable price, for which the remedy would be time consuming and costly litigation. At the very least, the potential for that perception, and its possible impact on a shareholder vote, could never be fully eliminated. Consequently, in a merger between the corporation and its controlling stockholder—even one negotiated by disinterested, independent directors—no court could be certain whether the transaction terms fully approximate what truly independent parties would have achieved in an arm's length negotiation. Given that uncertainty, a court might well conclude that even minority shareholders who have ratified a ... merger need procedural protections beyond those afforded by full disclosure of all material facts. One way to provide such protections would be to adhere to the more stringent entire fairness standard of judicial review.

123. Weinberger, 457 A.2d at 703.
124. Rosenblatt v. Getty Oil Co., 493 A.2d 929, 937 (Del. 1985) (holding that "approval of a merger... by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs").
126. Delaware decisions addressing self-dealing transactions, which do not involve controllers, sometimes allow disinterested, informed ratification by directors or shareholders to cure a fiduciary breach or at least trigger deferential review. The Delaware Supreme Court has not entirely resolved the issue. Compare, e.g., Orman v. Cullman, Civ. A. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (finding that the informed, uncoerced vote of company's disinterested public stockholders "extinguished" the plaintiffs' remaining breach of fiduciary duty claims in the context of a sale of the company); Cooke v. Oolie, Civ. A. 11134, 1997 WL 367034, at *9 (Del. Ch. June 23, 1997) (suggesting that Delaware Supreme Court has weighed in favor of giving limited effect even to proper ratification, so that the business judgment rule is not "reinstated" due to ratification); Marciano v. Nakash, 535 A.2d 400 (Del. 1986) (stating in dicta that proper ratification would effectuate business judgment deference so that plaintiff could recover only upon proof of "waste").
128. Lynch, 636 A.2d at 1117 ("... an approval of the transaction by an independent committee of directors or an informed majority of minority shareholders shifts the burden of proof on the issue of fairness from the controlling or dominating shareholder to the challenging shareholder-plaintiff."). See Weinberger, 457 A.2d at 703 ("... but in all this, the burden clearly remains on those relying on the [burden-shifting] vote [i.e. the defendants] to show that they completely disclosed all material facts relevant to the transaction.").
Nevertheless, in order to encourage controllers to follow the generally salutary practice of empowering either the independent directors or minority shareholders to accept or reject the freezeout's terms, the Lynch court provided for a shift in the burden of proof where valid consent is obtained. Upon such valid consent, Lynch provides, the plaintiffs must demonstrate the unfairness of the freezeout, instead of the controller having the burden to demonstrate its fairness—which is the ordinary rule in transactions which involve self-dealing fiduciaries. The Lynch Doctrine's insistence on adherence to the Entire Fairness standard of review in cash-out mergers is at the heart of Cox's vituperative against current freezeout doctrine.

C. THE COMPLEX BACKGROUND TO MODERN TENDER OFFER FREEZEOUT DOCTRINE

Tender offer freezeouts simply did not occur until the final years of the twentieth century. Accordingly, tender offer freezeout doctrine did not exist. In 1996, in its Solomon decision, the Delaware Supreme Court considered controllers' duties in making a tender offer to purchase the minorities' shares—but the supreme court did not address a true going private transaction therein. In 2001, in its Glassman decision, the Delaware Supreme Court held that fiduciary fair dealings criteria are inapplicable to short-form mergers. But even Glassman did not address a combined tender offer and short form merger engineered by a controller intent on going private. Hence, tender offer freezeout doctrine is still very new. Many fundamental issues in tender offer freezeouts have never been addressed by the courts, and none have been resolved by the Delaware Supreme Court. The contrast with cash-out merger doctrine is striking in this regard. The adherence to the Entire Fairness standard in cash-out mergers is the outgrowth of decades of judicial analysis. Furthermore, although the supreme court has not ruled on a tender offer freezeout, in recent cases where it has addressed transactions posing

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129. The wariness the courts show towards allowing ratification of potential fiduciary loyalty breaches reflects the important stature of the duty of loyalty within corporate law. For a classic statement of the importance of the duty of loyalty, see, e.g., Bayer v. Beran, 49 N.Y.S.2d 2 (N.Y. Sup. Ct. 1944) ("The concept of loyalty, of constant, unqualified fidelity, has a definite and precise meaning. The fiduciary must subordinate his individual and private interests to his duty to the corporation whenever the two conflict." (citation omitted)).

130. For example, no prior tender offers by controllers are cited by the Delaware Supreme Court in its landmark opinion in Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977) (ruling that "complete candor" was required in the controller's disclosures in its tender offer). Moreover, short form mergers in tender offer freezeouts (i.e. combined tender offer/short-form mergers) are nowhere evident in the myriad short form mergers reviewed by the Delaware Supreme Court in Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).


a substantial risk of self-dealing by controllers, it has applied the Entire Fairness standard of review to these suits, and has not been unequivocal in so doing. Seen against this historical background, the recent rebellion against applying the Entire Fairness standard of review in freezeouts appears anomalous.

Because the Delaware Supreme Court has never endorsed a departure from the Entire Fairness standard for tender offer freezeouts, it is premature to conclude that there are two genuine "tracks" in freezeout doctrine—with tender offer freezeouts falling outside the scope of the Entire Fairness standard. Nevertheless, the court of chancery cases addressing freezeouts based on tender offers proceed as if the existence of distinct, more lenient fiduciary standards for these transactions is a certainty. They invoke Solomon's "no fair price duty absent malfeasance" admonition as their lodestar. Thus despite the fact that neither Solomon nor Glassman address a genuine tender offer freezeout, they have exerted a definitive influence on the development of Delaware's fiduciary doctrine governing tender offer freezeouts. This influence is apparent in Siliconix,135 Pure,136 and Cox,137 described in detail in Part III.

The above discussion is not intended to suggest that either tender offers or short form mergers were uncommon or unregulated throughout the twentieth century. This is most definitely not true. In Delaware, short-form mergers were the subject of statutory enactments and equitable prescriptions by mid-century, and they became quite common thereafter.138

With respect to the regulation of tender offers, federal law plays the leading role through the Williams Act and the SEC's regulations promulgated thereunder. Enacted by Congress in 1968, the Williams Act focuses principally on promoting full and accurate transactional disclosures to the recipients of the tender offer. It also includes certain anti-manipulation requirements intended to bolster target shareholders' ability to make unhurried, rational choices about whether to tender or hold their shares as described below. With respect to disclosure, the Williams Act and SEC regulations impose extensive disclosure requirements on bidders and

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133. See, e.g., Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del 1997).
134. Solomon, 672 A.2d at 40.
137. In re Cox Commc'n's, Inc. S'holders Litig., 879 A.2d 604 (Del. 2005).
138. For detailed discussion of the early short-form merger statutes and case law, see Weiss, supra note 91. The evolution of the case law is also explored in Glassman, 777 A.2d at 244-48 (attesting to the enactment of the short-form merger statute in Delaware by 1937, with its modern version appearing by 1957).
140. For a survey of federal tender offer law and regulation, see THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION ch. 11 (5th ed. 2005), id. at § 11.1 ("The securities laws contained a regulatory gap. By and large, there were no disclosure provisions applicable to tender offers.").
target directors in tender offers, and substantial prohibitions on fraud to back them up. In tender offer freezeouts, the disclosure requirements arising from the Williams Act and attendant SEC regulations are complemented by the disclosure mandated by the SEC's going private rule, Rule 13e-3. The Exchange Act requires the target company's directors to take a public position on the offer by filing a statement on a Schedule 14D-9.

With respect to the anti-manipulation rules, where the bidder's offer is for less than all shares, there is a pro rata acceptance requirement which is designed to limit the pressure on shareholders to make hurried choices. By virtue of Rule 14e-1(a) tender offers must remain open for at least 20 business days which should reduce the pressure on shareholders to make hurried choices. The SEC's rules also give shareholders the ability to change their mind by creating withdrawal rights. Furthermore, the Williams Act requires that if the offeror increases the price before the expiration of the offer, the higher price must also be paid to shareholders who have already tendered.

The legislative history of the Williams Act speaks loudly of Congressional intent to favor neither bidders nor targets; hence in tender offer freezeouts, neither controllers nor minorities. Again, Congress' focus was on affording the target company's shareholders the information necessary to make rational, informed choices in their self-interest. Hence, the federal tender offer scheme is not intended to

141. Section 14(d) of the Exchange Act (codified at 15 U.S.C. § 78n(d) (2000)) requires that any person planning a tender offer subject to the Exchange Act's registration and reporting requirements must file all solicitations, advertisements, and any other materials used in connection with the offer with the SEC prior to the distribution of the tender offer material. The tender offeror must file a long form Schedule TO, 17 C.F.R. § 240.14d-100 (2007).
143. See 15 U.S.C. § 78m(e) (2000 & Supp. IV 2004). The disclosure called for by SEC Rule 13e-3, 17 C.F.R. § 240.13e-3 (2007), applies to going private deals irrespective of whether they are structured as cash-out mergers (where proxies or information statements are required to be filed) or tender offer freezeouts (where tender offer filings must be made, consistent with 17 C.F.R. § 240.14d-3 (2007)). Under Rule 13e-3, the bidder must file, update, and finalize a Schedule 13E-3 with the SEC. In both instances the Rule 13e-3 disclosures are adjunctive to the proxy or tender offer statement disclosures.
149. For analysis and citation to the legislative history of the Williams Act, see Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 30–31, reh'g denied, 430 U.S. 976 (1977) ("The sponsors of this legislation were plainly sensitive to the suggestion that the measure would favor one side or the other in control contests; however, they made it clear that the legislation was designed solely to get needed information to the investor, the constant focal point of the committee hearings. Senator Williams articulated this singleness of purpose, even while advocating neutrality: 'We have taken extreme care to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids. S. 510 is designed solely to require full and fair disclosure for the benefit of investors.' 113 Cong. Rec. 24664 (1967)."
150. See id.
preempt or displace state regulation of bidders (including controllers) or targets (including special committee directors). Nothing in federal tender offer regulation speaks to the appropriate allocation of gains arising from a freezeout tender offer (that is "fair price") or the role of target directors in taking affirmative actions, as opposed to taking a public opinion, in response to a tender offer. Congress, the SEC, and the federal courts have allowed state corporate law to occupy the field in this area—to decide the appropriate scope of fiduciary requirements for controllers and target directors in tender offers.

One explanation for why tender offers did not become popular earlier as vehicles for freezeouts is that it is impossible wholly to eliminate the minority shareholders through a tender offer. To transform a tender offer into a freezeout, controllers typically execute a short-form merger after the tender offer is completed. Through the short-form merger, controllers are able to eliminate the last, holdout minority shareholders. Section 253 of the DGCL facilitates this process by providing that once a controller has obtained at least 90% of the outstanding voting stock of the target, the controller can effectuate the short-form merger unilaterally and almost immediately.151 No agreement or negotiation with the target directors or vote by the remaining public shareholders is required to effectuate the short-form merger. Hence, if a controller obtains 90% or more of the target company's stock in the tender offer, the second step of the tender offer freezeout is assured.

Given that the transactional technology to combine tender offers and short form mergers had existed for decades, it is surprising that controllers had not earlier combined them as a vehicle for going private. The best explanation for this appears to be that the uncertainty over the applicable standard of review for the short form merger discouraged this technique.152 In 2001 the Delaware Supreme Court's Glassman decision resolved that the Entire Fairness standard would not be applied to short-form mergers.153 Many commentators believed that tender offer freezeouts would quickly eclipse cash-out mergers as vehicles for going private, but the evidence does not suggest that an overall shift towards tender offer freezeouts has occurred.154

Part III of this Article is devoted to an in-depth analysis of tender offer freezeout doctrine, but some broad observations are appropriate at this juncture. First, in tender offer freezeout doctrine before Pure state corporate fiduciary law in essence yielded the floor to federal tender offer law and the bare statutory requirements applicable to short-form mergers under the DGCL. Prior to Pure and Cox, the fiduciary prohibition on "fraud" and "coercion" in controllers' tender offers added little to the protection afforded minorities under federal law. This is highly uncharacteristic of corporate fiduciary law's role in high stakes M&A transactions, yet consistent with the concept of transactional choreography described in the

152. This matter was resolved in the Delaware Supreme Court's holding in Glassman, 777 A.2d 242, described infra Part III.A.2.
Introduction. The disclosure-is-enough approach that characterizes federal securities law does not "rub off" on corporate fiduciary law's oversight of mergers with third parties, or third parties' tender offers and boards' responses to them. In these areas extensive fiduciary requirements sit atop the state statutory architecture and the federal disclosure mandates. Delaware's failure to address target directors' fiduciary duties in responding to a controller's tender offer certainly cannot be explained in terms of de facto preemption therefore.

Perhaps an explanation for the comparatively laissez faire character of Delaware's tender offer freezeout doctrine is that the courts have assumed that the substantive anti-coercion provisions in federal tender offer regulation (the all holders' best price, pro-rata acceptance, minimum 20 days' time provisions, etc. described above) adequately protect minorities' interests in controllers' tender offers. There are several problems with this conclusion however. First, none of the cases suggest this rationale, either expressly or implicitly. Second, the legislative history to the Williams' Act evidences Congress' intent to favor neither bidders nor targets but to maintain a "level playing field." This effort to favor neither bidders nor targets, is also apparent in the federal cases interpreting the Act. Because the Williams Act's and SEC rules' substantive anti-coercion provisions are not aimed at minorities in specific, they do not address the distinct power advantages possessed by controllers in tender offers. Third, state corporate fiduciary law affirms target board's authority to defend against unsatisfactory and coercive third party tender offers. If the Delaware courts had reached a consensus that the anti-coercion provisions present in federal law were sufficient to protect target shareholders in tender offers, then such broad defensive authority for target directors would not have arisen in the case law governing third parties' bids. Hence, the existence of a scheme of federal regulation in the area of tender offers does not provide a satisfactory explanation for the comparatively laissez faire approach to minorities' rights evident in Solomon and the recent court of chancery tender offer freezeout cases.

To the extent that the court of chancery has furnished explanations for this comparatively laissez faire approach and the rejection of the Entire Fairness standard

155. See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 874 (Del. 1985) (in evaluating a proposed merger the directors must inform themselves of all information reasonably available to them).
156. Unitrin, Inc. v. American Gen. Corp., 651 A.2d 1361, 1387 (Del. 1995) (defenses that are neither preclusive nor coercive fall within the permissible range of defenses available to target directors); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (directors can respond to threat to corporation by adopting reasonable takeover defenses).
157. For example, in the landmark case of Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the Supreme Court refused to afford a private remedy to the tender offeror who lost to the winning bidder.
158. See Unocal, 493 A.2d at 954 ("Finally, the board's power to act derives from its fundamental duty and obligation to protect the corporate enterprise, which includes stockholders, from harm reasonably perceived, irrespective of its source."); Moran v. Household Int'l, Inc., 500 A.2d 1346, 1355 (Del. 1985) (approving target board's use of poison pill to defend against coercive or inadequate tender offers).
159. Solomon, 672 A.2d at 39-40; see also Eisenberg v. Chicago Milwaukee Corp. 537 A.2d 1051, 1056 (Del. Ch. 1987) (enumerating conduct that would be deemed coercive in controllers' tender offers for preferred shares).
in tender offer freezeouts in particular, it has pointed to the fact that the DGCL is simply silent on the subject of tender offers.\(^\text{160}\) It is true that the DGCL fails to address whether target boards have a role in responding to a tender offer. This statutory silence is startling in comparison to the extensive statutory provisions governing mergers in the DGCL, and in particular, the requirement that mergers cannot proceed without the assent of the target company's board.\(^\text{161}\) The absence of a DGCL requirement of target director approval for a tender offer has been interpreted by the Delaware courts as affirmation that no corporate level transaction occurs in a tender offer freezeout—because otherwise the DGCL would require some response from the board.\(^\text{162}\)

Prior to Pure, the Delaware courts assumed that minority shareholders (because they faced only a personal decision about what to do with their own property, i.e. their stock) were capable of fending for themselves in a tender offer freezeout and did not experience coercion in a controller's tender offer. From a more formal perspective, it was possible to conclude that the controller's tender offer did not conform to the "at both sides" model of a self-dealing transaction, so that heightened fiduciary safeguards were unwarranted. After Pure's affirmation of the coercive forces inherent in tender offer freezeouts, controllers' power for overreaching in these transactions is more apparent. Controllers' tender offers are not importantly distinguishable from classic self-dealing transactions, and are more problematic for minorities than third parties' tender offers.\(^\text{163}\) Consistent with this view, neither the Pure nor Cox opinion argues against Entire Fairness' application to tender other freezeouts on the rationale that minorities are adequately protected under federal law, or because tender offer freezeouts do not involve fundamental, corporate change that merits a board's attention. Rather they argue against applying the Entire Fairness standard to tender offer freezeouts because this approach may stimulate more freezeouts and discourage litigation. However, these two broad

\(^{160}\) In re Pure, 808 A.2d at 437 ("Tender offers are not addressed by the Delaware General Corporation Law ("DGCL"), a factor that has been of great importance in shaping the line of decisions addressing tender offers by controlling stockholders... "); id. at 437-38 ("Because no consent or involvement of the target board is statutorily mandated for tender offers, our courts have recognized that "[i]n the case of totally voluntary tender offers... the courts do not impose a right of the shareholders to receive a particular price."). From a statutory perspective, an activist role for the target board can be grounded in the board's plenary authority under Section 141 of the DGCL. See Del. Code tit. 8, § 141 (2007), amended by 76 Del. Laws ch. 145, § 1 (2007). Moreover, in tender offers from third parties, the Delaware courts have established a rich and nuanced set of equitable principles that affirm target directors' duties to defend the company and the shareholders from inadequate or coercive bids. No such equivalent equitable authority is recognized in the case law in relation to controllers' bids, although they create an even greater risk of coercion and unfairness than tender offers from third parties do. The paradox is explored in Pure, 808 A.2d at 429-31. Furthermore, consistent with the landmark Schnell decision, courts have extended fiduciary principles based on the exigencies of the context in the interest of protecting the parties and reducing the agency costs of capital. They have very rarely been constrained by the statutory architecture. See id. at 434 (citing Schnell v. Chris-Craft Indus., Inc., 285 A.2d 437, 440 (Del 1971) ("[t]he equitable action does not become permissible simply because it is legally possible.").

\(^{161}\) See Del. Code tit. 8, § 251(b) (2007).

\(^{162}\) See Pure, 808 A.2d at 441.

\(^{163}\) For further discussion of controllers' ability to act coercively in a tender offer freezeout, see Part III.B., infra.
policy goals are more controversial and complex in their practical effects than these opinions acknowledge.

In conclusion, the background to the tender offer freezeout standards endorsed in Pure and Cox is a mosaic of federal and state statutes and cases that do not form a consistent picture with the broader framework of corporate fiduciary law or, especially, the standards the Delaware Supreme Court has endorsed for cash-out mergers.

II. INCONSISTENT LEGAL APPROACHES TO CONTROLLING SHAREHOLDERS' DUTY TO PAY A FAIR PRICE IN FREEZEOUTS

At present there are three distinct legal regimes that define minorities' entitlements in freezeouts. First, in tender offer freezeouts, consistent with the Solomon decision, courts decline to impose a fair price duty on controllers. Secondly, the appraisal statutes provide that shareholders eliminated in cash-out mergers must receive "fair value." Thirdly, under Lynch's Entire Fairness standard, as applied to controllers' cash-out mergers, minorities are entitled to receive a "fair price" in the transaction. The disparate definitions of fair price in these three legal regimes affect investors ex post, in defining the financial remedies minorities may obtain in litigation, as well as ex ante by influencing the prices minorities will demand and controllers will offer in freezeout negotiations.

Consistent with the efficient capital markets hypothesis, the prices that minorities will pay for their securities at the time of their original issuance will reflect a judgment regarding the securities' relevant risk/return profile, including the potential for opportunism by those in control. Of course, there are many factors that influence the risks relevant to an investment, but the existence of three non-equivalent legal schemes defining minorities' financial entitlements in freezeouts has certainly increased the level of risk attendant to holding a minority equity stake by creating inconsistent and opaque understandings about the financial entitlements attaching to a minority stake. Again, these conflicting legal

164. Solomon, 672 A.2d at 39.
165. Pure, 808 A.2d at 438 ("To begin with, the controlling stockholder is said to have no duty to pay a fair price, irrespective of its power over the subsidiary.").
167. Lynch, 638 A.2d at 1115 (citation omitted).
schemes of financial entitlements are relevant to the price that minorities should pay to purchase the shares and also to the price they should demand in a sale, including a freezeout.

Achieving unity and clarity in the scheme of financial entitlements applicable to freezeouts should yield two forms of economic benefits. First, there will be less room for controllers to exploit these ambiguities relevant to price as a means to appropriate wealth from minorities in freezeouts—i.e. less room for “structural arbitrage.” Second, a clear legal standard that would effectively limit controllers' overreaching in freezeouts should reduce companies' and controllers' costs of raising minority equity stakes. \(^{171}\) Hence, achieving a unified doctrinal approach to fair price in freezeouts should benefit investors and companies overall. \(^{172}\)

A. In Tender Offer Freezeouts Fair Price Is the Market Price

The presumption validated in Solomon is that minority shareholders can decide for themselves whether to hold or sell their shares in a controller’s tender offer. \(^{173}\)

The working assumption is that because minorities are capable of making choices in their self-interest, heightened equitable protections, including a fair price requirement, are unnecessary. On this presumption, Solomon and subsequent courts have held that no fair price duty attaches to controllers' tender offers for minorities' shares. Hence, Solomon treats controllers as being on a par with third parties in tender offers for minorities' shares. (Third parties, have no duty to offer a legally set minimum price in a tender offer). The problem with the Solomon approach is that it ignores the substantial advantages that controllers have over third parties in making a tender offer.

The view that target shareholders can make free choices in their self-interest is more reasonable in relation to third parties' offers. First, under Delaware fiduciary doctrine in responding to third party tender offers, the target board has been empowered to function as an effective bargaining agent for the shareholders' best interests. \(^{174}\) The same is not true in controllers' tender offers—the law has not empowered the target board to seek alternatives to and defend against controllers' offers. \(^{175}\) In a third party's tender offer, if the offered price is perceived as being too low, the board or special committee will have a variety of defenses it can employ

\(^{171}\) For further explanation, see Gilson & Gordon, supra note 5, at 787–88.

\(^{172}\) The academic literature has failed to address the increased risks for minorities arising from the three distinct legal schemes relevant to pricing in freezeouts. On the need for clarity in the appraisal standard itself—in the interest of protecting minorities' interests, reducing agency costs and hence reducing firms' cost of raising outside equity capital—see e.g. Margolin & Kursh, supra note 166, at 415 (“Hence, corporate law's economic function is to reduce the firm's cost of equity capital through the governance of managerial malfeasance. Appraisal rights serve this purpose by preventing management from forcing the minority to tender its shares at less than Fair Value.”).

\(^{173}\) Solomon, 672 A.2d at 39.

\(^{174}\) See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985).

\(^{175}\) See Pure, 808 A.2d at 446.
while it seeks financial or transactional alternatives.\footnote{176} In addition, the market for corporate control ensures that if the third party's bid remains too low, an alternative bidder will commonly appear on the scene. In the context of a controller's tender offer, however, the market for corporate control is stymied by the controller's presence because of the controller's potential exercise of its voting power to thwart a sale to a third party.\footnote{177}

In addition, an outside third party bidder will not have access to confidential information at the target which it could use to launch an offer while the target's board and minority shareholders remain ignorant about a pending increase in value or profitable alteration of the firm's business plan. In contrast, access to this kind of information and the timing advantage it affords controllers creates a serious risk of opportunism in freezeouts.\footnote{178} Moreover, in an arms' length tender offer, the bidder will lack any ability to coerce the target board or minority shareholders with threats of diminishing shareholder value \textit{ex post} if the freeze-out is thwarted—the inherent coercion phenomenon is irrelevant in third parties' tender offers. Each of these factors distinguishes third parties' tender offers from controllers', and points to reasons for applying a fair price duty in tender offer freezeouts.

Corporate law's role in reducing agency costs, and hence firms' cost of capital, is also a reason to enforce a legal minimum fair price in tender offer freezeouts. As observed in corporate legal scholarship, corporate law establishes a benchmark level of irremediable agency costs to which minorities are exposed.\footnote{179} The market trading price of the minorities' shares will reflect a discount to going concern value that registers the presence of the controller and this risk of overreaching by it.\footnote{180} With third parties' tender offers, the market trading price will still reflect some level of irremediable \textit{managerial} agency costs, but a third party bidder has no


\footnote{177. \textit{Id.} This assumes a true majority controller. Where there is a \textit{de facto} controller who owns less than absolute voting control, as was true in \textit{Cysive} for example, then the freezeout would involve a "change in control," and \textit{Revlon} duties should apply to the target board. For further discussion see Part V, \textit{infra}. This issue has not been meaningfully discussed in the cases or the literature.}

\footnote{178. Hamermesh & Wachter, \textit{supra} note 166, at 120. \textit{See also} Coffee, \textit{supra} note 166, at 416 (proposing rule to protect minorities from controllers' exploitation of confidential information of target).}


\footnote{180. Professors Gilson and Gordon analyze the web of legal safeguards relevant to controllers' dealings affecting minorities as trading off the benefits of reduced managerial agency costs and controller's siphoning private benefits of control in their own interest. \textit{See} Gilson & Gordon, \textit{supra} note 5, at 785–87, 843.}
power to engage in fiduciary/insider self-dealing to drive down the market price of the stock in order to compel an unfair acquisition. In contrast, if controllers are not required to pay pro rata going concern value in their tender offer freezeouts, then they will have an opportunity and incentive to undermanage the firm and drive down the market price of shares in anticipation of a tender offer freezeout. In the absence of a fair price requirement, the greater the controller's malfeasance, the deeper the market's apprehension, the steeper the market trading discount, the lower the price the controller would have to offer to succeed in the tender offer freezeout. The absence of a fair price duty in controllers' tender offer freezeouts operates in effect as a hole in the fiduciary web of prohibitions on malfeasance by controllers, and portends a downward cycle of returns to minorities, and consequently an increase in the cost of raising minority equity stakes. In sum, the absence of a fair price duty in controllers' tender offer freezeouts is a very serious matter—one that relates to the most fundamental structures of corporate law and their influence on M&A and capital markets.

B. CASH-OUT MERGER FREEZEOUTS AND THE "FAIR VALUE" STANDARD APPLIED IN APPRAISAL ACTIONS

Delaware's appraisal statute provides financial recourse for shareholders who are eliminated through a cash-out merger at less than "fair value," as defined therein. By its express terms it applies only in a merger or consolidation involving cash consideration. Depending on the precise attributes of the tender offer freezeout, appraisal may be available in the back end, short-form merger, but it is unavailable to shareholders who sell to a controller in the tender offer portion of a tender offer freezeout.

In defining the appropriate remedy for the courts to award in an appraisal, section 262(h) of the DGCL provides that shareholders should receive the "fair value" of their shares. In specific, the statute states that the court of chancery shall:

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181. For further discussion of the myriad ways that controllers can obtain private profits from corporate control—many of them legal or at least not remediable at law, see John C. Coates, "Fair Value" as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions, 147 U. PA. L. REV. 1251, 1274 (1999).


184. For an excellent analysis of fair value in Delaware appraisals see, Hamermesh & Wachter, supra note 166 (exploring the alternative notions of valuation in the case law on fair value in appraisals). For discussion of the appraisal statute and its role in corporate law, see Robert B. Thompson, Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law, 84 GEO. L. J. 1 (1995); see also Randall S. Thomas, Revising the Delaware Appraisal Statute, 3 DEL. L. REV. 1, 16–17 (2000) (describing narrow scope of appraisal and situations where appraisal rights should exist).


186. Ordinarily, the consideration in the short form merger would be cash; but this is not necessarily the case. Appraisal is unavailable where the consideration in the merger is shares in the acquire. Id. It is not uncommon for a tender offer freezeout to offer shares of the acquirer as consideration, as was true in Pure. Pure, 808 A.2d at 421.

determine the fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation, together with interest, if any, to be paid upon the amount determined to be the fair value. In determining such fair value, the court shall take into account all relevant factors.

Valuation in appraisal actions is complicated by the fact that the statute provides only this very loose definition of fair value. Given the open-ended definition of fair value in the statute ("all relevant factors"), the task of creating a workably clear standard of "fair value" has fallen to the courts.

There are certain longstanding ambiguities in the definition of fair value reflected in the Delaware case law. The thorniest of these relates to which forms of post-merger gains should be included in "fair value." Leaving this significant problem aside, the core concept of fair value is clear, and has remained almost entirely constant through the years. Cashed-out shareholders are entitled to be paid the value of what has been taken from them in the merger. For purposes of an appraisal, corporate shares represent a pro rata interest in the company valued as a going concern. Accordingly, "fair value" is often referred to as "going concern value" or "intrinsic value." "Going concern value" as the core concept of "fair value" for appraisal purposes was firmly established in the Delaware case law by the mid 20th century, as reflected in the often cited case of Tri-Continental Corp. v. Battye. Thirty years later, the Supreme Court cited Tri-Continental favorably and expansively in Weinberger's landmark treatment of fair value in appraisals—again, validating the concept of valuing corporate shares as a going concern.

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'fair market value' or 'fair cash value.' Fair value is typically defined by statute as 'the value of the shares immediately before the effectuation of the corporate action to which the dissenter objects, excluding any appreciation or depreciation in anticipation of the corporate action.' (citations omitted)). 188. Del. Code tit. 8, § 262(h) (2007), amended by 76 Del. Laws ch. 145 § 14 (2007).

189. These ambiguities reflect the changing nature of the appraisal remedy. At first appraisal seems to have been intended to facilitate the law's abandonment of the universal consent requirement for fundamental corporate changes, which had allowed minorities the ability to hold up value-enhancing mergers with third parties. The appraisal remedy eliminated such hold-up potential, while compensating the dissenting shareholders for what they lost, and providing them liquidity. Over time, appraisal has become more important in preventing oppression by controllers in cash-out mergers. For discussion of the changing nature of the appraisal remedy and its impact on the development of the fair value concept, see Wertheimer, supra, note 166.


191. For treatment of this issue, see Hamermesh and Wachter, supra note 166, at 138 (presenting the argument in favor of employing a definition of fair value that encompasses not only "the current asset stock and the return on those assets" but also the value arising from "reinvestment in new assets").

192. See, e.g., Paskill Corp. v. Alcoma Corp., 747 A.2d 549, 553 (Del. 2000) (affirming that appraisals' fair value concept presumes that the cashed-out shareholders would have maintained their investment had the merger not occurred).

193. For analysis and citation to the cases, see Hamermesh & Wachter, supra note 166, at 137-39. For citation to extensive Delaware precedent preceding employing going concern value as the benchmark for fair value, see id. at 132 n.56.

194. Tri-Continental Corp. v. Battye, 74 A.2d 71, 72 (Del. 1950) ("The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern.").
the definition of fair value as going concern value. (It's remarkable but true that Weinberger both established the foundation of modern freezeout doctrine for cash-out mergers and also the foundations of modern appraisal methodology in relation to the fair value determination.) Weinberger rejected the mechanistic "Delaware block method" that had governed valuations in appraisal actions. In its place, the court endorsed "a more liberal approach...[to] include proof of value by any techniques or methods which are generally considered acceptable in the financial community..." Consistent with the forward-looking notion of going concern value and modern finance theory, discounted cash flow is the most accepted valuation methodology for appraisal actions. Most importantly for this discussion Weinberger affirmed that appraisal is intended to be an expansive remedy for cashed-out shareholders and that courts should proceed accordingly.

The expansive, forward looking interpretation of "fair value" established by Weinberger has held to the present. For example, the supreme court's decision in Glassman affirmed Weinberger's expansive approach to fair value analysis in appraisals. As stated in Glassman:

[It]he determination of fair value must be based on all relevant factors, including damages and elements of future value, where appropriate. So, for example, if the merger was timed to take advantage of a depressed market, or a low point in the company's cyclical earnings, or to precede an anticipated positive development, the appraised value may be adjusted to account for those factors.

Glassman's definition of fair value thus expressly speaks to the problem of opportunistic timing in cash-out mergers—which is a special concern in controllers' transactions. And Glassman, and the other contemporary cases interpreting fair

196. Id. at 713.
198. The court stated:
In determining what figure represents this true or intrinsic value, the appraiser and the courts must take into consideration all factors and elements which reasonably might enter into the fixing of value. Thus, market value, asset value, dividends, earnings prospects, the nature of the enterprise and any other facts which were known or which could be ascertained as of the date of merger and which throw any light on future prospects of the merged corporation are not only pertinent to an inquiry as to the value of the dissenting stockholders' interest, but must be considered by the agency fixing the value.

Weinberger, 457 A.2d at 713 (emphasis in original).
199. Glassman, 777 A.2d at 248 (emphasis in original).
value in appraisals, attribute little significance to the public trading price of the minorities’ shares, consistent with the concern over the minority discount.\textsuperscript{200} The logic of the fair value remedy (understood as going concern value) has held up remarkably well under contemporary financial economics.\textsuperscript{201} In particular, the fair value requirement would foster value-creating merger freezeouts so long as the minority shareholders are not left worse off—that is, so long as the merger is Pareto-superior.\textsuperscript{202} This fits with the economics-based logic that Delaware corporate law should encourage transactions that increase wealth overall—so long as no party to the transaction is rendered worse off.\textsuperscript{203}

Unfortunately, there are features of the appraisal statute that radically limit the utility of appraisal actions for minorities in freezeouts. These limits often make appraisals’ “fair value” an unattainable remedy for minorities in freezeouts.\textsuperscript{204} By far the most important limitation affecting appraisal rights is that they are unavailable to minorities who sell to a controller in a tender offer. As described previously, the Delaware statute contemplates that appraisals are not available in tender offers.\textsuperscript{205} In addition, appraisal is unavailable if the freezeout contemplates that the consideration in the merger will be securities in the controller, or in any publicly traded corporation, despite the controller’s ability unilaterally to determine the securities the minority will receive in the freezeout.\textsuperscript{206} Minorities who do not formally dissent from a cash-out merger prior to the shareholder vote thereon are precluded from pursuing an appraisal.\textsuperscript{207} Also, appraisal rights can be perfected only by the record holders of the shares—\textsuperscript{208}—which generates confusion and

\textsuperscript{200} See Emerging Commc’ns, 2004 Del. Ch. LEXIS 70, at *83–84 (“... the market price of shares is not always indicative of fair value. Our appraisal cases so confirm. ... Moreover, because Prosser always owned the majority interest, the market price of ECM stock always reflected a minority discount.”); Hamermesh & Wachter, supra note 166, at 132 (“If the shares’ current market price were used to value the firm, the controller would be encouraged to under-manage, since the more it did so, the less it would have to pay for the minority interest in a squeeze out merger.”).

\textsuperscript{201} For a discussion of corporate valuation in which going concern value approximates financial economists’ understanding of “fundamental value,” see Michael L. Wachter, Takeover Defense When Financial Markets Are (Only) Relatively Efficient, 151 U. Pa. L. Rev. 787, 798 (2003) (“[T]he corporation’s fundamental value is the sum of the free cash flows generated by the company’s assets.”). For further discussion of going concern value and DCF as a basis for valuation, see, e.g., Richard A. Brealey, ET AL., PRINCIPLES OF CORPORATE FINANCE, at 509–511 (8th ed. 2006).

\textsuperscript{202} For a discussion of Pareto efficiency versus Kaldor Hicks efficiency and their relevance to corporate fiduciary law, see, e.g. Rutheford B. Campbell, Jr., A Positive Analysis of the Common Law of Corporate Fiduciary Duties, 84 Ky. L. J. 455, 469–71 (1995–96) (proposing that corporate fiduciary law mandates managers to take all actions that “move corporate shareholders to Pareto superior states”).

\textsuperscript{203} Id. This logic is distinct from that which bars a corporate fiduciary from profiting at a beneficiary’s expense, as a mode of encouraging investment in the corporate form.

\textsuperscript{204} Observing the hurdles attendant to pursuing appraisal actions, commentators have noted the comparative paucity of appraisal actions since \textit{Weinberger} affirmed the equitable cause of action arising under the Entire Fairness standard. See Gilson & Gordon, supra note 5, at 789–99; \textit{Pure}, 808 A.2d at 436 n.20 (“Another underpinning of the \textit{Lynch} line of cases is an implicit perception that the statutory remedy of appraisal is a less than fully adequate protection for stockholders facing \textit{Inherent Coercion} from a proposed squeeze out merger.”).


\textsuperscript{207} See Del. Code tit. 8, § 262(d) (2007).

\textsuperscript{208} See Del. Code tit. 8, § 262(a) (2007).
administrative complexity that defeats some claims. The time period for initiating
an appraisal action is brief—120 days from the date of the merger.\textsuperscript{209} Hence it is
not uncommon for minority shareholders to miss the window of opportunity to
initiate an appraisal action. In addition, in order to proceed with an appraisal,
the plaintiff shareholders may be required to submit their stock certificates to the
Register in Chancery, and may have their action dismissed if they fail to submit
them.\textsuperscript{210} During the period of the proceedings—which typically last nearly four
years on average\textsuperscript{211}—the shareholders will not have received any consideration
for the sale of their shares.\textsuperscript{212} Finally, perhaps most significantly, the absence of
a class-based mechanism for proceeding in an appraisal action limits the efficacy
of the appraisal remedy and consequently minorities' recourse to fair value in
freezeouts.\textsuperscript{213} The costs of pursuing individual and even consolidated appraisal
actions are often prohibitive for minorities eliminated in freezeouts.

In sum, notwithstanding the clarity of appraisal's promise of going concern
value, the limits and practical hurdles that apply to appraisal actions have sent
negative signals to minorities about their potential to rely on appraisal actions
to obtain fair value in a freezeout. Controllers can significantly discount the cost
of judicial awards of fair value in appraisals as they weigh the relative benefits of
pursuing a freezeout and its optimal form from their perspective. In this regard,
the limitations inherent in appraisal actions have facilitated controllers' ability to
offer minorities less than going concern value even in a cash-out merger. These
limitations mean that the cause of action arising in equity under Lynch's Entire
Fairness standard is of great importance for minorities. Of course, in contemplating
a freezeout offer, controllers will compare the scope of both the fair value and
fair price actions against the absence of a fair price duty in their tender offers for
minority shares.

C. THE "FAIR PRICE" STANDARD APPLIED IN EQUITABLE
ACTIONS IN CASH-OUT MERGERS

Professors Gilson and Gordon have described the cause of action arising under
Lynch's Entire Fairness standard as "the equivalent of a class appraisal proceeding
without the need for shareholders actually to perfect their appraisal rights."\textsuperscript{214}
This statement fails to account for significant differences between the causes of
action for fair price and fair value, differences relevant not only to process (i.e. litiga-
tion) but also substantive differences in the potential remedies. Importantly, as
these professors suggest, the equitable fair price action is not limited in its efficacy
by the myriad requirements and qualifications that face minorities in appraisal

\textsuperscript{210} See \textit{Del. Code tit.} 8, § 262(g) (2007).
\textsuperscript{211} See Hamermesh & Wachter, \textit{supra} note 166, at 144 n.102 ("...the average appraisal proceed-
ing lasts nearly four years.").
\textsuperscript{213} See \textit{Del. Code tit.} 8, § 262(a), (j) (2007).
\textsuperscript{214} Gilson & Gordon, \textit{supra} note 5, at 831–32.
actions. Perhaps most importantly, minorities can proceed through a class action in Entire Fairness claims. This is a hugely important procedural difference, one which makes the cause of action under the Entire Fairness standard, and the fair price duty thereunder, an extraordinarily meaningful one for minorities.

Furthermore, notwithstanding the professors' suggestion about the equivalence between fair value and fair price, Weinberger and the cases applying it suggest that there may be meaningful valuation differences in these standards. In specific, fair price may provide a more expansive measure of damages for minorities in freezeouts. If the controller is found culpable of gross misconduct, as stated in Weinberger "[the] appraisal remedy... may not be adequate in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved." This difference between the more limited scope of the appraisal remedy and the potentially more expansive scope of the remedy in a fiduciary action against a controller in a cash-out merger has been affirmed by the Delaware Supreme Court, for example in Cede & Co. v. Technicolor, Inc. In appraisal actions, going concern value reflects the upper limit of a recovery. The dissenting shareholders can anticipate a maximum benefit from the appraisal proceedings of the "fair value" of what was taken from them in the cash-out merger. The court in an appraisal has discretion also to award interest going back to the merger date, to compensate for the value-loss attributable to the delayed payout, as well as the award of litigation costs. But based on the statute and its interpretation in the case law, the computation

215. Lynch, 638 A.2d at 1111 (noting that the plaintiff brought a class action on behalf of all shareholders of the acquired company whose stock had been procured through the merger).
216. Weinberger, 457 A.2d at 711; Lynch, 638 A.2d at 1115 (citing Weinberger).
217. Weinberger, 457 A.2d at 714.
218. The Delaware Supreme Court stated:

To summarize, in a section 262 appraisal action [under the DGCL] the only litigable issue is the determination of the value of the appraisal petitioners' shares on the date of the merger, the only party defendant is the surviving corporation and the only relief available is a judgment against the surviving corporation for the fair value of the dissenters' shares. In contrast, a fraud action asserting fair dealing and fair price claims affords an expansive remedy and is brought against the alleged wrongdoers to provide whatever relief the facts of a particular case may require. In evaluating claims involving violations of entire fairness, the trial court may include in its relief any damages sustained by the shareholders. See Rabkin, 498 A.2d at 1107; Weinberger, 457 A.2d at 713. In a fraud claim, the approach to determining relief may be the same as that employed in determining fair value under 8 Del. C. § 262. However, an appraisal action may not provide a complete remedy for unfair dealing or fraud because a damage award in a fraud action may include "rescissory damages if the [trier of fact] considers them susceptible of proof and a remedy appropriate to all issues of fairness before him." Weinberger, 457 A.2d at 714. Weinberger and Rabkin make this clear distinction in terms of the relief available in a section 262 action as opposed to a fraud in the merger suit.

Cede, 542. A.2d at 1187–88 (citations in the original). Compare Emerging Commc'ns, 2004 Del. Ch. LEXIS 70, at *94–95 (noting that in an appraisal the court may compute a prejudgment interest award to effect disgorgement by the acquirer of any benefit obtained from the use of the funds, as well as the lost time value of the money; citing Cede & Co. JRC Acquisitions Corp., No. 18648, 2004 WL 286963, at *12 (Del. Ch. Feb. 10, 2004)).
of fair value is supposed to be blind to malfeasance by an acquirer—even if it is a controller, i.e. a fiduciary. In this regard, appraisal under-deters fiduciary wrongdoing in freezeouts. In contrast, if a controller has been found culpable of fraud or significant overreaching in an action under the Lynch Doctrine, it may be forced to pay a larger award to the plaintiffs. This flows from the express language of Weinberger cited above.\textsuperscript{221}

Indeed, the structure of remedies for breach of fiduciary loyalty, consistent with the expansive fair price remedy established in Weinberger, allows disgorgement of profits obtained as the result of a breach of duty. For example, where a corporate fiduciary is found culpable of taking a corporate opportunity, the Delaware courts have endorsed the imposition of a constructive trust on the profits arising from the seizure of the business opportunity.\textsuperscript{222} In addition, where a fiduciary has exploited its access to confidential information for the purpose of personally profiting from this information, the shareholders may bring a derivative action to require the disgorgement of such profits, even absent a showing of harm to the corporation.\textsuperscript{223} Hence, the remedy available in the cause of action for fiduciary breach against controllers in cash-out mergers (i.e. fair price) is broader at the upper end, than the remedy of going concern value applied in appraisals.

Commentators have generally assumed that in nonfraudulent cash-out mergers by controllers, the fair price remedy is the same as appraisal's "fair value"—i.e. going concern value. Weinberger suggests that this should often be the case; that the fair price determination in nonfraudulent transactions will be analogous to the expanded fair value remedy it affirms for appraisals.\textsuperscript{224} However, if appraisal affords minorities only the fair value of what is taken in the cash-out merger, then an analogous fair price standard allows controllers to capture all the anticipated synergy gains from the cash-out merger. If "fair value" and "fair price" are intended to be equivalent then fair price may exist even if the minority receives no financial benefit from the transaction. The standard of fair price asks only whether the minority was injured by the cash-out merger, in comparison to its financial position \textit{ex ante}. This standard for fair price would be unusual as applied

\textsuperscript{221} See Weinberger, 457 A.2d at 714.
\textsuperscript{222} See e.g. Guth v. Loft, 5 A.2d 503, 510–11 (Del. 1939) ("[i]f, in such circumstances, the interests of the corporation are betrayed, the corporation may elect to claim all of the benefits of the transaction for itself, and the law will impress a trust in favor of the corporation upon the property, interests and profits so acquired;... a constructive trust is the remedial device through which precedence of self is compelled to give way to the stern demands of loyalty."); see also Eric G. Orlinsky, Corporate Opportunity Doctrine and Interested Director Transactions: A Framework for Analysis in an Attempt to Restore Predictability, 24 Del. J. Corp. L. 451, 524–25 (1999).
\textsuperscript{223} See Oberly v. Kirby, 592 A.2d 445, 463 (Del. 1991) ("It is an act of disloyalty for a fiduciary to profit personally from the use of information secured in a confidential relationship, even if such profit or advantage is not gained at the expense of the fiduciary. The result is nonetheless one of unjust enrichment which will not be countenanced by a Court of Equity."); see also Brophy v. Cities Service Co., 70 A.2d 5, 7–8 (Del. Ch. 1949).
\textsuperscript{224} Weinberger, 457 A.2d at 714 ("... a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established, we do not intend any limitation on the historic powers of the Chancellor to grant such relief as the facts of a particular case may dictate.").
to a self-dealing transaction. Entire Fairness analysis (should require) that the transaction be *mutually* beneficial to be fair.225

Consistent with this idea, at several points *Weinberger* suggests that even absent wrongdoing, the fair price standard for cash-out mergers is broader than the fair value standard in appraisals.

Perhaps most importantly, *Weinberger* repeatedly states that fairness in a cash-out merger must be equated to the outcome that would occur if the parties were dealing at arms' length where a transaction occurs if mutually beneficial. As stated in *Weinberger*'s famous footnote 7:

...fairness in this context can be equated to conduct by a theoretical, wholly independent board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. ...Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the parties had exerted its bargaining power against the other at arms' length is strong evidence that the transaction meets the test of fairness.226

The importance of this approach to fair price analysis under the Entire Fairness standard is that a wholly independent board would not agree to a transaction that conferred no monetary benefit on the minority shareholders, but merely left them no worse off. Hence, this oft-cited passage from *Weinberger* supports a broader understanding of "fair price" than the "fair value" determination relevant in an appraisal, even absent wrongdoing by the controller.

This same logic, that fair price encompasses a broader measure of value than *ex ante* going concern value, also explains one of the most puzzling features of the *Weinberger* decision. *Weinberger* admonishes that the determination of fairness is not a bifurcated one between fair price and fair process.227 (As stated previously, in appraisals the court does not consider the relevance of fair dealings to fair value.) By insisting that the fairness of the price is not independent of the negotiating process in a cash-out merger, *Weinberger* affirms a larger metric of value under the rubric of "fair price" because an independent board negotiating at arm's length would not agree to a transaction that did not financially benefit the minority shareholder. Thus, "fair price" affords the minority some measure of the synergy gains arising from the acquisition and may exceed "fair value's" *ex ante* going concern value.228

This higher base-line value in the fair price construct also explains another controversial passage in *Weinberger*—that is, where the court discusses what forms of post-merger gains are to be incorporated into the new, unitary measure of value

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225. See, e.g., Fleigler v. Lawrence, 361 A.2d 218, 221 (Del. 1976) (requiring controller/director to establish that sale of assets to corporation was beneficial to the minority/corporation, in order to meet the fair price criteria of the Entire Fairness standard).
227. Id. at 711.
228. In the terminology employed by Professors Gordon and Gilson, the fair price element of the Entire Fairness standard ensures the minority a price that reflects the outcome of bargaining in a bilateral monopoly, where a deal doesn't happen unless the welfare of each party is improved. *Gilson & Gordon, supra* note 5, at 804.
for fiduciary actions and appraisals. While the appraisal statute expressly states that post-merger gains are to be excluded from “fair value,” Weinberger states that only “speculative elements of value that may arise from the ‘accomplishment or expectation’ of the merger” should be excluded in remedies for breach of fiduciary duties. That is, reflecting its instinct that minorities will benefit from a uniform legal price standard for actions against cash-out mergers, the court expands the scope of the fair value remedy to equate it with a “fair price” measure based on arms’ length dealings.

D. THE NEED FOR A UNIFORM STANDARD REQUIRING CONTROLLERS TO PAY A FAIR PRICE IN FREEZEOUTS

The above analysis reveals three reasons why the cause of action against controllers under the Entire Fairness standard is not a gratuitous add-on to the cause of action established by the appraisal statutes—hence, three reasons why it is of great importance to minorities. The first is that the limits and burdens attendant to pursuing appraisal actions hinder a significant number of meriticious “fair value” claims from proceeding. Minority shareholders who have been undercompensated in a freezeout may have no practical remedy at all absent an action in equity. Second, the Lynch Doctrine backs the prohibition on overreaching and fraud by controllers with added bite by providing for an expansive damages remedy in cases where wrongdoing by the controller in a cash-out merger has been proven. The third is that the “fair price” requirement under the Entire Fairness standard contemplates that the controller (as a fiduciary) must offer a price that leaves the minority shareholders, at least in some measure, better off from the freezeout—not merely “no worse off.” Consistent with the dictates of fiduciary duty, the Entire Fairness standard looks not only to efficiency in an economist’s sense (as gains overall) but also to the distribution of gains arising from equity investment and how that distribution affects the parties’ investment costs and incentives.

This discussion yields several insights. First, freezeout doctrine is presently underserving minorities’ interests. The power advantages possessed by controllers mean that controllers can exploit the disparities in legal price regimes described above through “structural arbitrage.” In effect, minorities’ financial entitlements in freezeouts are a moving target with controllers having the power to “do all the moving.”

Second, given these highly complex and nonequivalent legal constructs relevant to pricing in freezeouts, it is highly unlikely that the securities markets are

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230. Weinberger, 457 A.2d at 713. To emphasize the narrowness of this exclusion the opinion provides: “We take this to be a very narrow exception to the appraisal [valuation] process, designed to eliminate the use of pro forma data and projections of a speculative variety relating to the completion of a merger.” Id. Again, as Professors Hamermesh and Wachter have illuminated in their discussion of “fair value” valuation, going concern value in an appraisal should not allocate any synergy-specific gains from the merger to the minority. Hamermesh & Wachter, supra note 166, at 148–50.
231. Weinberger, 457 A.2d at 713.
able accurately to price the risks attaching to minority equity investment. Thus, the three non equivalent price regimes in corporate law may inadvertently help controllers profit unfairly by selling minority equity stakes when the minorities' vulnerability to controllers' financial overreaching is not fully evident. A uniform, clear fair price standard applicable in equitable actions against freezeouts would limit controllers' ability to exploit this market failure.

Finally, if Professors Gilson and Gordon are correct that there is an inevitable interrelationship between the fiduciary safeguards that shape the conduct of controllers in relation to operating decisions, sales of control and freezeout transactions, then the looser standards in tender offer cases represents a vulnerability that (if accurately perceived) would negatively affect firms' cost of capital. Firms that have recently been taken private will soon seek to sell minority equity stakes in the public markets. If the fair price disparities in freezeout doctrine are not resolved adequately, then minorities should pay relatively less for these securities than they would otherwise. This would be a bad result for the economy and investors overall.

At present there is one important limit to controllers' capacity to obtain "the best of all possible freezeouts" through structural arbitrage. Once the controller has executed a cash-out merger agreement with the target company, the Entire Fairness standard "sticks" to the freezeout irrespective of any subsequent structural modifications. Even if the controller abandons the negotiated merger agreement and consummates the deal through a combined tender offer and short-form merger, the courts apply the Entire Fairness standard to the entire freezeout. This feature of freezeout doctrine has never been explicitly recognized in the case law or academic commentary. Nor has it been tested through litigation. Nevertheless, the Entire Fairness standard presently operates as a significant backstop protecting minority shareholders' interests in freezeouts. It gives minority shareholders some meaningful leverage in cash-out merger freezeout negotiations and limits the benefits controllers can obtain through structural arbitrage in freezeouts. If the Cox Reforms are affirmed as binding however, and the scope of Entire Fairness review in freezeouts is significantly curtailed, minorities will lose this important feature of their negotiating leverage, and controllers' will have greater capacity to compel unfair freezeouts.

In light of the uncertainty being created by the "two tracks" in freezeout doctrine, the Delaware courts should adopt a unified standard of fair price for freezeouts. The laissez faire approach endorsed in Solomon is inferior to the Lynch Doctrine's fair price standard. If the courts allow the market price to become the benchmark for fair price, they will be fostering a cycle of overreaching by controllers that would be detrimental not only to investors but also to firms seeking to sell minority equity stakes. These economic arguments underscore this Article's recommendation for applying the Entire Fairness standard to both forms of freezeouts.

232. Gilson & Gordon, supra note 5, at 785 (arguing that an equivalent degree of rigor should apply in the fiduciary standards that shape controllers' receipt of private benefits in operating decisions, sales of control and freezeouts).
III. THE COURTS' AMBIGUOUS TREATMENT OF CONTROLLERS' DUTIES IN TENDER OFFER FREEZEOUTS

This section of the Article focuses on the court of chancery's recent reforms to tender offer freezeout doctrine. In particular, it finds fault with the notion endorsed by Pure and Cox that allowing business judgment deference in the presence of Dual Ratification would represent only a minor "easing" of the Entire Fairness standard in freezeouts. Pure and Cox endorse several new criteria that controllers must follow in order for their tender offer freezeouts to qualify as non-coercive and be eligible for deferential review. However, these new standards are incomplete and easily subject to manipulation by controllers, especially because, as Pure and Cox present them, they are divorced from the conceptual moorings of the duty of fair dealings. In addition, Pure and Cox eschew imposing a duty of fair price on controllers' tender offer freezeouts, which has profoundly negative implications for minorities negotiating these deals. Hence, the new standards would exacerbate the minority discount and further controllers' capacity to profit from this discount in freezeout tender offers.

This section provides a critical analysis of the Solomon, Glassman, and Siliconix decisions, which provide an essential backdrop to understanding the reforms proposed in Pure and Cox. This Part III concludes that the shift to deferential review endorsed in Pure and Cox would unacceptably jeopardize minorities' interests in freezeouts and thus have negative spillover effects for firms and markets.

A. BACKGROUND TO THE RECENT TENDER OFFER FREEZEOUT CASES

1. The Solomon Decision

Solomon has been accepted as the landmark decision governing controllers' fiduciary duties in tender offers. This is surprising in several respects. First, the opinion is only an affirmation by the Delaware Supreme Court of the court of chancery's grant of the defendant's motion to dismiss. Thus, the substantive questions of fiduciary duty which were at the heart of the plaintiffs' complaint did not receive the benefit of a trial.

Secondly, Solomon includes only a brief discussion of substantive questions of fiduciary law—that is, controllers' and directors' duties in tender offers. Most
of the opinion focuses on the pleading standards applicable to fiduciary class actions, and the question of when complaints in such actions may be dismissed for failure to state a claim.240 The plaintiffs argued that the lower court had erroneously applied a heightened pleading standard, but the supreme court disagreed and affirmed the dismissal.241

That the transaction disputed in Solomon was not a genuine freezeout adds to the incongruity of the opinion's stature in freezeout doctrine. The controller, Credit Lyonnais Bank, was conducting a tender offer for the small slice of Pathe Communications' public equity that it did not own, while simultaneously foreclosing on the 89.5% interest that it held as collateral on a loan. On the day the tender offer was announced, the controller initiated an auction to sell the 89.5% stock interest subject to the pledge.242

Although the case is accepted as landmark precedent on the scope of controllers' duties in tender offers, the plaintiffs' amended complaint (as described by the supreme court) alleged only fiduciary breaches against the target company's directors.243 Reading Solomon closely, it seems as if the court is unclear about whether it was supposed to rule on the propriety of the controller's or the directors' conduct, and the opinion is certainly unclear about the connection between these two issues. The court notes that there were only two counts in the amended complaint—both against the directors. The first count described in the opinion alleged breach of care by the target directors for failing to "negotiate a sufficient tender offer price;" the second alleged that the directors failed to oppose the tender offer.244 The supreme court affirmed the court of chancery's decision that both failed to state a claim upon which relief could be granted.245

Instead of addressing the matter complained of by the minority (i.e. the directors' passivity), the supreme court quoted the Chancellor is finding that there cannot be "a fleeting doubt of the fairness of the... $1.50 tender offer price."246 That is, the court provide no explanation for why the directors' passive conduct in the face of the controller's offer satisfied their fiduciary duties to the minorities. The court's failure to consider the substance of the plaintiffs' claims is especially odd because these were essentially breach of care claims, and in breach of

240. Id. at 38-39.
241. Id. at 39.
242. Id. at 37. Given the factual circumstances noted in the opinion, it is likely that the bank's tender offer was intended to push its ownership over the 90% threshold, so that it would be able to obtain a higher price in the sale of Pathe's stock by conveying to a third party the right to execute a short-form merger—but that, like other important features of the case, is not discussed in the Delaware Supreme Court's opinion.
243. Id. at 39.
244. Id. at 39. Earlier in the opinion the complaint is described as alleging a breach of loyalty against the controller, based on the "coercive" tender offer price. Id. at 37.
245. Id. at 39. For a discussion of the standards relevant to dismissal of a shareholder complaint in a class action against a controller, see Rabhin v Philip A. Hunt Chem. Corp., 498 A.2d 1099, 1104 (Del. 1985) (in order to sustain a motion to dismiss a complaint for failure to state a claim, the court must conclude, with reasonable certainty, that the plaintiff cannot prevail and would not be entitled to the relief sought under any set of facts that could be proven to support the claims).
246. Solomon, 672 A.2d at 39.
care claims the Delaware courts usually focus on the adequacy of the process followed by the directors, rather than the substance of the transaction or the result of the decision.\footnote{247}{See, e.g., Smith v. Van Gorkom, 488 A.2d 858, 877 (Del. 1985) ("Here, the issue is whether the directors informed themselves as to all the information that was reasonably available to them.").}

The Solomon court avoided inquiring about the adequacy of the target directors' actions or deliberations in responding to the controller's offer.\footnote{248}{Solomon, 672 A.2d at 39.} Solomon's failure to discuss the extent of target directors' defensive duties and authority in controllers' tender offers is a major shortcoming in the opinion. It has dampened the development of the Delaware case law on this subject to this day.\footnote{249}{Solomon, 672 A.2d at 39.}

Returning to Solomon's discussion of controllers' duties in tender offers, it too is quite problematic. First, again, it is unrelated to the claims brought by the plaintiffs, which alleged fiduciary breaches by the target directors. Second, it is logically unmoored from the rest of the discussion of fiduciary duty—that is, there is no necessary connection between whether controllers have a fair price duty and whether the directors have adequately fulfilled their fiduciary duties in responding to the controller's offer. These two legal issues are not interdependent, despite the opinion's suggestion that they are. On the issue of the adequacy of the price offered, in the dictum that has made the case famous, the court stated: "[i]n the case of totally voluntary tender offers... courts do not impose any right of the shareholders to receive a particular price."\footnote{250}{Solomon, 672 A.2d at 39.} This assertion is problematic. Solomon declares that controllers have no fair price duty as if this issue was resolved—which it was not—and then cites precedents which presumably support this principle, although they do not.\footnote{251}{See infra notes 314-32 and accompanying text.}

In specific, Solomon cites the Vickers Energy litigation and the Weinberger decision\footnote{252}{Solomon, 672 A.2d at 39 (citing Lynch v. Vickers Energy Corp. 351 A.2d 570, 576 (Del. Ch. 1976), rev'd on other grounds, 383 A.2d 278 (Del. 1977); Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983)).} as support for the absence of a fair price duty on the part of a controller in a tender offer for minorities' shares. However, as clarified below, neither of these two decisions come close to supporting the conclusion that no fair price duty applies to controllers in their offers to purchase minorities' shares. The lower court opinion cited by the court in the Vickers Energy litigation was overturned on appeal in a manner that casts doubt on the portion of the opinion cited in...
Solomon. As for the citation to Weinberger (which involved a cash-out merger), that opinion is wholly silent on the issue of controllers' duties in tender offers. Nothing expressly stated or even implied in Weinberger suggests that controllers do not have a fair price duty in a tender offer for minorities' shares. And Weinberger unequivocally affirms that controllers do have a fair price duty in a cash-out merger, so it certainly is not "soft" on the fair price question. Hence, Solomon interprets the decisions in Vickers Energy and Weinberger far too expansively, if not incorrectly.

Nor is Solomon faithful to the spirit of the Vickers' Energy or Weinberger decisions, both of which place tremendous importance on corporate law's role in supporting minority shareholders' capacity for free choice. In sum, although Solomon is cited as landmark precedent for the principle that controllers do not have a legal fair price duty in a tender offer to purchase the minorities' shares, the opinion nowhere provides any satisfying legal rationale for this conclusion.

Even more troublingly, at the same time that Solomon invokes the notion that minority shareholders can make "voluntary" choices in responding to controllers' tender offers as the basis for rejecting a fair price duty, the court fails to give serious consideration to what constitutes a totally noncoercive, "voluntary" tender offer by a controller. Instead of exploring the power dynamics affecting controllers' tender offers and minorities decision-making therein, Solomon accepts that "total voluntariness" in relation to minorities' decision-making means only an absence of coercion or fraud by the controller. Seven years later, in his opinion in Pure, Vice-Chancellor Strine explores this gap between controllers affirmatively acting to support minorities' ability to make free choices and controllers' engaging in prohibited coercion and fraud. But there is no hint of controllers having any affirmative

253. Lynch v. Vickers Energy Corp., 351 A.2d 570 (Del. Ch. 1976), rev'd, 383 A.2d 278 (Del. 1977). The decision to which the Solomon court refers is the earlier Delaware Court of Chancery case. Solomon, 672 A.2d at 39. The precise language in Vickers Energy which the Solomon court relies upon is as follows:

There is no provision in the Delaware Corporation Law and it would not be appropriate under equitable principles, in my opinion, to bind an offeror in a situation such as the one at bar to an implied commitment to pay an additional consideration for tendered shares in an amount made up of the difference between the price offered and what might ultimately be found to be the intrinsic value of the shares in question.


254. Weinberger, 457 A.2d at 711.

255. Id.; Lynch v. Vickers Energy Corp., 383 A.2d 278, 281 (Del. 1977) (holding controllers to a standard of "complete candor" rather than mere adequacy in their tender offer disclosures, in light of their opportunity to exploit 'special knowledge' they gained as insiders, to the offerees' detriment).

256. See Solomon, 672 A.2d at 39.

257. Id.

258. Id. (citing Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, 1056 (Del. Ch. 1987) (providing a rare treatment of the features which would constitute coercion in this setting)). For further discussion of the Delaware case law on inequitable coercion, see, e.g., Dennis J. Block and Jonathan M. Holl, The Doctrine of Inequitable Coercion under Delaware Law, 221 N.Y.L.J. 5 (Apr. 22, 1999).

259. Pure, 808 A.2d at 445-46.
obligations as fiduciaries to facilitate minorities informed decision making in the
supreme court's treatment of controllers' tender offers in Solomon.260

These are profound shortcomings in Solomon's treatment of minorities' entitle-
ments and directors' and controllers' duties in tender offers. They have been made
more serious by the fact that the supreme court has not had an occasion to recon-
sider these issues in subsequent years.

2. The Glassman Decision

It was only in 2001 that the Delaware Supreme Court resolved that the business
judgment rule rather than the Entire Fairness standard would apply in short-form
mergers.261 The supreme court's 1971 opinion in Schnell v Chris Craft Industries, Inc.
expressly validated courts' equitable authority to supplement statutory mandates
in matters of corporate governance.262 Schnell provided authority for applying the
Entire Fairness standard to short-form mergers, since the principles endorsed in
Schnell were applied most commonly to situations where the board's or the share-
holders' usual scope of authority had been undermined, or improperly circum-
scribed.263 Short-form mergers are intriguing in this regard, because the statute's
terms contemplate controllers bypassing the target's board and also the minority
shareholders in purchasing the remaining outstanding shares.264 The Lynch deci-
sion had also contributed to the impression that Entire Fairness was the appropri-
ate standard of review for short-form mergers. Lynch described Entire Fairness as
the "exclusive" standard of review for parent companies' cash-out mergers of their
subsidiaries.265

Weighing against the application of Entire Fairness, however, was the Delaware
Supreme Court's 1962 decision in Stauffer v. Standard Brands, Inc.266 In Stauffer
the court held that absent fraud or wrongdoing, appraisal would be the sole remedy
available to dissatisfied minorities contesting a short-form merger.267 Controllers
considering going private based on tender offers anxiously awaited the supreme
court's resolution of whether Entire Fairness would apply to the short-form
merger portion of a tender offer freezeout.

261. See In re Unocal Exploration Corp. S'holders Litig., 793 A.2d 329, 338 n.26 (Del. Ch. 2000),
not become permissible simply because it is legally possible.").
consent solicitation had begun, designed for purpose of thwarting a shareholder vote, held to violate
fiduciary duties despite their conformity with statutory provisions, consistent with Schnell).
265. Lynch, 638 A.2d at 1118 ("Once again, this Court holds that the exclusive standard of judicial
review in examining the propriety of an interested cash-out merger transaction by a controlling or
dominating shareholder is entire fairness."). The Lynch decision nowhere expressly discussed short-
form mergers, however.
267. Id. at 80.
In 2001, the supreme court held in *Glassman v. Unocal Exploration Corp.* that courts would not apply an equitable, fair dealings requirement to short-form mergers, on grounds that doing so would conflict with the streamlined process envisioned in the statute itself.268 Reviewing the supreme court's decision, it is apparent that the court did not consider the issue cut and dried. The court discussed five decades of equitable decision-making in long and short-form mergers before it announced that deference to the legislature precluded applying equitable fair dealings standards to short-form mergers.269 *Glassman* held, furthermore, that in light of the absence of the fiduciary fair dealing requirement, valuation disputes in short-form mergers would henceforth be reviewable exclusively through the appraisal process.270 Appraisal would provide the exclusive recourse for aggrieved shareholders in short-form mergers "absent fraud or illegality."271 Hence, after 2001, controllers were empowered to proceed with short-form mergers unilaterally—that is, without consultation with the target's directors or minority shareholders (consistent with the terms of the statute).272 Controllers were also spared being "second-guessed" by the courts in equitable actions, consistent with *Glassman.*273

However, subsequent courts have read *Glassman* too broadly—as support for a very narrow role for equity in tender offer freezeouts.274 In *Glassman* there was no "premeditated" combination of a tender offer and short form merger by a controller—hence no tender offer freezeout as presently understood.275 Furthermore, because prior to *Glassman* controllers had very rarely relied on tender offers as vehicles for going private, there is reason to doubt that the supreme court contemplated the relevance of its holding for tender offer freezeouts.276 And in the six years since *Glassman*, moreover, the Delaware Supreme Court has not had an occasion to rule on a tender offer freezeout.

For the reasons described above, *Glassman* is questionable authority for the view that controllers have no equitable fair price or fair dealings obligations in tender offer freezeouts. On the same basis, the decision should not be interpreted to resolve that there are two distinct tracks in freezeout doctrine. In this regard, the court of chancery decisions addressing tender offer freezeouts have over read the combined effect of *Solomon* and *Glassman*, and have gone too far in invoking them as a spring board for deregulating freezeout doctrine.

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269. *Glassman*, 777 A.2d at 247-48 ("The equitable claim plainly conflicts with the statute. If a corporate fiduciary follows the truncated process authorized by § 253, it will not be able to establish the fair dealing prong of entire fairness. If, instead, the corporate fiduciary sets up negotiating committees, hired independent financial and legal experts, etc., then it will have lost the very benefit provided by the statute.").

270. Id. at 248.

271. Id.


274. For a discussion of the residual ambiguity in the opinion, see Marc I. Steinberg, *Short-Form Mergers in Delaware*, 27 Del. J. Corp. L. 489 (2002).


3. In re Siliconix—Delaware's First True Tender Offer Freezeout Decision

a. Siliconix's Facts

In Siliconix the court of chancery had an opportunity to review a true tender offer freezeout—a going private transaction consciously structured by a controller as a combined tender offer and short-form merger.277 Siliconix provides a provocative illustration of how far a controller could go in exerting a dominating influence over the controlled company's board and minority shareholders, while successfully avoiding judicial intervention on grounds that it had committed fraud and coercion.278 The target of the freezeout was Siliconix Inc., a NASDAQ listed technology company that had suffered through the market correction of early 2000.279 The controller, Vishay Intertechnology Inc, owned 80% of Siliconix's stock and operated in the same line of business as Siliconix.280 As described by the court, Vishay was attempting to exploit what appeared to be a fleeting opportunity to acquire Siliconix's publicly traded shares at a favorable price. Indeed, the freezeout allowed Vishay to eliminate a potential competitor.281

In February of 2001, without prior notice, Vishay announced a cash tender offer for all of Siliconix's shares.282 Its SEC filings and public disclosures declared Vishay's probable intention to consummate a short-form merger after the tender offer—hence, the minority shareholders could not assume they would have appraisal rights if they refused to tender to the controller.283 Vishay also announced that Siliconix would probably be delisted from the NASDAQ at the conclusion of the tender offer.284 This announcement, logically, would have deepened the minority's concerns about the diminished liquidity their shares would suffer after the tender offer's consummation. In these disclosures Vishay was also equivocal about its motives for the freezeout.285 And notwithstanding the applicable federal and fiduciary disclosure requirements, Vishay failed to enunciate a rationale for the price it was offering to pay for the minorities' shares.286 In these respects

277. In fact, the controller remained somewhat indecisive about its intention to complete the short-form merger. The effect of that, however, was to make the target stockholders' decision to refuse to tender more perilous, because appraisal rights would not be triggered without a short-form merger. In re Siliconix, Inc. S'holders Litig., C.A. No. 18700, 2001 WL 716787, at *2 (Del. Ch. June 19, 2001).

278. Id. at *15 (“I now turn to the instances alleged by Fitzgerald to constitute actionable coercion.”). Prior to Siliconix, the most telling case on the question of what “pressure” from controllers constituted “coercion” in equity was Eisenberg v. Chicago Milwaukee Corp., 537 A.2d 1051, 1056 (Del. Ch. 1987).

279. Siliconix, 2001 WL 716787, at *2, *4–5. Siliconix's stock price and product performance were showing signs of a rebound at the time of the buyout offer; however, the stock's price had advanced only slightly from its recent historic low.

280. Id. at *1.

281. Id. at *2.

282. Id.

283. Id.

284. Id. at *16 (finding that this declaration, too, was not coercive).

285. Id. at *12.

286. Id.
Vishay's disclosures skirted the edge of what was legally acceptable under both federal law and fiduciary disclosure mandates.\textsuperscript{287}

Vishay's tactics suggested at best a perfunctory effort to comply with the established transactional choreography for freezeouts—perhaps the very least a controller could do to avoid a judicial finding that it had acted coercively. The \textit{Siliconix} opinion describes at length many reasons to be concerned that the controller acted coercively in the transaction. For example, although Vishay declared its willingness to negotiate with a special committee of Siliconix's independent directors,\textsuperscript{288} the resulting committee was quite obviously dominated by Vishay.\textsuperscript{289} The two special committee directors each had substantial ties to Vishay. One of them had been Vishay's lawyer until shortly before the transaction.\textsuperscript{290} The other “had been active in providing banking services” to Vishay several years earlier.\textsuperscript{291} In addition, both special committee directors “were friends of Vishay management,” including the chief negotiator for Vishay in the freezeout.\textsuperscript{292} Moreover, the aforementioned lawyer-director had been appointed to Siliconix's special committee at the suggestion of the person who would become Vishay's principal negotiator.\textsuperscript{293} There was evidence, also, that the two special committee directors would receive a “special fee” contingent on the controller's consummation of the freezeout—which seems shocking given their role as agents for the minority in the freezeout negotiations.\textsuperscript{294} Hence there was no basis for the parties or the court to assume the independence of the committee directors who ostensibly represented the minority in the “negotiations” with the controller. Indeed, the court noted that the independence of the special committee members was debatable.\textsuperscript{295}

As to advice from outside experts, Vishay was allowed to vet the special committee's selection of its outside financial advisers.\textsuperscript{296} And the financial advisers’ fee, too, was contingent on the freezeout's consummation!\textsuperscript{297} Finally, Siliconix's special committee was cautioned by its legal advisers that “Vishay could not be compelled to sell its stake in Siliconix” and could “commence a unilateral offer at any time.”\textsuperscript{298} The court's extensive recitation of the facts suggests that the committee's legal or financial advisers did not work aggressively in the minorities' best interest. In fact, the court's recital of the facts reads like a “worst case scenario” of corporate governance in freezeouts. The court describes extensive evidence of domination and coercion by the controller: the compromised composition of the committee,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} For the discussion of the fiduciary disclosure requirement, see \textit{id.} at *9–14.
\item \textsuperscript{288} Id. at *2.
\item \textsuperscript{289} Id.
\item \textsuperscript{290} Id.
\item \textsuperscript{291} Id.
\item \textsuperscript{292} Id.
\item \textsuperscript{293} Id.
\item \textsuperscript{294} Id.
\item \textsuperscript{295} Id. at *2 n.4.
\item \textsuperscript{296} Id. at *3.
\item \textsuperscript{297} Id. at *3 & n.7 (the court called attention to the $1.75 million fee to be paid to Lehman, the special committee's advisers, upon the closing of the transaction).
\item \textsuperscript{298} Id. at *3.
\end{itemize}
\end{footnotesize}
the ambiguous and incomplete disclosures, the vetting of the committee's advisers, the problematic "special fee" arrangements affecting the committee and its financial adviser, the unilateral switch to stock consideration, and the surprise timing of the original offer. And still the court rejected the minorities' requested injunction and ruled in favor of the controller.

Although Siliconix pays lip service to Solomon's criteria of "total voluntariness," based on the facts described in the opinion, there were many factors that inhibited the shareholders' free choice in regard to Vishay's tender offer. As stated above, Vishay's Williams Act and Schedule 13e-3 disclosures were equivocal about its motive for going private, and silent regarding the basis for the price it was offering. In addition, Siliconix's directors assumed a posture of neutrality in the Schedule 14D-9, so the minority investors did not have guidance from their directors in evaluating the merits of the offer. Finally, the special committee did not attempt to obtain a fairness opinion from its financial advisors—so this information, too, was unavailable for the minority's consideration.

In regard to the financial merits of the freezeout offer, the court stated that in its original cash offer, Vishay "made no effort to value Siliconix," but instead merely applied a 10% premium to the prevailing public trading price of the stock. It also observed that Vishay even lowered its final offer as part of its switch to stock consideration. In addition, the switch to stock consideration and finalization of the offer's other basic terms were resolved and publicized without prior notice to the special committee. The controller's only bow to concerns over fair process was its apparent observance of a "majority of the minority" minimum tender condition. In sum, Vishay's tender offer freezeout for Siliconix's outstanding publicly-traded shares presents remarkable facts, facts that suggest patent coercion and overreaching on the controller's part.

299. Id. at *6 ("However, this Court will intervene to protect the rights of the shareholders to make a voluntary choice."). Compare Solomon, 672 A.2d at 39 ("In the case of totally voluntary tender offers, as here, courts do not impose any right of the shareholders to receive a particular price." (citations omitted)), with Siliconix, 2001 WL 716787, at *15 ("A tender offer is coercive if the tendering shareholders are 'wrongfully induced by some act of the defendant to sell their shares for reasons unrelated to the economic merit of the sale.' The wrongful acts must 'influence in some material way' the shareholder's decision to tender. I now turn to the instances alleged by Fitzgerald to constitute actionable coercion."
(citations omitted)).


301. Id. at *5 ("... [The Schedule 14D-9] reported that the Special Committee has determined to remain neutral and make no recommendation with respect to the tender offer. The special committee never requested Lehman to prepare a fairness opinion as to the exchange offer.").

302. Id.

303. Id. at *2. The controller set its opening cash bid at a 10% cash premium over the market trading price of Siliconix stock—a relatively low premium which was, moreover, twenty percent below the average trading price of the stock in the six months prior to the bid. The court states that Vishay made "no effort to value Siliconix." Id. For facts relating to the switch to stock, see id. at *4.

304. Id. at *4 ("Unlike the February 22 cash tender announcement, the share exchange carried no market premium for the Siliconix shareholder.").

305. See id. at *4.

306. Id. at *4.
b. Coercion and Inadequate Disclosure by Controllers

With respect to the application of fiduciary law, the Siliconix court departed from the Solomon standards in a way that biased the proceedings against the plaintiffs. In addition to having to meet the usual, heightened standard of irreparable harm in order to obtain an injunction, the plaintiffs were required to show "actual" fraud, "improper" coercion, or conduct that was "coercive in some significant way." In applying these heightened standards for coercion, Siliconix moved beyond the Solomon standards in accepting that some level of coercion by controllers in tender offers is acceptable. In this disparity between the court's recitation of highly worrisome facts, and application of the law in a fashion biased in favor of the controller, Siliconix is a strange opinion. The court seems to have gone out of its way to avoid granting the injunction requested by the plaintiffs, despite its airing many ways the freezeout appeared problematic. Even while the court denied the injunction, it openly expressed consternation over the "lesser scrutiny" applied to controllers' tender offers in comparison to cash-out mergers.

Even the court's analysis of the adequacy of the controller's disclosures also appears biased in favor of the controller. In its Vickers Energy opinion, the Delaware Supreme Court mandated that controllers' tender offer disclosures must meet a standard of "complete candor." In the alternative, in Siliconix the court of chancery imposed the burden of proof on the plaintiffs and asked whether they had proven there were material misrepresentations by the controller. The Siliconix court's disclosure analysis is problematic both in terms of the substantive standard applied (material misrepresentation versus complete candor) and the allocation of the burden of proof. In Siliconix the court concluded that "Fitzgerald [the plaintiff] has not met his burden of a preliminary showing that there was a disclosure violation," notwithstanding the court's recitation of several forms of disclosure

307. Id. at *17.

308. Id. at *6 ("The issue of voluntariness of the tender depends on the absence of improper coercion and the absence of disclosure violations.... Accordingly, Vishay was under no duty to offer any particular price, or a 'fair' price to the minority shareholders of Siliconix unless actual coercion or disclosure violations are shown by Fitzgerald." (emphasis added)).

309. See, e.g., id. at *2 n.4 ("It is not disputed that all Siliconix directors, because of their deep involvement with Vishay suffered serious conflicts of interest (except for those directors Segall and Talbert, about whose independence there is debate.").)

310. Id. at *7 ("It may seem strange that the scrutiny given to tender offer transactions is less than the scrutiny given to, for example, a merger...").


312. Siliconix, 2001 WL 716787, at *14 ("In conclusion, I have not found that, on this preliminary record, Fitzgerald had made the necessary showing to establish any disclosure violation."). id. at *9 ("In the context of a preliminary injunction proceeding regarding a tender offer, the issue becomes whether there is a reasonable probability that a material omission or misstatement has been made 'that would make a reasonable shareholder more likely to tender his shares.'" (Citations omitted.)).

313. Id. at *12.
deficiencies that individually and collectively would have been significant to the minority shareholders' decision-making in the transaction.

c. Directors' Duties in Tender Offer Freezeouts

The preceding discussion of the Siliconix opinion focused on the court's analysis of the conduct of the controller, Vishay. However, the Siliconix decision is also important for its treatment of target directors' duties in tender offer freezeouts.\textsuperscript{314} (Both the controller, Vishay, and Siliconix's directors were named as defendants in the breach of fiduciary duty class action.)\textsuperscript{315} Because Solomon avoided this subject, and Glassman ruled against the application of fiduciary fair dealings criteria in short-form mergers, the Siliconix court found itself working off of a nearly clean slate in analyzing the nature and scope of target directors' fiduciary duties in tender offer freezeouts. Reviewing their actions, the court found the special committee directors' conduct passive and wholly ineffectual.\textsuperscript{316} Nonetheless, it concluded that the committee's conduct satisfied the fiduciary duties they owed the minority shareholders.\textsuperscript{317} To be more precise, the court reviewed the duty of care and duty of loyalty breaches alleged in the plaintiffs' complaint against the directors,\textsuperscript{318} but then quickly disregarded this inquiry and instead switched to a discussion of the Entire Fairness standard. The court stated that "unless coercion or disclosure violations can be shown, no defendant has the duty to demonstrate the entire fairness of this proposed... transaction."\textsuperscript{319} The court conflated the rule applicable to the controller with that applicable to the target's directors, although they are not the same.

In a different portion of the opinion, the Siliconix court engaged in an inquiry into the target directors' responsibilities in freezeout tender offers. In its effort to discern the nature and scope of these directors' duties, the court notes that the DGCL is silent about directors' roles in responding to tender offers.\textsuperscript{320} This statutory silence provides a major part of Siliconix's rationale for affirming that the directors' conduct, though shockingly passive, was adequate to meet their fiduciary duties\textsuperscript{321}—notwithstanding the obvious distinction between statutory duties and fiduciary duties recognized in Delaware's corporate jurisprudence.\textsuperscript{322} Secondly, the court rationalized that target company shareholders make individual decisions to

\textsuperscript{314} Id. at *7 ("Indeed, the board of the tender target is not asking its shareholders to approve any corporate action by the tender target. That, however, does not mean that the board of the company to be acquired in a tender has no duties to the shareholders.").
\textsuperscript{315} Id. at *1.
\textsuperscript{316} Id. at *2-3, *5.
\textsuperscript{317} Id. at *8-9.
\textsuperscript{318} Id. at *6.
\textsuperscript{319} Id. at *6.
\textsuperscript{320} Id. at *7-8.
\textsuperscript{321} Siliconix, 2001 WL 716787, at *8 (distinguishing the Delaware Supreme Court's expansive view of directors' duties in McMullin on the basis that those duties "were statutory duties imposed by 8 Del. C. § 251"). See McMullin v. Beran, 765 A.2d 910 (Del. 2000).
\textsuperscript{322} See, e.g., Pure, 808 A.2d at 434.
hold or sell in a tender offer—which distinguishes them from transactions involving a corporate-level event.\textsuperscript{323} However, what the Siliconix court notably failed to discuss was the accepted, activist role of target directors in responding to inadequate third party tender offers as reflected in the Delaware jurisprudence. The absence of a "corporate level" event has not prevented the courts from recognizing expansive fiduciary duties for target directors in defending against hostile tender offers from outsiders.\textsuperscript{324}

The Siliconix court paused over the issue of the adequacy of the directors' conduct long enough to be troubled by a parallel with a recent decision by the Delaware Supreme Court, McMullin v Beran.\textsuperscript{325} The problem was that in McMullin the supreme court held that the target directors may have breached their fiduciary duties on account of their passivity in the face of the controller's preferred sale transaction.\textsuperscript{326} The Siliconix court comments at length that in the freezeout before it and the one contested in McMullin, the minorities' "need for (and ability to benefit from) the guidance and information to be provided by their boards" was virtually "indistinguishable."\textsuperscript{327} The Siliconix court also observed that the financial alternatives for the minorities were analogous in the two instances: they could either take the deal consideration offered by the controller, without meaningful guidance from their directors, or pursue an appraisal action.\textsuperscript{328}

The supreme court's disapproval of the target directors' passivity in McMullin clearly caught the court's attention in Siliconix. Based on these observations, it seemed that the court was close to reaching the same determination as the court had in McMullin—i.e. that the directors may have failed to fulfill their fiduciary duties in remaining so passive in the face of the controller's chosen sale transaction. But there were differences also noted by the court in Siliconix. In McMullin, the controller had forced a sale of the company through a merger with a third party.\textsuperscript{329} Siliconix observed that McMullin teaches that directors of a Delaware corporation have an affirmative duty to protect the minority if the controller is forcing through a disadvantageous corporate sale, and the directors cannot take a "leave it to the shareholders" approach.\textsuperscript{330} However, the Siliconix court concluded that these duties are more relevant to a controllers' merger, than a freezeout tender offer. With little else to distinguish the conduct of the two sets of directors in these transactions, in Siliconix the court relied on the different statutory consent require-

\textsuperscript{323} Siliconix, 2001 WL 716787, at *7 ("...the target company in the tender context does not confront a comparable corporate decision [to a merger].").

\textsuperscript{324} See supra note 158.

\textsuperscript{325} Siliconix, 2001 WL 716787, at *8 (citing McMullin v Beran, 765 A.2d 910 (Del. 2000)).

\textsuperscript{326} McMullin v Beran, 765 A.2d 910, 920 (Del. 2000) (motion to dismiss for failure to state a claim reversed and remanded).

\textsuperscript{327} Siliconix, 2001 WL 716787, at * 8.

\textsuperscript{328} Id.

\textsuperscript{329} McMullin, 765 A2d. at 921.

\textsuperscript{330} This same principle is enunciated earlier in Smith v Van Gorkom, in relation to directors' duties in a sale by merger to a third party. See Smith v Van Gorkom, 488 A.2d 858 (Del. 1985).

\textsuperscript{331} 2001 WL 716787, at *7 ("Indeed, the board of the tender target is not asking its shareholders to approve any corporate action by the tender target. That, however, does not mean that the board of the company to be acquired in a tender has no duties to the shareholders.").
ments relevant to tender offer freezeouts and cash-out mergers to distinguish the scope of the directors' duties. Most problematically, Siliconix ignores the highly developed Delaware case law affording target directors extensive defensive authority in responding to hostile tender offers from third parties. In sum, Siliconix is an unsatisfying and provocative decision on many levels, and its treatment of target directors' duties in responding to tender offers by controllers is particularly unsatisfying. These shortcomings were obviously apparent to the Vice Chancellor writing in Pure.

B. THE PURE DECISION: NEW PRECONDITIONS FOR DEFERENTIAL REVIEW IN TENDER OFFER FREEZEOUT SUITS

1. The Facts in Pure

The tenor of Pure suggests a generally favorable view of Unocal's freezeout offer. And certainly Unocal, the controller proceeded in a manner that seemed less coercive than the freezeouts analyzed by the court of chancery in Siliconix and Acquila. However, upon closer examination, the recital of facts in the opinion reveals that Unocal unhesitatingly sought to benefit from its superior negotiating leverage, from disclosure deficiencies, a committee whose independence may have been compromised, and consent terms that systematically favored its interests. Perceiving the latter forms of self-interested conduct, certain minority shareholders of Pure Resources, Inc. sued and obtained a preliminary injunction against Unocal's proposed tender/exchange offer. Nevertheless, the court of chancery ruled that the freezeout could go forward so long as Unocal (which owned 65.4% of Pure's shares) (i) disclosed valuation data prepared by the investment bankers hired by the special committee, (ii) provided a fuller description of the communications that had occurred between the special committee and Unocal's representatives over the scope of the committee's authority, and (iii) amended the majority-of-minority consent provision to back out shares in the minority group affected by conflicting financial interests. These were easy "fixes." They allowed the court of chancery in Pure to advocate law reforms

332. Id. at *8. In Siliconix, the court expressed the view that it would have to endorse "a new approach to assessing the conduct of directors of a tender target" if it were to rule in plaintiffs' favor. The court said that it would have to overrule cases such as Solomon to validate an active defensive role for target directors. Id.
333. Pure, 808 A.2d at 446–332.
334. See supra text accompanying notes 276–332.
336. See infra notes 350–84 and accompanying text.
337. Pure, 808 A.2d at 450.
338. Id. at 430.
339. Id. at 424–25.
340. Id. at 425.
341. See id. at 449–51.
342. Id. at 446.
343. 808 A.2d at 452 ("...an injunction can be issued that can be lifted in short order if Unocal and the Pure board respond to the concerns addressed in this opinion.").
in the minority’s interest, grant the requested injunction, and yet compromise
the controller’s ability to go forward with the freezeout only in small measure.\textsuperscript{344}
Indeed, Unocal promptly consummated its tender offer freezeout after it imple-
mented the changes requested by the court.\textsuperscript{345}

The chancery court’s opinion described the process of the transaction in detail.
Unocal had been involved in Pure’s business operations from the latter’s incep-
tion.\textsuperscript{346} As part of the creation of Pure, Unocal obtained a shareholder voting
agreement that gave it control over five of Pure’s eight board seats,\textsuperscript{347} and a “Busi-
ness Opportunity Agreement” that allowed it to take commercial opportunities
that otherwise might have been deemed (consistent with the corporate opportu-
nity doctrine) to belong to Pure.\textsuperscript{348} The competitive operations of the parent and
subsidiary, the prospect of favorable market conditions and financing alternatives
for the subsidiary, and the fact that Pure had genuinely independent and ambi-
tious senior executives\textsuperscript{349} created friction that led to Unocal’s freezeout offer.

Unocal’s interest in acquiring Pure was initially out in the open.\textsuperscript{350} Then, in the
fall of 2001 Unocal gave notice to Pure’s CEO that it had decided not to proceed
with the offer.\textsuperscript{351} However, by the following summer Unocal’s interest in acquir-
ing its subsidiary’s remaining shares resurfaced in a “surprise” public announce-
ment of its proposed freezeout tender/exchange offer.\textsuperscript{352} During the summer of
2001, as part of its original investigation into a freezeout, Unocal’s representa-
tives on Pure’s board had gathered confidential information from Pure.\textsuperscript{353} That
Unocal had “permission” from Pure’s management to do so\textsuperscript{354} (as described in the
opinion) reveals the extent of the conflicting interests that affected Pure’s CEO
and COO,\textsuperscript{355} and their possession of valuable severance agreements that would
be triggered by the freezeout.\textsuperscript{356} The opinion notes that Pure’s management and
Unocal’s representatives had discussed the fact that proceeding through a single
step cash-out merger was probably untenable.\textsuperscript{357} Although the court does not
discuss why this would have been so, it likely reflects that the Entire Fairness
standard would have applied in the event of a freezeout merger, which would
have been problematic since seven of the eight directors had financial interests

\textsuperscript{344} Id.

\textsuperscript{345} On October 30, 2002 (one month after the court of chancery’s decision in Pure) Unocal closed
its short-form merger finalizing its acquisition of Pure. The exchange offer had closed the previous night
at midnight. See Unocal Press Release archives, \textit{Unocal completes acquisition of Pure Resources} (Oct. 30,

\textsuperscript{346} Pure, 808 A.2d at 425–26.

\textsuperscript{347} Id.

\textsuperscript{348} Id. at 426–27.

\textsuperscript{349} Id. at 426–28.

\textsuperscript{350} Id. at 427.

\textsuperscript{351} Id.

\textsuperscript{352} Id. at 428–29.

\textsuperscript{353} Id. at 427.

\textsuperscript{354} Id.

\textsuperscript{355} Id. at 426.

\textsuperscript{356} Id.

\textsuperscript{357} Id. at 428.
potentially conflicting with the unaffiliated minority stockholders.\(^{358}\) The transaction in \textit{Pure} thus represents an explicit example of the kind of "structural arbitrage" described in the Introduction and the conclusion to Part II.\(^{359}\)

Unocal structured its offer with some attention to the established transactional choreography for tender offer freezeouts—that is, Unocal seemed to recognize the advantage of proceeding in a fashion that was not obviously coercive.\(^{360}\) Yet it sought to exploit its power advantage as well. For example, while Unocal did nothing to thwart Pure’s establishment of a special committee,\(^{361}\) it attempted to keep the committee’s negotiating and defensive authority limited.\(^{362}\) Accordingly, \textit{Pure} contains conflicting information regarding the committee’s authority to negotiate at arms’ length in the freezeout (as would be required if the Lynch Doctrine applied). For example, the court notes that Keith Covington, one of Pure’s two special committee directors, was “a close personal friend” of Timothy Ling—who was Unocal’s President and COO and a Pure director.\(^{363}\) Also troubling is the fact that after the negotiations over the freezeout's terms had commenced, Unocal took a harder line in enforcing the Business Opportunities Agreement than it had in the past. It barred, for the first time, Pure’s pursuit of an opportunity that implicated Unocal’s commercial interests.\(^{364}\) This was of course a negative sign for Pure in regard to Unocal’s willingness to engage in financial retribution if the freezeout was opposed or defeated (i.e. the operation of inherent coercion). As the negotiations over the freezeout progressed, Unocal’s representatives on Pure’s board refused to recuse themselves from the special committee’s deliberations.\(^{365}\) This would have inhibited the special committee’s candor and freedom in responding to the controller’s offer. Finally, most palpably, when the committee sought clarification of its power to block Unocal’s bid and seek alternatives more consistent with all the shareholders’ interests (including its ability to employ a rights plan to hold Unocal at bay while it did so) Unocal’s representatives at Pure sounded the alarm and aggressively confronted the special committee.\(^{366}\) This response squelched the special committee’s “insurgency.”\(^{367}\) The court was definitive that Unocal had

\(^{358}\) See \textit{id.} at 425–26. On the indeterminate effect of a conflicted board’s approval of a merger agreement, see \textit{Krasner v. Moffett}, 826 A.2d 277, 285 (Del. 2003) (noting the dilemma posed by statute’s prohibition on assent to a merger by a committee where nearly the entire board was affected by material conflicts of interest in a merger).

\(^{359}\) See supra Part II, D.

\(^{360}\) For the conditions Unocal agreed to abide by in its offer, see \textit{Pure}, 808 A.2d at 430. By the time of its opinion in \textit{Pure}, the court of chancery was able to refer to a “line of cases” under which a controller’s observance of certain terms would demonstrate that the freezeout tender offer was non-coercive. \textit{id. at 438}.

\(^{361}\) \textit{Id.} at 429, 431.

\(^{362}\) \textit{Id.}

\(^{363}\) \textit{Id.} at 426.

\(^{364}\) For the denial of the waiver, see \textit{id.} at 432 n.9; for previous grants of the waiver, see \textit{id.} at 427 ("Unocal granted these waivers in each case.").

\(^{365}\) \textit{Id.} at 429 (noting that Unocal affiliated directors “Maxwell and Laughbaum did not recuse themselves generally from the Pure board’s process of reacting to the Offer”).

\(^{366}\) \textit{Id.} at 430–31.

\(^{367}\) See \textit{id.}
taken aggressive efforts to terminate the special committee's efforts to block the freezeout, despite the fact that the details of the back and forth between the committee and Unocal's representatives were unavailable to it. Because the directors at Pure were concerned about their own fate in relation to the suit challenging Unocal's freezeout, they elected to invoke the attorney client privilege to protect the confidentiality of their communications about the scope of their defensive authority. In any event, what resulted from the conflict between Unocal's representatives and Pure's special committee was a "pared down" version of the board resolution conferring negotiating authority on the special committee. This ended the committee's affirmative efforts to stop the freezeout, although the committee refused to recommend in favor of the freezeout in the Schedule 14D-9.

In some respects, at least at a superficial level, Unocal's offer was attentive to fair process concerns. Nevertheless, a close reading of the facts reveals that there were significant grounds for concern about coercion and overreaching on Unocal's part. Indeed, Unocal's conduct seems more coercive and overbearing than the court's legal analysis and holding reflects. For example, consistent with the minorities' interest, Unocal agreed to a majority-of-the-minority minimum tender condition. However, as the court observed, the minority approval condition was tainted by the fact that shares owned by Unocal representatives and shares owned by Pure's two most powerful executives were included in the minority group although these shares were affected by financial incentives different from rest of the 35.4% shares unaffiliated with Unocal. Unocal also adopted a 90% minimum tender condition, and agreed to consummate a short-form merger at the tender offer price if it obtained the required 90% share-level in Pure. However, Unocal reserved the right to waive the 90% minimum tender condition and close the tender offer irregardless. The ability to wave the 90% minimum tender condition meant that at the time the minority shareholders would have to make a choice about whether or not to tender, they would not know whether the back-end, short-form merger and attendant appraisal rights would materialize.

Furthermore, Unocal did not commit to abandon the offer if the committee withheld its approval. Indeed, Unocal did in fact go ahead with the freezeout

368. Id.
369. This becomes evident principally in relation to the court's discussion of the disclosure deficiencies relating to the Schedule 14D-9, id. at 450–51.
370. Id. at 431.
371. Id.
372. Pure, 808 A.2d at 432 ("...on September 17, 2002 the Special Committee voted not to recommend the Offer, based on its analysis and the advice of its financial advisors").
373. Id. at 438–39.
374. Id. at 430.
375. Id. at 446–47.
376. Id. at 430.
377. It is not clear how withdrawal rights would or would not protect minorities in this case. For the regulation affording minorities withdrawal rights in tender offers, see supra note 147 and accompanying text.
378. Pure, 808 A.2d at 430, 432.
when the committee declined to give its approval of the offer in the Schedule 14D-9.379 (As discussed below, Cox subsequently affirms that special committee approval should be a prerequisite to deferential judicial review.380) In addition, Unocal had publicly stated its unwillingness to sell its shares to a third party,381 which significantly decreased the chance that a third party offer for the company would materialize. And the court of chancery's grant of the requested injunction reflected that the tender offer disclosures to the minority included no substantive information from the valuation studies conducted purportedly in the minorities' interests, by the committee's financial advisers.382 This information would clearly have helped the minority shareholders make more informed choices about whether or not to tender to the controller. Nor were the shareholders told about the committee's failed efforts to obtain blocking power.383 In addition, the court notes that Pure's special committee was unsuccessful in motivating Unocal to improve the exchange ratio over that originally announced.384 Because the chancery court declined to apply Lynch's Entire Fairness standard, and instead endorsed Solomon's standard as more appropriate to the review of the transaction, Pure does not discuss the adequacy of the price offered by Unocal. The court notes the exchange ratio,385 and Unocal's statement describing the size of the premium,386 but does not engage in any analysis of the adequacy of the controller's offered price.

The lengthy description of facts provided herein is directly relevant to this Article's normative conclusions about the future of freezeout doctrine and the use of the Entire Fairness standard. This is because in many respects Unocal's freezeout of Pure's minority, and the court of chancery's new standards enunciated in Pure,387 have served as a springboard for a broad initiative to reform the doctrine relevant to both cash out mergers and tender offer freezeouts.388 Furthermore, the minority-protective features in Unocal's offer, as incorporated into a set of "anticoercion" criteria endorsed in Pure (and supplemented by Cox) have been "ratified" by corporate legal academics studying freezeouts as a sufficient basis for allowing judicial deference in freezeouts.389 For example, as stated by Professors Gilson and Gordon: "We

379. Id. at 432.
380. See infra Part III, C.
381. Pure, 808 A.2d at 429 ("... we are not interested in selling our shares in Pure").
382. Id. at 450.
383. Id. The court requires amendments to these disclosures, but they may have influenced the course of the transaction nevertheless.
384. Id. at 432.
385. Id. at 430.
386. Id. at 429.
387. Id. at 445.
388. Id. at 444 ("To the extent that my decision to adhere to Solomon causes some discordance between the treatment of similar transactions to persist, that lack of harmony is better addressed in the Lynch line, by affording greater liability-immunizing effect to protective devices such as majority of the minority approval conditions and special committee negotiation and approval."). For discussion of Cox's broad based plan to overhaul freezeout doctrine, see infra Part IV.
389. See, e.g., Subramanian, Fixing Freezeouts, supra note 5, at 8 (concluding that where a special committee and majority of the minority shares have ratified a freezeout, deferential review rather than the Entire Fairness standard is warranted); Letsou & Haas, supra note 113, at 29 (adopting analogous approach though with greater emphasis on the controller's disclosure duties).
share the *Pure* court's conclusion that a fully empowered special committee, including the *Pure* anticoercion litany and the right to say "no" affords sufficient process so that entire fairness review in a freeze out merger can be eliminated.  

The discussion of the Unocal freezeout is intended to qualify this enthusiasm for the anti-coercion standards endorsed in *Pure* (even as supplemented by *Cox*) and their endorsement of deferential judicial review, by illuminating reasons why the court should have been more concerned about coercion and overreaching on Unocal's part, and less confident about the committee's effective ability to say "no" to the controller. Instead, in *Pure* the court chose to emphasize the more favorable elements of the offer: the absence of express threats of financial retribution, creation of a special committee and its employment of independent legal and financial advisers, the majority of the minority consent requirement and the controller's affirmative promise to execute the back-end, short-form merger (if it obtained the shares necessary to do so), while it gave less emphasis to the many worrisome features of Unocal's freezeout offer. In essence, by invoking the *Solomon* standards instead of the Entire Fairness standard of the *Lynch* Doctrine, the court was able to resolve each of the ambiguities in the freezeout in the controller's favor, while requiring the controller to make changes only in areas that were consistent with the freezeout's consummation. Certainly, another court might have emphasized the more problematic features of the transaction—and the court of chancery would have been required to do so if it had employed the Entire Fairness standard.

2. **Doctrinal Analysis and Pure's Holding**

*Pure*'s holding should be stated with clarity at this point. First, the court rules that the *Solomon* tradition provides the analysis of Unocal's offer for *Pure*'s minority shares. 391 It concludes, furthermore, that *Solomon*'s "more flexible" standards are preferable to *Lynch*'s Entire Fairness standards as a general matter. 392 Second, *Pure* holds that, certain of the provisions incorporated into Unocal's tender offer freezeout should be deemed essential preconditions to a court's finding that a controller has avoided acting coercively in a tender offer freezeout, consistent with *Solomon*'s mandates. As noted by the court in *Pure* these are: (i) the absence of express threats by the controller to take retributive action injurious to the minority if the freezeout fails, (ii) the observance of a majority-of-the-minority minimum tender condition, (iii) a promise to complete a short-form merger if the controller reaches more than 90% ownership in the target at the conclusion of the tender offer, and (iv) the controller allowing the special committee (if one exists) to consult independent advisers and formulate an opinion on the merits of the transaction. 393

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390. See, e.g., Gilson & Gordon, supra note 5, at 838.

391. *Pure*, 808 A.2d at 444 ("...the preferable policy choice is to continue to adhere to the more flexible and less constraining *Solomon* approach...").

392. Id.

393. Id. at 445. Apart from these equitable requirements, controllers have extensive disclosure obligations, consistent with established fiduciary requirements and federal securities' law mandates, of course. These are addressed in a separate portion of the *Pure* opinion. Id. at 447-52.
Pure presents an ambitious, comprehensive and thoughtful analysis of three distinct strands of Delaware doctrine potentially relevant to tender offer freezeouts in general. These are the "Solomon standards,"394 the Lynch Doctrine395 and Unocal's progeny.396 Because the court endorses new, objective standards for adjudging coercion by controllers in tender offer freezeouts, the Pure opinion is generally interpreted as a positive step towards protecting minority shareholders' rights.397 In comparison to Siliconix and Aquila (as stated above) this view is correct.398 After reviewing the court's doctrinal choices in depth, however, it is apparent that there were very different avenues of analysis available to the court.

Pure's first bold doctrinal move is its affirmation that the "Solomon standards" represent a legitimate alternative tradition for adjudicating controllers' conduct in freezeouts.399 This had been accepted by the court of chancery in Siliconix400 and Aquila,401 but those opinions did not engage in the kind of comprehensive and rigorous doctrinal analysis that Pure does. Interestingly, Pure nowhere suggests there is a doubt about Solomon representing a legitimate alternative doctrinal tradition for freezeouts—despite the fact that neither Solomon nor Glassman involved a true tender offer freezeout as presently understood, as discussed above.402

Secondly, Pure observes, at length, that the problem of inherent coercion (i.e. *ex post* financial retribution by the controller) is not a cognizable issue in the Solomon tradition for freezeouts403 (as opposed to the Lynch Doctrine)—despite the fact that the potential for inherent coercion, Pure affirms, is equally present in freezeouts based on tender offers.404 In effect, the Pure court implicitly concludes that the supreme court's failure to discuss the issue of inherent coercion in Solomon represents authority for disregarding the significance of inherent coercion in modern tender offer freezeout doctrine. That is, while Pure pays lip service to the operation of inherent coercion in tender offer freezeouts, the reforms it endorses fail to address the dangers posed by inherent coercion.405

394. Id. at 437-39.
395. Id. at 435-37.
396. Id. at 439-41.
397. See, e.g., Gilson & Gordon, supra note 5, at 826 ("Properly understood, the Pure resolution is an important, yet still incomplete, step toward restoring a desirable coherence in this area.").
398. See, e.g., Gilson & Gordon, supra note 5, at 817 (critique of the improper loosening of standards effectuated by Siliconix and Aquila for tender offer freezeouts).
400. In re Siliconix Inc. S'holders Litig., No. 18700, 2001 WL 716787, at *8 (Del. Ch. June 19, 2001) (citing as a rationale for its holding the belief that an alternative finding would have required it to "overrule" Solomon).
402. See supra Part III, A.1 and 2.
403. Pure, 808 A.2d at 438 ("The inherent coercion that Lynch found to exist when controlling stockholders seek to acquire the minority's stake is not even a cognizable concern for the common law of corporations if the tender offer method is employed.").
404. Id. at 441 ("The problem is that nothing in the tender offer method of corporate acquisition makes the 800-pound gorilla's retributive capabilities less daunting to minority stockholders. Indeed, many commentators would argue that the tender offer form is more coercive than a merger vote.").
405. There reforms address informational, organizational and timing issues, but not inherent coercion. Pure, 808 A.2d at 445.
What makes Pure's treatment of inherent coercion even more problematic is that the conceptual core of the court's analysis is the presumption that minorities can make informed choices in their own interest.\textsuperscript{406} This faith that minorities can protect their own interests so long as the new anticoercion tests are met is the rationale that underlies Pure's endorsing business judgment deference and no fair price duty for tender offer freezeouts. In short, Pure relies on Solomon's concept of "totally voluntary" tender offers, while failing to take seriously the threat to minority free choice posed by inherent coercion.\textsuperscript{407} In sum, Pure acknowledges the relevance of inherent coercion in freezeout tender offers but then proposes anticoercion standards that fall short of the mark in dealing with the inherent coercion problem. However, if minorities' capacity for free choice remains the lynchpin for deferential rather than intensive judicial review, and also the rationale for not imposing a fair price duty on controllers in these deals, then the problem of inherent coercion deserves more consideration than Pure (and Cox\textsuperscript{409}) affords it.

In the end, Pure's choices do not seem motivated by the conviction that inherent coercion is irrelevant in tender offer freezeouts (since the court says it is not\textsuperscript{410}), or the view that minorities have adequate leverage under the Solomon standards (since the court observes they may not\textsuperscript{411}). Rather, the court's doctrinal choices are motivated by its express policy preferences in M&A transactions.\textsuperscript{412} Pure's policy preferences resonate in the court's "meta-musings" about the role of judges in building the common law.\textsuperscript{413} The court concludes that the policy alternatives favor Solomon's "flexible" standards, because they may limit litigation and hence foster strong capital markets by encouraging acquisitions.\textsuperscript{414} In contrast, Pure finds Lynch's Entire Fairness standard as more "constraining," "litigation-intensive," and apt to inhibit value-enhancing transactions.\textsuperscript{415}

Ironically, throughout much of the first half of the opinion, Pure presents an extensive "defense" of the minority-protective rationales underlying the Entire Fairness standard's noting their relevance to controllers' power in freezeout tender
The court observed that the Lynch Doctrine rests on the perception of unequal bargaining power between controllers and minorities in freezeouts. And Pure notes that the timing, informational, organizational, market and legal power advantages that are relevant to cash-out mergers are relevant also to tender offer freezeouts. Indeed, throughout its lengthy discussion of the Lynch Doctrine's validity, it seems that the Pure opinion is establishing a logical foundation for extending Lynch's Entire Fairness to tender offer freezeouts. However, while Pure affirms controllers' many power advantages over minorities in freezeouts, it proposes that these power advantages will be sufficiently neutralized if controllers adhere to the bright line anticoercion rules set forth. According to the court in Pure, so long as controllers observe the four express conditions described above (and commit no material disclosure violations), the tender offer freezeout should be judged noncoercive and eligible for deferential review. In this fashion, Pure substitutes a standard of "relative noncoerciveness" for Solomon's standard of "total voluntariness."

Leaving aside the conflict between the Solomon and the Lynch standards, there was a further doctrinal hurdle to Pure's ruling in favor of the controller. This hurdle was the conflict acknowledged in Pure between the laissez faire standards for target directors' duties in tender offer freezeouts and the progeny of Unocal Corp. v. Mesa Petroleum Co. and Moran v. Household Int'l, Inc. which affirm target directors' broad defensive duties and authority in responding to tender offers by third parties. The court is cognizant of the relevance of this case law—it addresses it expressly. For this reason its conclusion that a controller can permissibly (without exercising coercion) shut down a special committee's defensive efforts to block a controller's freezeout tender offer when the directors have judged it to be inadequate or coercive, is startling. The legal issue was directly relevant in Pure, since the special committee requested expansive defensive authority and was refused it by Unocal's representatives on Pure's board.

As a matter of statutory law, it is the board of directors that has authority to define the scope of a committee's power, not the shareholders. Furthermore, since Pure's board owed fiduciary duties to all the shareholders equally, it would seemingly have needed some all-shareholder or corporate-regarding explanation for denying the committee's authority to seek alternatives to the controller's

416. Id. at 435–36, 441–44.
417. Id. at 442.
418. Id. at 442–44.
419. Id. at 444–45.
421. 500 A.2d 1346, 1355 (Del. 1985).
422. See Pure, 808 A.2d at 439. For further discussion of this issue, see Gilson & Gordon, supra note 5, at 820–22.
423. Pure, 808 A.2d at 446.
424. Id. at 430–31.
offer.\textsuperscript{427} Such a rationale is never supplied however, nor does the court demand one, remarkably.\textsuperscript{428} In defending its conclusion, that controllers need not allow a committee authority to deploy a poison pill and that a committee need not seek authority to defend against an unsatisfactory tender offer freezeout, the court points to the "awkward sociology" of controlled boards and the "burdensome" implications for the common law of a contrary rule.\textsuperscript{429} However, neither one of these is a satisfactory rationale for the limits the court recognizes for special committees' authority. Just as strangely, the court rationalizes that the statutory underpinnings of poison pills are less than solid—notwithstanding that the case law has resolved this issue absolutely by now.\textsuperscript{430} In sum, the court does not provide a satisfactory legal basis for limiting the target director's authority. In this way it fails to reconcile the disparity between directors' duties and authority in controllers' tender offers compared to third parties.

To recap, in ruling on the role of the board in a controller's tender offer, \textit{Pure} holds (merely) that for the freezeout offer to be deemed noncoercive, the controller must only afford committees access to advisers and the time required for them to reach an informed judgment about the offer. The court states that controllers must do "at least" this much; but they need not do more to empower the special committees in the minorities' interest.\textsuperscript{431} In effect, the court provides only that controllers must not stand in the way of the committee doing its job—since the federally mandated Schedule 14D-9 requires target director's to make some public pronouncement of their views on the offer. Furthermore, the court does not attribute independent significance to the committee's views on the offer, but requires merely that the controller allow the committee to serve as an \textit{adviser} to the minority shareholders.\textsuperscript{432} This is the opposite approach from that taken in \textit{Weinberger} where the court afforded great significance (in regard to the determination of fairness) to whether the controller afforded the committee genuine negotiating authority.\textsuperscript{433} Commentators who have concluded that \textit{Pure} affirms a robust negotiating role for the special committee have over read its holding.\textsuperscript{434}

\section*{3. Closer Analysis of \textit{Pure}'s New Requirements}

\textit{Pure}'s new standards for determining whether a freezeout is coercive each merit consideration.

First, the requirement that the controller cannot have made any express threats is effectively an historical artifact.\textsuperscript{435} In the cash-out merger in \textit{Lynch}, the controller warned the committee that it would commence a tender offer at a lower price

\begin{footnotesize}
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\item \textsuperscript{427} See \textit{Freedman}, 1990 WL 135923, at *6–7.
\item \textsuperscript{428} \textit{Pure}, 808 A.2d at 431.
\item \textsuperscript{429} \textit{Id}. at 446.
\item \textsuperscript{430} \textit{Id}. See, e.g., \textit{Moran}, 500 A.2d at 1355.
\item \textsuperscript{431} \textit{Pure}, 808 A.2d at 445.
\item \textsuperscript{432} \textit{Id}.
\item \textsuperscript{433} \textit{Weinberger}, 457 A.2d at 709.
\item \textsuperscript{434} See \textit{Gilson & Gordon}, supra note 5, at 838.
\item \textsuperscript{435} 808 A.2d at 445.
\end{itemize}
\end{footnotesize}
if the committee failed to approve the cash-out merger. In reality, express threats of retributive action by controllers are gratuitous. It would be truly odd (especially given the role of counsel in modern transactions) to find a record of a controller making such a threat. Put simply, there is no need. Minorities, special committees and the capital markets in general are already aware of controllers' capacity to take retributive action if it meets sustained opposition in its freezeout. Hence, the absence of "express" threats by the controller is illusory as an indication of the voluntariness of a tender offer freezeout.

With regard to Pure's second standard for determining whether the controller has acted coercively, even a majority-of-the-minority tender condition only mildly mitigates the severity of the prisoner's dilemma; it surely does not eliminate it. (Nor does Pure claim it does.) The pressure to tender persists because the shareholders contemplating the offer are aware that once the controller is intent on the freezeout, they cannot maintain the status quo. If the tender offer fails, the controller can switch to a cash-out merger, which it probably can compel. Even the special committee's express disapproval would not block the controller from proceeding. In Pure the court afforded no weight to the committee's disapproval of the controller's offer in its holding. Furthermore, even after Pure, the shareholders' "reward" for not selling into the controller's tender offer is that they will either hold shares that are more illiquid and trading at a deeper discount, or they may (though not assuredly so) be able to pursue a costly, protracted appraisal action, as discussed previously. This awareness, logically, influences minorities' choices ex ante. Hence, the minimum tender condition endorsed in Pure is also a weak indicia of the voluntariness of a tender offer freezeout.

Nor is Pure's proposed minimum tender condition analogous to the minority voting consent relevant to the Lynch doctrine: the dynamics in tender offers favor tendering, in a way that is not applicable to shareholders' voting decisions. Justice Jacobs noted this disparity in his opinion in Emerging Communications, for example. And even in Pure the court noted disparities between mergers and tender offers that pressure minorities to tender. Most importantly, shareholders who vote "no" in a merger may still take the merger consideration if the deal closes, whereas nontendering shareholders have no such option. In addition, the more accelerated timing in tender offers exerts pressure on investors to

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436. Lynch, 638 A.2d at 1113. In Lynch the committee's choices were further constrained by the controller's power to block third party offers that received approval by less than 80% of the voting shares. The subsidiary's law firm had proposed and explored adoption of a poison pill or the search for a "white knight" bidder but found both "unfeasible" in light of the controller's blocking power. See id. at 1113 n.3.

437. Pure, 808 A.2d at 445.

438. Id.

439. It is important to note that neither the recent cases nor this Article propose new requirement for controllers to proceed in freezeouts. What is at stake is the standard of review.


441. In re Emerging Commun'cs, 2004 Del. Ch. LEXIS 70, at *114–15 ("Nor should a tender offer be treated as the equivalent of an informed vote.").

442. Pure, 808 A.2d at 442–43.
sell, and the looming deadline increases the salience of the premium over the market price. The short time frame limits the target board's ability to ascertain if alternatives more favorable for the minority are feasible, even if the controller has not expressly blocked the committee's power to do so. These factors have a cumulative effect and pressure minorities to sell in tender offer freezeouts. Finally, under the Lynch doctrine, the minority's voting their approval merely effects a shift in the burden of proof; in contrast, in Pure the court proposes that the easier-to-obtain minimum tender condition should serve as an important indicia of a freezeout's voluntariness—and hence a crucial factor weighing in favor of judicial deference towards the transaction.

Lastly, Pure's "90%-short-form merger" provision is also ineffective to reduce the prisoner's dilemma affecting minority shareholders' decision making about whether or not to tender. There are two relevant ways for controllers to exploit their power advantages in tender offer freezeouts. The first involves the prospect of the hold-out minority shareholders being "crushed" in a back-end short form merger (which the controller can effectuate unilaterally) at a radically discounted price. Appraisal rights are of only tenuous value here, for the reasons discussed earlier. Second, after Glassman, minorities have no ability to bring an equitable class-action for fair price in the short-form merger. In Pure, the court appears to shore the likelihood of there being a prompt short-form merger at the tender offer price, but it falls short of doing so effectively, for two reasons.

First, Pure's short form merger provision fails to provide minorities protection because it gets the numbers wrong. Section 253 of the DGCL gives controllers certainty that they can consummate a short-form merger once they own "at least" 90% of the shares. However, Pure provides that a tender offer freezeout will be deemed noncoercive if the controller commits to effectuate a short-form merger if it acquires more than 90% as a result of the tender offer. This disconnect between the statute and Pure means that a controller can acquire precisely 90% of the target's shares (which would give it certainty that it could consummate the short form merger at its discretion), without having to consummate a prompt short-form merger at an equivalent price, and without its freezeout being deemed coercive. Hence, Pure's short form merger provision does not reduce the controller's ability to "squeeze" the minority in the front end of the tender offer freezeout—because it does not ensure the minority a prompt, equivalently priced short-form merger.

443. See supra note 146.
444. On the phenomenon of "salience," as it may affect investor psychology, see, e.g., Cass R. Sunstein, What's Available? Social Influences and Behavioral Economics, 97 Nw. U. L. Rev. 1295 (2003) (analyzing social influences that make certain forms of risk salient or "cognitively available" and their relevance to law).
445. In addition, brokers earn commissions on shareholders' decisions to tender (these are stock sales), but no commissions are earned by brokers if minorities retain their shares.
446. See supra notes 204–13 and accompanying text.
447. 777 A.2d at 248.
449. Pure, 808 A.2d at 445.
450. Id.
even if the controller acquire the 90% ownership level required by statute. It is possible that this defect in Pure's short-form merger provision is simply a misreading of the statute. That is, that the court meant "at least 90%" (i.e the statutory standard) instead of "more than 90%" (as stated in the opinion). Nevertheless, the short-form merger provision is a core element of Pure's holding, which would suggest that the court gave it thorough consideration.

That takes us to the second way that a controller can exploit its power advantages in a tender offer freezeout. In addition to the fear of being "crushed" in an unfair short form merger, the minority shareholders will fear being left holding "super-minority" shares. That is, they will fear that there will not be any short-form merger at all, and hence no recourse to appraisal. If a very small segment of the minority holds because they believe the tender offer price is inadequate, they may end up holding stock that effectively has no value because it is delisted and radically illiquid. Selling to the controller privately at a later date might be their only viable option. No appraisal rights would be available in relation to such private sales. On this score, too, Pure's short-form merger provision falls short. It provides that the controller must commit to effectuate the (prompt, equivalently priced) short-form merger only if it obtains more than the 90% ownership level. Here the danger for the minority is that the controller will close the offer before the threshold is reached, the short form merger will never materialize, and the minority will be left owning virtually worthless shares.

Furthermore, there is less room to believe this is a "mistake" in the opinion. This feature of the court's new standards probably reflects the fact that Unocal agreed only to a waivable 90% minimum tender condition, and the court did not inhibit Unocal's tender offer from proceeding on this account. In other words, at the time that the minority shareholders had to make a decision about whether or not to tender to Unocal, they could not be assured that the back-end, equivalently priced short-form merger would ever take place.

Of final importance is the fact that even if the short-form merger does materialize promptly, and at an equivalent price as the tender offer, that tender offer will not have been subject to a fair price requirement. This is a further implication of Pure's rejection of Lynch in favor of Solomon. For these reasons, Pure's short-form merger provision does not protect minorities' interests in controllers' tender offer freezeouts.

In considering the effect of Pure's new standards for tender offer freezeouts, furthermore, it is important to recall that they must be read outside of a fair dealings

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452. In Pure itself there were mixed signals sent to the minority shareholders about the 90% minimum tender condition. Unocal initially announced that its offer was "conditioned on the tender of a sufficient number of shares of Pure common stock such that, after the offer is completed, we will own at least 90% of the outstanding shares of Pure common stock...." Pure, 808 A.2d at 429. However, in describing the key terms of the Unocal offer as presented to the special committee, the court noted the inclusion of "a waivable condition that a sufficient number of tenders be received to enable Unocal to own 90%...." Id. at 430 (emphasis added).
453. See Pure, 808 A.2d at 444.
requirement. The duty of fair dealings is an essential part of the Lynch Doctrine, which Pure rejects in favor of Solomon's looser prohibition on coercion. Consistent with this expressed preference on the part of the court, Pure's prohibitions on coercion must be read literally, according to their express terms. Even after Pure, the "divide and conquer" strategy that is the essence of the prisoner's dilemma is still available to controllers in tender offer freezeouts.  

The court's analysis of the disclosures to the minority shareholders in Pure is also troubling. First, Pure places the burden of proving a material disclosure deficiency on the minority shareholders. This is exceptional because in cases where self-dealing is present (as in a tender offer freezeout) courts ordinarily require the party relying on the shareholder vote to demonstrate the adequacy of the disclosures. Second, in reviewing the S-4 and the Schedule 14D-9 submitted for the minorities' consideration, the court nowhere endorses the "complete candor" standard affirmed for controllers' tender offers in Lynch v. Vickers Energy. Instead, in Pure, the question was whether minority shareholders had demonstrated a misstatement or omission of a material fact in the controller's disclosures. This is a critical difference which would certainly allow room for less than "complete candor" in the tender offer freezeout disclosures.

A considerable portion of the Pure opinion is devoted to describing controllers' numerable opportunities for acting coercively in tender offer freezeouts. The tests for coercion endorsed by the court in Pure are insufficient to address the vulnerabilities of minorities in these deals. This is true even if Pure's new standards are considered cumulatively. The best explanation for the softness in the court's stance towards coercion in tender offer freezeouts is its stated policy preference for encouraging freezeout transactions. However, as the court failed to observe, promoting freezeouts that are less than fair will not strengthen the capital markets; it will have the opposite effect.

C. Cox Adds Another Special Committee Requirement for Deferreral Review in Tender Offer Freezeouts

The Cox opinion amends Pure's anticoercion standards for tender offer freezeouts in one important respect. It recants the part of Pure's holding that attached

454. See, e.g., Rabkin v. Olin Corp., C.A. No. 7547, 1990 WL 47648, at *12 (Del. Ch. Apr. 17, 1990), aff'd, 586 A.2d 1202 (Del. 1990) (Where the controller waited until immediately after a price agreement had expired to eliminate the minority, the court of chancery held, consistent with Lynch's Entire Fairness standard, that such precise tactical maneuvering was incompatible with the duty of fair dealings.).

455. See, e.g., Emerging Comm'ns, 2004 Del. Ch. LEXIS 70, at *111 (ruling that tender offer freezeout was a self-dealing transaction because the controller was at both sides, so that Entire Fairness was the proper standard of review). The self-dealing nature of the transaction would be mitigated if there were truly a majority of independent directors, i.e. if there was only a de facto controller. But then Revlon duties would apply. See infra note 501 and accompanying text.

456. See, e.g., Weinberger, 457 A.2d. at 703 ("But in all this, the burden clearly remains on those relying on the vote to show that they completely disclosed all material facts relevant to the transaction.").

457. 383 A.2d at 280 ("The court's duty was to examine what information defendants had and to measure it against what they gave to the minority stockholders, in a context in which "complete candor" is required.").
no significance, in terms of the applicable standard of review to a committee's disapproval of a controller's offer.\textsuperscript{458}

To review, Pure's new standards for independent directors in tender offer freezeouts are quite limited. In Pure, the court held merely that where a controller is found to have hindered the target's directors from serving as informed, impartial advisers to the minority shareholders, the freezeout would not be presumed fair—hence not entitled to deferential review.\textsuperscript{459} To be clear, the court did not create an affirmative fiduciary obligation on the part of a controller to create (i.e. allow the target board's creation of) a special committee. Pure merely assumes that such a special committee will have been created. Indeed, Pure does not resolve or even address the equitable effect of the absence of such a committee. (Nor is it clear that Cox resolves this issue—a committee that does not exist cannot disapprove of a controller's offer).\textsuperscript{460} Second, given that Pure allowed "a close personal friend" of the controller's President and COO to serve as one of the two members of Pure's special committee (without even noting there was any problem regarding the committee's independence from the controller),\textsuperscript{461} it is clear that the court did not establish a rigorous test of independence for special committee members in a tender offer freezeout. Nor did the court find that the controller had unacceptably hindered the committee's functioning, notwithstanding that Unocals' representatives participated in meetings where the committee was deliberating.\textsuperscript{462} This result is remarkable since Pure's only express requirement regarding a committee's role in a tender offer freezeout is that the controller must not hinder the committee's ability to formulate its opinion about the offer.\textsuperscript{463}

Even more significantly, Pure expressly rejected the view that committees have inherent fiduciary authority to oppose a controller's bid that they judge to be inadequate or coercive.\textsuperscript{464} Finally, Pure declined to give distinct significance to whether a special committee approved or disapproved of the controller's offer. (In the transaction in Pure itself the committee determined to recommend against the minority's tendering to the controller,\textsuperscript{465} and the court did not afford this disapproval significance in its holding.\textsuperscript{466}) On this last point only, Cox recants Pure's special committee provision.\textsuperscript{467}

\textsuperscript{458} Cox, 879 A.2d at 607 ("That is, in the context of going-private transactions implemented by tender offers by controlling stockholders—so called Siliconix transactions—the protections of Pure Resources should be supplemented by subjecting the controlling stockholder to the entire fairness standard if a special committee recommended that the minority not tender." (citations omitted)); compare id. at 645 ("In the case of a tender offer by a controlling stockholder, the controlling stockholder could be relieved of the burden of proving entire fairness if: 1) the tender offer was recommended by an independent special committee; 2) the tender offer was structurally non-coercive in the manner articulated by Pure Resources; and 3) there was disclosure of all material facts.").

\textsuperscript{459} Pure, 808 A.2d at 445.
\textsuperscript{460} See Cox, 879 A.2d at 607.
\textsuperscript{461} Pure, 808 A.2d at 426, 429.
\textsuperscript{462} Id. at 431.
\textsuperscript{463} Id. at 445.
\textsuperscript{464} Id. at 446.
\textsuperscript{465} Id. at 432.
\textsuperscript{466} Id. at 445.
\textsuperscript{467} Cox, 879 A.2d at 607, 645.
In sum, Cox provides that in a tender offer freezeout, in addition to a controller needing to adhere to Pure's anticoercion standards, a court should apply the Entire Fairness standard if the special committee disapproved of the controller's offer and the controller proceeded with the freezeout nevertheless.\footnote{\textit{Id.}}

On this point the Cox opinion is absolutely clear: committee disapproval should mandate the application of the Entire Fairness standard.\footnote{\textit{Id.}}

However, two profoundly important caveats are pertinent to evaluating Cox's treatment of the role of committees in tender offer freezeouts. First, Cox provides only that the committee's disapproval will preclude deferential review of the tender offer freezeout.\footnote{\textit{Id.}} Cox does not provide that controllers should be precluded from going forward if the special committee has disapproved of the offer. The cost of the committee's disapproval is the application of the Entire Fairness standard if claims are filed in equity. Secondly, crucially, Cox does not mandate that committees must be given real negotiating authority for the freezeout to receive judicial deference.\footnote{\textit{Id.}} Cox does not address the part of Pure that rejected special committees' fiduciary authority to employ a defensive strategy while it investigated alternatives to the controller's offer.\footnote{\textit{Id.}} Neither Pure nor Cox resolves the disparity between target directors' expansive authority in third party hostile tender offers and target directors' circumscribed authority in responding to controllers' tender offers. The second important shortcoming in Cox's special committee provision is that there are two significantly different versions of it in the opinion.\footnote{\textit{Id.}} The two versions, have very different implications for freezeout negotiations. To put the issue most succinctly: it is unclear what effect Cox would give to a special committee's decision to remain neutral in a tender offer freezeout. On the first occasion in the opinion where the court addresses this issue, it provides that deferential review should apply if (in addition to Pure's anticoercion litany being followed) the special committee does not "disapprove" of the tender offer freezeout.\footnote{\textit{Id.}} In the second instance, it provides that the special committee's approval should be required in order for the transaction to be presumed noncoercive and eligible for deferential review.\footnote{\textit{Id.}} This second version, of course, raises the bar for deferential review.

\footnote{\textit{Id.}} Whether read as an approval requirement or a requirement of nondisapproval, it is clear that Cox is proposing that a special committee's disapproval would trigger the Entire Fairness standard for the tender offer freezeout.\footnote{\textit{Id.}} at 607 (the "nondisapproval" requirement) and 645 (the approval requirement).\footnote{\textit{Id.}} At times Cox describes the special committee's role in negotiating the freezeout, in addition to approving of it, as a condition to deferential review.\footnote{\textit{Id.}} at 643-44. However, as part of this negotiating power Cox nowhere proposes that the special committee be allowed defensive authority to block the bid while it considers alternatives. In the absence of such plenary defensive power and the attendant capacity to consider alternative proposals, it is difficult to make sense of what genuine negotiating authority means.\footnote{\textit{Id.}} at 607, 645 (this is evident from Cox's failure to address a committee's defensive authority or even negotiating role in a tender offer freezeout).\footnote{\textit{Id.}} at 607 (the "nondisapproval" requirement) and 645 (the approval requirement).\footnote{\textit{Id.}} at 607.\footnote{\textit{Id.}} at 645.
Thus the court in Cox did not take a definitive stand in favor of the approval or non-disapproval requirement judicial deference.

The relevance of neutrality (i.e. whether “nondisapproval” will be sufficient for deferential review) is significant because special committees will remain under significant pressure not to disapprove of a controller's tender offer. It will be extraordinarily tempting for them to elect neutrality “at worst.” This is certainly a viable option as far as Schedule 14D-9 is concerned; the SEC rule so provides expressly. The attraction to the committee of electing neutrality is intensified by the limited defensive authority afforded special committees in these cases. Indeed, given the absence of a fair price duty in tender offer freezeouts (as validated by Pure and Cox), the absence of defensive authority on the committee’s part, and the fact controllers will foreseeably threaten not to rescind their offer if the committee disapproves, “neutrality” will be a nearly irresistible option for a committee that is unpersuaded or uncertain about the value of the controller’s offer. Given the court’s historic presumption that minority shareholders can decide for themselves whether to tender their shares, the committee will be under tremendous pressure not to “kill the deal” by officially disapproving of it, as the controller will assert would be the case.

In this regard it is noteworthy that Cox does not present its new special committee provision for freezeouts as part of a law reform agenda aimed at protecting minorities’ interests. The tenor of the Pure opinion is very different from that of the Cox opinion in this respect. The Pure opinion expressed considerable concern about controllers’ capacity for overreaching in tender offer freezeouts. The Cox opinion, in contrast, expressed far less concern for minorities’ vulnerability in freezeouts. In Cox, these issues take a back seat to the court’s goals of unifying freezeout doctrine and reducing shareholder litigation in freezeouts.

D. THE AMBIGUOUS STATUS OF CONTEMPORARY TENDER OFFER FREEZEOUT DOCTRINE, IN SUMMARY

The ambiguities present in Cox’s different special committee provisions are one salient example of the shortcomings in the court of chancery’s approach to

476. This is illustrated by the conduct of the committees in Siliconix and Aquila. See Siliconix, 2001 WL 716787, at *5; Aquila, 805 A.2d at 191.
478. Pure, 808 A.2d at 445; Cox, 879 at 607 and 645.
479. Pure, 808 A.2d at 446; Cox, 879 at 607 and 645.
480. Solomon, 672 A.2d at 39.
481. For discussion of Cox’s emphasis on reducing litigation in freezeouts and unifying freezeout doctrine, see infra Part IV, B and D.
482. Pure, 808 A.2d at 445 (“The potential for coercion and unfairness posed by controlling stockholders who seek to acquire the balance of the company’s shares by acquisition requires some equitable reinforcement, in order to give proper effect to the concerns undergirding Lynch.”).
483. Cox, 879 A.2d at 646 (“The jarring doctrinal inconsistency between the equitable principles of fiduciary duty that apply to Lynch and Siliconix deals has been noted by this court before in Pure Resources and Cysive.”).
484. Id. (“It was thought preferable in Pure Resources to keep the strands of the doctrine separate until there is an alteration of Lynch, lest the less than confidence inspiring pattern of “Lynch litigation” replicate
reforming tender offer freezeout doctrine. Admittedly, affirming the application of a fair dealings requirement would not resolve all the ambiguities regarding what controllers could and could not do in tender offer freezeouts, consistent with their fiduciary duties. It would, however, alter the background standard of what is acceptable, and preclude marginally acceptable practices by controllers in this context. Whether the courts validate a background norm of Entire Fairness or business judgment deference thus matters tremendously to minorities and controllers contemplating these deals.

Furthermore, the establishment of a fair price requirement in tender offer freezeouts would limit controllers' ability to use these transactions to profit from the market's apprehension of controllers' capacity for self-dealing. Neither Pure nor Cox make progress in resolving the doctrinal disparity and logical inconsistency between the largely passive role contemplated for target directors in responding to controllers' tender offers and the robust authority afforded independent directors in defending against unsatisfactory third party tender offers under Unocal and its progeny. Neither Pure nor Cox effectively grapples with the "total voluntariness" standard affirmed by Solomon for controllers' tender offers. For these reasons, the Solomon tradition, even as further elaborated by Pure and Cox, does not create a solid foundation for the future evolution of freezeout doctrine.

IV. THE COX DECISION AND THE FUTURE OF FREEZEOUT DOCTRINE

This Part IV first analyzes the criticisms of suits and settlements in cash-out mergers under Lynch's Entire Fairness standard, as they are enumerated in the court of chancery's opinions in Cysive and Cox. These criticisms are the backdrop to Part IV's later discussion of the contribution to minorities' welfare made by Lynch's Entire Fairness standard.

A. A PRELUDE: CYsIVE DERIDES ENTIRE FAIRNESS REVIEW IN FREEZEOUTS

1. The Facts in Cysive

The Cysive opinion reflects the court of chancery's findings after a full trial. In 2003, Nelson Carbonell, the controller, founder and chief executive officer of Cysive, Inc. sought to acquire the remaining publicly traded shares of Cysive through a cash-out merger. In 2000, Carbonell sold a minority interest in Cysive in a public offering (earning more than $62 million in so doing). Soon thereafter, the technology market lost value and a business reorganization failed. Both
Cysive's independent and management directors, and Carbonell himself, agreed that fundamental change was necessary for Cysive to avoid liquidation. Accordingly, they hired an investment bank and commenced a search for a buyer. After months of searching and not receiving any credible offers, Carbonell himself offered to purchase the company's remaining publicly traded shares. His good faith toward the minority was manifest in his permitting the search for a third party buyer to continue while he negotiated the cash-out merger with Cysive's independent directors. In addition, the price he offered exceeded not only the market trading price of the minority shares, but also the firm's anticipated liquidation value. The court held that Carbonell's cash-out merger met the Entire Fairness standard.

2. Litigating Factually-Intensive Questions in Equity

Cysive begins by observing that the parties disagreed about the relevant standard of review. The plaintiffs argued that Carbonell was a controller, so that the Entire Fairness standard was relevant. The defendant argued that the business judgment rule applied. The court observed that the answer was not self-evident because Carbonell owned just under 40% of Cysive's voting shares, and hence possessed less than conclusive voting control. However, because he exercised managerial control, as the founder and CEO of the company, the court combined his voting power and his managerial power to conclude he was a controller (in the language of this Article, a de facto controller). On this basis the court applied the Entire Fairness standard. Cysive's decision to treat Carbonell as a controller was based on the court's conclusion that he exercised both voting and managerial control, as evidenced by his ownership of just under 40% of the voting shares and his role as the founder and CEO of the company.

490. Id. at 538.
491. Id. at 533-34.
492. Id. at 540.
493. Id. at 534, 541-44.
494. Id. at 542. Because of the company's problems, the stock price plummeted. As stated therein: "When the market's infatuation with technology stocks ended, Cysive's formerly lofty stock price dropped precipitously. From its NASDAQ trading high of $63 per share in March 2000, Cysive's stock price dropped drastically, eventually reaching a low of $1.93 per share in August 2001." Id. at 536-37.
495. Id. at 557.
496. Id. at 546-47.
497. Id. at 546.
498. Id. at 547.
499. Id. at 551-52 ("Carbonell holds a large enough block of stock to be the dominant force in any contested Cysive election."). For another example of a case in which it was questionable whether a shareholder was a controller, see In re Western Nat'l Corp. S'holders Litig., No. 15927, 2000 WL 710192 (Del. Ch. May 22, 2000) (finding, under the Lynch doctrine, that a 46% shareholder was not a controller based on the factual circumstances).
501. Cysive, 836 A.2d at 552-53. As defined in the introduction, Carbonell was a de facto controller. For this reason, as the court in Cysive recognized, the sale of the company represented a change of control and implicated Revlon duties. See id. at 557 n.40 ("Whether Revlon duties pertain in a cash deal involving a controlling stockholder is an interesting question the answer to which has little practical effect. Because entire fairness is the most exacting form of review, and because the Snowbird Agreement passes muster under that test, it is difficult to see how the intermediate Revlon standard could be violated."). Nevertheless, if the Cox Reforms allow Dual Ratification to trigger deferential review,
controller reflects an expansive application of the Entire Fairness standard, but not an unorthodox one. Nevertheless, had the court been searching for a principled way to streamline the proceedings and to avoid review for Entire Fairness, it could have ruled against Carbonell's "controller" status, and hence applied the business judgment rule. Instead, the court's expansive ruling on Carbonell's controller status served as a vehicle for its proposing fundamental reform of the Lynch Doctrine.502

The Cysive court's indictment of the Lynch Doctrine is sweeping. The court especially condemns the factually intensive nature of the fair dealings inquiry, noting that fair dealings is relevant to both the question of the burden shift and the resolution of the merits of the claim.503 The court criticized Lynch's adherence to the Entire Fairness standard as miring suits against controllers' cash-out mergers in "time consuming questions that are of little practical consequence."504 According to Cysive, Lynch has "so entangled the determination over the standard of review with the resolution of the merits that the two inquiries are inseparable."505 In sum, the court expresses substantial frustration with the Lynch Doctrine for preventing the efficient adjudication, and especially the timely dismissal of claims, in cash-out merger freezeouts.506 While suggesting various strategies which courts could employ to simplify the burden-shifting aspect of the Lynch Doctrine, Cysive goes so far as to question whether the Lynch Doctrine should be perpetuated at all.507

Cysive's claims about the Lynch Doctrine's hypertrophied complexity are rather odd because all claims of breach of fiduciary duty require courts to adjudicate complex facts. This intertwining of flexible, nuanced, context-specific standards and complex facts is the hallmark of Delaware's corporate legal jurisprudence, and a reason for its prestige.508 In this regard, it is notable that just two years before Cysive was decided, Vice-Chancellor Strine had co-authored an article published in The Business Lawyer (with two other Delaware judges) protesting that undue complexity had grown up in Delaware's corporate fiduciary

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502. Cysive, 836 A.2d at 549 ("These realities suggest that the Lynch doctrine if it is to be perpetuated could be usefully simplified.").
503. Id. at 549-50.
504. Id. at 550. The court further contends that even the determination over whether a controller is present has consumed "disproportionate energy" and generally cannot be resolved on the pleadings. Id. at 550-51.
505. Id. at 547.
506. Id. at 547-49.
507. Id. at 549.
508. See, e.g., Edward B. Rock, Saints and Sinners: How Does Delaware Corporate Law Work?, 44 UCLA L. Rev. 1009 (1997) (arguing that Delaware fiduciary law operates through normatively saturated, factually intensive narratives that provide guidance to corporate actors about proper and improper conduct in complex transactions).
jurisprudence.\textsuperscript{509} In particular, the article proposed that going forward, the courts should allow less intensive judicial scrutiny of many kinds of transactions, consistent with the business judgment rule.\textsuperscript{510} Other commentators do not necessarily agree that the business judgement rule should be the universal standard.\textsuperscript{511} Put simply, the Lynch Doctrine is not exceptional for requiring courts to scrutinize complex facts. What makes Lynch exceptional is its refusal to allow disinterested director or shareholder consent to supplant judicial scrutiny of the transaction. In other contexts, such disinterested consent to a self-dealing transaction will trigger deferential review (i.e. application of the business judgment rule), rather than merely shifting the burden of proof.\textsuperscript{512} This is why the recent trilogy of freezeout cases characterize the Lynch Doctrine as being gratuitously "rigid"—that is, in insisting that shareholders are entitled to a hearing on Entire Fairness because of the controllers' potential for coercion and the high stakes involved in a cash-out merger.\textsuperscript{513} Cysive is correct that the Lynch Doctrine allows minorities more room to have their claims of unfairness heard by the court, but this is fitting since freezeouts are unusual in the potential for insider opportunism they present, and the limited play of minority-protective market forces in this context.

Cysive correctly observes that there is some degree of overlap in the facts pertinent to the determination of who possesses the burden of proof and a resolution of a fair dealings claim under the Lynch Doctrine.\textsuperscript{514} But the court's conclusion that Lynch is fatally flawed because it is grossly inefficient in this regard is hyperbole.\textsuperscript{515} As long as courts are able to impose limits on attorneys' fees in these suits (which they are),\textsuperscript{516} the phenomenon of duplicative presentations of evidence is

\begin{itemize}
  \item \textsuperscript{509} Allen, Jacobs & Strine, supra note 17, at 1292 ("Moreover, new standards of review proliferated when a smaller number of functionally-thought-out standards would have provided a more coherent analytical framework.").
  \item \textsuperscript{510} Id. at 1317 ("In contrast to current practice, however, we would apply the business judgment review standard to self-interested mergers, in cases where the merger: (1) was expressly conditioned on an informed and uncoerced majority of the minority vote; or (ii) was approved as fair by an effective and uncoerced special committee of independent directors."); id. ("We would also rid the corporate law of the 'waste' exception to the ratification effect currently accorded to informed, uncoerced stockholder votes."); id. at 1321 ("These modest incremental changes should better position the Delaware corporation law to tackle the new doctrinal challenges that will undoubtedly emerge during this new century.") (emphasis added).
  \item \textsuperscript{511} See, e.g., E. Norman Veasey & Christine T. Di Gugliemo, What Happened in Delaware Corporate Law and Governance from 1992-2004?, A Retrospective on Some Key Developments, 153 U. Pa. L. Rev. 1399, 1486 (2005) ("Having two applicable standards of review available, rather than applying entire fairness review to all transactions involving controlling stockholders, leaves room for the fact-specific, contextual inquiries at which the Delaware courts are adept.").
  \item \textsuperscript{512} See supra note 126. For further analysis and citation to the case law under section DEL. CODE tit. 8, § 144, see Cox, 879 A.2d at 614-15.
  \item \textsuperscript{513} See, e.g., Cox, 879 A.2d at 609 ("any amended complaint the plaintiffs might file against an ultimate merger agreement could not be dismissed, per the teachings of Kahn v. Lynch Communication Systems, Inc., if the plaintiffs could plausibly allege unfairness.").
  \item \textsuperscript{514} Id.
  \item \textsuperscript{515} Cysive, 836 A.2d at 547-48.
  \item \textsuperscript{516} See id. at 549.
  \item \textsuperscript{517} See infra Part IV, C, 2.
a manageable one. The procedural devices incorporated into the Lynch Doctrine facilitate a methodical litigation process that allows the controller’s and minority’s representatives to assess the strength of their claims while they resolve whether to litigate further or to settle them. Instead, Cysive proposes that the intermingling of facts relevant to threshold procedural questions (such as the burden of proof) and facts relevant to resolving the merits of these claims are an “aspect of our corporation law that is passing strange.” The opinion proposes that the case at bar is an example of this, noting that neither the plaintiffs nor the defendant requested that the standard of review or burden of proof be resolved prior to trial. However, as the court fails to note, it was the defendant who requested an expedited full trial on the merits, in order to facilitate his ability to obtain the financing required to consummate the transaction. Hence, contrary to what the court suggests, the proceedings in Cysive do not support the conclusion that the Lynch Doctrine prevents dismissals when they are warranted, or that it forces full trials in conditions of absurd uncertainty. The controller’s interest in resolving all the open issues through an expedited trial made Cysive exceptional in this respect.

3. The Importance of the Burden of Proof in Freezeout Suits

The Cysive opinion adds force to its criticism that the Lynch Doctrine unfruitfully prolongs litigation by proposing that the court’s consideration and assignment of the burden of proof in the proceedings is of little practical importance to the litigants. As stated therein: “The practical effect of the Lynch doctrine’s burden shift is slight.” Accordingly, as a logical next step, the Cysive opinion recommends that the Lynch Doctrine should be streamlined to eliminate the potential for burden-shifting upon disinterested consent to the freezeout. By eliminating hearings contesting the validity of the consents (that are the predicate to burden shifting under the Lynch Doctrine), Cysive intends to accelerate the resolution of shareholder claims against cash-out mergers and increase controllers’ chances of obtaining dismissals.

518. Cysive, 836 A.2d at 547. The court suggests that controllers are so intent on avoiding the costly, duplicative presentation of evidence as part of the proceedings that they prefer to endure full trials in situations where the allocation of the burdens of proof and the relevant standard of review are not resolved prior to trial—that is, in a state of nearly intolerable uncertainty. Id. at 549.
519. Id. at 547 (“Although the trial in this matter has already been held, a major aspect of the parties’ post-trial briefs focuses on the standard of review I am to apply to decide the case.”).
520. Id. at 534 (“Because the pendency of this suit was hampering Carbonell’s financing efforts, the defendants sought an expedited trial. That request was granted...”).
521. Id. at 547–49.
522. Id. at 534.
523. Id. at 549 (“Thus, because of the factually intensive nature of the burden-shifting inquiry and the modest benefit obtained by the defendants from the shift, it is unsurprising that few defendants have sought a pre-trial hearing to determine who bears the burden of persuasion on fairness.”).
524. Id. at 548.
525. Id. at 549–50.
526. Id. at 549 (“These realities suggest that the Lynch doctrine, if it is to be perpetuated, could be usefully simplified. When the Lynch doctrine governs, it would be simpler to take one of two
The heart of Cysive's assertion that the assignment of the burden of proof is "time consuming" and "of little practical consequence" in freezeouts is its conclusion that the burden of proof operates essentially as a tiebreaker—that it assumes functional importance only in the rare case when the evidence is "in equipoise." As stated therein: "[S]hifting the burden of persuasion under a preponderance standard is not a major move, if one assumes, as I do, that the outcome of very few cases hinges on what happens if the evidence is in equipoise." Because dead ties are highly unlikely in litigation, if the burden of proof operated merely as a tiebreaker, then the court would be correct in finding it of little practical significance. However, this is an oddly limited view of the function of burdens of proof in litigation.

It is more plausible that the allocation of the burden of proof between plaintiffs and defendants exerts a comprehensive framing effect on the proceedings, and that this would be true in respect to both the court's interpretation of the facts and the law. First, the law's allocation of the burden of proof reflects a base-line policy judgment about which party should bear the risk of ambiguity. Under the Lynch Doctrine, and the duty of loyalty in general, once conflict of interest has been established, the fiduciary-as-defendant bears the burden of proof. Accordingly, the assignment of the burden of proof would influence the resolution of ambiguity in regard to the review of all the facts and legal issues in the case. The assignment of the burden of proof (like the standard of review) operates comprehensively in the litigation as a heuristic, not merely as an ex post tiebreaker.

As analyzed above the Lynch Doctrine's allowance of burden-shifting takes into account the superior bargaining power of controllers in freezeouts. Hence, it assigns the burden of proof and attendant risks arising from ambiguity to the controller, absent evidence of the minorities' informed ratification of the transaction, or that of their directors, on their behalf. Furthermore, by allowing disinterested,

approaches. If it is thought that giving the plaintiff the opportunity to litigate a case under a favorable fairness standard is sufficient...then the burden of proving unfairness could be placed on, and remain with, the plaintiff from the beginning.

527. Id. at 550.
528. Id. at 548.
529. Id.
531. See, e.g., Tamar Frankel, Presumptions and Burdens of Proof as Tools for Legal Stability and Change, 17 Harvard J. L. & Pub. Pol'y 759, 765 (1994) ("If plaintiff-shareholders fail to prove that the board's decision was flawed by lack of care or tainted with conflicts of interest, their actions will be unsuccessful. If plaintiffs prove either flaw, the burden of proof then shifts to the defendants. At this point the gate opens up, allowing judicial scrutiny of the merits of the decision.").
532. Id.
533. For a discussion in the academic literature, see, e.g., Stephen M. Bainbridge, Mergers and Acquisitions 211 (2003) ("As is often the case, the party bearing the burden of proof on a given dispute lost."); Frankel, supra note 531.
534. For the court's treatment of the burden of proof issue in a tender offer freezeout, see Emerging Comms'n, 2004 Del. Ch. LEXIS 70, at *111 ("Both sides agree that because the Privatization is a self-dealing transaction of which the majority stockholder stands on both sides, entire fairness is the standard of review ab initio. The only question is whether the burden of proof, which normally falls on the defendants, has shifted to the plaintiffs in this particular case.").
informed consent to shift the burden of proof back to the plaintiffs, the Lynch Doctrine (in the manner of transactional choreography) provides controllers a positive incentive to expose their deals to this salutary constraint. In these respects the allocation of the burden of proof has genuine practical significance to minority shareholders in cash-out mergers.

In contrast to Cysive's suggestion that the assignment of the burden of proof is of little consequence, Delaware's broader case law on corporate fiduciary loyalty supports the conclusion that the assignment of the burden of proof is significant to the litigants and the proceedings. This is reflected in the fact that the courts oversee something like a "pas de trois" in considering the allocation of the burden of proof in a case alleging a fiduciary breach. Once the burden-possessing plaintiff demonstrates the apparent presence of self-dealing, it is the defendant/proponent of the self-dealing transaction who must prove its "entire" or "inherent" fairness to avoid paying damages—unless it obtains the burden-shifting consent described above. If there was a broad consensus that the allocation of the burden of proof was of little importance, then there would be widespread judicial resistance to this feature of fiduciary doctrine. This basic feature of Delaware's duty of loyalty jurisprudence would not exist if the burden of proof were as insignificant as Cysive contends.

Further evidence of the practical importance of the allocation of the burden of proof is demonstrated by the fact that controllers go to considerable lengths to obtain disinterested consent—that is, by supporting the establishment of special committees in cash-out mergers, and inviting their consideration of the freezeout proposal. Controllers do so, moreover, despite the fact that under the Lynch Doctrine, the maximum legal benefit consent will afford them is a shift in the burden of proof (rather than a return to the business judgment rule), as discussed above. Controllers would not go to the trouble of facilitating the formation of such committees, and seeking their consent to freezeout, if they did not anticipate substantial benefit from their efforts—and, again, under the Lynch Doctrine, the maximum benefit controllers can obtain is a shift in the burden of proving fairness.

535. See, e.g., Cox, 879 A.2d at 618 ("Initially it cannot be ignored that Lynch created a strong incentive for the use of special negotiating committees in addressing mergers with controlling stockholders. This is a very useful incentive.").

536. For a recent application of the principle that informed ratification by disinterested directors or stockholders shifts the burden of proof to plaintiffs and makes the business judgment rule applicable, see, e.g., Orman v. Cullman, No. Civ. A. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (finding that stockholder ratification of the merger, notwithstanding the presence of conflicted directors, shifts the burden to plaintiffs, resolving claims in controller's favor). In Orman, because the court did not interpret the sale as a freezeout, it allowed the business judgment rule to apply.

537. See, e.g., Cahall v. Lofland, 114 A. 224 (Del. Ch. 1921), aff'd, 118 A. 224 (Del. 1922) (discerning circumstances in which courts should give effect to a burden shift); Fleigler v. Lawrence, 361 A.2d 218 (Del. 1976).

538. See, e.g., Gottlieb v. Heyden Chem. Corp., 91 A.2d 57 (Del. 1952). There is no basis to believe that the allocation of the burden of proof is of less importance in self-dealing transactions involving controllers, as opposed to other cases involving self-dealing by corporate fiduciaries.

539. For data indicating prevalent employment of special committees in cash-out mergers, see Subramanian, Theory & Evidence, supra note 23, at 18-19.

540. See supra notes, 70-72.
Authoritative legal commentators also affirm the importance of the allocation of the burden of proof. Most persuasively, in a retrospective of Delaware Supreme Court decisions, published in 2005, former Delaware Chief Justice E. Norman Veasey stated that "...burdens [of proof] and standards of review are often outcome determinative." In line with the above insights and conclusions about the importance of the assignment of the burden of proof, Part V of this Article proposes that in future freezeout doctrine, for both forms of freezeout, the burden should continue to lie initially with the controller, consistent with the "interested" nature of transaction, as it presently does under the Lynch Doctrine.

In contrast to the present rule, however, the better approach is to require Dual Ratification as a prerequisite to shifting the burden of proving unfairness to the plaintiffs.

4. Does the Lynch Doctrine Prohibit the Granting of Motions to Dismiss?

Even if one accepts Cysive's policy conclusion that claims should be dismissed on the pleadings whenever possible, is it correct that Lynch's adherence to the Entire Fairness standard precludes courts from dismissing claims against cash-out mergers on the pleadings? Cysive seems to propose that the factual underlay of cash-out merger cases is too complex to be resolved without a full trial. However, it should be remembered that in cash-out mergers and tender offers, the controller would have presented extensive, detailed information about the substance and process of the freezeout in its SEC mandated proxy statement or tender offer statement. The SEC's going private rule also adds to the detailed disclosures about

541. Veasey & DiGuglielmo, supra note 511, at 1435.
542. See, e.g., Cox, 879 A.2d at 606 (arguing that the directors' and minorities' consents are properly understood as complements, not substitutes).
543. To bolster its argument that the disinterested, informed nature of the consent of the directors (as a condition to burden shifting) is too complex to be resolved absent a full trial, Cysive cites to the Delaware Supreme Court's nearly contemporaneous decision in Krasner v. Moffett, 826 A.2d 277 (Del. 2003) as authority. Cysive, 836 A.2d at 549. However, there were matters of first impression at issue in Krasner. One was the effect to be given to special committee approval of a merger where a majority of the board had material conflicts of interest in the outcome, because a committee cannot give valid consent to a merger in Delaware. Krasner, 826 A.2d at 286. Krasner does not support a broad reading that the supreme court has determined that the allocation of the burden of proof is too complex to be determined on the pleadings, i.e. without or prior to a trial. In Krasner, furthermore, the Delaware Supreme Court affirmed that defendants have a high burden to win dismissal of a conflicted transaction. As stated therein, it is the defendants "not the plaintiffs [who] bear the burden of proving that the [challenged, interested] merger was approved by a committee of disinterested directors, acting independently, with real bargaining power to negotiate the terms of the merger." Id. at 284-85. Thus Krasner provides another example of a court allocating importance to the burden of proof in a situation involving a controller, and construing ambiguity in favor of the minority shareholder plaintiffs. On this point, see Kahn v. Tremont Corp., Civ. A. No. 12339, 1992 WL 205637, at *3 (Del. Ch. Aug. 21, 1992), rev'd on other grounds, 694 A.2d 422 (Del. 1997) (finding that the independence of the committee is a question of fact that must turn on the particular realities of the situation). But see Veasey & DiGuglielmo, supra note 511, at 1471 (suggesting that process determination regarding efficacy of special committees in conflicted transactions is a challenge to legitimate dismissals on the pleadings).
the that the controller must publish. Information from the parties' federally-mandated disclosures is often presented to the court as part of motion practice in proceedings under the Lynch Doctrine, either as part of the complaint or in motions for summary judgment. If controllers observe the minority protective conditions affirmed in the case law and in Part V of this Article, and provide the comprehensive, candid disclosure required by law, courts should be capable of legitimately resolving plaintiff's unfairness based claims prior to trial.

In Cysive there were no such extensive disclosures because the defendant's request for an expedited trial preceded the solicitation of the shareholder vote, and hence the filing of a proxy statement. However, based on the facts presented in the opinion, it seems that most of the evidence was not disputed by the parties, so that many of the questions critical to the burden of proof and resolution of the standard of review could have been resolved even without a trial. There was evidence that a genuinely independent special committee had actively and effectively negotiated with the controller, while at the same time Carbonell allowed the committee freedom to continue searching for a third party buyer. The record showed that the special committee had twenty-one meetings, contacted thirty-seven potential buyers, and obtained valuation analyses from two different well-known, independent financial advisers. The committee had negotiated a decrease in Carbonell's requested termination fee, had refused his preliminary bids, and had denied his request to cut off third party offers. There was little if any dispute over these facts. Had the procedural posture of the case not been extraordinary—that is, had the controller not sought an expedited trial prior to consummating the transaction—these facts would have been set forth in a proxy statement. Furthermore, the objective independence criteria for directors recently endorsed by the NYSE and the NASD will influence determinations about whether an independent committee ratified the freezeout and thus facilitate prompt resolution of claims. In sum, in many freezeouts, the information in

544. See SEC Rule 13e-3, 17 C.F.R. § 240.13e-3 (2007). There are many self dealing cases where the Entire Fairness standard applied where the court resolves issues pertaining to the adequacy of disclosures (as they are relevant to the efficacy of minority shareholders' approvals) on motions to dismiss. See, e.g., Orman v. Cullman, No. Civ. A. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004). Furthermore, if the court was not satisfied that the complaint and the disclosures appended thereto were sufficient, it could order limited discovery and then hear the defendant's motion to dismiss. The point is, the court can control litigation agency costs.

545. This is evident from perusing these SEC filings, but also from the judicial analysis of controllers' disclosure in the freezeout cases. See, e.g., Pure, 808 A.2d at 447-52.

546. Cysive, 836 A.2d at 536, 542.

547. The committee's composition and hiring of its financial advisor are described in Cysive, 836 A.2d at 541-42.

548. Id. at 546 ("After the Snowbird Agreement was signed, the special committee continued to entertain inquiries from interested buyers and to seek diligently a higher price.").

549. Id. at 543 and 546.

550. Id. at 543.


552. See NYSE, INC., LISTED COMPANY MANUAL § 303A.02 (defining "independent director" for NYSE listing purposes), available at http://www.nyse.com/icm/icm-section.html; NASD MANUAL, Marketplace
mandated filings with the SEC contain evidence sufficient for courts to resolve, whether to shift the burden of proof and the merits of the unfairness claim prior to a full trial. It is reasonable to believe that if Carbonell had not sought an expedited trial, the objective evidence in that case would have been sufficient for the court to resolve that the plaintiffs possessed the burden of proof.\textsuperscript{553}

Furthermore, Cysive's contention that the Lynch Doctrine is an outlier in regard to the complexity it imports to the litigation of shareholder claims is suspect. It seems highly implausible that the Lynch Doctrine is meaningfully more complex than are other corporate legal doctrines, and other features of modern litigation practice.\textsuperscript{554} The more reasonable conclusion is that neither freezeout transactions nor the doctrines governing them are more complex on average than other forms of M&As and the fiduciary standards applicable to them.\textsuperscript{555} Because the Delaware courts commonly resolve highly complex, fact-intensive disputes in corporate transactions on motions to dismiss and motions for summary judgment, it is reasonable to believe that they can do so efficaciously while adhering to the Lynch Doctrine. If claims under Lynch's Entire Fairness standard commonly go forward, this is more likely indicative of the courts' perception of widespread overreaching by controllers than their helplessness in the face of the demands of the Lynch Doctrine.\textsuperscript{557}


553. Cysive is nearly a textbook example of when the courts should allow the controller business judgment deference in litigation.

554. The article by Allen, Jacobs and Strine comes to mind. If one accepts that the role of law is to increase economic efficiency defined as growth overall (a contestable assumption), and if one accepts that shareholder litigation inhibits some number of profitable transactions (also contestable—depending on the definition of "profitable"), then the function of Delaware doctrine is to err on the side of facilitating more deals—hence looser standards are preferable. This is the working analytical framework of that law review article, and its relevance to Cysive and Cox (opinions written by one of the article's co-authors) is obvious. See Allen, Jacobs & Strine, supra note 17, at 1287-88 (describing corporate law's role in relation to economic efficiency).

555. See, e.g., Paramount Comm'ns, Inc. v. QVC Network, Inc., 637 A.2d 34 (Del. 1994); Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261 (Del. 1989). For further discussion of the heightened fiduciary standards that apply in other acquisition transactions, see infra Part V, D.


557. One would think that at this point in the evolution of the transactional choreography for freezeouts and other M&As, transactions that most buyers, and especially controllers, would avoid patent overreaching, however this does not seem to be the case. For a case demonstrating remarkable facts in this regard, see Emerging Comm'ns, 2004 Del. Ch. LEXIS 70, at *119-33 (individual director defendants on special committee were conflicted and exhibited shockingly bad judgment in representing minorities' interests, so that certain of them were found individually to have breached their fiduciary duties).
B. THE COX DECISION AS AN “ADVISORY OPINION”

The next sections of this Part IV provide an analysis of the Cox opinion’s criticisms of litigation under the Lynch Doctrine. In many respects, these criticisms expand on those in Cysive analyzed above.

1. The Cash-Out Merger in Cox

The cash-out merger in Cox exemplifies many features of modern freezeout transactions. The Cox family proposed a buyout of the public shares in Cox Communications, Inc, a company in the broadband communications industry that had listed minority shares on the New York Stock Exchange. The controlling family had previously taken the company public, and then private, and then public again, consistent with its private preferences and the company’s need for capital. When the family announced its freezeout bid in the fall of 2004, it held 74% of the company’s voting stock and control over the chairmanship of Cox’s board. The Cox family was thus unequivocally a controlling shareholder as defined under the Lynch Doctrine.

The Cox family’s initial $32 bid represented only a 14% premium over the average trading price of the listed shares. The final price, which was agreed to both by the special committee and counsel for the minority shareholders, was $34.75. Consistent with the minority shareholders’ best interests, the family agreed to go forward only if it reached an agreement with the special committee. The family also agreed to abandon the freezeout if the special committee was unable to obtain a fairness opinion from its financial adviser. Less favorably for the minority, the family announced its unwillingness to allow a market check or sale of the company to a third party. This limited the committee’s and its financial adviser’s ability to evaluate the company’s true going concern value, and hence the actual merits of the controller’s offer.

Consistent with the established transactional choreography for cash-out mergers, the special committee hired independent legal advisers (Fried, Frank, Harris, Shriver & Jacobson LLP) and independent financial advisers (Goldman Sachs). Once the controller and the special committee arrived at final terms, the merger agreement was ratified by the company’s full board. The Cox family then made a tender offer for the minority’s shares to accelerate the closing of the freezeout and

558. Cox’s changes to tender offer freezeout doctrine were analyzed in Part III, supra. In many respects, the Cox decision deepens and expands on the Cysive’s criticisms of the effects of applying Entire Fairness standard to Freezeouts under the Lynch Doctrine.
559. Cox, 879 A.2d at 607 (“At various times, the Family has found it convenient to take Cox public, in order to raise money from the public capital markets. At other times, the Family has found it preferable to run Cox as a private company.”).
560. Id.
561. Id. at 605.
562. Id.
563. Id.
564. Id. at 608. The family was quoted as saying that “it would not sell its Cox shares or support a sale of Cox to a third party.” Id.
565. Id. at 609.
566. Id. at 612.
minimize their exposure to appraisal proceedings. After acquiring over 90% of Cox Communications' shares in the tender offer, the family consummated the freezeout through a short-form merger. The Stipulation of Settlement reflecting the resolution of legal claims against the freezeout was presented to the Delaware Court of Chancery a month prior to the transaction's closing.

2. A Plan for Comprehensive Doctrinal Reform for Freezeouts

Neither the reasonableness of the price paid for the minority shares nor the family's adherence to fair dealings in the freezeout were before the court in Cox. The sole issue being contested was an objection to the plaintiffs' lawyers' requested fee. However, in Cox the fee issue serves as a platform for the court to survey contemporary freezeout doctrine and recommend comprehensive reform.

From the outset of the Cox opinion, the court's negative view of the conduct of the plaintiffs' lawyers in the transaction is explicit. In one of its blander criticisms, the court describes the lawyers as having filed "premature, hastily-drafted makeweight complaints." Moreover, the opinion expresses a palpable aversion to the conduct of plaintiffs' lawyers in claims filed under the Lynch doctrine as a general matter. It objects to what it describes as a nearly comprehensive pattern of abusive suits and settlements in cash-out mergers governed by the Lynch Doctrine. The opinion describes the settlement negotiations in the Cox transaction, and in claims against cash-out mergers governed by the Lynch Doctrine in general, as unfolding in a triangulated interchange between controllers, special committees and lawyers for minority shareholder plaintiffs. Cox contends that these problematic settlement negotiations are paradigmatic in suits filed using the Lynch Doctrine, and that they represent an easy, unfair way for plaintiffs' lawyers to earn fees. The specter of "free riding" plaintiffs' lawyers clogging Delaware's
dockets with meritless claims\textsuperscript{578} fuels the court’s sweeping invective against \textit{Lynch} is adherence to the Entire Fairness standard. Accordingly, Cox calls for comprehensive reform; indeed, for reforming not only the doctrine applicable to cash-out mergers, but all Delaware freezeout doctrine.\textsuperscript{579} In specific, Cox proposes that the business judgment rule should apply as the presumptive standard of review in all freezeouts, so long as the controller obtained Dual Ratification,\textsuperscript{580} or at least so long as neither the independent directors or minority shareholders disapproved of the transaction.\textsuperscript{581} This law reform proposal is the culmination of Vice Chancellor Strine’s opinions in \textit{Pure}, \textit{Cysive}, and Cox. As applied, it would largely repeal the Entire Fairness standard in freezeouts.\textsuperscript{582}

Notwithstanding the comprehensiveness of the reforms proposed in Cox, the “emergency” that purportedly compels their adoption relates to only one category of freezeouts (cash-out mergers), and one category of cash-out mergers—those announced as negotiable transactions.\textsuperscript{583} At a few different points in the Cox opinion the court acknowledges the limited empirical basis of its critique—observing that different pattern of claims and settlements exist in cash-out mergers announced after final terms have been reached between the controller and the minority shareholders’ representatives, as well as in a tender offer freezeouts.\textsuperscript{584} In these other contexts, Cox notes in passing, the allegedly abusive pattern of hastily filed complaints and collusive settlements does not manifest itself.\textsuperscript{585} This is a significant

\textsuperscript{578} \textit{Id.} at 605 (“...each \textit{Lynch} case has settlement value, not necessarily because of its merits, but because it cannot be dismissed.”).

\textsuperscript{579} There is some confusion with respect to the precise nature of the consent/nondisapproval required, as previously noted, \textit{supra} at notes 473–80 and accompanying text. Although the court is motivated to unify freezeout doctrine, an interesting disconnect appears. In cash-out mergers, Dual Ratification is proposed as the prerequisite to the business judgment rule. Cox, 879 A.2d at 606, 643–44. Hence, neutrality would not be sufficient, which is consistent with DGCL § 251. In the first statement of the proposal for tender offer freezeouts, the absence of disapproval seems to be sufficient. In a later treatment of this question, however, Cox proposes Dual Ratification for tender offer freezeouts to obtain business judgment deference as well. Cox 879 A.2d at 645.

\textsuperscript{580} \textit{Id.} at 643–44 (“Put simply, if a controller proposed a merger, subject from inception to negotiation and approval of the merger by an independent special committee and a Minority Approval Condition, the business judgment rule should presumptively apply.” (emphasis in original)).

\textsuperscript{581} \textit{See id.} at 606–07, 643, 647.

\textsuperscript{582} The \textit{Cox} court affirmatively avoids proposing the repeal of \textit{Lynch}, as \textit{Cysive} had delicately suggested. \textit{Cysive} 836 A.2d at 549. Cox contends that the Delaware Supreme Court has never precluded the application of the business judgment rule upon Dual Ratification. \textit{See Cox}, 879 A.2d at 617. Furthermore, \textit{Cox} deemphasizes the radicalness of its proposal to apply the business judgment rule to freezeouts upon Dual Ratification as merely “a relatively modest alteration of \textit{Lynch}.” \textit{Id.} at 643. In this way the court of chancery is endeavoring to avoid a direct conflict with respected supreme court precedent.

\textsuperscript{583} Cox, 879 A.2d at 620. (“[P]laintiffs sue as soon as there is a public announcement of the controller’s intention to propose a merger.”).

\textsuperscript{584} \textit{Id.} at 628 (“When a controller has already had to complete negotiations with a special committee or launched a tender offer, it cannot provide more consideration without implicitly criticizing the special committee (or itself) and without incurring more out of pocket acquisition costs.”).

\textsuperscript{585} \textit{Id.} at 627. Interestingly, in Cox’s lexicon there are only “premature” claims and “tardy” claims. The former are filed against cash-out mergers which are still advertised as negotiable, so that the receipt of a fee by plaintiffs’ lawyers is presumed. The latter “tardy” claims are filed against cash-out mergers after terms have been agreed to by controllers and committees—controllers generally refuse to settle those claims according to Cox. \textit{See id.} at 627.
caveat to Cox’s sweeping call to limit the application of Lynch’s Entire Fairness standard. And yet it is not one the court takes much notice of. Instead, Cox engages in a tirade against the “perverse incentives” generated by review for Entire Fairness under the Lynch Doctrine, and presents a wide array of arguments why review for Entire Fairness in freezeouts should be limited. The court proposes this sweeping law reform initiative notwithstanding that its principal criticisms of the Lynch Doctrine are inapplicable to cash-out mergers announced after key terms have been agreed to and inapplicable to tender offer freezeouts. The overbreadth in Cox’s criticisms of review for Entire Fairness reveals that the opinion is fueled by the broader, policy-based agenda noted in the Introduction.

Indeed, the Cox court is quite adamant in expressing its policy preference for significantly limiting shareholder litigation in freezeouts and encouraging more freezeout transactions.

However, if Cox was correct that controllers routinely face “injurious” circumstances in going ahead with publically announced negotiable cash-out mergers through forced settlements and the payment of excessive fees to plaintiffs’ lawyers, then controllers would eschew negotiable cash-out mergers. They could proceed with a going private deal through a tender offer freezeout or by delaying the announcement of their cash-out merger until after the principal terms had been agreed with the board or special committee. That this is not the case suggests that controllers are not stuck in an untenable situation on account of the Lynch Doctrine, but rather that they commonly enjoy some benefit from obtaining an early, comprehensive settlements in shareholder suits under the Lynch Doctrine. This likely benefit is discussed below in relation to the United States Supreme Court’s holding in Matsushita Electric Industrial Co. v. Epstein.

Although Cox acknowledges in passing that controllers may obtain some benefits from early settlements, this is a minor footnote to the discussion of opportunistic plaintiffs’ lawyers, meritless “Lynch litigation” and Lynch’s deleterious effects on firms and the economy. That is, controllers are portrayed as unwitting “victims” in Cox’s account of freezeout litigation under the Lynch doctrine.

Cox’s review of the fee dispute provided the court an opportunity to present its vision for reforming freezeout doctrine. Reviews of settlements have spurred

586. Id. at 628.
587. Id. at 605 (“Because [the Lynch] standard makes it impossible for a controlling stockholder ever to structure a transaction in a manner that will enable it to obtain a dismissal of a complaint in a challenged transaction, each Lynch case has settlement value, not necessarily because of its merits but because it cannot be dismissed.”).
588. See id. at 607, 646.
590. In general, the opinion proposes that controllers settle in order to avoid having to pay the inevitable costs associated with discovery because, the court claims suits under Lynch cannot ever be dismissed, and to avoid the waste of executive time. See, e.g., Cox, 879 A.2d at 606.
591. See, e.g., id. at 619 (“The incentive system that Lynch created for plaintiffs’ lawyers is its most problematic feature.”).
592. Id. at 646.
593. Id.
594. This is a hallmark of Vice Chancellor Strine’s decisions, about which he is not shy. To his credit, his opinions are extraordinarily comprehensive he allows no sacred cows in corporate governance; and
such far-ranging and influential opinions from the Delaware Court of Chancery in other instances.595 Merely applying the established fee doctrine to the dispute in question would not have yielded a survey of the entire body of Delaware freezeout doctrine, or an opportunity to propose a sweeping reform of freezeout doctrine.

C. Cox’s Criticisms of the Operation of the Entire Fairness Standard in Freezeouts

1. Motions to Dismiss under the Lynch Doctrine

Cox claims of the Lynch Doctrine prevents even specious shareholder claims against cash-out mergers from being dismissed.596 This view is stated and restated throughout the opinion.597 For example, Cox states that the Lynch Doctrine “makes it impossible for a controller ever to structure a transaction in a manner that will enable it to obtain dismissal of a complaint challenging the transaction.”598 In another passage Cox claims that it is “an undeniable reality that Lynch stated that any merger with a controlling stockholder, however structured, was subject to a fairness review.”599 To further emphasize this point, the opinion describes a hypothetical freezeout in which a controller offered a 25% premium above the market price to the minority shareholders, negotiated with a special committee composed of independent directors (“Bill Gates and Warren Buffett”) and otherwise adhered to the established transactional choreography for cash-out mergers meticulously and in good faith—only to have its motion to dismiss denied.600 This story is offered up as “proof” of the Lynch Doctrine’s dysfunctionality and the damage it is causing to investors and the legal system. In this respect, the Cox opinion claims, the Lynch Doctrine is different from all other corporate legal doctrines, including ones that impose heightened fiduciary requirements on M&A and self-dealing.
transactions. According to the court, in all these other doctrines, the court can dismiss nonmeritorious claims, but not under the Lynch Doctrine.

a. Entire Fairness and the Courts' Ability to Dismiss Claims in Freezeouts

As represented in the Cox opinion, the nondismissability of even the most specious of shareholder claims under the Lynch Doctrine is the root of much evil. Because even "premature, hastily-drafted, makeweight" complaints cannot be dismissed under the Lynch Doctrine, Cox contends, plaintiffs' lawyers know that they can make a "sizable" fee by free riding on the negotiation efforts of special committees in cash-out merger freezeouts. According to the court, controllers have a rational preference for settling even nonmeritorious claims because only in this way can they avoid the otherwise unavoidable and exorbitant costs of discovery and lost executive time. According to Cox, when the settlements are presented to the court for approval, the plaintiffs' lawyers claim that they have benefitted the minority shareholders by pointing to the improved price earned by the special committee. That is, Cox insists that the litigation itself contributes little or no value to improved prices where a committee has been negotiating with the controller, but that committees would win such price improvements without the filing of claims. As evidence for this conclusion the court points to the fact that it has not been presented with a case in which the plaintiffs' lawyers elected to litigate further after a special committee had settled with a controller (the "Simultaneous Settlement" phenomenon). According to the court, the plaintiffs' lawyers justify their decision to terminate the litigation on the rationalization that some improvement in the price offered to the minority is better than none which could be the result if there were further litigation.

601. Id. at 620-22.
602. Id. at 605.
603. Id.
604. See id. at 606. See also id. at 643 ("The judicial process should be invoked when a party has a genuine claim of injury. Particularly in the representative litigation context, where there are deep concerns about the agency costs imposed by plaintiffs' attorneys, our judiciary must be vigilant to make sure that the incentives we create promote integrity and that we do not, by judicial doctrine, generate the need for defendants to settle simply because they have no viable alternative, even when they have done nothing wrong.").
605. Id. at 606 ("Moreover, I cannot give credence to the notion that the litigation had a substantially important impact on the pricing of the transaction because the plaintiffs' claims were not meritorious when filed and it is most probable that the defendants settled simply because they had, under Lynch, no other economically efficient option for disposal of the lawsuit.").
606. The Cox court attributes virtually all the increases obtained by special committees in negotiations with controllers to their savvy and organizational stature (in comparison to disaggregated minority shareholders), with only the slightest advantage being conferred by the added leverage of claims filed by plaintiffs under the Entire Fairness standard. As a basis for the conclusion that committees are the driving engines of minorities' receipt of meaningfully high premiums, the Cox court cites the absence of a situation in which "the controller's lawyer told the plaintiffs' lawyer this is my best and final offer and received the answer, 'sign up your deal with the special committee, and we'll meet you in the Chancellor's office for the scheduling conference on our motion to expedite.'" Id. at 621. The Cox court proposes that "in every instance, the plaintiffs' lawyers have concluded that the price obtained by the special committee was sufficiently attractive, that the acceptance of the settlement at that price was warranted." Id.
607. Id. at 622, 633.
Finally, the Cox opinion ups the ante by asserting that the Lynch Doctrine is not only disadvantageous to controllers, but also harming the system of representative litigation under Delaware law and impairing economic efficiency in general by deterring some profitable freezeouts. As stated in Cox, the filing of meritless suits under the Lynch doctrine is deterring “the procession of offers that provide valuable liquidity to minority shareholders and efficiency for the economy in general.” These assertions form the basis of Cox’s proposal for allowing deferential review in freezeouts upon Dual Ratification.

b. The Entire Fairness Standard and “Mere” Allegations of Financial Unfairness

The claim that the Lynch Doctrine prevents the timely dismissal of claims was made previously by the court in Cysive, as described earlier. The claim seemed largely to rest on the court’s view that suits under Lynch present mixed questions of law and fact that cannot legitimately be resolved absent a trial. In Cox the nondismissability thesis rests on a different conclusion. The strongest explanation the Cox court provides for its assertions that Lynch claims “cannot ever” be dismissed is that a plaintiff can go forward under the Lynch Doctrine simply by disputing the price offered in the cash-out merger. In the words of the court, because “financial fairness is a debatable issue,” plaintiffs can always go forward, and so defendants are forced to settle even nonmeritorious claims to avoid further nonmeritorious litigation. As presented in Cox, Lynch litigation is unstoppable because the fair price aspect of the Entire Fairness standard is an open door to the courthouse.

But the court in Cox has misread the scope and implications of the Lynch Doctrine. Put simply, as provided in Weinberger and affirmed subsequently by the Delaware Supreme Court in Rabkin v. Philip A. Hunt Chemical Corp., without a credible claim of unfair dealing, a plaintiff cannot go forward with an Entire Fairness claim against a cash-out merger. The cause of action would properly be dismissed. The Weinberger opinion held so expressly—that in the absence of a genuine claim of unfair dealing, minority shareholders would be relegated to the

608. Id. at 645.
609. Id. at 646.
610. See supra Part IV, A.2.
611. See id.
612. Cox, 879 A.2d at 620.
613. Id. at 617 (“Although it is an undeniable reality that Lynch stated that any merger with controlling stockholder, however structured, was subject to a fairness review...”).
614. Weinberger, 457 A.2d at 715 (citing Stauffer v. Standard Brands, Inc., 187 A.2d 78 (Del. 1962) and David J. Greene & Co. v. Shenley Indus., Inc., 281 A.2d 30 (Del. Ch. 1971)). The Weinberger court continued to explain that “…the provisions of 8 Del. C. § 262, as herein construed, respecting the scope of an appraisal and the means for perfecting the same, shall govern the financial remedy available to minority shareholders in a cash-out merger.” Id. (emphasis added).
615. 498 A.2d 1099, 1107-08 (Del. 1985) (finding that plaintiffs had made out a credible claim that the controller had manipulated the timing of the freezeout in a way that constituted unfair dealing—a cognizable issue under the entire fairness standard—rather than merely disputing the price of the cash-out merger, so that the claim should not have been dismissed).
appraisal remedy. As envisioned by Weinberger, the fiduciary Entire Fairness claim survives only if the plaintiff has made out a viable claim of unfair dealing in the cash-out merger.

Rabkin affirms this same rule. Rabkin is widely and correctly cited for affirming Weinberger's admonition that a plaintiff can go forward in equity (is not relegated to an appraisal) where its complaint presents a genuine claim of unfair dealing in the cash-out merger. However, there was also a negative implication to Rabkin's holding. Rabkin affirmed that the lawsuit could go forward because it was not merely a valuation dispute. The controller had been "charged with bad faith that goes beyond issues of 'mere inadequacy of price.'" The import of Rabkin is that a mere valuation dispute in a freezeout, without a genuine claim of unfair dealing, should not survive as an Entire Fairness action. Hence, Cox mistakenly interprets the fair price aspect of the Entire Fairness standard as an opportunity for minorities to litigate mere valuation differences as equitable actions. And Rabkin also addressed the potential for plaintiffs to add a "mere allegation" of unfair dealing in order to survive a dismissal. To this objection the court stated: "...our courts are not without a degree of sophistication in such matters."

c. The Matsushita Effect

Again, Cox's core objection to the Lynch Doctrine is that even specious claims cannot be stopped and plaintiffs' lawyers are allowed to extort unearned fees and unfair settlements from controllers. But Cox fails to acknowledge the benefits for controllers of achieving comprehensive settlements of claims against freezeouts in state class actions.

In 1996, in Matsushita Electric Industrial Co., Ltd. v. Epstein, the Supreme Court held that federal courts must extend full faith and credit to state court settlements, including the settlement of federal securities law claims therein. Resolution of this issue was complicated by the fact that Congress provided for exclusive jurisdiction in the federal courts of claims arising under the Exchange Act. This would include

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617. Rabkin, 498 A.2d at 1107.
618. Id. at 1104-05 ("Weinberger's mandate of fair dealing does not turn solely on issues of deception."); id. at 1105 ("In Weinberger we observed that the timing, structure, negotiation and disclosure of a cash-out merger all had a bearing on the issue of procedural fairness."). In Rabkin, the supreme court reversed the chancery court's conclusion that fair dealing was limited to allegations of misrepresentation. See Rabkin, 480 A.2d 655, 660 (Del. Ch. 1984), rev'd, 498 A.2d 1099, 1104-05 (Del. 1985).
619. Rabkin, 498 A.2d at 1107.
620. Id. at 1107-08.
621. Id. at 1107.
622. Cox, 879 A.2d at 605-06 ("For their part, plaintiffs' lawyers can get sizable fees by 'contributing' to the successful work of a special committee and by settling at the same level that the special committee achieved.").
623. In fairness, Cox does make brief mention of the fact that controllers may enjoy a benefit as the result of a "broad release" of claims relating to the freezeout, but without fleshing out the significance of the reference. See id. at 631.
federal securities fraud claims against controllers' merger proxy statements\textsuperscript{627} and tender offer statements\textsuperscript{628} But in \textit{Matsushita} the Court allowed that the settlement of claims in state court (which would include claims for fiduciary breach in freezeouts) may also preclude further litigation of federal securities law claims arising from the same transaction\textsuperscript{629} \textit{Matsushita}'s holding is significant for controllers' decisionmaking regarding whether to settle claims in freezeouts. As Professor Richard Painter observed, "\textit{Matsushita... makes state court class actions advantageous for defendants who can settle state fiduciary duty and federal securities claims together in state court.}"\textsuperscript{630}

The benefits for controllers of avoiding duplicative litigation under federal and state law is obvious. But there are particular advantages for controllers of precluding federal securities litigation by achieving state court settlement of Entire Fairness claims in freezeouts\textsuperscript{631} On average, the size of settlements and attorneys' fees paid by defendants in federal securities class actions is greater than those paid by defendants in state law class actions\textsuperscript{632} In addition, the \textit{Lynch} Doctrine affords defendants a meaningful procedural benefit from obtaining disinterested consent to the freezeout (i.e. the plaintiff would bear the burden of proving unfairness in the freezeout), which may make settling (or if necessary litigating) state claims more favorable for defendants than responding to federal claims.\textsuperscript{633} There are also benefits for individual defendants of achieving state court settlements in fiduciary claims against freezeouts; in particular, the availability of charter exculpation\textsuperscript{634} and corporate indemnification rights.\textsuperscript{635} These would shield the defendant directors even if they were found to be grossly negligent in the face of the controller's freezeout. However, they would afford directors no protection from liability in federal securities fraud suits.\textsuperscript{636}

\textsuperscript{628} See 15 U.S.C. § 78n(e) (2000 & Supp. IV 2004) (prohibiting fraud, deceit, and material misrepresentation or omissions "in connection with any tender offer or request or invitation for tenders").
\textsuperscript{629} See Matsushita, 516 U.S. at 369; see also William T. Allen, Finality of Judgments in Class Actions: \textit{A Comment on Epstein v. MCA, Inc.}, 73 N.Y.U. L. Rev. 1149 (1998).
\textsuperscript{630} Painter, supra note 625, at 95.
\textsuperscript{631} State fiduciary claims may be heard in federal court as part of federal securities law actions by way of supplemental jurisdiction. See 28 U.S.C. § 1441(c) (2000 & Supp. IV 2004).
\textsuperscript{632} Thompson & Thomas II, supra note 51, at 189–94.
\textsuperscript{633} The plaintiffs would have the burden of proof in the federal securities law claims as well, but the presence of ratification in state case law, as suggested by Weinberger, is "strong evidence" of fairness. Weinberger, 457 A.2d at 709 n. 7. For further discussion of incentives that favor settling in state court, see Thompson and Thomas II, supra note 51, at 191.
\textsuperscript{634} For the relevance of charter exculpation clauses to claims of fiduciary breach against individual director defendants in freezeouts, see, e.g., \textit{Emerging Commc'ns}, 2004 Del. Ch. LEXIS 70, at *138.
\textsuperscript{635} These arise by contract but are provided for by Delaware statutory law. See Del. Code tit. 8, § 145(a) (2007).
\textsuperscript{636} By the express terms of the statute, Delaware charter exculpatory clauses are relevant only to breach of fiduciary duty claims. Del. Code tit. 8, § 102(b)(7) (2007). As a general matter, the federal courts support the SEC's position that corporations may not indemnify their executives against liability for securities fraud. See, e.g., \textit{Globus v. Law Research Service, Inc.}, 418 F.2d 1276 (2d Cir. 1969), cert. denied, 397 U.S. 913 (1970).
Cox fails to cite to the well-known Matsushita decision, and does not address the advantages it offers controllers in achieving global settlements of claims against a freezeout in state court. Cox contends that defendants settle nonmeritorious Entire Fairness claims because they have no rational economic alternative. Once the substantial benefits for controllers of achieving prompt settlements in Entire Fairness cases are apparent, Cox's account of the deleterious effects of suits under the Lynch Doctrine must be reconsidered. Certainly further research is required to reach definitive conclusions but it is possible that the settlement of Entire Fairness suits affords controllers a "cheap" way to resolve legitimate claims of both fiduciary breach and securities fraud in freezeouts. If this is the case, then these settlements may be affording controllers more room to compel freezeouts that are disadvantageous to investors and the economy overall.

d. Comparing Dismissals of Claims Governed by Revlon versus Lynch

As outlined above, a principal argument that Cox makes against the legitimacy of Entire Fairness review under Lynch is that it has prevented the dismissal of nonmeritorious claims to a degree that is unparalleled in corporate law.\footnote{637. See supra notes 596–601 and accompanying text.} Most dramatically the Cox opinion states that courts routinely dismiss nonmeritorious Revlon claims,\footnote{638. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).} but cannot ever dismiss nonmeritorious Entire Fairness claims filed under Lynch.\footnote{639. Cox, 879 A.2d at 619.} As stated therein: "Unlike any other transaction one can imagine—even a Revlon deal, it was impossible after Lynch to structure a merger with a controlling stockholder in a way that permitted the defendants to obtain a dismissal of the case on the pleadings."\footnote{640. Id.} The comparison with Revlon is intended to illuminate that the Lynch Doctrine is dysfunctional and harmful to shareholders but of real value only to plaintiffs' attorneys.\footnote{641. This is clearly the suggestion made by the objectors to the fee in Cox. Id. at 605. See also Elliott J. Weiss and Lawrence J. White, File Early, Then Free Ride: How Delaware Law (Mis)shapes Shareholder Class Actions, 57 Vand. L. Rev. 1797, 1820 (2004). Professor Weiss was among the objectors to the fee in Cox. Cox, 879 A.2d at 604.} However, there are other explanations for the disparity in dismissal rates which are consistent with the central tenets of corporate law.

Cox is correct that viewing the disparity in dismissal rates at a generalized doctrinal level, it is difficult to explain it. Claims filed under Revlon (which involve sales of control) and Lynch (which involve cash-out mergers) reflect similarly complex facts, context-specific and nuanced fiduciary mandates and high stakes for the parties. Revlon claims involve a similar admixture of substantive economic issues ("best price reasonably available") and process-based safeguards ("best efforts" and "good faith")\footnote{642. Revlon, 506 A.2d at 182.} as do Lynch claims.

However, if courts are less willing to dismiss Lynch claims, this would be consistent with two fundamental differences in these types of claims and transactions.
First, Revlon claims only rarely present problems of self-dealing corporate fiduciaries, whereas claims against controllers in freezeouts always do, by definition. In essence, Revlon duties are analogous to heightened duties of care (imposed on the target directors). In contrast, Lynch claims involve self-dealing transactions and the duty of loyalty—central to the concerns of corporate law.

Second, Revlon is applicable to a range of situations where market forces are more likely to operate and provide some meaningful protection to shareholders, as is not the case in freezeouts. In Revlon cases, the courts scrutinize the change of control transaction to ensure that the target board has indeed allowed market forces to operate for the benefit of the shareholders—or, otherwise, that it has a compelling reason for not having done so. The Entire Fairness standard imposed on controllers in contrast, reflects the fact that market forces generally do not operate meaningfully in freezeouts; hence greater legal oversight is warranted.

Finally, the fact that individual directors on special takeover committees are commonly the target of Revlon claims, whereas controllers are frequently corporate entities, would also suggest a principled reason for the disparity in dismissal rates. Delaware corporate law is extremely reluctant to hold individual directors liable for breaches of fiduciary duty, especially where they have not acted out of personal self interest (which is rarely an issue in a Revlon case). This limitation on director personal liability is intended to encourage talented people to serve on public companies' boards. This policy concern would commonly favor dismissals in Revlon cases but not cases filed under Lynch.

Hence there are good reasons—reasons consistent with fundamental corporate law policies and principles—why the courts would be more inclined to dismiss claims under Revlon than claims under Lynch. Nothing about the disparity suggests that the Lynch Doctrine is broken, unreasonable, or misshaping Delaware corporate law.

643. Revlon, 506 A.2d at 182 (holding that board could not play favorites among bidders once company had been put up for sale and directors' choice of bid that presented certain liability immunizing benefits for themselves was unlawful).

644. See, e.g., Paramount Communications, Inc. v. QVC Network, Inc. 637 A.2d 34, 46 n.17 (Del. 1994); Mills Acquisition Co. v. MacMillan, 559 A.2d 1261, 1287-88 (Del. 1989); City Capital Assoc. Ltd. Partnership v. Interco, Inc. 551 A.2d 787, 802 (Del. Ch. 1988), appeal dismissed, 556 A.2d 1070 (Del. 1988) (holding that a disinterested board maintains the right and continues to have the duty to exercise its business judgment in seeking to maximize shareholder value).

645. This is reflected, for example, in the fact that duty of care breaches may be excused but breach of loyalty claims or other claims involving bad faith or express wrongdoing by fiduciaries cannot be. Del. Code tit. 8, § 102(b)(7) (2007).

646. See, e.g., Barkan v. Amsted Indus., Inc., 567 A.2d 1279, 1288 (Del. 1989) (where sale of control is implicated, a deal that does not involve a realistic market check may be difficult to sustain).

647. See, e.g., In re The MONY Group Inc. Shareholder Litig., 852 A.2d 9 (Del. Ch. 2004) (directors did not breach duty, having put the company up for sale, and entered into a merger agreement, which nevertheless allowed for a post signing market check—notwithstanding that they had eschewed an auction).

648. The most famous exception in the acquisitions area is Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). As relevant to freezeouts, however, see Justice Jacobs decision in In re Emerging Commc'ns, Inc. Shareholder Litig., No. Civ. A. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004). Nevertheless, the independent directors in that transaction used extraordinarily bad judgment.
2. Attorneys’ Fees in Settlements under the Lynch Doctrine

The issue of controllers paying (being compelled to pay) excessive, unearned fees to plaintiffs’ lawyers in freezeout suits on account of the Lynch Doctrine is at the heart of the Cox opinion.649 This is true in the literal sense that the court had to rule on an objection to the plaintiffs’ attorneys’ request for fees. But it is true in the broader sense that Cox claims that this is a serious, harmful byproduct of the Lynch Doctrine. As stated in the opinion, the “incentive system that Lynch created for plaintiffs’ lawyers is its most problematic feature.”650

However, it is unclear why freezeout doctrine, as opposed to the fee doctrine pertinent thereto, would have created this problem. Indeed, it is difficult to comprehend how the problem of excessive plaintiff attorney’s fees could have become such a major problem in Delaware class actions, as Cox suggests it is. The payment of coerced or excessive fees to plaintiffs lawyers should be controllable in corporate law because the court of chancery has sweeping authority and ready practical means to moderate the size of plaintiffs’ attorneys’ fee awards. The Cox opinion itself acknowledges this in its statement that “this court had been modest in awarding fees in [the class action] context.”651 The court of chancery is required to review all settlements in class actions, which includes the award of fees as part of these settlements.652 The Cox decision itself illustrates the expansive discretionary authority possessed by the court in the review of fees. The court determined to reduce the fee awarded to the minority shareholders’ lawyers.653

In reviewing the doctrine relevant to the disputed fee, Cox notes that the courts have discretion to apply either the Chrysler Corp. v. Dann standards654 or the more traditional Sugarland standards.655 Unabashedly exercising its broad dis-

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649. This is the core complaint presented by Professors Weiss and White in their Vanderbilt Law Review article. See supra note 641.
650. Cox, 879 A.2d at 619. The court employs colorful metaphors to ridicule the conduct of the plaintiffs’ lawyers in the Cox transaction—for example it describes the process of their selecting lead counsel as resembling a “food fight.” Id. at 609. As an aside, it is difficult to believe that controllers’ lawyers are less concerned about their fees and status among their peers than are plaintiffs’ lawyers, but their battles over status and fees are less visible.
651. See id. at 622. See also id. at 639 (“As the objectors point out, this court has never yielded to plaintiffs and defendants the right to set the level of fees that are awarded in representative actions. Even when defendants agree to pay the requested fee fully, the settlement benefits to the class are concededly adequate, and there has been no objection, this court has often reduced the requested fee to a smaller number.”).
652. Delaware Chancery Court Rule 23.1(c) provides that “the [derivative] action shall not be dismissed or compromised without the approval of the Court.” Del. Ch. Ct. R. 23.1(c).
653. Cox, 879 A.2d at 606 (“For reasons I detail, I therefore award a substantially smaller fee than the plaintiffs have requested.”); id. at 642 (awarding fees and expenses totaling $1.275 million).
654. Id. at 638 (finding that the Chrysler standard governs the payment of fees where plaintiffs’ suit has become moot on account of voluntary action by the defendant (citing Chrysler Corp. v. Dann, 223 A.2d 384, 386–87 (Del. 1966)).
655. Cox, 879 A.2d at 640 (considering under Sugarland: “1) the benefits achieved in the action; 2) the efforts of counsel and the time spent in connection with the case; 3) the contingent nature of the case; 4) the difficulty of the litigation; and 5) the standing and ability of counsel.” (citing Sugarland Industries, Inc. v. Thomas, 420 A.2d 142, 147–50 (Del. 1980)). In Cox, the Delaware Court of Chancery validates the more “traditional” and conservative Sugarland standards as being appropriate for freezeouts. Cox, 879 A.2d at 640–42.
cretionary authority to update the Delaware doctrine governing fees in freezeouts, the opinion states that “complaints challenging fully negotiable, all cash, all shares merger proposals by controlling shareholders are not meritorious when filed under the Chrysler Corp. v. Dann standard.”\textsuperscript{656} The opinion further limits the ability of plaintiffs’ lawyers to obtain fees in freezeouts by providing that “no risk premium should be awarded in fee applications in cases... when a plaintiff suing on a proposal settles at the same level as the special committee.”\textsuperscript{657} Finally, Cox holds that if a controller and a special committee ignore a “prematurely filed” suit and conclude the final terms of the freezeout without including the plaintiffs’ lawyers in their negotiations, there should be “no presumed entitlement to a fee by the plaintiffs’ lawyers.”\textsuperscript{658} In these respects, the Cox opinion extends the transactional choreography for cash-out mergers to encompass plaintiffs’ lawyers therein and substantially limits these lawyers’ incentives to file specious claims in these freezeouts.

With respect to the magnitude of the fee, the Cox decision substantially reduced the fee the controller had agreed to pay the plaintiffs’ lawyers. It approved a fee award of only $1.275 million, instead of the $4.95 million fee the controller had agreed to pay.\textsuperscript{659} Moreover, the court elected to reduce the fee despite the fact that the fee award did not reduce the funds allocated to the minority shareholders, as provided by the settlement’s terms.\textsuperscript{660} In this sense, the court could not claim that it was compelled to reduce the fee in the minorities’ interests. Rather the court was acting as a “gatekeeper” of the litigation system in reducing the fee.\textsuperscript{661}

In the end, Cox’s attack on unearned fees in freezeout claims is nearly entirely severable from its complaints about the Lynch Doctrine. The portion of the Cox decision that discusses and amends the fee doctrine pertinent to freezeouts (that is, the significance of Chrysler v. Dann\textsuperscript{662} and the application of the Sugarland factors\textsuperscript{663} to the requested fee) is analytically and doctrinally separate from the opinion’s discussion of Lynch and Solomon.\textsuperscript{664} Based on the discussion and holding in Cox, it is apparent that the court of chancery can amend the doctrine relevant to the approval of fees in class actions, and grant only a reduced fee to the plaintiffs’ lawyers without overhauling freezeout doctrine.

In addition, recent empirical data on fees in acquisition-oriented class actions, presented by Professors Thompson and Thomas in a Vanderbilt Law Review article published in 2004, conflicts with Cox’s assertions about the gravity of the fee problem.
in Entire Fairness claims against cash-out mergers.\textsuperscript{665} Although they acknowledge the need for further research,\textsuperscript{666} these professors conclude that plaintiffs' lawyers' fees in Entire Fairness claims under Lynch are relatively modest in amount.\textsuperscript{667} The relatively modest nature of these fees becomes evident, for example, in comparison to the fees awarded in the settlement of federal securities class actions.\textsuperscript{668} This modest nature of the fees paid to plaintiffs' counsel in these cases holds true whether they are considered on a percentage of recovery basis,\textsuperscript{669} or on an hourly basis.\textsuperscript{670} Just as significantly, Thompson and Thomas illuminate the genuinely contingent nature of plaintiffs' lawyers' receipt of any fees in freezeouts and other acquisition-oriented class actions.\textsuperscript{671} With respect to claims in freezeouts, Thompson and Thomas' data suggests that plaintiffs' lawyers receive fees in less than forty percent of all the cases filed.\textsuperscript{672} This conclusion contrasts starkly with Cox's assertion that plaintiffs' lawyers can earn "sizable fees"\textsuperscript{673} by filing a claim under Lynch.\textsuperscript{674} Even Cox itself, after excoriating the conduct of plaintiffs' lawyers in cash-out merger freezeouts, observes that the lawyers have "moderated" the size of their fee requests in these suits in recognition of the court of chancery's supervisory role.\textsuperscript{675}

Consistent with the view of the objectors, the Cox opinion concludes that Entire Fairness review under the Lynch Doctrine has proven a "green light" for attorneys

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\item 665. See Thompson & Thomas II, supra note 51, at 192–93 (citing data demonstrating that the median attorneys' fee award in federal securities cases from 1991 to 1996 was about 32 percent of the settlement value). In comparison, the median percentage of attorneys' fees in control shareholder acquisition cases was five percent of the additional consideration. Id. at 192. For a discussion of fees computed on an hourly basis, see id. at 193.
\item 666. Professors Thompson and Thomas were able to study the figures presented by the plaintiffs' law firms in the briefs they are required to file with the Delaware court of chancery to accompany their fee petitions. As they note, calculating hourly fees on this basis does not take account of the work done by plaintiffs' lawyers in claims that are dismissed without settlement—where no fees are recovered and no figures are extant. Thompson and Thomas II, supra note 51, at 193–94.
\item 667. Id. at 193.
\item 668. Id. at 192–93.
\item 669. Id. at 192
\item 670. See id. at 193.
\item 671. Id. at 193 n.222.
\item 672. See id. at 200 ("We find that in 20 of 65 of the controlling shareholder cases, additional consideration was paid to the minority shareholders, and in another five cases there were attorneys' fees paid in a settlement."). The authors note "the contingent nature of these cases." Id. at 193. More particularly, in cases dismissed without settlement (40 out of 65), no fees were paid to plaintiffs' counsel. Id. at 193.
\item 673. Cox, 879 A.2d at 605–06.
\item 674. See Thompson & Thomas II, supra note 51, at 199, Table 17; id. at 192 ("If we look at attorneys' fee awards, we see some evidence supporting the claim that Delaware class action litigation has lower litigation agency costs.... In the 20 control shareholder transactions settled in the Delaware courts [in the two year sample studied], the median amount of additional consideration paid to shareholders was about $15 million. The median percentage of attorney's fees for these cases was 5 percent of the additional consideration (with a range extending up to 37 percent). In dollar terms, the median attorneys' fees awarded by the court were $875,000 (with a range extending up to $4.4 million.").
\item 675. See Cox, 879 A.2d at 622 ("In seeking fees in these cases, the plaintiffs' lawyers have been pragmatic. Recognizing that they, at best, can claim "shared credit" with the special committee, the plaintiffs' lawyers have tempered their fee requests and have asked for relatively small percentage of the "benefit"—i.e., the difference between the price of the controller's opening bid and the final merger price agreed to by the special committee. But, at the same time, the rewards they reap are substantial...").
\end{itemize}
to extort sizable, unearned fees from controllers in freezeouts. But the available
evidence, does not demonstrate that the plaintiffs' attorneys' fees problem in these
class action suits is substantial. Most significantly, as illustrated in Cox itself, the
Delaware Court of Chancery has discretionary authority and ample authority to
block the payment of excessive fees in its review of settlements in these cases.

3. The Simultaneous-Settlement Phenomenon

At the heart of the Cox opinion is the question of what role a suit under the
Entire Fairness standard plays when it is filed during the freezeout negotia-
tions. The objectors were adamant that the lawsuit against the Cox transaction did not
add value to the bettered price obtained by the minority shareholders in the
cash-out merger negotiations—that the special committee would have obtained
the price increase without the lawsuit. The expert for the plaintiffs' lawyers,
Guhan Subramanian, testified that the pendency of the lawsuit was a positive
factor influencing the price increase, so that the plaintiffs' lawyers had earned
their fee. The court had to reach some resolution to the question of whether
the lawsuit had created value for the minority shareholders in order to rule
on the fee issue, of course. But in Cox the court addressed a broader question:
whether Entire Fairness lawsuits during freezeouts should generally be discour-
aged. The court finds that during the pendency of a freezeout negotiation
committees and minority shareholders can fend for themselves, without legal
proceedings. According to Cox, if the committee and a majority of the minor-
ity shares approve the freezeout offer that is “good enough.” In the alternative,
if either the committee or the majority of the minority disapprove, only then
should a cause of action arise in the freezeout. The issues discussed in the Cox opinion need to be teased apart to be analyzed
adequately. First, the court had to evaluate whether the lawsuit filed in the Cox
transaction helped increase the price obtained for the minority shareholders in
the freezeout. This is an empirical question—one that the court bravely endeav-
ors to answer in considering the conflicting empirical data presented by the par-
ties' experts. Although much of the opinion is spent excoriating the plaintiffs' lawyers, the court arrives at the most intelligent answer possible to this question.
The court concludes that the experts had both failed to prove their case; that it
is impossible conclusively to isolate the effect of the special committee from the

676. See Cox, 879 A.2d at 621–23.
677. See id. at 625–29.
678. See id. at 605–06.
679. See id. at 607 (“At the same time, by giving defendants the real option to get rid of cases on the
pleadings, the integrity of the representative litigation process would be improved, as those cases that
would be filed would involve plaintiffs and plaintiffs' lawyers who knew they could succeed only by fil-
ing and actually prosecuting meritorious cases, and not by free riding on a special committee's work.”).
680. For statements of Cox's Dual Ratification proposal for reforming freezeout doctrine, see id. at
606, 607, 643–44, 645, 647.
681. Id.
682. See supra notes 676–77 and accompanying text.
effect of the lawsuit on bettering the price received in the negotiations based on the empirical evidence. The ambiguous nature of the empirical evidence left the court with a dilemma however, because it has to reach a decision about the fee. Cox altered the fee doctrine to reflect the court's fervently expressed view that committees can bargain effectively without a pending lawsuit. But the court also allows a fee of $1.275 million to the plaintiffs' lawyers—thus validating their contribution to the positive outcome achieved for the minority.

On the general issue of the validity of Entire Fairness suits during the pendency of negotiations, the court rules that they will be regarded as "nonmeritorious." The principal evidence the court points to for this conclusion is a phenomenon of "simultaneous settlements." According to the court, the plaintiffs' lawyers routinely settle on the same terms as the special committee representing the minority, and at the same time. However, despite the court's conclusion, it is not obvious that the simultaneous settlement phenomenon proves that these lawsuits are specious. There are many different conclusions that are possible from this evidence. Just because plaintiffs' lawyers elect not to continue in their claims does not prove that the pendency of the lawsuit had no effect on the committee's bargaining leverage with the controller. Indeed, Cox grudgingly admits that the application of the Entire Fairness standard and even, perhaps, the pendency of the litigation, gives special committees increased leverage in bargaining with controllers in freezeouts. This is a remarkable admission on the part of the court.

683. See Cox, 879 A.2d at 629 n.57 ("...the relative contributions of the Special Committee and the plaintiffs' counsel have not been, and perhaps cannot be, empirically isolated"); id. at 631 ("One cannot tell, of course, how important each of them is as a factor...”).

684. See id. at 647 ("By now, experience has proven that special committees...are willing to say no to controllers.").

685. See id. at 641-42.

686. See id. at 638-40.

687. See id. at 621-22 ("...one awkward fact strongly suggests that the threat of bare knuckles litigation over fairness is not as important as the special committee's role as an negotiating force. That awkward fact is the absence of evidence that "traditional" plaintiffs' lawyers, who attacked going private proposals by controllers, have ever refused to settle once they have received the signal that the defendants have put on the table their best and final offer, i.e. an offer that is acceptable to the special committee.").

688. For example, it might be possible to argue that the plaintiffs' lawyers' resolution to follow the lead of special committees in this regard is evidence of the operation of salutary checks and balances in this litigation context, since, after all, the committee has a fiduciary duty to the minority and there is some chance that continued litigation would "kill the deal." It is also possible that the suit added value, by operationalizing the fair duty and fair dealings' promises in the negotiations, but that the plaintiffs' lawyers are giving up too soon because the costs and risks of the lawsuit will radically increase for them once the committee settles. This might suggest that the courts should not routinely approve the settlements but instead encourage the plaintiffs' lawyers to litigate further. It does not provide evidence suggesting that the litigation had no effect to date.

689. See Cox, 879 A.2d at 631 ("The plaintiffs' bar would say, of course, this is because they did such a good job in each case that the price concessions they helped the special committee extract was of such inarguable fairness that it would be silly to fight on.").

690. See id. ("Perhaps what can be most charitably said is that the pendency of litigation and the theoretical threat that the plaintiffs will press on provides special committees members with additional clout that they wield to get good results..."
Cox states that the lawsuits do not add value because committees, have the legal power to say "no" to controllers in cash-out mergers. As noted previously, however, the committee's disapproval will not ordinarily bar the controller from proceeding with a freezeout. Given the terms of the merger statute and the option of pursuing a tender offer freezeout, the controller will ordinarily be able to go around a disapproving committee and effectuate the freezeout if it so chooses. As previously stated, the consequence of disapproval under the Lynch Doctrine is that the controller will have the burden of proof in respect to the cash-out merger's fairness. The committee's disapproval may alter the controller's tactics or even its willingness to go forward with a cash-out merger, but the committee has nothing akin to veto power.

Finally, Cox concludes that Entire Fairness suits filed during the pendency of cash-out merger negotiations do not add value because "there is no litigation conflict." This is not an obvious conclusion. To apply an imperfect analogy, no one disputes that poison pills are effective anti-takeover devices despite the fact that one has never been triggered. Their importance is that they signal the availability of an immediate, detrimental response to an unfair acquisition. In a similar fashion, Entire Fairness lawsuits filed during the pendency of freezeout negotiations are a "direct line" into the courthouse, so that if the controller engages in coercive conduct there can be an immediate response. Given that the Lynch Doctrine rests on the view that some degree of coercion is omnipresent in freezeouts, the immediate access to the courthouse created by the pendency of the lawsuit is not unreasonable. Furthermore, if Cox is correct that there is "no actual litigation conflict" in these transactions, then the pending claims cannot be exhausting a significant amount of judicial resources or taxing controllers substantially in practical terms.

Finally, the prompt filing of claims upon the commencement of the cash-out merger which the court finds so objectionable allows time for the minorities' lawyers to resolve who will serve as lead counsel and lead plaintiff. Given that Delaware has adopted these mechanisms to promote efficiency and fairness in shareholder class actions, it makes sense to allow the lawyers time to do what is required. Furthermore, the plaintiffs' lawyers may need to organize especially early in freezeouts because controllers have the potential to accelerate the timing of the transaction by electing to proceed unilaterally without negotiating with representatives for the minority.

691. See id. at 647.
693. See supra notes 71–72 and accompanying text.
694. See Cox, 879 A.2d at 625.
695. See id. at 631 ("Third, litigation under Lynch never seems to involve actual litigation conflict if the lawsuit begins with a suit attacking a negotiable proposal.").
696. Id.
697. See id. at 608 ("That complaint was even less meaty than the first filed complaint. It is exemplary of hastily-filed, first-day complaints that serve no purpose other than for a particular law firm and its client to get into the medal round of the filing speed (also formerly known as the lead counsel selection) Olympics.").
For these reasons, neither the simultaneous settlement phenomenon nor the filing of claims during the pendency of negotiations is evidence of abuse under the Lynch Doctrine, or evidence that these suits fail to confer value on minority shareholders.

4. The Utility of Discovery

The Cox opinion portrays discovery requests in claims filed under Lynch as a tool used to extort settlements from controllers. Surely the court is correct that discovery requests could be abused, as was recognized by the PSLRA's stay of discovery provision. However, as in review of fee requests, the court of chancery has ample discretion to limit the scope of discovery in freezeout litigation in order to prevent "fishing expeditions."

Even more fundamentally, however, discovery may serve special committees' and minority shareholders' legitimate needs for information about the freezeout offer. The Lynch Doctrine reflects judicial cognizance of the systemic informational asymmetry confronting minorities in freezeouts. Controllers are the ultimate "insiders" in this situation. Minorities and the outside directors representing them will not have anything close to informational parity with respect to the company's prospects and opportunities. In this regard, the discovery process with proper judicial oversight should properly be regarded as an extension of the "arms' length" dealing mandated by Weinberger, that is, an altered form of the due diligence process conducted on behalf of minorities in freezeouts. Given the court of chancery's ability to limit discovery requests, the Cox opinion's grossly disparaging view of discovery is unwarranted.

Minorities' ability to obtain discovery in a freezeout suit is especially crucial in light of the informationally disadvantaged status of outside directors—who are specifically chosen to serve on special committees on account of their greater impartiality. Nonmanagement directors are less likely to be beholden to a controller, but they are also more likely to have a less detailed understanding of the business, in comparison to the controller. The information obtainable through discovery may be necessary in some instances to compensate for this information balance.

698. See Cox, 879 A.2d at 606, 620 and 622; id. at 622 ("...the plaintiffs' claims always have settlement value because of the costs of discovery and time to defendants.").


701. Weinberger, 457 A.2d at 709 n.7.

702. Not only the buyer but also the seller in a merger transaction will need to do a due diligence analysis of the inherent value of the company. This was another point illustrated in the sale-through-merger in Smith v. Van Gorkom. In that case the "independent" directors were cowed by the company's chief executive officer; as a consequence they failed to undertake the kind of intensive analysis of their firm that would have furnished an appropriate valuation basis for approving its sale. Smith v. Van Gorkom, 488 A.2d 858, 876-77 (Del. 1985).

703. See Cox, 879 A.2d at 618.
Furthermore, consistent with Lynch's concern about inherent coercion, the special committee directors may be reluctant to engage—or may be inhibited from engaging—in a full scale due diligence process to ascertain the company's value and prospects. The directors on the committee might reasonably fear that conducting substantial due diligence to evaluate the financial value of the company and the merits of the freezeout offer might unsettle the controller's plans, provoke its ire, and encourage it to engage in more self-seeking conduct to the minorities' detriment. Furthermore, Cox itself acknowledges that despite their good faith efforts, outside directors may be constrained by time, expertise or other practical limitations that might make them less than effective "information gatherers" or vigorous negotiators for minorities. Hence the discovery process may make a crucial contribution to overcoming the special committee's and minorities' relative informational disadvantages. Cox's conclusion that discovery requests under the Lynch Doctrine are essentially a tool of extortion misses the mark. (And yet the claim may pass as being noncontroversial, on account of the negative publicity surrounding discovery abuses in federal securities class actions.)

5. The Utility of Claims Against Target Directors During Negotiations

Individual target company directors are commonly included as defendants in freezeout litigation, as the Cox opinion observes. Because the Lynch Doctrine addresses the fiduciary duties of controllers, and the duties of individual directors only indirectly, claims against individual director defendants would be brought as "regular" breach of care (or more rarely breach of loyalty) claims pendant to the Entire Fairness claims against the controller. If the individual directors are not named as defendants, they may still be asked to give testimony in the litigation against the controller which may either be at trial, through affidavits or in depositions. In most instances, because of the business judgment rule and the limits affecting director liability for breach of care, these claims against the

704. See id. at 619 ("...history shows that [independent directors] are sometimes timid, inept, or... well, let's just say worse").

705. See Cox, 879 A.2d at 620 ("...directors involved in the transactions all... become defendants in lawsuits attacking those transactions").

706. The Lynch doctrine itself only addresses controllers' duties in freezesouts, and not the fiduciary obligations of the target directors themselves. See, e.g., In re Emerging Comm'ns, Inc. S'holders Litig., No. Civ. A. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004); Van Gorkom, 488 A.2d at 874 (finding that directors breached their duty in approving a sale of the company through a merger by failing to inform themselves of all information reasonably available); McMullin v. Beran, 765 A.2d 910 (Del. 2000) (finding that directors breached their duty to the minority shareholders by turning merger process over to controller, consistent with controller's best interests). In 1995, in the now notorious Technicolor litigation, the Delaware Supreme Court affirmed that the rushed approach of the selling company directors to the approval process, and their failure to conduct a market check of the value of the company prior to approving the deal, constituted a breach of the directors' duty of care. That breach mandated the application of the Entire Fairness standard—the court ultimately concluded that the acquisition of Technicolor met that standard. Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1175 (Del. 1995) ("The Court of Chancery properly considered that the Technicolor board's now undisputed lack of care in [failing to make] a market check was a flaw in its approval process.").
target directors would not go forward if it were not for the claims against the controller. The point is that the directors' awareness of the pending litigation will make them especially keen to fulfill their fiduciary duties and exert their best efforts in negotiating with the controller on the minority's behalf. Although target company directors are very rarely held liable for breach of duty in freezeouts or other M&A transactions, the threat of personal financial liability is not the only stimulus influencing their conduct. By virtue of their having to give testimony in affidavits, depositions or trials, the target directors' acts or failures to act in the minorities' interest in the freezeout will be publicly aired, scrutinized and judged. The outside directors' professional stature will be on the line, even if their exposure to financial damages is only a remote possibility. This potential exposure to embarrassment among their peer group of elite corporate actors (which their lawyers would alert them to ex ante) would encourage the directors to work diligently in representing the minorities' interests in the freezeout negotiations. This "extra-liability" mode of stimulating best efforts from corporate decision makers is well known to the courts and commentators. Indeed, Delaware's judicial opinions sometimes take clear advantage of this kind of "shaming" opportunity (or threat of shaming) to stimulate better conduct from directors. Hence, the existence of pendant claims against individual target directors in freezeouts, or the taking of their testimony in claims filed against controllers under the Lynch Doctrine, is a further positive feature of freezeout claims filed during the pendency of negotiations.

D. On Cox's Objective of Reducing Litigation in Freezeouts

1. The Purported Problem and a Plan

This section of the Article analyzes the feasibility and likely intended effects for the litigation system of the adoption of the Cox Reforms. The Cox opinion's most fundamental criticism of the Lynch Doctrine is that it invites strike suits because claims thereunder cannot be dismissed in a timely fashion. The basis of this claim was reviewed above. As it encourages strike suits because claims thereunder cannot be dismissed in a timely fashion. The basis of this claim was reviewed above. As it encourages strike suits, current

707. Directors' fiduciary care liability will often be abridged by charter exculpation, indemnification agreements and insurance. See Bernard Black, Brian Cheffins & Michael Klausner, Outside Director Liability, 58 Stan. L. Rev. 1055 (2006) (distinguishing nominal director liability from actual director liability, noting that directors have virtually never been required to pay damages from personal resources given insurance, indemnification, and exculpation).

708. For commentary and citations illustrating the Delaware courts' use of shaming sanctions, see Edward B. Rock, Saints & Sinners: How Does Delaware Corporate Law Work?, 44 UCLA L. Rev. 1009 (1997). The court's "morality tales" also provide instruction for future directors about what is and is not acceptable, consistent with the transactional choreography of freezeouts.

709. See, e.g., Cox, 879 A.2d at 647 (proposing that allowing deferential review so long as there is Dual Ratification will "encourage the consistent use of the transaction structure that best protects minority stockholders while simultaneously discouraging the filing of premature lawsuits of dubious integrity and social utility").

710. See supra notes 603-21 and accompanying text. The Cox court claims that Rule 11 sanctions are ineffective in this context because "financial fairness is a debatable issue." Cox, 879 A.2d at 620. As discussed supra notes 612-21 and accompanying text, however, financial fairness alone is not a basis to go forward with an Entire Fairness complaint.
freezeout doctrine has many negative byproducts, according to the court. Viewing their effect on the economy overall, Cox states that the threat of Entire Fairness strike suits has deterred "the procession of offers that provide valuable liquidity to minority stockholders and efficiency for the economy in general." 711 Reviewing the Lynch Doctrine's effect on Delaware's corporate legal system, Cox claims that it has "cast doubt on the integrity of the representative litigation process." 712 The court's prescription is that Lynch should be "eased" so that business judgment deference would apply in freezeouts that have received Dual Ratification. 713 In Cox the court contends that this "modest" 714 and "sensible" 715 law reform will bring freezeout doctrine into "harmony with the rest of Delaware corporate law," 716 and thus increase investors' faith in the "integrity" of the Delaware corporate legal system. 717 Hence, as proposed by the court, there are no significant costs or disadvantages to the Cox Reforms; everyone benefits. In fact, the Dual Ratification proposal is described as increasing the protections afforded investors in freezeouts 718 without "diminish[ing] the integrity-enforcing potential of litigation in any material way." 719

Scrutinizing the substance underlying these claims, it is obvious that the court anticipates that most freezeouts would receive Dual Ratification. If this were not their foreseeable effect, the proposed reforms would be ineffectual in achieving their intended result of reducing litigation in freezeouts. And the court is likely correct to anticipate that most freezeouts would receive Dual Ratification. Consistent with the concept of transactional choreography, controllers will seek Dual Ratification for their freezeouts because obtaining it will allow them to obtain a dismissal on the pleadings. 720 And controllers' ability to obtain Dual Ratification is suggested by the operation of inherent coercion—the cornerstone principle of the Lynch Doctrine—which Cox does not "disprove," 721 and which Pure affirmed operates in both freezeout formats. 722 The likelihood of controllers receiving Dual Ratification is suggested by the effect the Cox Reforms would have on the fair price duty. As described below, the Cox reforms would marginalize the operation of the

711. Cox, 879 A.2d at 646. Transactions that appear unfair, even if profitable for one party, may decrease investment and growth over the longer term.
712. Id. at 607, 643. The basis of the integrity of a legal system is a complex matter, of course. For further discussion of the social freight carried by the system of shareholder litigation under Delaware corporate law, see James D. Cox, The Social Meaning of Shareholder Suits, 65 Brook. L. Rev. 3 (1999).
713. See supra note 680.
714. Cox, 879 A.2d at 606, 643.
715. Id. at 607.
716. Id. at 646; see also id. at 607 (the Cox Reforms would "provide even greater coherence to our law...").
717. For Cox's express appeal to increasing the "integrity" of Delaware corporate law and investors' faith in it via adoption of its proposed reforms, see Cox, 879 A.2d at 606, 607, 613, 643.
718. Id. at 606.
719. Id. at 644.
720. Again, this is an express objective of the proposed reforms. See, e.g., Cox, 879 A.2d at 607, 643, 644.
721. For analysis of Cox's disparagement of the legitimacy and continued relevance of the inherent coercion concept, see infra notes 852-75 and accompanying text.
722. See Pure, 808 A.2d at 441.
fair price duty in negotiations, which would reduce committees' and minorities' leverage to say "no" to controllers.\(^{723}\)

As future courts consider endorsing Cox's Dual Ratification proposal, it is important for them to be wary of these claims and their cumulative rhetorical appeal. Perhaps most glaringly, the Dual Ratification proposal is not "modest\(^{724}\) and cannot truly be considered an "extension" of the Lynch Doctrine.\(^{725}\) Cox avoids proposing repeal of the Lynch Doctrine and indeed suggests that its proposed reforms can be reconciled with Weinberger and Lynch.\(^{726}\) But those decisions validate that both forms of consent are tainted by inherent coercion, so that even dual ratification would be tainted and an unacceptable route to deferential review. The Lynch Doctrine is grounded on suspicion over the legitimacy of consents in freezeouts, and the concern over shortcomings of the bargaining process that pits controllers against committees and minorities. In the alternative, the reforms proposed by the court in Cox accept that committees' and minorities' consents can be freely given. Furthermore, the pressure pushing special committees and minorities to consent to freezeouts would be accentuated by the Cox Reforms because they will attenuate the fair price duty that has afforded directors and minorities leverage in negotiating with controllers.

2. Will the Quality of Consents Be Reviewable?

As proposed by the court in Cox, so long as a controller's freezeout was approved by both the special committee and a majority of the minority shares, the business judgment rule would preclude judicial inquiry into the merits of the transaction. The aforesaid consents thus become pivotal to determining the relevant standard of review: Entire Fairness or business judgment deference. But this presents a paradox, as Cysive intuited. If the quality of the consents (whether they are uncoerced, based on accurate and complete disclosure, and in conformity with the applicable numerical minimums) is reviewable in future freezeouts, then there will still need to be significant judicial inquiry into "fair dealings."\(^{727}\) In the alternative, if the courts are not open to scrutinizing the circumstances and legitimacy of the consents, while allowing them nevertheless to afford controllers a route to business judgment protection and hence dismissals upon the pleadings, then equity will effectively have resigned its role in freezeouts. This conflict

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\(^{723}\) See discussion infra at notes 722-76 and accompanying text.

\(^{724}\) For "modest," see Cox, 879 A.2d at 606, 643.

\(^{725}\) For the claim that the Cox Reforms would "extend" rather than repeal the Lynch Doctrine, see Cox, 879 A.2d at 606 and 607. See also Pure, 808 A.2d at 444 n. 43.

\(^{726}\) For this claim, see Cox, 879 A.2d at 617 ("For this reason, it is important not to assume that the Supreme Court has already rejected this more precisely focused contention."). The court contradicts this assertion earlier in the opinion however. Id. at 616 ("Even if the transaction was 1) negotiated and approved by a special committee of independent directors; and 2) subject to approval by a majority of the disinterested shares . . . , the best that could be achieved [under Lynch] was a shift of the burden of persuasion on the issue of fairness from the defendants to the plaintiffs.").

\(^{727}\) In administering these claims, courts could delay the fair price inquiry until after they addressed fair dealings, but the "burden" of the fair dealings inquiry would remain if the Cox Reforms are to be interpreted as anything other than a total abdication of equity's role in freezeouts.
illustrates that the easy accommodation suggested by the court in Cox is illusory. As a matter of policy, the courts may decide to apply the business judgment rule to freezeouts; but they cannot legitimately do so while claiming that they have not radically diminished the role of equity in protecting minority shareholders interests therein.\footnote{728. For this suggestion in the Cox opinion, see 879 A.2d at 644.}

3. The Likelihood of Increased Appraisals

If the Cox Reforms are followed by future courts, will there be an overall reduction in shareholder suits in freezeouts—as the court in Cox proposes? This is an unlikely result. Most obviously, there would be a foreseeable increase in the number of appraisal actions filed in Delaware. This migration to appraisal would not even reduce the valuation litigation before the Delaware Court of Chancery, because it hears both kinds of actions. (At present appraisal actions and claims of fiduciary breach against cash-out mergers are often consolidated.)\footnote{729. At present these actions are commonly combined. See, e.g., In re Emerging Commc'ns, Inc. S'holders Litig., No. Civ. A. 16415, 2004 WL 1305745 (Del. Ch. May 3, 2004).} After Weinberger, the equitable cause of action became a preferable way for aggrieved minority shareholders to proceed against cash-out mergers.\footnote{730. As the data collected by Professors Thompson and Thomas indicate, appraisals are presently used infrequently by aggrieved minorities in cash-out merger, in comparison to class action Entire Fairness suits. See Thompson & Thomas II, supra note 51, at 170 (“Appraisal proceedings make up a very small portion of the Chancery Court docket . . .”); see also Gilson and Gordon, supra note 5, at 799 (“. . . the economics of the litigation process mean that, if a fight about price is limited to appraisal, the controlling shareholder is exposed as to price only with respect to the number of shares for which appraisal rights are perfected, typically a quite small number.”). For further statistical information about the incidence of appraisal actions see Thomas, Delaware Appraisal, supra note 184, at 22 (finding fewer than 14 cases per year since 1977 and analyzing ways that appraisal falls short of meeting the needs of investors and the express goals of the statute); compare Wertheimer, supra note 166, at 626 (noting that “the number of reported appraisal decisions has expanded greatly” despite the notable shortcomings in the appraisal statute).} However, this would likely change if the Cox Reforms are followed—because they would drastically circumscribe the scope of the equitable cause of action in freezeouts. Even if the appraisal statute remained in its present form, many minority shareholders could recast their claims to be appraisal actions. Because both types of legal proceedings require the court of chancery to rule on corporate valuation disputes, there would not be an overall reduction in the court's responsibilities in this regard. Hence, the court of chancery's expressed frustration with valuation litigation would not radically be diminished by following the Cox Reforms.\footnote{731. For discussion of the Pure court's expressed frustration and dissatisfaction with assessing value in freezeouts and its relative preference for a “process based” solution, see Gilson & Gordon, supra note 5, at 834 (“We are sympathetic to the Pure court's preference for a resolution to the treatment of freeze-outs that focuses on the court's assessing process, rather than determining value.”).}

Furthermore, there is a strong likelihood that the appraisal statute would be amended to increase its accessibility to aggrieved shareholders eliminated in freezeouts. The decision in Glassman certainly increases the pressure on the legislature to act—since it has prohibited minorities eliminated in short-form mergers from...
proceeding in equity. In addition, there has been an increase in the scholarly commentary calling for liberalizing the appraisal statute in recent years. And although corporate legal scholarship has endorsed the kind of Dual Ratification proposal put forward in Cox, this Article will not be the sole voice objecting to limiting the application of the Entire Fairness standard in freezeouts. As in the 1970s, shareholder advocates are likely to take their concerns public. Hence, if the Cox Reforms are followed, these pressures will likely combine to produce reforms in Delaware’s appraisal statute which will increase the number of appraisal actions.

4. More Claims Against Target Directors?

In Cox the court professes that its Dual Ratification proposal for freezeouts would not “diminish the integrity-enforcing potential of litigation in any material way.” As described above, this is a dubious assertion. Nevertheless, the court emphasized that shareholders will be adequately protected notwithstanding the Cox Reforms because “potent litigation weapons” would “remain in their arsenal.”

In furtherance of the notion that shareholders’ “arsenal” would remain sufficient to respond to the threat posed by unfair freezeouts, the court states that:

| plaintiffs who believed that a special committee breached its fiduciary duties in agreeing to a merger would continue to have the practical ability to press a claim; they would just have to allege particularized facts demonstrating a breach of fiduciary duty. |

This is a remarkable suggestion. The court proposes that although Dual Ratification would preclude an Entire Fairness attack on a controller’s conduct in a freezeout, minorities would still be adequately protected because they could sue the special committee directors for breach of fiduciary duty.

There are several reasons why this statement is difficult to take seriously. First, merely “swapping” shareholder claims against controllers for claims against special

732. See supra notes 261–71 and accompanying text. For decades there have been calls to reform the appraisal process. See infra note 733. Those reform proposals have never succeeded—but that lack of success may be attributable to the fact that the equitable cause of action for Entire Fairness under the Lynch Doctrine has remained an attractive option for minority investors to challenge cash-out mergers. If the Cox Reforms are adopted, however, the legal landscape will have changed substantially, and the Delaware Legislature will be under greater pressure to defend minorities’ interests in freezeouts through modifications to the appraisal remedy.

733. See, e.g., Thomas, Delaware Appraisal, supra note 184, at 1 (“Modern appraisal statutes are a mess”); Wertheimer, supra note 166; Thompson, Exit, supra note 184.

734. See, e.g., Subramanian, Fixing Freezeouts, supra note 5, at 8; Gilson & Gordon, supra note 5, at 839–40; Leisou & Haas, supra note 113, at 94.

735. Cox, 879 A.2d at 647. It is noteworthy that in adopting this metaphor the court implicitly affirms that shareholder litigation is viewed as a form of warfare. Id.

736. Id. at 644.

737. This issue of director personal liability in freezeouts relates back to Weinberger. It is striking in that case that while the court expresses horror at the conduct of Signal’s directors on UOP’s board it never even implies that they might be held personally liable for fiduciary breach. See Weinberger, 457 A.2d at 708 (“A primary issue mandating reversal is the preparation by two UOP directors, Arledge and Chitea, of their feasibility study for the exclusive use and benefit of Signal.”).
committee directors would accomplish nothing in terms of reducing shareholder suits in freezeouts—which is an express objective espoused by the court in *Cox*. Second, encouraging shareholders' pursuit of litigation against outside directors conflicts with one of the most fundamental principles in Delaware corporate law—that is, that outside directors should not be held liable absent inattentiveness that amounts to bad faith or secret profit taking that injures the company in a material fashion.\(^7\)

Furthermore, as stated previously, most suits against special committee directors would proceed as claims for breach of care—in essence the gravamen of the complaint would be that the directors were too passive in defending against the freezeout. This was the essence of the shareholders' complaint in *Solomon*, for example.\(^7\)\(^4\) Even if the directors are found to be "beholden" to the controller, this would not give rise to a loyalty breach per se, but rather would affect the posture of claims against the controller.\(^7\)\(^4\) Returning to the issue of directors' potential liability for fiduciary care breach, as stated previously, a variety of devices have evolved which expressly limit or eliminate directors' financial exposure to damages for breach of care in most cases.\(^7\)\(^4\) For the above reasons it is impossible to take seriously the claim that suits for fiduciary breach brought by minorities against committees (or the individual directors thereon) will operate as effective surrogates for reduced accountability on the part of controllers in freezeouts.

### 5. Will Minorities' Approvals Be Used to Exculpate Directors?

There is a further troubling aspect to the Dual Ratification proposal that is at the heart of the *Cox* Reforms. As the court observes, consistent with the *Lynch* Doctrine, controllers most commonly have sought approvals from special committees rather than minority shareholders in order to obtain the favorable burden shift.\(^7\)\(^4\)\(^3\) This makes sense, since no proxy solicitation is required to obtain special committee approval—hence there is less cost and delay associated with this ratification strategy. In *Cox* the court observes that the *Lynch* Doctrine has underserved minorities' interests in this regard—i.e. that it has failed to encourage minority

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\(^7\)\(^4\)\(^0\). See supra notes 243–49.


\(^7\)\(^4\)\(^2\). See supra notes 707.

\(^7\)\(^4\)\(^3\). Controllers' preference for obtaining directors' consents is noted in *Cox*, 879 A.2d at 618 ("... the absence of any additional standard of review-affecting benefit for a Minority [Shareholder] Approval Condition, has made the use of that independent, and functionally distinct, mechanism less prevalent").

\(^7\)\(^4\)\(^4\). *Cox*, 879 A.2d at 618 ("But *Lynch* also created other unintended and unanticipated effects... For starters, the absence of any additional standard of review-affecting benefit for a Minority Approval Condition, has made the use of that independent and functionally distinct, mechanism less prevalent... As a result, *Lynch* did not tend to make prevalent the transactional structure that most clearly mirrors an arms' length merger.").
shareholder ratification of freezeouts, because Dual Ratification would not provide controllers any additional "litigation" benefit.\footnote{745. For further discussion, see supra notes 121–29 and accompanying text.}

If the effect of Cox's Dual Ratification proposal is to stimulate more instances where controllers seek and obtain minority shareholders' consents in freezeouts, a question will arise over what effect the courts should give to these shareholders' consents. In the Cox opinion, they are discussed in relation to whether a controller would face the Entire Fairness or business judgment rule standard in litigation over a freezeout. However, the possibility arises that courts would allow the minority shareholders' consents to exculpate the target's directors from personal liability for fiduciary breach in the freezeout. Surely target directors will urge that the shareholders' consents should operate as a "waiver," in this fashion, as was argued in the recent litigation challenging the freezeout in \textit{In re Emerging Communications}.\footnote{746. In the Emerging Communications litigation the defendants made the novel argument that the majority of the minority's tendering their shares operated as consent to the transaction which waived their right to bring suit for fiduciary breach. Justice Jacobs (sitting by designation) did not have to resolve what legal effect could be given to such a waiver, because he had ruled that the disclosure to the shareholders was deficient. He did observe, however, that no Delaware court has approved that shareholders' sales in tender offers should be considered the equivalent of an affirmative shareholder vote. This admonition aside, there will be considerable pressure on the Delaware Supreme Court to move in this direction. See \textit{Emerging Commc'n}, 2004 Del. Ch. LEXIS 70, at *110.}

In the Delaware case law that has developed as an outgrowth of Section 144 of the DGCL,\footnote{747. Del. Code Ann. tit. 8, § 144 (2007).} valid shareholder ratification has been allowed to exonerate directors from financial liability for certain breaches of fiduciary duty.\footnote{748. This jurisprudence is described in Cox, 879 A.2d at 614–15, so there is no doubt that Vice-Chancellor Strine was mindful of the issue.} This result is illustrated by the holdings in \textit{Smith v. Van Gorkom},\footnote{749. 488 A.2d 858 (Del. 1985) (finding shareholder ratification void and hence insufficient to protect the directors from financial liability on account of their demonstrated breach of fiduciary care because the disclosures in the proxy statement were deficient).} \textit{Orman v. Cullman},\footnote{750. No. Civ. A. 18039, 2004 WL 2348395 (Del. Ch. Oct. 20, 2004) (ruling that the disclosure to the shareholders was acceptable so that their vote triggered the waste standard and nullified the duty of loyalty claims against the board).} and \textit{Harbor Financial Partners v. Huizenga},\footnote{751. 751 A.2d 879, 900–01 (Del. Ch. 1999).} for example. Furthermore, shareholder ratification may insulate directors not only from liability for breach of care, but even liability for breach of loyalty, hence its potential utility for defendants is broader than charter exculpation and indemnification.\footnote{752. See \textit{Orman}, 2004 WL 2348395, at *5 (finding that the fully informed vote of a majority of company's disinterested shareholders would be effective to trigger business judgment rule so that the special committee directors would not be liable in approving the sale of the company). See also, e.g., J. Robert Brown, Jr., \textit{Speaking with Complete Candor: Shareholder Ratification and the Elimination of the Duty of Loyalty}, 54 Hastings L. J. 641 (2003); Victor Brudney, \textit{Revisiting the Import of Shareholder Consent for Corporate Fiduciary Loyalty Obligations}, 25 J. Corp. L. 209 (2000).}

To be clear, there is no express suggestion in the Cox opinion that minority shareholder consents to freezeouts should be given this broader effect of reducing the directors' potential liability for fiduciary breach. However, in Cox the court was mindful of the liability immunizing effect of disinterested shareholder ratification.
The opinion specifically discusses this body of case law approvingly. Furthermore, the overall approval Cox shows towards negotiated, "bargained-for" outcomes in freezeouts opens the door to allowing minority shareholder ratification to limit directors' liability therein. Hence, if the controller obtains the approval of a majority-of-the-minority shares as part of the Dual Ratification process, such a vote (or, even, tenders of shares by a majority of the minority) might be deemed sufficient to insulate the target directors from financial liability for fiduciary breach in relation to the freezeout. In sum, although in Cox the court describes the proposed increase in majority-of-the-minority shareholder ratifications in freezeouts as a further safeguard of minority shareholders' interests that consent might easily be interpreted to limit the minorities' recourse in equity against target directors.

6. Limiting the Development of the Transactional Choreography for Freezeouts

Throughout the Cox opinion, the court represents Lynch's Entire Fairness standard as giving rise to meritless lawsuits that discourage profitable transactions, reduce economic efficiency, and impair the integrity of the system of representative litigation under Delaware law. In other words, the court has virtually nothing good to say about these lawsuits. The discussion above was intended to illustrate the ways in which Cox's criticisms of Entire Fairness litigation in freezeouts are exaggerated or unwarranted.

But the Cox opinion also fails to address the favorable contributions to investor welfare that arise from Delaware's transactional choreography for freezeouts. If the Cox Reforms are followed, so that business judgment deference would block judicial review of freezeouts in many or most instances, the court of chancery will have fewer occasions and less discretion to refine the best practices for freezeouts it has prescribed. Much would depend on the court's interpretation of its role in limiting the Development of the Transactional Choreography for Freezeouts.

754. For a decision where the court found that informed, uncoerced minority shareholder ratification precluded a finding of liability against defendant directors, and granted summary judgment on that basis, see Orman, 2004 WL 2348395; see also Harbor Fin. Partners, 751 A.2d at 900–01 (discussing the exculpatory effect of disinterested shareholder ratification on a duty of loyalty claim, outside of a freezeout). There is controversy regarding whether shareholder ratification can expunge a duty of loyalty claim against controllers in a freezeout. Shareholder ratification of directors' fiduciary breaches is frequently invalidated on the basis of shareholders being inadequately informed. See, e.g., Van Gorkom, 488 A.2d at 858 (invalidating shareholder ratification of directors' breach of their duty of care because shareholders were inadequately informed). For a discussion of this issue, see In re JCC Holdings Co., Inc., 843 A.2d 713, 722–23 (Del. Ch. 2003) (holding that the voting of plaintiff minority shareholders in favor of accepting consideration in a merger effectuated by a controlling stockholder does not bar them, on the basis of acquiescence, or any other related doctrine of waiver, from challenging the fairness of the merger in an equitable action).
756. See id. at 646 ("It was thought preferable in Pure Resources to keep the strands of freezeout doctrine] separate until there is an alteration in Lynch, lest the less than confidence inspiring pattern of 'Lynch litigation' replicate itself across the board in all going private transactions, thereby deterring the procession of offers that provide valuable liquidity to minority stockholders and efficiency for the economy in general.").
reviewing motions to dismiss. If the court was careful about overseeing the integrity of the consents, as a prerequisite to deferential review, then it would still have the opportunity to safeguard against the kind of defects found by the court in Pure (i.e. the defect in the structure of the minority approval condition, and the disclosure omissions relevant to the tender offer). The Pure opinion makes a valuable contribution to the transactional choreography for the minority approval structure and disclosure issues. However, if in a post-Cox Reform world the court of chancery is less than fully engaged in scrutinizing the context in which the directors' and minorities' consents are obtained, then the kind of defects uncovered by the court in Pure will go unobserved. Controllers will be under less pressure, will have less incentive to observe standards of fair dealings in freezeouts.

E. BARGAINING IN THE SHADOW OF A LIMITED FAIR PRICE DUTY

Both controllers' duties of fair price and fair dealing are crucially important to minorities' welfare, but the fair price duty is the more controversial of the two. This is apparent from the difference between the Lynch Doctrine and the Solomon standards on the fair price question: the former says "yes;" the latter says "no." Achieving a resolution to whether there should be a fair price duty represents the greatest stumbling block to unifying freezeout doctrine. Perhaps because Lynch and Solomon seem irreconcilable on the issue of fair price, the Cox opinion engages in some obfuscation on this issue. In brief, it nowhere expressly discusses what place a fair price duty would have in its proposed unified freezeout doctrine. The court expresses a clear preference for Solomon (where no fair price duty applies) over the Lynch Doctrine (where a fair price duty applies) as the superior basis for unifying freezeout doctrine. The court's only treatment of the fair price duty is implicit in its Dual Ratification proposal, as clarified below.

1. The Fair Price Duty and Negotiations

As a preface to analyzing what the Cox opinion says about the fair price duty, it is important to consider in what way a legal fair price duty (or its absence) would shape freezeout negotiations. In specific, is there much difference between a fair

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757. Lynch and Solomon are less radically far apart in their treatment of fair process in freezeouts. They both prohibit coercion and fraud by controllers. However, while the Lynch Doctrine takes an "affirmative" approach, making controllers accountable for "fair dealings," the Solomon standards merely prohibit misconduct by controllers. But this is essentially a difference in degree or approach. Both doctrines affirm that there are legally enforceable limits on the process through which controllers can effectuate a freezeout.

758. See supra notes 214–31 and accompanying text.

759. See supra notes 173–82 and accompanying text.

760. See Cox, 879 A.2d at 642–48 ("A Coda on the Jurisprudential Elephant in the Corner").

761. See id. at 646. In this respect, the Cox Reforms should not be seen as a middle ground between the two. Rather, the Lynch Doctrine is being folded into Solomon's more lenient framework—with a consequent "yielding" of the fair price duty as it would apply to negotiations.
price duty (as applies under Lynch) and a fair price remedy as applies under Solomon in deals where coercion or fraud by the controller has been proven?

Part II of this Article addressed the different legal price regimes relevant to freeze-outs. The discussion of the problems arising from Solomon's failure to apply a fair price duty to controllers' offers are relevant once again here. In the absence of a fair price duty, controllers have an incentive to exploit their power advantages to the maximum degree, to minorities' detriment. They can gain from pushing the limits of the doctrine governing controllers' receipt of private benefits in ongoing operations to their maximum advantage in the period before they launch a freeze-out. They can gain from pushing the limit of the corporate opportunities doctrine and delaying the development of lucrative business ventures in the period before a freezeout. They will gain from manipulating dividend policy in their interest in the period before a freezeout. There are a variety of ways that controllers can advertise to the market that they are willing to exploit their control over the firm to their maximum advantage and the minority's disadvantage. With respect to corporate actions requiring board assent, even in a post-SOX world, so long as the controller is a true majority controller, there only needs to be three independent directors on the board—not a majority of them. In all likelihood, the controller has a variety of mechanisms that would succeed in forcing down the trading price of the minority's stock. In a world without a fair price duty, the controller can then take advantage of this depressed stock price to compel a freezeout.

What do negotiations at a hypothetical bargaining table look like in the absence of a fair price duty? Given the limits on appraisal, the minority's pro rata stake in the company's going concern value is only very marginally relevant to the negotiations if the freezeout is based on a tender offer. The same limits on appraisal's efficacy mean that even if the freezeout is based on a cash-out merger, the controller has no incentive to offer more than the lowest credible estimate of going concern

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762. See supra notes 173–82 and accompanying text.
763. For excellent discussion of the not easily enforceable and sometimes loose limits applicable to controllers' obtaining private benefits from the corporation during its ongoing operations, see Gilson & Gordon, supra note 5, at 789–93. See also Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (applying very different equitable standards to (i) the parent's preferred dividend policy, (ii) the parent's general oversight of the subsidiary's management consistent with its overall interests, (iii) whether the company had taken a particular business opportunity that belonged to the subsidiary and (iv) the enforcement of another wholly owned subsidiary's contract with the first subsidiary).
765. See id. at 721–22.
value discounting this price to reflect the foreseeably large number of shareholders who will give up on pursuing fair value through an appraisal. A well advised controller would ordinarily offer no more. The controller will counter the special committee's request for a higher price with the truism that it would be irrational for it to pay more than it is legally required, and that it is up to the committee to take it (ratify the freezeout price offered) or leave it (leaving the minority with no alternative to the probably now more deeply discounted market price).

Without a fair price duty, any premium to the market price begins to look appealing. (Indeed, consistent with this departure from financial valuation theory, and earlier Delaware case law, in Cox the court observes that minorities are doing "more than tolerably" well because they are selling to controllers in freezeouts at premiums to the public trading price of their shares.\textsuperscript{667}) The savvy controller describes its offer as a great deal for the minority shareholders. ("Puffery" is not the basis for a complaint under the federal securities laws.\textsuperscript{668}) The announcement of the offer generates significant publicity that likely attracts arbitrageurs, stimulates increased trading, and leads to an increase in the stock's trading price (which would dissipate quickly upon the committee's disapproval of the offer, since it would be seen as a harbinger of the deal falling apart). There is a herding effect in the market: minority shareholders become excited by the prospect of the transaction.\textsuperscript{669} Unless the offer is grossly underpriced, the absence of a clear legal metric for fair price invites enough speculation and hype to result in the transaction's consummation.

In the absence of a definitive fair price duty in the negotiations, the special committee is under tremendous pressure not to "kill the deal" by refusing the controller's offer. Absent a fair price duty, the committee has only a very attenuated conceptual framework—appraisal's fair value, discounted by its impractical nature—against which to evaluate the adequacy of the price the controller is offering. If the committee concludes that the controller's price is inadequate, it will have to scramble to provide a compelling account of why it reached this conclusion. Without a fair price duty, the committee cannot fall back on the gap between the fair price and the controller's price as the basis for its decision.

\textsuperscript{667} See, e.g., Cox, 879 A.2d at 632 ("Fourth, minority stockholders seem to be doing more than tolerably well under both the Lynch and Siliconix regimes. Even if premiums to market are lower in Siliconix transactions, the premiums paid are large in comparison to the routine day-to-day trading prices in which minority and liquidity discounts will be suffered."). On the limited significance of the market trading price, and hence a premium to the market price, as an indicia of a company's value see also Van Corhom, 488 A.2d at 875–76 (concluding where no controller was present that "[u]sing market price as a basis for concluding that the premium adequately reflected the true value of the Company was a clearly faulty, indeed fallacious premise... "); Emerging Commc'n, 2004 WL 1305745, at *23; Hamermesh & Wachter, supra note 166, at 132 (noting that market price is inherently unreliable as an indicia of the value of minority shares, if they are assumed to represent a pro rata share of the residual value).


\textsuperscript{669} See, e.g., Hersh Shefren, Beyond Greed and Fear: Understanding Behavioral Finance and the Psychology of Investing 184–89 (2000).
If the minority's representatives are well advised, the negotiations look very different in the presence of a fair price duty. The fair price duty creates a clear heuristic and should give the committee the high ground to commence the negotiations. The committee should open by asserting the minority's legal entitlement to a "fair price." This positive claim yields a normative one: the controller should meet its fiduciary duty and pay the minority the amount it is entitled to by law. The fair price duty allows the committee to argue that it cannot consent (consistent with its own fiduciary duties) to a price that is less than what the controller has a legal duty to pay. If the fair price duty applies and the committee believes the controller's price remains inadequate, it has a clear explanation to give to the (disappointed) minority shareholders: "the controller refused to pay the price you were entitled to by law!" Given that the committee directors have no incentive to derail the deal, there is little reason to be concerned that they will err on the side of disapproving the transaction. Furthermore, the fair price duty frees the committee from the virtually untenable predicament of having to go back to the minority and say "we just didn't feel that the price was high enough." In a world where the fair price duty applies, the committee can provide the minority with a coherent account of what their legal entitlement was and why the controller's offer did or did not conform to it.

2. Cox on the Fair Price Question

Would a fair price duty apply under the Cox Reforms. First, Cox's clear preference for Solomon over Lynch suggests that it would not. Second, reading the express language of Cox's Dual Ratification provision, the best answer is that it would not clearly apply—i.e., a definitive fair price duty would not apply in the negotiations to give the committee leverage with the controller. The ambiguity (i.e., that the answer is neither clearly yes, nor clearly no) stems from two different features of the Cox opinion. The first is that the shift from an absolute duty to a counter part duty (depending on the committee's approval or nondisapproval) places untenable pressure on committees not to reject the controller's offer. The committee is not "in the hot seat" in the same way under the Lynch Doctrine. Under Lynch, the Entire Fairness standard applies irregardless of whether the committee says "yes" or "no." If there is ambiguity surrounding the value being offered by the controller's proposal,

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771 In effect this Article's proposals assert that the controller is inhibiting the board from fulfilling its duty of care if it blocks the committee's investigation of alternatives, e.g. prevents it from conducting an auction or market check. See Van Gorkom, 488 A.2d at 872 ("The determination of whether a business judgment is an informed one turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.'" (citations omitted)).

772 In addition, if the Entire Fairness standard and its fair price duty apply to all freezeouts, then as these deals are litigated, there will be a record of the valuation methodologies which are acceptable for the committee to consider in analyzing the merits of a controller's offer, as was the case in Emerging Comm'n, 2004 Del. Ch. LEXIS 70, at *43-101.
it rests on the shoulders of the controller. Under the Lynch Doctrine, because the fair price duty applies irregardless of whether the committee consents or not, the committee's participation can only benefit minority shareholders. It cannot be used by the controller as a Sword of Damocles to hang over the committee—which is what it would become if it were dispositive of the standard of review.\footnote{Controllers will surely threaten to pull the offer if the committee does not approve. That many would do so is attested to in the Cox opinion. See Cox, 879 A.2d at 625. Once this happens in enough freezeouts, committees will anticipate being blamed in the media for killing the deal if they disapprove of it. Given the court of chancery's fervently expressed preferences for freezeouts going forward, at least as evidenced in Siliconix, Pure and Cox, it will be very hard for committees to risk terminating the transaction by disapproving it.}

Under Lynch, the fair price duty is absolute. It is not waiting to spring to life if the committee says "no." As long as the negotiations over the cash-out merger are ongoing, whether the controller is pushing forward, backpedaling or feigning disinterest, the fair price duty is appliable. The controller cannot use the Entire Fairness standard against the committee; the power play works only in one direction—to correct the power asymmetry between the controller and the minority. In this fashion, the fair price aspect of the Entire Fairness standard is a heuristic that informs the entire shape of the negotiations.

The second problem with Cox's Dual Ratification provision is that it is too ambiguous and unstable. The different versions of the Dual Ratification provision presented in the Cox opinion illustrate this. Does the fair price standard apply unless (i.e. until) either the independent directors or the minority shareholders reject the offer? This is one plausible reading of Cox's Dual Ratification provision.\footnote{See Cox, 879 A.2d at 643-44.} Would the fair price duty apply only once (i.e. after) the committee or the minority had rejected the offer? This is the result suggested by one version of Cox's Dual Ratification proposal.\footnote{Id. at 607.} In this case, fair price is at best a remedy, in effect, not a standard of conduct or fair price duty—since the negotiations are over. In other places in the Cox opinion, Dual Ratification is proposed as a unitary standard for determining the standard of review in freezeouts. The timing and application of the fair price duty is even more ambiguous.\footnote{Id. at 606.}

The shift away from Lynch, towards a "Dual Ratification" standard raises further questions. As envisioned in Cox, should the business judgment rule standard apply if the committee elects not to take a position on the freezeout (or remains neutral), and the majority of the minority approves? (This standard would create problems in cash-out mergers, but not tender offer freezeouts, presumably.\footnote{See Van Gorkom, 488 A.2d at 873 ("A director may not abdicate his duty by leaving to the shareholder alone the decision to approve or disapprove the agreement [of merger]."); McMullin 765 A.2d at 919 ("...when the proposal to merge with a third party is negotiated by the majority shareholder, the board cannot abdicate that duty [to make an informed judgment on the merger] by leaving it to the shareholders alone to approve or disapprove the merger agreement because the majority shareholder's voting power makes the outcome a preordained conclusion.").})

Should the participation of a majority of the minority shares in a tender offer be given the same effect as an affirmative vote in affording the transaction the
protection of the business judgment rule, given that the pressure to tender is greater than that affecting shareholder voting in mergers? Certainly there is reason for caution on this point.

Finally, given the importance of committee assent under Cox's Dual Ratification provision—i.e. that it would largely obviate the fair price duty in negotiations and trigger deferential review in a suit over the freezeout—what numerical minimums should attach to committee assent? Pure had a committee of two: what if there was a split vote, or one abstained? Can it be reasonable to allow deferential review, and an attenuated fair price duty based on the assent of only two outside directors? The supreme court's recent decision in Krasner v. Moffett suggests that there is reason for caution. In a committee of three (which may foreseeably become the norm) if two outside directors consent, is that sufficient or should unanimity be required? Until recently New York required unanimity for disinterested director ratification if the committee directors numbered less than a quorum. Placing so much weight on the committee's assent, makes each of these issues highly important and, given Cox's Dual Ratification proposal, relevant during the negotiations.

Indeed, the fact that Dual Ratification would raise so many unresolved issues means that the parties would not be able to predict with certainty whether the Entire Fairness standard or the business judgment rule was applicable and whether the fair price duty was not. Compared to this very unstable state of affairs, Lynch's clear affirmation of a fair price duty is more beneficial to investors. Compared to an indistinct, "hybrid" approach, it would allow equity investors more accurately to appraise the risks attendant to their investment. Finally, the Dual Ratification resolution is acceptable only if one accepts the illegitimacy of inherent coercion. But nothing in the recent trilogy of freezeout cases comes close to proving that inherent coercion is less of a problem than it was when Lynch was decided.

3. Empirical Evidence

There is a growing body of scholarship analyzing the premiums paid in freezeouts. These studies—reviewed by the court in Cox—focus on different features of freezeout transactions, and especially the role of law and lawsuits in influencing parties' conduct in freezeout transactions. Because these studies are relevant to the future of the Entire Fairness standard in freezeouts (as well as the resolution of the fee issue before the court in Cox), they are analyzed in considerable depth by the court—and presented in summary form herein.
Professors Thompson and Thomas have concluded that suits in cash-out mergers under the Lynch Doctrine raise the premiums offered in the “worst” transactions. Professor Subramanian's data led him to a similar conclusion about freezeout suits under the Entire Fairness standard. (He served as an expert on behalf of the plaintiffs' lawyers claiming the fee as part of the settlement.) Professors Weiss and White's data led them to conclude, in contrast, that Lynch's Entire Fairness standard has led primarily to an increase in plaintiffs' lawyers filing nonmeritorious claims in freezeouts—hence an increase in plaintiffs' lawyers' welfare with little attendant benefit for minorities. In sum, Thompson and Thomas' and Subramanian's conclusions point in the direction of extending the Lynch Doctrine to all forms of freezeouts, consistent with minorities' best interests, as is suggested in this Article. In contrast, Professors' Weiss and White's analysis supports limiting the Entire Fairness standard's application, consistent with the Dual Ratification proposal endorsed in Cox.

See Thompson & Thomas II, supra note 51, at 202; Cox, 879 A.2d at 626. Subramanian, Theory & Evidence, supra note 23; see Cox, 879 A.2d at 625–31; id. at 625 (“Subramanian makes two major arguments. First Subramanian cites to his own recent scholarly studies to support his view that the Lynch form of transaction results, on average, in going private transactions that pay the minority a higher premium in comparison to the preannouncement market price than do Siliconix deals. Second, Subramanian attempts to show that the filing of lawsuits under Lynch challenging going private merger proposals by controlling stockholders are a material factor in producing these more favorable results. I will now explain in summary form Subramanian’s arguments and explain why I conclude that the first of his arguments is his strongest, and that his other point is less convincing.”).

See Weiss & White, supra note 641, at 1804 (“Thus, in most mergers involving conflicts of interest and especially in mergers involving sales of control, the combination of corporate practice and Delaware law appears to have provided plaintiffs' attorneys with substantial incentives to file class actions, regardless of whether it appeared that fiduciary duties had been or would be breached.”).

A significant caveat is required: Notwithstanding his conclusions about the beneficial effects of claims filed under the Entire Fairness standard, Professor Subramanian endorses the kind of "hybrid," dual consent-based solution to unifying freezeout doctrine put forward by the court in Cox—i.e. that Entire Fairness should not apply in cases where a special committee and a majority of the minority approve the transaction. It would seem then that Professor Subramanian believes that committees will be able to push controllers to pay fair prices through negotiations even if the Entire Fairness standard is substantially relaxed. See Subramanian, Fixing Freezeouts, supra note 5, at 8.

See Cox, 879 A.2d at 613 (“...Weiss has recently turned his attention to the class action settlement process in corporate law cases, most particularly in the courts of Delaware. Aside from objecting in two cases himself, Weiss, along with Professor Lawrence J. White, an economist at New York University, has published an article called File Early, then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions that argues that certain features of Delaware's common law of corporations have permitted the plaintiffs' bar to reap windfall profits by filing cases that have no benefit to stockholders.”) (emphasis added).

The Cox court cites the objectors' view that "litigation of this kind is of no material benefit to minority stockholders," id. at 624, but it does not present their evidence for that assertion, and thus the evidence never comes under scrutiny.

Id. at 613.
The most significant feature of the court's analysis of these studies is that the
court reduces the Lynch Doctrine to a "club" that plaintiffs' lawyers wield to brow-
beat controllers into settling nonmeritorious cases. Indeed, even when Cox con-
cedes that minorities receive higher premiums in cash-out mergers than in tender
offer freezeouts (on average), it attributes this effect to Lynch's "extortion value,"
rather than crediting the positive effect of the fair price duty on the negoti-
tions. In Cox, claims filed under the Entire Fairness standard are merely a form
of currency that plaintiffs' lawyers use to obtain fees and settlements. Again, this
perspective fails to give meaningful consideration to the fair price duty's positive
contribution to minorities' welfare in negotiations with controllers. The courts
should be able to address most of the excesses that could arise in shareholder suits
against freezeouts under the Entire Fairness standard—i.e. by limiting the pay-
ment of fees to the lawyers, by limiting the scope of discovery, by screening com-
plaints for well plead facts evidencing unfair dealings and by dismissing claims
that allege mere valuation disputes. If one assumes (and we should) that the Dela-
ware courts are "not without a degree of sophistication" in these
matters, then the fair price duty should be allowed to do the work that the Delaware Supreme
Court intended it to do when it decided Lynch.

**F. Fair Dealings and Cox's Rejection of
the Inherent Coercion Concept**

**1. The Substance of Fair Dealings**

A finding that there has been genuine, free consent to the transaction is a
highly attractive option for resolving the problems attaching to freezeouts. This is
apparent from the discussion of fair dealings in Weinberger—which still provides
the most comprehensive discussion of fair dealing in freezeouts. In Weinberger,
the court presents two approaches to a judicial analysis of fairness in freezeouts:
one of these focuses on the process through which the freezeout was negotiated.
As stated in Weinberger, if the court found sufficient basis to believe that there
were vigorous, unrestrained negotiations between the controller and the minori-
ties' disinterested, informed representatives—this would establish a sufficiently
strong indicia of fairness. The defendants would ordinarily prevail in a
lawsuit. In sum, if truly free, uncoerced, informed consent to the freezeout could be estab-
lished, Weinberger says, then unfairness would not be a concern meriting further
judicial inquiry. Nevertheless, Weinberger and Lynch, suggest reasons why truly
free, informed consent is a near impossibility in the context of a freezeout—most
especially, that the controllers power advantages as corporate insiders and the

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792. The court concludes that the Entire Fairness standard precludes timely dismissals, hence
invites nonmeritorious cases which, in turn, are settled by controllers in order to avoid costly discov-
ery and other inefficiencies associated with further litigation. Id. at 631.
793. Rabkin, 498 A.2d at 1107.
794. See supra notes 94–104 and accompanying text.
specter of inherent coercion undermine the presumption of genuine, freely-given consent to a freezeout. Yet the attraction of the consent "construct" is compelling and it drives the chancery court's calls for reforming freezeout doctrine. The issue of consent in freezeouts thus warrants further consideration here. What motivates the intense interest about freedom of choice for minorities in relation to the potential sale of their shares in freezeouts?

2. Property Law Concerns

First, Lynch's Entire Fairness standard represents an attempt to address a fundamental problem of property law that arises in the context of freezeouts. As described earlier, the DGCL affords controllers the power to eliminate shareholders through a cash-out merger. In effect, the controller can force the minority to sell (surrender) their shares. This raises concerns from the perspective of property law, even if fair value is paid. Indeed, the power possessed by controllers to compel the surrender of the minorities' property interests in their stock is remarkable as a matter of law. In effect, controllers' power in cash-out mergers is analogous to the state's power of eminent domain. The state's power of eminent domain is subject to strict constitutional limits and careful judicial oversight. Judicial oversight of freezeouts under the Entire Fairness standard is an analog of the federal courts' oversight over governmental takings of property, which are subject to meaningful constitutional due process guarantees. If the minority truly consent to the transaction, there would be no "taking," the property law problem presented by the freezeout would be neutralized.

3. Institutional Checks and Balances in Corporate Law

A freezeout offer also poses a threat to the ordinary legal framework of corporate governance. The Entire Fairness standard is a response to that institutional threat. Once a controller is present, the routine allocation of decisional authority established in corporate law is up-ended, as are the checks and balances inherent therein. The preeminent authority of the board of directors in corporate affairs is generally acknowledged as the central axiom of corporate law. As stated in the Cox opinion: "...the central idea of Delaware's approach to corporation law is the empowerment of centralized management, in the form

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795. See supra notes 84–85 and accompanying text.
796. For the most recent jurisprudence on eminent domain, see Kelo v. City of New London, Conn., 545 U.S. 469 (2005) (affirming local government's power to seize land for financial redevelopment purposes consistent with the Fifth Amendment to the United States Constitution).
797. See, e.g., U.S. CONST. amend. V.
798. See, e.g., McMullin, 765 A.2d at 920 ("When a majority of a corporation's voting shares are owned by a single entity, there is a significant diminution in the voting power of the minority stockholders. Consequently, minority stockholders must rely for protection on the fiduciary duties owed to them by the board of directors.").
799. See infra notes 800–03 and accompanying text.
800. See Del. Code tit. 8, § 141(a) (2007); McMullin, 765 A.2d at 916–17.
of boards of directors and the subordinate officers they choose, to make disinterested business decisions. The business judgment rule exemplifies and animates this idea.\textsuperscript{801} As this statement reflects, it is the board that has decisional authority over corporate affairs—not the officers (who are appointed and may be dismissed by the board)\textsuperscript{802} and not the shareholders. Although they have power to elect and remove the directors, they have virtually no direct decision making authority over corporate conduct. This allocation of rights and powers is considered maximally efficient (though not perfectly so). Outside equity investors are considered low-cost risk bearers. Professional executive officers bring particular business expertise to the firm's operations and administration. The board recruits and supervises managerial talent, limits managers' self-seeking conduct, and oversees systems of transparency and accountability that promote institutional integrity and efficiency.\textsuperscript{803}

Once there is a controller present, however, the preeminence and institutional distinctness of the board is severely undermined. If the controller is an individual, he or she will normally be on the board (and serve as a senior executive officer of the company).\textsuperscript{804} If the controller is a parent company, it will commonly elect officers of the parent company to the subsidiary's board.\textsuperscript{805} Notwithstanding the emphasis placed on independent directors since SOX's enactment, the presence of the controller dampens the application of these mandates so that a controlled company's board must include only three independents (as stated previously\textsuperscript{806}). As noted in the Introduction, in theory the board owes duties to all the shareholders equally,\textsuperscript{807} but in practice the controller's interests will shape management's and the board's composition and strategies.\textsuperscript{808}

\textsuperscript{801.} Cox, 879 A.2d at 614.
\textsuperscript{802.} Del. Code tit. 8, § 142(b) (2007).
\textsuperscript{803.} For an economics-oriented description of corporate governance arrangements, see, e.g., Margolin and Kursh, supra note 166, at 414 (“The corporate form, characterized by the introduction of outside equity investors, evolved to transfer the risk of firm operations from high-cost risk bearers (management), to low-cost risk bearers (stockholders), but accomplishes this only at the expense of relaxing hierarchical constraints on managerial malfeasance.”).
\textsuperscript{804.} See, e.g., Cysive, 836 A.2d at 533 (“This post trial opinion addresses stockholder-plaintiffs' challenge to a management buy-out proposed by defendant Nelson Carbonell, the Chairman, Chief Executive Officer, director, and largest stockholder of Cysive, Inc...”).
\textsuperscript{805.} In Pure, Unocal was limited by a shareholder agreement to five representatives on Pure's board of eight. Of these, one was Unocal's treasurer; a second was Unocal's President and COO and a director of Unocal; a third was a retired executive who had worked at Unocal for 34 years and still provided consulting services to it; a fourth was "an executive for many years at Unocal before 1992;" a fifth was "a close personal friend of Unocal's President and COO." The latter director was on Pure's special committee in fact. See Pure, 808 A.2d at 425–26.
\textsuperscript{806.} See supra note 766.
\textsuperscript{807.} See McMullin, 765 A.2d at 920 (noting board's responsibility in considering a merger to judge whether the "transaction maximized value for all shareholders"); id. at 918 ("The Chemical Board owed fiduciary duties of care, loyalty and good faith to all Chemical shareholders in recommending a sale of the entire corporation.").
\textsuperscript{808.} Id. at 921–22 (describing the basis for overturning the court of chancery's dismissal of the complaint allowing breach of fiduciary duty in a situation where the controller effectively pushed through the sale of the company against the minority's best interests).
A freezeout proposal is effectively a corporate governance "showdown." The freezeout proposal originates with the controller, consistent with its private interests; it does not originate with the board, consistent with all the company's or shareholders' best interests. Indeed, reflecting this reality, Weinberger rejected the requirement that the controller prove a corporate-oriented purpose for eliminating the minority.\textsuperscript{809} While the freezeout effects a fundamental corporate change, the minority's votes are effectively useless.\textsuperscript{810} As in Pure and Cox,\textsuperscript{811} where the controller announces its unwillingness to sell to a third party, the market for corporate control will be stymied. Even assuming a committee is established, it would not have legal authority to go around the controller to the market or even to authorize a financial restructuring.\textsuperscript{812}

The Entire Fairness standard invites the controller to constitute surrogates for the usual institutions of corporate governance and their salutary effects by empowering a special committee of independent directors with authority to negotiate with the controller, and/or facilitating an informed vote by the majority of the minority shares. Under the Lynch Doctrine, this does not set things back to the "original position," so that deferential review is warranted. A vote by the majority of the minority or committee ratification is not the same as assent by a majority of all voting shares. However, under the Lynch doctrine, such consents would constitute "strong evidence" of fairness. Nevertheless, even in the presence of such consent, equity still has a meaningful role: a minority shareholder who can make out a credible claim of unfairness in the freezeout can attempt to demonstrate such unfairness to the court. Under the Cox Reforms, consistent with the court's stated objective of facilitating controllers' ability to obtain dismissals on the pleadings,\textsuperscript{813} the court would have diminished responsibility in freezeouts. Dual Ratification would mean the parties would be left to their private agreements in the freezeout: contract law triumphs over fiduciary law.

Nor has the "market" really replaced judicial oversight under the Cox Reforms, because they would not provide independent directors full authority to go to the market to invite alternative offers or the authority to pursue a financial restructuring. Under the Cox Reforms the controller can obtain deferential review upon the basis of consents obtained under powerful constraints—i.e. while allowing the committee, essentially, only the power to say "yes" or "no." True arms' length deal-

\textsuperscript{809} Weinberger, 457 A.2d at 715.
\textsuperscript{810} This conclusion is reflected, for example, in McMullin, 765 A.2d at 920 and Paramount Comm'n, 637 A.2d at 42.
\textsuperscript{811} Pure, 808 A.2d at 429 (In its announcement of the tender offer freezeout, Unocal stated: "...we are not interested in selling our shares in Pure."); Cox 879 A.2d 607-08 ("...the Family did state that it would not sell its Cox shares or support a sale of Cox to a third party.").
\textsuperscript{812} See, e.g., Pure, 808 A.2d at 446.
\textsuperscript{813} See Cox, 879 A.2d at 607 ("by giving defendants the real option to get rid of cases on the pleadings, the integrity of the representative litigation process would be improved..."); id. at 619 ("...it was impossible after Lynch to structure a merger with a controlling stockholder in a way that permitted the defendants to obtain dismissal of the case on the pleadings."); id. at 130 ("As important, this incentive would enable transactional planners to know that they can structure transactions in a way that affords them the opportunity to obtain a dismissal on the complaint.").
going contemplates having the power not only to accept or reject the controller's offer but also to search for alternatives. Parties negotiating at arms' length are not limited to "thumbs up" or "thumbs down." Hence under the constrained Dual Ratification process endorsed in the Cox opinion the minority shareholders would be left stranded in an odd transactional limbo with neither the full power of the market nor the full power of equity to adequately protect their interests. In sum, allowing "business judgment deference" in freezeouts (even upon the Dual Ratification envisioned in Cox) is a strange concept from the perspective of corporate governance. Consent is an appealing idea for resolving the conflicts that arise on account of the freezeout, but the underpinnings of "totally voluntary" consent in freezeouts must be carefully considered before judicial deference is allowed.

4. Four Theoretical Perspectives on Voluntary Consent

There is considerable impetus behind the "pro-choice" model for fixing freezeout doctrine. It is at the heart of the reforms presented in Pure, Cox and Cysive, as described herein. And Dual Ratification has been endorsed as an adequate basis for deferential review by several scholars who have recently considered the issue. Much of the allure of the free choice model for freezeout reform stems from its "fit" with contemporary corporate legal theory. The Lynch Doctrine rests on the view that the dynamics in freezeouts are sufficiently coercive that consents by or on behalf of the minority shareholders cannot legitimately be presumed freely given. Nevertheless, the allure of the Dual Ratification/free choice model for fixing freezeouts is powerful given the choice-based, bargaining principles in private law. Theoretical frameworks in corporate law demonstrating this are presented in summary form below. They are: (i) neo-classical economic theory, (ii) agency theory, (iii) team production theory, and (iv) civil society theory.

Over the last twenty five years, neo-classical economic theory has influenced the development of corporate law in important respects. Under the rubric of "law and economics," this school of thought emphasizes corporate law's role in supporting strong capital markets and economic growth. A basic tenet of neo-classical economic theory is that people are rational, self-interested actors who will undertake a transaction only if they believe doing so is in their mutual self-interest. From the perspective of law-and-economics, the role of corporate law is to facilitate

814. See Solomon, 672 A.2d at 39 ("In the case of totally voluntary tender offers, as here, courts do not impose any right of the shareholders to receive a particular price.").

815. See Pure, 808 A.2d at 444 n.43, 445; Cox, 879 A.2d at 606, 607, 643-44, 646; Cysive, 836 A.2d at 549-50.

816. See supra citations in note 5.

817. The role of law in supporting strong capital markets is considered in both the Pure and Cox opinions. See Pure, 808 A.2d at 433-44; Cox, 879 A.2d at 646 (the Lynch Doctrine should be reformed because it is inhibiting transactions that provide "efficiency for the economy in general").

818. For consideration of the role of economic thought in contemporary corporate law, see, e.g., Stephen M. Bainbridge, CORPORATION LAW AND ECONOMICS (Foundation Press 2002). For a more progressive analysis, see Lynne L. Dallas, LAW AND PUBLIC POLICY: A SOCIOECONOMIC APPROACH (Carolina Academic Press 2005).
transactions, since they are presumed to increase wealth overall. Along these lines, the consent by or on behalf of the minority shareholders in a freezeout would suggest that the transaction is wealth-enhancing, and thus socially beneficial. If consent was reliably rational, informed, and freely given, then the proper role of the courts would be to "get out of the way" and leave the parties to their bargain. Hence, if the Cox Reforms would reliably yield genuinely consensual freezeout transactions, they would be an improvement in corporate law from the perspective of neo-classical economic theory.

Corporate law has also been influenced by transaction cost economics, and in particular its concern for the effects of agency costs on the corporations' cost of capital. With Berle and Means' famous treatise in the distant background, agency theory focuses on the "separation between ownership and control," and its implications for managers and investors. As Professors Gilson and Gordon have illuminated, once a controller is present agency costs run along two axes: controllers are better monitors of managerial misconduct, so there will be lower managerial agency costs for the equity holders, but the controller will engage in some degree of private profit-taking, which will increase the agency costs borne by the minority. The role of corporate law is to effect a system of organization which will decrease agency costs overall, but to do so without creating new agency costs—for example, by stimulating an inefficient amount of litigation. Freezeouts are such an occasion for controllers to expropriate wealth from minorities, although the enforcement of fiduciary duties through litigation might limit controllers' expropriation of wealth through freezeouts. But for agency law-oriented scholars, litigation may increase other forms of agency costs. These dangers of increased agency costs and wealth destruction disappear if the freezeout transaction was genuinely consensual. Once again, if Dual Ratification could reliably yield a consensual freezeout transaction, then judicial oversight would be unnecessary. With informed, disinterested freely-given consent, there would be no reason to worry about increased agency costs as the result of the freezeout. The Cox Reforms would be an improvement in corporate law from the perspective of agency cost theory.

Team production theory is especially helpful as a framework for conceptualizing the role of the board and, the role of special committees in freezeouts. Team production theory focuses on the limits of contracting over the factors of production in the corporate enterprise. From the perspective of team production theory, the board's role is to support the fair and efficient distribution of the surplus value produced by the corporate enterprise. In effect, the mediating hierarch's

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820. See Jensen & Meckling, supra note 179.
821. Gilson and Gordon, supra note 5.
role ensures that the parties will have less incentive to shirk or engage in self-dealing because they will have more assurance of a fair return on their input into the firm. Here again, if the special committee was properly doing its job as a mediating hierarch in the freezeout based on an informed basis, then presumably the transaction would not be unfair rent-seeking by the majority shareholder. The norms of teamwork would not be undermined by the transaction. If the Cox Reforms could guarantee that the special committee would function effectively as an unconstrained, mediating hierarch, then where its approval was obtained for a freezeout, judicial review would be unnecessary. The Cox Reforms would be an improvement in corporate law.

Though civil society theory is less commonly applied to corporate law than are the theories discussed above, it provides interesting insights into corporate governance. From the perspective of civil society theory, corporations are part of a broader network of nongovernmental organizations that counterbalance governmental authority by providing a "space" for positive, free communal interchange. Civil society theorists scrutinize and encourage the features of institutions that make them consistent with norms of democratic organization and participation, and thus valuable social institutions. The Lynch Doctrine's fair dealing requirement provides an example of these values in corporate governance. Hence, if a freezeout occurred in the presence of the informed, free consent of the independent directors and minority shareholders, then it would be an exemplar of civil society virtues. Assuming the presence of such freely given consent, from the perspective of civil society theory, the Cox Reforms would be an improvement in corporate law.

These four theoretical perspectives on corporate governance help illuminate why the consent construct, as applied to freezeouts, is such a compelling one. The problem is that the Cox Reforms are an improvement in corporate law under the

823. As used in contemporary corporate legal scholarship the term "rent-seeking" refers to the pursuit of above market returns through the exploitation of an advantage nonsusceptible to competition, for example an anti-competitive regulation. For a study analyzing rent-seeking, see Sanjay Gupta and Charles W. Swenson, Rent Seeking by Agents of the Firm, 46 J. Law & Econ. 253 (2003) (creating an empirical model to measure rent-seeking by corporate executives and then applying it to firms' political contributions to see if they track managers' interest in tax relief relevant to executive compensation). Admittedly, the board's placing the committee in the role of advocate for the minority, in facing up to the controller, is a slight departure from the basic model, but the team production construct still has relevance, especially with the board in the background and the controller looming.


826. At first glance, the Cox court's Dual Ratification proposal is consonant with these theoretical frameworks as well; not only does the Cox court affirm the importance of voluntary consent, it requires Dual Ratification unlike the court in Lynch that allows either shareholder or director consent to shift the border of proof. The Cox court proposes that the two forms of consent are complementary to one another; that they provide heightened protections to minority shareholders over Lynch. According to Cox, directors are more effective negotiators, but the Cox court also allows for the possibility that the independent director may be lazy or inept or less than independent and recommends a requirement of minority shareholder ratification, as a check on the directors' diligence and judgment. See Cox, 879 A.2d at 618-19. However, there is a significant difference between employing consent as a burden shifting device and using it as a rationale for limiting judicial review.
above theories only if the consents of the committee and the minority shareholders are genuinely freely given. The *Lynch* Doctrine maintains that inherent coercion taints the consents and renders them unreliable as indicia of the true voluntariness of the transaction. Nothing in *Cox* enhances the ability of committees or minority shareholders to evaluate a freezeout in a truly uncoerced, unconstrained manner.

5. What *Cox* Says About Inherent Coercion

As described in Part III, in *Pure* the court affirmed that inherent coercion is present in freezeouts based on tender offers and in those based on cash-out mergers. What does the court say about inherent coercion in *Cox*? First, *Cox* claims that inherent coercion is no longer a serious concern for freezeout doctrine because the passage of time has made the idea outmoded. According to the court, committees and minorities can now say “no” if they want to.\(^{827}\)

Second, *Cox* employs several rhetorical devices to discredit, even ridicule, the concern over inherent coercion in freezeouts. Because inherent coercion cannot be “disproven,” in *Cox* the court employs various rhetorical devices to mock and hence “shrink” its importance. This use of rhetoric is an important aspect of the opinion because the *Cox* Reforms rest on the presumption that committee’s and minorities’ consents can be genuinely valid, and inherent coercion is not a real concern.

6. Independent Directors’ Capacity to Say “No” Now?

At present, there are no empirical studies that support the conclusion that committees can reject unfair freezeout proposals. The few existing empirical analyses of freezeouts that exist address different issues; they do not provide evidence that helps to resolve this question.\(^{828}\)

Furthermore, whether committees in fact are free to reject inadequate freezeout offers is a question that seems especially difficult to resolve empirically.\(^{829}\) Such a study would first need to identify which deals offered too low a price. This question alone would involve a complex valuation exercise for each company in the data set sampled. Using premiums over market price would not be a reliable indicator of fair price, for the reasons discussed above.\(^{830}\) It would be possible to gather

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827. *Cox*, 879 A.2d at 647 (“By now, experience has proven that special committees and independent board majorities are willing to say no to controllers. Experience has also shown that disinterested stockholders, given a non-coercive choice, will reject low ball tender offers by controllers.”).

828. We are only beginning to see empirical studies on freezeouts. In *Cox* the court was highly critical of the only study that provides some data on committees’ acceptances and rejections of controllers’ offers, see Subramanian, *Theory & Evidence*, supra note 23. There is information about settlement rates in suits filed against freezeouts, but not information relevant to *Cox*’s assertion about committees’ disapprovals of unfair offers in Thompson and Thomas II, supra note 51. Weiss and White’s study also contains empirical analysis of claims and settlements in freezeouts, but their data does not illuminate whether directors have genuine freedom to disapprove unfair freezeouts. Weiss & White, *supra* note 641.

829. The question was hotly debated in the late 1980s when there were many leveraged buyouts. See, e.g., William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 Bus. Law. 2055 (1990).

830. See *supra* note 767.
data reflecting committee disapprovals, but impossible to ascertain the number of times that committees were pressured into acquiescing to too low a price because they feared worse for the minority if they resisted, or because they lacked adequate authority to pursue financial or transactional alternatives. Though individual case studies might be revealing, conducting this research with a data set large enough to support robust conclusions would be extraordinarily difficult. Hence, it is highly premature to conclude that we now know that committees can reject unfair proposals, so that inherent coercion and judicial scrutiny for fairness is outmoded. There may be valid policy reasons for wishing that committees had the resources to resist unfair freezeouts, but there are solid reasons for skepticism.

Leaving aside empirical measures, social science evidence on group dynamics does not present an encouraging picture of committees' capacity and propensity to reject unfair deals.\textsuperscript{831} To the contrary, the emerging social science data reveals that the persistent socio-demographic homogeneity in boards (and committees as subsets thereof) tends to foster a "group cohesion" dynamic and hence various cognitive biases that would lead directors (even outside directors) in the direction of being relatively conformist and passive in responding to proposals from a controller.\textsuperscript{832} Nor are changes to the director election process that might force greater diversity forthcoming.\textsuperscript{833} Because at least with true majority controllers in all likelihood the controller's representatives would occupy at least a majority of the board seats, this means that their conformity and passivity would generally lead to the freezeout proposal being approved. The power of controllers to influence the information that outside directors obtain would further perpetuate the cognitive biases weighing in favor of their approving the offer.\textsuperscript{834}

The limits that protect directors from liability for breach of care also reinforce committees' inclination not to "make waves."\textsuperscript{835} Saying "yes" would be the path of


\textsuperscript{832} Marleen A. O'Connor, \textit{Women Executives in Gladiatorial Corporate Cultures: The Behavioral Dynamics of Gender, Ego and Power}, 65 Mo. L. Rev. 465, 494 (2006); James D. Westphal, \textit{Defections from the Inner Circle: Social Exchange, Reciprocity and the Diffusion of Board Independence in U.S. Corporations}, 42 ADMIN. SCI. Q. 161, 163–64 (1997); Donald C. Langevoort, \textit{The Human Nature of Corporate Boards: Law, Norms, and the Unintended Consequences of Independence and Accountability}, 89 GEO. L.J. 797, 811 (2001) ("For a variety of reasons, the natural gravitational pull is away from diversity towards collegiality.").

\textsuperscript{833} The "tightly-knit" nature of corporate boards, even after the recent financial accounting scandals, is illustrated by the enormous outpouring of negative comment letters resulting from the SEC's proposed conservative version of a shareholder nomination rule. See Proposed Rule: Security Holder Director Nominations, SEC Rel. No. 34-48626, 68 Fed. Reg. 60784 (Oct. 23, 2003).

\textsuperscript{834} The CEO is unlikely to take a position adverse to the controller and therefore may be unhelpful to the outside directors in terms of what information is shared. See generally Lawrence E. Mitchell, \textit{Structural Holes, CEOs, and Informational Monopolies}, 70 BROOK. L. REV. 1313 (2005); James D. Westphal, \textit{Board Games: How CEOs Adapt to Increases in Structural Board Independence from Management}, 43 ADMIN. SCI. Q. 511 (1998); Daniel R. Fischel, \textit{The Corporate Governance Movement}, 35 VAND. L. REV. 1259, 1282 (1982) (opining that outside directors' limited information about operating details limits their utility in crucial respects).

least resistance. Saying “no,” on the other hand, requires a greater investment of
time on the committee directors’ part, and the time constraints that affect outside
directors are notorious.836 The unresolved problem of outside director compensa-
tion also aggravates this problem. If outside directors are paid “too little” they
may lack a powerful incentive to devote substantial time to their committee work.
However, if outside directors are richly rewarded in a controlled company, they
may be unwilling to show “ingratitude” for this largesse by disapproving of a
freezeout offer.837

The many corporate scandals that came to light after December 2001 also sug-
gest the limited efficacy of boards in preventing self-dealing by powerful corporate
insiders including controlling shareholders.838 In almost all of these scandals, the
companies had substantial numbers of outside directors on their boards; Enron
was exemplary in this fashion.839 In many of these cases the independent directors
approved transactions despite clear signs of self-dealing.840 These recent scan-
dals and the financial losses they caused suggest that caution is warranted before
reducing the fiduciary protections afforded public investors on the rationale that
committees’ oversight will be sufficient to protect them from controllers’ over-
reaching. The court of chancery’s careful scrutiny of the shabby work of the special
committee in the Emerging Communications tender offer freezeout provides
a cautionary tale in this respect.841

Finally, it is worth remembering that Lynch was decided by the Delaware
Supreme Court only in 1994. Independent directors had already been “invented”
as a significant institution of corporate governance, but their ratification was not a
sufficient guarantee of fairness. In this respect Lynch’s resolution that a committee’s

836. For a discussion of the time constraints that may limit outside directors’ utility, in relation to
executive compensation issues, see, e.g., Michael B. Dorff, Does One Hand Wash the Other? Testing the
Managerial Power and Optimal Contracting Theories of Executive Compensation, 30 J. Corp. L. 255, 266
(2005).
837. See Jeffrey N. Gordon, What Enron Means for the Management and Control of the Modern Business
compensation).
838. Report of Investigation by the Special Investigative Committee of the Board of Directors of
sicreport020102.pdf; William W. Bratton, Enron and the Dark Side of Shareholder Value, 76 Tul. L.
Rev. 1275, 1305-15 (2002) (describing extensive self dealing transactions at Enron); Robert Prentice,
ristics and cognitive biases can help explain the actions of various actors, including outside directors
in the Enron scandal); Arnoud WA. Boot & Jonathan R. Macey, Monitoring Corporate Performance: The
Role of Objectivity, Proximity, and Adaptability in Corporate Governance, 89 Cornell L. Rev. 356, 368-73
(2004) (noting that boards tend over time to internalize managers’ values and therefore lose their
objectivity as they become unduly influenced by management’s perspective). Special problems arise,
of course, in cases in which the controller is the senior executive officer. Note the case of Hollinger
International, Inc. where controlling shareholders allegedly looted $400 million over four years. Holl-
839. See Bratton, supra note 838, at 1332-34; Gordon, supra note 837, at 1241-44.
840. For facts relating to WorldCom’s board, see, e.g., In re WorldCom, Inc. Sec. Litig., 294 F. Supp. 2d
841. Emerging Commc’ns, 2004 Del. Ch. LEXIS 70, at *140-47.
consent is insufficient indicia of a freezeout's fairness to warrant application of the business judgment rule cannot be relegated to bygone times, as Cox suggests.

7. Institutional Investors' Capacity to Say "No" Now?

The same caveats about the lack of evidence supporting committees' ability to say "no" to unfair freezeout proposals applies to minority shareholders. We simply do not possess such empirical evidence at this time regarding the ability of minority shareholders to say "no" to controllers.

In Cox the court places significant emphasis on the increased institutionalization of the public equity markets as a source of empowerment for minorities in freezeouts. But corporate legal scholars have consistently been disappointed by the level of coordinated action by institutional investors, especially in relation to company specific matters. The factors that produce this effect are well documented. Even institutional investors face significant transaction costs in evaluating and opposing a freezeout offer. Coordinated action is costly and there are still a variety of legal regulations and financial conflicts of interest that discourage coordinated action among institutional investors. In addition, institutional investors have differing financial incentives and investment strategies, and this

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842. Cox, 879 A.2d at 619, 647. Institutions are more likely to focus on individual firms where there is a buyout offer, but the well-discussed limits to institutional investor activism are still powerful in freezeouts. See, e.g., James D. Cox & Randall S. Thomas, Letting Billions Slip Through Your Fingers: Empirical Evidence and Legal Implications of the Failure of Financial Institutions to Participate in Securities Class Action Settlements, 58 STAN. L. REV. 411, 425–28 (2005); Edward Rock, The Logic and (Uncertain) Significance of Institutional Shareholder Activism, 79 Geo. L.J. 445, 466–68 (1991). Furthermore, there will also be conflicts between larger and smaller institutional investors in public companies.


844. These rules are discussed in Bernard S. Black, Shareholder Passivity Reexamined, 89 MICH. L. REV. 520 (1990).

845. For an account of these conflicts, see Adrian Cadbury, & Ira M. Millstein, The New Agenda for ICGN [International Corporate Governance Network], in 1506 PLI/Corp 673, 698–99, PLI, CORP. LAW AND PRAC. COURSEBOOK HANDBOOK SERIES, Sept. 15-16, 2005 ("Conflicts of interest are an endemic institutional investor affliction. The problem is structural. For example, corporate pension fund managers are retained by plan sponsors and may find themselves acting in the best interests of the corporation rather than the beneficiaries who have entrusted their retirement savings to the plan. Similarly, trustees of public and union pension plans may seek to use their position to further political interests at the expense of beneficiaries, for example, by using beneficiary funds to engage in litigation that is politically motivated or to further "union" issues which may not bear on governance. Alternatively, institutional investors may be reluctant to sue to recover fraud-related losses where those lawsuits would be launched against other institutions with which they have a relationship. Banks that engage in proprietary trading may inappropriately support those activities using information they gather from clients in relation to trading intentions. These conflicts are increasing coming to the attention of regulators. In fact, some regulatory intervention has already occurred in the institutional investor community in the United States in relation to mutual funds. As a result of rules adopted on January 23, 2003, the SEC requires investment companies and their advisers to disclose the fund's voting policies and procedures, actual votes cast and how material conflicts of interest are dealt with.").

diversity undermines their incentives and propensity to act in concert. In addition, institutional investors (especially hedge funds) are increasingly positioning themselves to respond to short-term market price changes, as intensified by the role of arbitrageurs in corporate transactions. These factors fit uneasily with the likelihood that institutions will band together to hold out for their fair share of going concern value when a controller offers a premium over the market price. Indeed, the pervasively short-term orientation of contemporary securities markets favors acquiescence to the controller’s freezeout, even if it offers minorities less than their fair share of the gains from the transaction. Since investing is subject to trends and social norms, a decision to oppose a freezeout at a premium might even appear “irrational” read in the context of other investors’ responses.

In any event, the major losses suffered by such institutional investors in Enron and other post-2001 corporate scandals and also the continued granting of mega-options to executives even at underperforming companies with significant institutional ownership suggests limits to the wisdom of relying on institutional investors to protect minorities’ interests in freezeouts.

8. Cox’s Use of Rhetoric to Discredit Inherent Coercion and the Lynch Doctrine

The Cox court uses highly charged rhetoric to undermine the legitimacy of the inherent coercion concept and hence the need for applying Entire Fairness in freezeouts. These uses of rhetoric are analyzed below because they are suggestive of the climate in which reforming freezeout doctrine is being considered. That is, it appears to be safe (even for the court of chancery) to mock not only the


850. For example, the media reported pension fund losses attributed to Enron alone at $1.5 billion. See Patrick McGeehan, 3 State Pension Funds Put Pressure on Wall St., N.Y. Times, July 2, 2002, at C1.

contribution of plaintiffs' lawyers to the system, but also the need for meaningful judicial review in freezeouts. Cox's intense rhetoric suggests that the appeal of contract-based norms over fiduciary norms is so powerful in corporate law that to disagree is foolish, if not ridiculous. Because appearing foolish is painful, Cox's rhetorical attack against inherent coercion may be quite effective in persuading future courts' or commentators' against defending the legitimacy of inherent coercion and Entire Fairness review in freezeouts.

a. Parody—Funny But Disturbing

The court's negative view of the inherent coercion concept—its intuition that the concept is misplaced, mistaken and plain silly—is evident in the vehicle through which it is "explained" in the Cox opinion. For purposes of convenience, this will be called the "Primate Parable."852

All in all, it is perhaps fairest and more sensible to read Lynch as being premised on a sincere concern that mergers with controlling stockholders involve an extraordinary potential for the exploitation by powerful insiders of their informational advantages and their voting clout. Facing the proverbial 800 pound gorilla who wants the rest of the bananas all for himself, chimpanzees like independent directors and disinterested stockholders could not be expected to make sure that the gorilla paid a fair price. Therefore the residual protection of an unavoidable review of the financial fairness whenever plaintiffs could raise a genuine dispute of fact about that issue was thought to be a necessary final protection.853

The Primate Parable is intended to capture the reader's attention through a radical departure from the usual rhetorical boundaries of corporate law cases. In the above cited passage, inherent coercion "reads" as a strange departure from the overall logic of corporate governance, which does not usually require reference to gorillas and chimpanzees to make sense of it. By presenting the "logic" of the inherent coercion concept (the underpinning of the Lynch Doctrine) through the Primate Parable, the court effectively marginalizes that concept. It makes the inherent coercion concept look bizarre—an odd digression within the otherwise rational jurisprudence of corporate governance.

Secondly, it is only a tiny move from bizarre to silly, and the references to gorillas, chimpanzees and bananas implicitly provide license to laugh at the concept of inherent coercion. Most of us know gorillas and chimpanzees only from zoos and/or television cartoons, and bananas are the notorious stock of slapstick comedy. So maybe the inherent coercion concept is just laughable?

The more closely one considers the Primate Parable the stranger and more offputting the logic of inherent coercion becomes. Though the "800 pound gorilla" is a cliché, it is also a grotesque metaphor. We don't want to look too closely at an 800 pound gorilla, maybe we should stop thinking about this overblown inherent coercion concept too? Besides, gorillas do not pay for bananas—this inherent coercion

852. Cox, 879 A.2d at 617.
853. Id.
stuff makes no sense! That is the reaction that the Primate Parable evokes, in a serious and yet simultaneously comic, and thus brilliant, powerful mode of argumentation.

The analogy between independent directors, minority stockholders and chimpanzees is also belittling. The natural response to reading it is to reject the comparison. Independent directors and minority stockholders are not analogous to chimpanzees! If the inherent coercion concept is based on this false analogy, then the inherent coercion concept is grounded on a major mistake.

It is worth noting that the Primate Parable is used as the vehicle to “explain” inherent coercion not only in Cox, but also in the court’s opinion in Pure, and in a law review article authored by Vice Chancellor Strine. This suggests that it resonates deeply with the Vice Chancellor and is being used to convey something highly important about the place of the inherent coercion concept in corporate law.

Another reason that one should take the Primate Parable seriously is that discrediting the continued legitimacy of the inherent coercion concept is critical to the law reform espoused by the court in Cox, Pure and Cysive (i.e. eliminating Entire Fairness review of freezeouts in cases of Dual Ratification). Because inherent coercion is not susceptible to being “disproven” at an empirical level (as described above), the court endeavors to shrink its significance through humorous disparagement. Poking fun at the inherent coercion concept does not diminish the importance of what is at stake, Cox contends that the Lynch Doctrine and its concern about inherent coercion is damaging both the litigation system and impairing economic efficiency.

The Primate Parable has one other dimension worth noting. At bottom, the question the court is grappling with is when the rule of law and resort to the courts are fruitful. In essence, the Primate Parable mocks reliance on complex legal doctrines and resort to the courts to resolve disputes in freezeouts. This logic also operates through the contrast between primates and more highly reasoning homo sapiens. If we are so much more intelligent, then why can’t we resolve our differences on our own, without resort to courts and overly complicated legal doctrines?

The Cox opinion uses a second stunning metaphor to discredit the Lynch Doctrine. This one, too, suggests that the concern for inherent coercion is “over the top;” that Entire Fairness review is distorting or perverting the system of litigation and corporate governance. This metaphor appears in the court’s description of the triangular settlement process involving committees, controllers and plaintiffs’ lawyers in lawsuits filed under the Lynch Doctrine:

As the objectors point out and this court has often noted in settlement hearings regarding these kinds of cases in the past, the ritualistic nature of a process almost

854. See Pure, 808 A.2d at 436.
856. Cox, 879 A.2d at 646. This Article contends that Entire Fairness review in freezeouts is important to maintaining the integrity of corporate fiduciary law and strong capital markets. See infra Part V
857. See also id. at 643 (“...Lynch has generated perverse incentives for both defense and plaintiffs' counsel that cast doubt on the integrity of the representative litigation process”).
invariably resulting in the simultaneous bliss of three parties—the plaintiffs' lawyers, the special committee, and the controlling stockholders—is a jurisprudential triumph of an odd form of tantra.\footnote{858 \textit{Id.} at 621.}

Like the reference to gorillas and chimpanzees, the opinion's references to "ritual," "bliss," and "tantra" are so unusual in the lexicon of corporate law as to be arresting. Describing settlement negotiations under the \textit{Lynch} Doctrine through an analogy to over-the-top emotions (bliss) and exotic spiritual or sexual practices (tantra) makes the \textit{Lynch} Doctrine appear excessive and even bizarre in its effects. Read in the context of a formal legal opinion, these references are unsettling. The court is inviting us to be uncomfortable with the \textit{Lynch} Doctrine and its effects. In its references to "bliss" and "tantra" the court is suggesting that the \textit{Lynch} Doctrine has caused corporate law that governs freezeouts to spin out of control and become decadent and disorderly.\footnote{859 This is evident also where the \textit{Cox} court describes the plaintiffs' lawyers as having a "food fight" over who would be lead counsel. \textit{See Cox,} 879 A.2d at 609.} In this fashion \textit{Cox} implicitly admonishes that law reform is overdue.

These are the opinions most potent use of rhetoric, but the rest should be noted as well because they operate cumulatively (albeit implicitly) in service of the court's law reform agenda.

\textit{b. Inherent Coercion—A "Sociological Inference"}

A further example of the court's use of rhetoric to discredit the \textit{Lynch} Doctrine is its reference to inherent coercion as a "sociological inference."\footnote{860 \textit{Id.} at 647.} By tying implicit coercion to sociology, rather than economics or positive law, \textit{Cox} once again marginalizes it within the lexicon of corporate law. Economics has been respected as a legitimate science and source of inspiration for corporate law. In contrast, until quite recently, sociology and the other social sciences were not acknowledged as legitimate sources of authority for courts to rely upon in deciding corporate cases.\footnote{861 The struggle for recognition of the Socio-Economics section of the American Association of Law Schools is suggestive of this relative undervaluation of sociology, which is especially acute in the area of corporate law. \textit{See, e.g.,} J. \textit{Richard Gershon, Teaching Federal Income Taxation Using SocioEconomics,} 41 \textit{SAN. DIEGO L. REV.} 201, 201 n.2 (2004) (citing \textit{Over 120 Law Teachers from 50 Member Schools Sign Petition to Form Section on Law and Socio-Economics, SECTION ON SOCIO-ECONOM. NEWSL. (Ass'n of Am. Law Sch. Washington D.C.), Jan. 1997, at 4}.}

Equally powerful is the court's statement that the inherent coercion core concept underlying the \textit{Lynch} Doctrine is based merely on an "inference."

\textit{c. A Pointed Rhetorical Question}

In \textit{Cox}, the court employs a pointed rhetorical question to undermine judicial concern for inherent coercion. Rhetorical questions are not actual questions of
course, but rather masked declarations of certainty. In just this discussion-ending mode, the opinion states:

If both the independent directors and the disinterested stockholders are given the ability to say no and do not, ought we not presumptively assume that the transaction was fair?

This rhetorical question appears near the conclusion of the opinion, after the court’s many objections to the Lynch Doctrine have been presented. It is intended to evoke a positive response. “Yes! Dual Ratification should end the inquiry into fairness in a freezeout!”

Furthermore, this rhetorical question contains a tautology. It assumes away the problem of inherent coercion by positing that the committee and the minority shareholders were given a genuine opportunity to reject the freezeout proposal. This doubt about the total voluntariness of minorities’ and committees’ consents in freezeouts is what motivates the invocation of the Entire Fairness standard under the Lynch Doctrine in the first place.

d. Corporate Law—A Species of Commercial Law?

As part of its argument against continued adherence to the Entire Fairness standard for freezeouts, the Cox opinion makes a claim about corporate law’s essential nature and proper boundaries. The statement is extremely terse, but quite powerful in its effect for this reason. The claim is as follows: “This is corporate law, after all, a species of commercial law...”

The statement quoted above achieves its rhetorical power through two definitions: one is “species” and the other “commercial law.” Taking the latter first, commercial law is sometimes used broadly as a synonym for private law but it has a narrower usage. For example, the Uniform Commercial Code governs numerous areas of commercial law including for example sales, leases, negotiable instruments, bank deposits, fund transfers, letters of credit, bulk sales, and warehouse receipts. It is unquestionably important to businesses and consumers to have a clear and coherent system of commercial laws. But the above list illustrates that the commercial law is more microeconomic in comparison to the kind of macroeconomic effect that Cox elsewhere claims are relevant to corporate law in general and the Lynch Doctrine in particular. For example, earlier in Cox the court expressly claims that the Lynch Doctrine is inhibiting profitable transactions that produce efficiency for the economy overall and liquidity for minorities in

862. Rhetorical questions are used to end discussions, rather than begin them. They imply that the matter is so obvious that there can be only one intelligent viewpoint—the one that the speaker is declaring to be self-evident.

863. Cox, 879 A.2d at 647.

864. Id.

865. For discussion of important concerns under the Uniform Commercial Code, see, e.g., Linda J. Rusch, Is the Saga of the Uniform Commercial Code Article 2 Revisions Over? A Brief Look at What NCCUSL Finally Approved, 6 DEL. L. REV. 41 (2003).
particular.\textsuperscript{866} And in \textit{Pure} the court muses about whether endorsing \textit{Lynch} or \textit{Solomon} would be more consistent with corporate law's objective of supporting strong capital markets.\textsuperscript{867} By limiting the proper concerns of corporate law to commercial law, then, the court is implicitly narrowing its appropriate focus.

This narrowing of the proper concerns of corporate law is accentuated by the claim that corporate law is merely a "species" of commercial law. Within biological classification, a species is the lowest level of taxonomic classification. By using the term species, the court is fitting corporate law under the genus of commercial law, in effect further shrinking the appropriate domain and concerns of corporate law. By invoking the taxonomy of biological science, Cox makes the claim that corporate law is a sub-category of commercial law and advances the court's rhetorical arguments that freezeout doctrine should move away from a focus on "Entire Fairness," and let the parties negotiate on their own.

e. Creating Urgency through Hyperbole

The Cox opinion is rife with hyperbole that creates an air of urgency around its law reform proposals. For example, strict adherence to the Entire Fairness standard for freezeouts has generated "perverse incentives"\textsuperscript{868} for both defense and plaintiffs' counsel. It has "cast doubt on the integrity of the representative litigation process."\textsuperscript{869} The \textit{Lynch} Doctrine has made it "impossible"\textsuperscript{870} for controllers "ever"\textsuperscript{871} to avoid a review of a cash-out merger's financial fairness because "any" amended complaints that the plaintiffs file could not be dismissed.\textsuperscript{872} According to the opinion, it is an "undeniable reality that any merger with a controlling shareholder is subject to review for fairness."\textsuperscript{873} The Cox opinion contends that minorities' claims of unfairness in freezeouts "cannot ever be dismissed" irrespective of their merit.\textsuperscript{874} These are only a few examples of the court's use of hyperbole to convey the urgency of limiting Entire Fairness review in freezeouts.\textsuperscript{875}

V. PROPOSALS: TWENTY-FIRST CENTURY STANDARDS FOR FREEZEOUTS

A. A Unified Doctrine for Freezeouts

The Delaware Court of Chancery's recent opinions in \textit{Pure}, \textit{Cysive}, and Cox make an important contribution to illuminating the negative effects of having two "tracks" in freezeout doctrine. As \textit{Pure} and Cox contend, the structural differences between tender offer freezeouts and cash-out mergers do not reflect substantially

\begin{itemize}
  \item 866. Cox, 879 A.2d at 646.
  \item 867. Pure, 808 A.2d at 434-35.
  \item 868. Cox, 879 A.2d at 643.
  \item 869. Id.
  \item 870. Id. at 605.
  \item 871. Id.
  \item 872. Id. at 605, 609.
  \item 873. Id. at 617.
  \item 874. Id. at 605.
  \item 875. The Cox opinion does not hide its law reform agenda. Id. at 642.
\end{itemize}
different capacities for overreaching by controllers.\textsuperscript{876} Minorities and committees have no less reason to fear ex-post retribution from controllers if they oppose a tender offer freezeout instead of a cash-out merger. And controllers' informational and timing advantages persist in freezeouts based on tender offers, as in cash-out mergers. The greater force of the prisoner's dilemma in freezeouts based on tender offers mandates applying equivalently rigorous fiduciary safeguards to these transactions.

Just as importantly, the operation of different standards of fair price in the two freezeout formats, in conjunction with the "hit or miss" nature of the appraisal remedy has undermined the securities markets' capacity accurately to price controllers' capacity for overreaching in freezeouts. The application of a fair price duty in cash-out mergers and no fair price duty in tender offer freezeouts sends mixed signals to the capital markets about the value of the minorities' shares. If the markets do not fully reflect the substantial risks of opportunism presented by tender offer freezeouts, then minorities are probably overpaying for their shares. In the alternative, if the securities markets are accurately discounting the minorities' shares to take account of controllers' potential for opportunism in tender offer freezeouts, then this hole in the web of fiduciary prohibition against self dealing may be driving up the cost of raising public equity capital. In either case, the Delaware Court of Chancery's critique that excess complexity in freezeout doctrine is inefficient is well founded in this context. It should be redressed through law reform that would unify the fiduciary standards applicable to freezeouts.

Furthermore, as the analysis of Solomon and Glassman herein revealed, it isn't clear that the supreme court ever intended for there to be two tracks in freezeout doctrine. The Delaware Supreme Court has never had the opportunity to review a genuine tender offer freezeout. The \textit{Solomon} decision exhibits striking shortcomings as landmark precedent. These shortcomings are evidence that the Delaware Supreme Court never intended to validate a separate, looser framework of fiduciary duties for freezeouts based on tender offers.

**B. ENTIRE FAIRNESS AS THE STANDARD FOR FREEZEOUTS**

The Entire Fairness standard represents the most appropriate basis for a unified doctrine for freezeouts. The \textit{Lynch} doctrine's fair price promise has facilitated minority shareholders' capacity to command higher premiums in freezeout negotiations than they can in negotiations where no fair price duty has applied. In the absence of a fair price duty, controllers can take a variety of actions that will force the trading price of the minorities' shares downward, and then profit from such actions by compelling a freezeout. The more the market fears controllers' capacity for coercion and overreaching, the deeper the discount will become; the less the controller will have to pay in the freezeout—unless a fair price duty applies. By extending \textit{Lynch}'s fair price duty to tender offer freezeouts,

\textsuperscript{876} Pure, 808 A.2d at 435 (arguing that the disparity between the \textit{Lynch} doctrine and the standards applied to tender offer freezeouts "creates a possible incoherence in our law").
corporate law can limit this kind of downward cycle and its negative effects for minorities and corporations' cost of capital. In this respect, the application of Entire Fairness review to controllers' cash-out mergers has provided a safeguard against freezeouts in which controllers' gains come at the minorities' expense. This same protection should apply in tender offer freezeouts.

The Lynch doctrine's concern about minorities' capacity for free choice in freezeouts reflects that shareholders have a property interest in their shares which cannot be "seized" by controllers without some meaningful due process, and the payment of full value to the minority. Second, the fair dealing aspect of the Entire Fairness standard limits controllers' capacity to subordinate the distinct institution that is the corporate board to their private interests. The Cox opinion itself emphasizes that "empowerment of centralized management, in the form of boards of directors" is an axiomatic principle in corporate law, and one relevant to freezeouts. Application of the Entire Fairness standard is further warranted on account of the fact that target directors have not been recognized to possess inherent fiduciary authority to explore transactional alternatives to a freezeout over the opposition of a controller. This is an especially odd result given target directors' broad discretion to defend against a hostile tender offer proposal from a third party. Target directors' defensive authority in freezeouts should be expanded so it is on a par with their authority in third-party offers, but in the end this is a matter separate and distinct from the standard of review applicable to controllers in freezeouts.

The Cox Reforms would allow Dual Ratification to trigger deferential review in a freezeout, and the court claims in Cox, that in doing so it would not diminish the integrity-enforcing role of corporate law. However, the court is able to arrive at this conclusion only by assuming away the essential concern underlying the Lynch Doctrine, i.e. the concern for inherent coercion. The appeal of the "pro-choice" solution for fixing freezeouts is powerful. But the court in Cox cannot "disprove" the continued validity of inherent coercion and disparages it through a variety of rhetorical devices. In an ideal world, people would freely bargain to mutually beneficial outcomes and courts would not be involved. But minorities' and committees' consents to freezeouts are not likely to be genuinely freely given and should not be treated as the product of arms' length dealings. The absence of strong fiduciary protections would further erode minorities' and committees' capacity to resist unfair freezeout proposals.

C. THE LYNNCH DOCTRINE IS NOT "BROKEN"

The Cox and Cysive opinions present a series of claims intended to prove that adherence to the Entire Fairness standard for freezeouts has serious deleterious effects on the legal system and economy. This Article has demonstrated that these claims are exaggerated. The Lynch Doctrine is not a free pass for plaintiffs' lawyers to proceed to discovery on mere allegations of unfairness especially mere

877. Cox, 879 A.2d at 614.
allegations of unfair price. The courts have the ability to dismiss claims that appear nonmeritorious and to keep fees to plaintiffs' lawyers in settlements in check. They can do so, moreover, without endorsing the business judgment rule as the presumptive standard for freezeouts.

Cox's objective of limiting shareholder suits in freezeouts is problematic. First, minorities' ability to bring class action claims against freezeouts under Lynch's Entire Fairness standard is essential to protecting their welfare. Second, limiting equitable claims in freezeouts would not necessarily result in net reduction in litigation against freezeouts, because there would likely be an offsetting increase in appraisal and federal securities law actions. Finally, if claims in freezeouts are routinely dismissed on the pleadings, then the Delaware courts will no longer be developing the transactional choreography that has had a salutary effect on deal making and corporate investment. The Cox court did not take this hidden cost into account in its proposal.

D. AUCTIONS AND MARKET CHECKS

The Cox opinion contends that the business judgment rule should be the presumptive standard of review for freezeouts unless either the target directors or minority shareholders have disapproved of the offer (or, so long as they both approve of the offer). There are many problems with this proposal, as reviewed above. In addition, the argument in favor of the business judgment rule in freezeouts ignores the fact that judicial deference is the exception and not the rule in high stakes M&A transactions. For example, even the "ordinary" duty of care is applied by courts with heightened scrupulousness in reviewing, sales to third parties. Under Revlon the courts apply heightened scrutiny to sales of corporate control. And under Blasius the courts apply heightened scrutiny to actions interfering with shareholders' voting rights, as may often occur in takeover battles. Furthermore, freezeouts involving de facto controllers actually involve sales of control as interpreted under Revlon's progeny. On this basis, the target's directors under present law have a duty to pursue an auction or market check to obtain the best price reasonably available for the minorities' shares in responding to a de facto controller's freezeouts. The new listing standards will require a majority of independent directors on boards where there is only a de facto controller.

Instead of imposing a fiduciary requirement of a market check or auction in all freezeouts however, the courts should work from the standard-of-review

878. See, e.g., Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985); Cinerama, Inc. v. Technicolor, Inc. 663 A.2d 1156 (Del. 1995) (sustaining Delaware Court of Chancery's determination that merger satisfied the test of entire fairness even though board failed to meet its duty of care by failing to test the market for other merger partners).
orientation reflected in the Lynch Doctrine. In pursuing a freezeout, controllers should either truly empower the committee to negotiate at arms' length or their transaction should be subject to scrutiny for fairness in the event of a shareholder challenge. Where there is evidence that the controller's freezeout was accepted by an independent committee after it had been empowered to pursue an auction or market check, and was approved by a majority of the minority shares, then the transaction should be eligible for deferential review. However, to ensure that the market check or auction reveals evidence of the company's going concern value, the controller would have to agree to be a seller if a bid emerged that was higher than one it was willing to match. These circumstances would constitute compelling evidence of arms length dealings and warrant judicial deference in a challenged freezeouts. This strategy would give controllers the opportunity to structure their freezeouts in a way that would provide for dismissals on the pleadings. If the controller is not willing to match a third party's bid at a higher value, then there is no reason to presume that it is offering going concern value for the minorities' shares, and no reason for the court to allow the freezeout judicial deference.

E. BURDENS OF PROOF AND BURDEN SHIFTING GOING FORWARD

The Lynch Doctrine's insistence that controllers bear the initial burden of proof in freezeouts is consistent with the basic judicial presumption in self-dealing transactions. Hence, courts should continue to impose the burden of proof on controllers in freezeouts in both formats. However, the Lynch Doctrine's burden-shifting device has helped to provide an incentive for controllers to promote fair dealing in freezeouts and to invite the scrutiny of minorities and independent directors in their freezeouts. Although this Article rejects Cox's proposal that Dual Ratification should trigger deferential review, the Cox opinion does make a powerful case for the "complementarity" of Dual Ratification in freezeouts. Hence Dual Ratification should be required in order for defendants to shift the burden of proof to the plaintiffs. If there was Dual Ratification but not as auction or market check, the plaintiff would have to demonstrate the fundamental unfairness of the freezeout in order to obtain a recovery.

CONCLUSION

Corporate academics often analogize corporate law to contract law; many envision the corporation as a "nexus of contracts." The Cox Reforms would take this analogy a step further by leaving controllers and minorities to the terms of their bargains in freezeouts. The bargaining model is appealing, as is reducing unnecessary litigation. However, there are powerful reasons to doubt that committees and minorities are capable of negotiating freely with controllers. On this basis,

883. Cox, 879 A.2d at 618–20. Id. at 619. ("These steps are in important ways complements and not substitutes.").
this Article concludes that courts should apply the Entire Fairness standard to both cash-out mergers and tender offer freezeouts, except where a controller has allowed a market check or auction conducted by independent directors to proceed prior to the approval of the freezeout. Instead of endorsing deferential review for freezeouts, consistent with the Cox Reforms, courts in equity should continue to have a meaningful role in developing standards of conduct and standards of review for freezeouts, unless market forces have genuinely been allowed to operate for the benefit of minority shareholders. The costs of equity becoming more tolerant of controllers' overreaching in freezeouts are potentially very large, surely larger than recent freezeout cases from the Delaware Court of Chancery reflect.