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EFFICIENCY VS. EQUITY IN CLOSE CORPORATIONS

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I. Introduction

In many states, the judiciary was first to recognize the special needs of close corporations.[1] Then, following in the judiciary's footsteps, legislatures enacted special statutory provisions. With its recent adoption of the ABA's Model Statutory Close Corporation Act,[2] Montana joins the ranks of those states.

The Montana Close Corporation Act (MCCA), however, restricts the power of the Montana Supreme Court to resolve close corporation disputes. Judges no longer have complete freedom to draft subjective judicial decisions tailored to their own ideologies. They must instead contend with a statutory structure that combines mandatory, enabling, supplementary and elective provisions.[3]

The judiciary must further reconcile Montana case law with the legislature's policy goals. These goals are implicit in the MCCA's statutory provisions, and exemplify a compromise between efficiency and equity.[4] The court's ultimate challenge is to recognize and enforce the spirit of this compromise.

This article examines the compatibility of the MCCA and Montana case law from both a factual and theoretical perspective. Section II sets forth an analytical framework based on economic theory. Sections III and IV then apply the analytical framework to

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1. Several characteristics are unique to close corporations: (1) familial relationship exists between shareholders; (2) no liquid market for shares; (3) relative ease of access to information; (4) shareholders are active in management; (5) share transfer restrictions are common; (6) few shareholders; (7) shareholders are often dependent on corporate income; (8) relatively small capital and earnings; (9) informal operations; (10) profits are distributed as salary; (11) employment is contractually assured; (12) loss of benefits from lack of specialization; and (13) reliance on mutual monitoring of officers. For a general discussion regarding the definition of close corporations, see 1 F. O'Neal & R. Thompson, O'Neal's Close Corporations § 1.02 (3d ed. 1987).

2. The Montana Close Corporation Act is codified as Mont. Code Ann. §§ 35-9-101 to -504 (1989) [hereinafter MCCA]. The MCCA mirrors the ABA Model Statutory Close Corporation Act [hereinafter Model Act] with the exception of defining a close corporation as a corporation having 25 or fewer shareholders rather than the Model Act's limit of 50 shareholders. Mont. Code Ann. § 35-9-103(2) (1989).

3. *See infra* section III. *See also* Kessler, *The ABA Close Corporation Statute*, 36 Mercer L. Rev. 661, 698 (1985).

4. *See infra* section III.

the MCCA and Montana case law addressing close corporations. Finally, the article compares the results of the two analyses and speculates on future Montana judicial decisions in close corporation disputes.

II. Analytical Framework

This analytical framework focuses on the relative importance that legislators and judges place on minimizing costs and maximizing value. The more legislators and judges, through their legislation and decisions, strive to increase value and decrease costs, the more they enhance efficiency. In contrast, a greater emphasis on equity usually decreases the value of resources and increases costs, but promotes an equitable distribution of wealth.[5] While the policies of equity and efficiency can cohabitate, it is more likely that advancing one necessarily hinders the attainment of the other.

For example, in *Jordan v. Duff & Phelps, Inc.*,[6] the majority and dissent embraced opposing viewpoints because of a split in policy objectives. In *Jordan*, an employee (Jordan) left the close corporation of Duff & Phelps, Inc., to pursue alternative employment. By the time Jordan left the company, he had accumulated $23,225 in company stock.[7] Eleven days after Jordan's employment terminated, the company announced a merger that would have increased the value of Jordan's stock to $646,000.[8] Jordan sued for the difference in stock value.

In adopting Jordan's position, the majority relied on the close corporation's implicit fiduciary duty to disclose material information to shareholders.[9] An implied term in every contract, written or oral, is that "neither party will try to take opportunistic advantage of the other."[10] The majority thus held that the corporation's failure to disclose the merger negotiations to Jordan justifies

5. The reader should also note the concept of diminishing marginal utility, which asserts that there is a point at which the marginal utility for wealth declines. This point occurs when an increase in a rich person's wealth results in a less proportionate increase in his demand for rights than an increase in a poor person's wealth. For example, a rich person owning three cars derives less utility from the right to buy a used car than a poor person owning none. Hence, there is a point at which some degree of equality increases the value of resources. *See* Baker, *The Ideology of the Economic Analysis of Law*, 5 Phil. & Pub. Aff. 3, 19 (1975). *See generally* Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 Harv. L. Rev. 592 (1985).

6. 815 F.2d 429 (7th Cir. 1987).

7. *Id.* at 432.

8. *Id.* at 433.

9. *Id.* at 434-35 (Judge Frank Easterbrook wrote the majority opinion.).

10. *Id.* at 438. For a definition of "opportunism," see *infra* note 19.

damages.[11]

In contrast, the dissent heavily relied on Jordan's employment-at-will status. Judge Richard A. Posner stated that the ability of the corporation to terminate Jordan's employment-at-will, and the existence of a stockholder agreement requiring the employee to sell back his shares upon termination, precluded the existence of any duty to disclose.[12] He further urged that the majority's holding creates implicit contractual obligations that are "an expensive way of backstopping market forces" and violate the general precepts of "freedom of contract."[13]

In short, the different outcomes of the majority and the dissent in *Jordan* arose from an underlying split in policy objectives. The majority opinion chose equity as its objective and then enforced an implied fiduciary duty of disclosure upon the contracting parties. The dissent, on the other hand, chose efficiency as its objective, asserting the need to uphold only the express agreements between transacting parties.

From a more specific viewpoint, this article's analytical framework embraces the concept that, in a theoretically perfect market, price directs all exchange transactions.[14] Every exchange is voluntary and costless, which ensures that all parties to an exchange realize economic benefit. Yet, in the real world, transacting parties often confront uncertainties in the exchange process that make exchange costly. Enforceable agreements entered into *ex ante*, and fair *ex post* resolution of unforeseeable problems can, however, minimize these costs.

The two primary institutions that create *ex ante* agreements and *ex post* resolution mechanisms are private firms and the government. Defining the government and the firm in their institutional capacities is no easy task. Simply put, the government represents both legislative and judicial enforcement mechanisms designed to avoid and resolve exchange conflicts.[15]

The definition of the firm, on the other hand, is subject to much dispute. In its broadest sense, individuals create a firm when

11. *Id.* at 443.

12. *Id.* at 446.

13. *Id.* at 448-49.

14. This concept is commonly referred to as the Neoclassical Model. The Neoclassical Model assumes that: (1) people will act in their own self interest; (2) people will act rationally; (3) people will have access to perfect information; (4) perfect mobility exists; (5) no artificial barriers to entry exist; and (6) the current distribution of wealth and resources is unquestioned. These assumptions provide the "theoretical basis for assertions that the free market is economically efficient." Farber, *Contract Law and Modern Economic Theory*, 78 NW. U.L. REV. 303, 310 (1983).

15. *See generally* B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984).

the relationship of prices and costs results in vertical integration, which then necessarily supersedes the market.[16] For instance, if General Motors could manufacture tires for less than it costs to purchase them from Goodyear, it would integrate tire manufacturing into its firm and no longer purchase tires on the open market. By comparison, one scholar unintelligibly defines the firm by the detectability of input performance and the expropriability of quasi-rents of interspecific resources.[17] A third definition, which encompasses elements of the two previous definitions, describes the firm as some variation of contractual arrangements entered into to minimize costs and to maximize the value of resources.[18]

It thus becomes necessary to consider both cost minimization and resource distribution to determine the impact that legislative and judicial decisions have on close corporation firms. How the government resolves conflicts that arise in close corporations controls the extent to which close corporation firms exist. Legislation and judicial decisions control both the ability of close corporation firms to avoid costs and the distribution of society's relative wealth. The structure and efficacy of Montana close corporation firms largely depends on whether Montana law champions minimizing costs (efficiency) or attaining an equitable distribution of wealth (equity). Therefore, this article next defines the parameters of cost/distribution analyses.

A. *Cost Analysis—Minimizing Costs*

The contracting process inherently creates the existence of two costs: (1) opportunism,[19] and (2) imperfect information.[20]

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16. *See* Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 388 (1937), *reprinted in* G. STIGLER & K. BOUKLING, READINGS IN PRICE THEORY 331 (1952).

17. *See* Alchian, *Specificity, Specialization, and Coalitions*, 140 J. INST. & THEORETICAL ECON. 34, 39 (1984). See *infra* note 45 for a discussion of quasi-rents.

18. *See* Cheung, *The Contractual Nature of the Firm*, 26 J.L. & ECON. 1, 3 (1983).

19. "Opportunism" is defined as a "variety of self-interest seeking" methods that includes "self-interest seeking with guile." Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233, 234 n.3 (1979). Opportunism is the foundation for the ethic of individualism. This ethic advocates that a person should center on oneself to the exclusion of others. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976). The plain cost of opportunism flows from each individual doing what is best for herself while wholly ignoring the interests of others.

The counter ethic to individualism is altruism, the essence of which is the "belief that one ought *not* to indulge a sharp preference for one's own interest over those of others." *Id.* at 1717 (emphasis added). Altruism "enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism." *Id.*

20. Opportunism and imperfect information are interrelated in that opportunism de-

These costs are unavoidable in a capitalistic economy; hence, contracting parties must contend with their existence by either absorbing them or contracting around them. The costs of opportunism and imperfect information are commonly set forth in terms of subcategories of costs: price-discovery costs,[21] negotiation costs,[22] uncertainty costs,[23] monitoring costs,[24] loss-of-team-value costs,[25] asset specificity costs,[26] and illiquidity costs.[27] Notably, none of these costs are exclusive, rather they are all interdependent to

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pends upon imperfect information and, conversely, imperfect information often exists due to opportunism.

21. Price-discovery costs are simply the costs of "discovering what the relevant prices are." Coase, *supra* note 16, at 390. Four factors determine the relative degree of price-discovery costs. As the number of transactions increase: (1) the greater the variance in prices; (2) the greater the difficulty of distinguishing between the final product price and component prices; (3) the greater the amount of measurement required; and (4) the greater "the problem of separating contributions." *See* Cheung, *supra* note 18, at 4-9.

22. Negotiation costs are primarily a function of the frequency rate of concluding separate contracts. Negotiation costs and the frequency rate are inversely related—as the frequency rate increases, negotiation costs decrease. Hence, the first time two parties transact their negotiation costs will be relatively high, but those costs continually decrease as the parties become more familiar with their contractual relationship. *See* Coase, *supra* note 16, at 390; Williamson, *The Economics of Governance: Framework and Implications*, 140 J. INST. & THEORETICAL ECON. 195, 202 (1984).

23. *See* Williamson, *supra* note 22, at 202.

24. Monitoring costs are defined as those costs associated with monitoring input productivity and rewards. *See* Alchian & Demsetz, *Production, Information Costs, and Economic Organization*, 5 AM. ECON. REV. 777, 778 (1972). Monitoring costs are primarily a function of the human characteristic of shirking, that is, each person balances their work rate and expected reward from their work against the personal value each person assigns to leisure time. The greater the value that an individual places on leisure, or the less they expect in relative rewards from their work, the more they will "shirk" from their work duties. *Id.* at 780. For shareholders to effectively monitor each other and thereby decrease the amount of shirking, they must have the power to modify the contractual relationship of the participants. *Id.* at 782.

25. The value of a successful team results from using comparative advantage to allow the sum of team work to exceed the sum of each individual's input. *Id.* at 779. The key to preserving team value is to ensure that each individual's realized rate of substitution is close to her true rate of substitution. *Id.* at 781. This deters negative externalities, or shirking, and maximizes the value of each individual's work product, or capital resources.

26. As assets become more specific, the "costs of contracting will generally increase more than the costs of vertical integration." Klein, Crawford & Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J.L. & ECON. 297, 298 (1978). The more specific an asset is to the entity, the greater the corporation's inducement to retain the asset because its value is greatest when held within the entity. It also benefits the owner of the specific asset, whether human or physical, to remain cohesive to the entity because severance results in an alternative use for the specific asset. Alternative use of the specific asset results in a comparatively low value. *See* Williamson, *supra* note 22, at 212-13.

27. *See* Hetherington & Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 44 (1977) ("Liquidity is thus essential to the efficient allocation of resources in the capital market, and a system that freezes allocation at the time of initial investment is inherently inefficient.").

some degree.

The avoidance of these costs is often quantified in terms of production efficiency.[28] Firms become more efficient as they decrease the costs of production proportionate to the quantity of goods produced, in other words, the cost of producing each individual unit decreases. By decreasing costs, firms can charge consumers lower prices for goods while maintaining adequate profit levels. Decreased costs benefit the firm through higher sales volume and also benefit society through lower priced goods and services. The quest to maximize efficiency is thus the backbone of a capitalistic market. The desire to decrease costs creates competition for scarce resources, driving firms to produce at an optimal level of efficiency.

Most courts and legislatures recognize the benefits of interpreting or promulgating law to enhance efficiency. However, courts and legislatures also must deliberate policy considerations in the decision-making process that compete against the goal of enhancing efficiency.[29] Foremost among these competing policy considerations is the goal of an equitable distribution of wealth.

B. *Distribution Analysis—Maximizing Value*

Increasing or decreasing the valuation of a party's legal rights has wealth distribution effects. As the value of a party's rights increases, the party can purchase more resources and, consequently, the party's relative wealth increases. In addition, a corollary to this concept is that each increase in the value of a resource expands the wealth of the individual who owns that resource.

Proponents of efforts to maximize the value[30] of resources argue that legislatures and courts should distribute resources to the party most willing and able to pay for that resource.[31] They con-

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28. Two main types of efficiency exist: (1) production efficiency, and (2) allocative efficiency. Production efficiency focuses on minimizing the costs of production, whereas allocative efficiency is concerned with producing the right amount of the right goods. *See* Farber, *Contract Law and Modern Economic Theory*, 78 Nw. U.L. Rev. 303, 312 (1983). Allocative efficiency is best discussed in the second part of this article's analytical framework, maximizing value. Allocative efficiency increases whenever firms maximize the value of goods. *See infra* section II(B).

29. *See infra* section II(B).

30. Richard Posner, a conservative proponent of law and economic theory, defines value as an individual's willingness or ability to pay for a given resource. R. Posner, Economic Analysis of Law 4 (1972). Willingness to pay is "a function of the existing distribution of income and wealth in a society." *Id.*

31. *See* R. Posner, *supra* note 30. For an overview of this position, with authorities cited therein, see J. Oliver, Law and Economics (1979); Cohen, *A Justification of Social Wealth Maximization as a Rights-Based Ethical Theory*, 10 Harv. J.L. & Pub. Pol'y 411 (1987); Note, *Efficiency and a Rule of "Free Contract": A Critique of Two Models of Law and Economics*, 97 Harv. L. Rev. 978 (1984).

tend that by directing resources in this manner, resources are put to their highest valued use.[32] This distribution, in turn, maximizes society's overall welfare.[33] However, this reasoning is circular because it is true only if one presumes that the pre-existing distribution of wealth is just.[34] However, if the pre-existing distribution of wealth is unjust, the rich get richer and the poor get poorer.[35] As the chasm between the rich and poor expands, societal welfare declines.[36]

A policy that attempts to narrow the gap between rich and poor is equity.[37] Promoting an equitable distribution of resources necessitates a paternalistic enforcement mechanism that allows fairness to displace value maximization.[38] This paternalistic approach assigns higher values to the less advantaged party's rights, compared to the previous approach, which focuses only on a party's ability to pay for a given right. For example, if a close corporation statute grants minority shareholders dissolution rights, the value of the dissolution rights depends upon what price the minority shareholders require to induce them to sell their rights. Conversely, if no dissolution rights are granted, the value of dissolution rights becomes what the minority shareholders must pay the majority shareholders to obtain the rights. This value is subject to the minority shareholders' ability to pay the required price.[39] The

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32. R. Posner, *supra* note 30, at 4.

33. *Id.* at 42. *See also* R. Posner, The Economics of Justice 67 (1981) ("It is the almost universal opinion of economists that free markets, whatever objections can be made to them on grounds of equity, maximize a society's wealth.").

34. *See* Baker, *supra* note 5, at 19. The underlying conflict between value maximization and equality is the acceptance or rejection of the existing distribution of wealth. If one relies upon the assumption that the existing distribution of wealth is just, this reliance on an unjust distribution likely produces unjust results. In contrast, if the existing distribution is deemed unjust, then a policy promoting equality becomes the instrumentality with which to correct the market's failure in distributing wealth.

35. *Id.*

36. *See* Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 Yale L.J. 39, 40-48 (1974).

37. *See* White, *From Sociological Jurisprudence to Realisms: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 Va. L. Rev. 999, 999 (1972). *See also* G. Clark, Principles of Equity (1919).

38. *See* Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763, 766 (1985)("Some paternalistic restrictions on contractual freedom are not only permissible but morally required."). *See also* R. Dworkin, A Matter of Principle (1985) (arguing that economic efficiency fails to provide a sufficient moral basis for adjudication).

39. One can argue that minority shareholders may prefer not to have dissolution rights provided that they can decrease their investment in the corporation while retaining the same ownership interest as if they had dissolution rights. If this occurs, the minority shareholders' expectations of protection from oppression, and their equitable rights to protection, necessarily decrease. For this argument to prevail under an equitable approach, however, one must presume that minority shareholders have sufficient resources available to purchase

former policy favors equality; the latter favors value maximization.[40] This grant or denial of rights affects the relative value of an individual's resources and, consequently, directs the distribution of wealth within society.

With the foundation in place for cost/distribution analyses, this article now focuses upon application. To properly analyze the MCCA, this article sets forth cost analysis and distribution concerns for each significant statutory provision. The analysis of the MCCA is categorized into three areas: (1) share transfer restrictions; (2) organizational attributes; and (3) termination and dissolution.

III. Montana Close Corporation Act

A. *Share Transfer Restrictions*

1. *Cost Analysis*

The MCCA's share transfer restrictions have contrasting cost implications. There is an inherent value in developing a learning curve within any successful management structure.[41] Managers expend significant time and energy in becoming familiar with other managing participants and, as with any job, individuals gradually realize and develop the parameters of their decision-making discretion. The value of existing management increases as the frequency that firms incur the costs of management turnover decreases.

The MCCA's right of first refusal[42] gives corporations the ability to avoid turnover and thereby prevent new entrants from diminishing the value of successful core management. Imposing barriers to new shareholder entry also avoids the likely renegotiation of corporate documents to accommodate the new investor. Whenever new investors enter a pre-existing entity, shareholders often must amend the incorporation documents to account for changes in relative duties and rights. The new shareholder's expectations invariably differ to some degree from both the outgoing shareholder's expectations and the pre-existing shareholders' expectations. The MCCA is thus cost favorable in that it avoids the costly renegotiation of shareholders' rights and duties.[43]

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dissolution rights if they desire to do so. In other words, the minority shareholders' choice must be void of any monetary coercion.

40. *See* Baker, *supra* note 5, at 12-13, 19. The crucial distinction is the difference between the ability to pay for a right and the price required to induce one to sell a right that he or she already possesses.

41. *See* Alchian & Demsetz, *supra* note 24, at 779.

42. *See* Mont. Code Ann. §§ 35-9-202 and -203 (1989).

43. *See supra* note 22.

The right of first refusal also decreases costs by allowing the corporation the opportunity to keep valuable assets. The corporation is in the best position to determine the importance of the outgoing shareholder's assets.[44] It has access to all relevant financial information and has witnessed the productivity of the shareholder's assets within the existing corporate structure. The corporation can thus more efficiently value the quasi-rents[45] associated with those assets, especially relative to outside investors who must base their valuation on the information provided by the selling shareholder.

The right of first refusal, however, also has several attributes that increase costs. These costs are primarily attributed to the difficulty associated with establishing the purchase price of the outgoing shares. To establish the purchase price, the shareholder must locate and secure an acceptable cash offer from an eligible third party.[46] This process imposes significant price-discovery costs[47] on the parties.

In addition, the uncertainty regarding the sincerity of a third-party offer creates a gambling atmosphere. If the corporation thinks the offer is illusory, it may call the shareholder's bluff and waive its right to purchase. If the corporation guesses incorrectly and the offer is legitimate, then the shareholder may consummate the sale to the third party in accordance with the terms of his offer to the corporation.[48] The corporation is then burdened with an involuntary selection of a new participant. In contrast, if the corporation believes the offer is valid and if it deems the potential participant is undesirable, it may exercise its right of first refusal to avoid the undesirable purchaser.[49]

Accordingly, both the shareholder and the corporation must incur considerable costs to ascertain the legitimacy of the opposing party's position. Both parties must seek out market information on

44. *See supra* note 26.

45. The concept of quasi-rents is intertwined with asset specificity. As assets become more specific to the entity, appropriable quasi-rents are created. A party has the opportunity to extract value from the entity that exceeds the "book value" of the asset—the value of the asset outside of the entity. However, the excess value is not always extractable. The party having rights in the specific asset is merely placed in a stronger bargaining position to increase the value of his resources and rights.

46. *See* MONT. CODE ANN. § 35-9-203 (1989). Montana Code Annotated section 35-9-203(2) further provides that a third person is eligible to purchase shares if she can become a qualified shareholder under any applicable federal or state tax statute, and if her purchase of shares will not impose any penalty on the corporation.

47. See *supra* note 21 for a definition of price-discovery costs.

48. *See* MONT. CODE ANN. § 35-9-203(6) (1989).

49. MONT. CODE ANN. § 35-9-203(1) (1989).

the relative value of the shares. The majority shareholders must also investigate the character of the third party who is a potential participant in the corporation. If this individual is acceptable, discovery costs imposed on the majority shareholders decrease and the price that the majority shareholders are willing to bid likewise decreases. If, however, the potential entrant is undesirable, the majority shareholders must embark on a very costly mission of price discovery.

2. Distribution Concerns

The statutes addressing share transfer restrictions overwhelmingly favor majoritarian rule; therefore, there is little emphasis on equality. The majority shareholders may vary all the statutory restrictions on share transfers in the articles of incorporation.[50] This gives the majority shareholders the power at the outset to establish discriminatory transfer rights that they can utilize to decrease both the alienability and the liquidity of the minority's shares.[51]

This argument presumes that most majority shareholders are unwilling to enter into contractual relationships in which their relative control over ownership is not proportionate to their capital contribution. By investing a relatively large percentage of the capital necessary to initiate a corporation, the majority shareholders expect to retain a significant amount of control over corporate affairs. Limiting transfer rights assures majority shareholders that distribution of power and, consequently, bargaining position with minority shareholders remains unchanged.

The share transfer statutes further require only a two-thirds vote to approve a merger, share exchange or termination of a corporation's close corporation status.[52] Any of these events will nullify any share transfer restrictions. Therefore, if the majority shareholders control at least two-thirds of the shares, they may simply vote to terminate close corporation status and thereby authorize the transfer of their shares at-will.[53]

The majority shareholders also control share transfer after a shareholder's death. This control is critically important. The

50. *See* MONT. CODE ANN. § 35-9-202(1) (1989) ("except to the extent permitted by the articles of incorporation . . . .").

51. In other words, the more restrictions that the majority shareholders place upon share transfers, the harder it is for minority shareholders to sell their shares. More share transfer restrictions decrease the liquidity of the minority shareholders' assets that are invested in the corporation.

52. MONT. CODE ANN. §§ 35-9-401 and -402 (1989).

53. See *infra* notes 80-84 and accompanying text for a discussion of the consequences of termination.

MCCA imposes a duty on the corporation to purchase the shares of the deceased "only if so provided in its articles of incorporation."[54] Ironically, if the shareholders implement this provision, the corporation must purchase the shares from the estate of the deceased, but the estate has no obligation to sell.[55] This paradox provides the majority shareholders with an incentive to omit the provision because its implementation would increase the value of the minority shareholders' shares by improving their bargaining position. In addition, the majority shareholders gain no additional rights and, hence, they find themselves in a relatively weaker position if they utilize such a provision.

Because the provisions that mandate the purchase of a deceased's shares favor minority shareholders' interests, it is odd that the drafters of the MCCA did not make such a provision mandatory subject to a unanimous vote of all the shareholders before deletion. A unanimous vote would give the minority shareholders a much greater ability to retain this right. Regardless, as the MCCA is now written, it is unlikely that majority shareholders would incorporate such a provision without obtaining a substantial compromise from minority shareholders in other areas of incorporation.[56]

Finally, note that two exceptions to transfer restrictions exist that tend to enhance equity. The MCCA allows intracorporate transfers to any holder of the same class of shares[57] and, also, the MCCA authorizes transfers to the shareholder's immediate family or to a trust.[58] Both of these rights, however, are minimized because the MCCA requires unanimous approval of all shareholders to validate such transfers.[59]

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54. MONT. CODE ANN. § 35-9-205(1) (1989).

55. MONT. CODE ANN. § 35-9-205(5) (1989).

56. Price is also an issue. Upon demand, the corporation first makes an offer to the estate that must be accompanied by year-end financial statements. Unfortunately, interim financial statements are optional, which imposes uncertainty costs on the estate. If the estate either feels that the price is unfair or if the corporation refuses to purchase the shares, the court is authorized to establish a fair price and compel purchase. MONT. CODE ANN. § 35-9-207 (1989). The court also has the ability to assign all court costs to one party if the court decides that the other party negotiated in bad faith. MONT. CODE ANN. § 35-9-208 (1989). This determination of price and the assignment of litigation expenses is costly. A better approach is to require that: (1) the estate must sell and the corporation must buy, and (2) the court must enforce any mandatory buy-out price in the shareholder agreement. *See* Kessler, *supra* note 3.

57. *See* MONT. CODE ANN. § 35-9-202(2)(a) (1989).

58. *See* MONT. CODE ANN. § 35-9-202(2)(b) (1989).

59. *See* MONT. CODE ANN. § 35-9-202(2)(c) (1989).

B. *Organizational Attributes*

1. *Cost analysis*

The MCCA's provisions regarding the structural organization of a close corporation's management generally promote cost minimization. The MCCA upholds shareholder agreements that regulate corporate powers, management, and the relationship of the shareholders.[60] Shareholder agreements provide shareholders with the freedom to contractually tailor their organization and management to account for any specific characteristics unique to their firm. Enforcing the parties' particular shareholder agreement minimizes the costs associated with vague drafting and implied terms. It also provides the courts with a solid basis from which to determine shareholder rights in the event of dispute.

Shareholders may further retain hands-on control of their firm by eliminating the board of directors and/or bylaws, provided that a provision to that effect is placed in the articles of incorporation.[61] Allowing shareholders to substitute shareholder management for a board of directors frees close corporations from the hierarchial structures of large public corporations. As a result, each shareholder likely retains some control over management decisions. This promotes a reliance on consensual decision-making and, consequently, mutual monitoring.[62] Mutual monitoring, in turn, decreases the agency costs associated with opportunism[63] because each shareholder has some control in management. The ability of one or more individuals to exploit the corporation to elevate their self-interest diminishes.[64]

Another important attribute of the MCCA is that a close corporation's failure to observe the usual corporate formalities does not impose personal liability on the shareholders.[65] This attribute

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60. *See* MONT. CODE ANN. § 35-9-301(1) (1989).

61. *See* MONT. CODE ANN. §§ 35-9-302 and -303 (1989).

62. "Mutual monitoring" is simply defined as a situation in which each shareholder has an interest in making sure that other shareholders are upholding their end of the bargain. This largely applies to the employment setting rather than ownership structure.

63. *See supra* note 19. The agency costs associated with opportunism are often referred to as "shirking." *See supra* note 24.

64. The MCCA's tolerance of the potential growth in shareholder numbers after they originally elect close corporation status undermines the efficacy of the mutual monitoring attribute. The 25 person limit applies only to new corporations, not to existing closely-held corporations that elected to incorporate according to the MCCA provisions. MONT. CODE ANN. § 35-9-103(2) (1989).

65. *See* MONT. CODE ANN. § 35-9-306 (1989). While the limited liability provision helps to deter technical litigation seeking to pierce the corporate veil, at least one commentator asserts that this section should be extended to provide that informality is insufficient grounds to invalidate *any* corporate action. *See* Kessler, *supra* note 3, at 678.

promotes investment into close corporations because the risk of personal liability is more predictable. Technical litigation seeking to impose personal liability upon the shareholders is much less likely. Consequently, the costs of negotiating with prospective investors diminishes and the value of close corporation stock increases.

2. *Distribution Concerns*

At first glance, the MCCA appears to promote an equitable approach to the formation and administration of a close corporation by enforcing shareholder agreements and thereby upholding shareholder expectations. For instance, shareholder agreements and any amendments thereto must be unanimous.[66] Requiring unanimous consent assures that each individual accepts and agrees with the proposed organization of corporate powers. In addition, it is important that shareholders have the opportunity to realize their expectations at incorporation, because shareholders presumably resist consent until the proposed agreement is aligned with their expectations.

The MCCA further supports an expectation approach because it allows shareholders to "treat the corporation as a partnership."[67] Treating "the corporation as a partnership" necessarily implies an increased sensitivity toward the fiduciary relationship among the shareholders that also helps to advance shareholder expectations.

Several majoritarian provisions, however, undermine the equitable approach of protecting shareholder expectations. First, by a two-thirds vote of each class of shares, shareholders can delete a provision waiving the board of directors, then reinstate the board, and thereby eliminate consensual rule in favor of majoritarian rule.[68] Second, by a two-thirds vote of each class of shares, shareholders can authorize and approve a merger or share exchange.[69] If utilized, this provision would effectively eliminate a corporation's

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Nevertheless, another article states that the increased protection from piercing the corporate veil is one of the primary reasons to elect the MCCA. *See* Bahls & Quist, *The ABA Model Statutory Close Corporation Act: A New Opportunity for "Made In Montana" Corporations*, 49 MONT. L. REV. 66, 112 (1988). *See also* Consumer's Co-op v. Olsen, 142 Wis. 2d 465, 490-91, 419 N.W.2d 211, 219-220 (1988). The *Consumer's Co-op* court held that even though a corporation did not elect to incorporate according to existing close corporation statutes, the mere existence of close corporation statutes provides legislative intent, as well as articulates the purpose of close corporation law, to make lack of observance to corporate formalities irrelevant to the issue of piercing the corporate veil.

66. *See* MONT. CODE ANN. §§ 35-9-301(1), (6) (1989).

67. *See* MONT. CODE ANN. § 35-9-301(2)(c) (1989).

68. *See* MONT. CODE ANN. § 35-9-302(4) (1989).

69. *See* MONT. CODE ANN. § 35-9-401 (1989).

close corporation status and require that the corporation invoke traditional corporate formalities. Finally, two-thirds of each class can simply vote to terminate close corporation status,[70] which then requires the corporation to establish a board of directors and adopt bylaws.[71]

Therefore, a contrast does exist among the distributional effects of statutory provisions addressing organizational attributes. While unanimity by consensus is available through shareholder agreements, a two-thirds vote by the majority ultimately controls. This creates confusion in the drafting process, a process that has inherent costs in itself. For instance, if shareholders want consensual rule, they must negotiate with the majority to opt into certain provisions. At the same time, they must opt out of provisions that allow a two-thirds vote to ultimately control the corporation. Because of these complexities, shareholders must hire corporate experts to properly draft incorporation documents. The quality of the respective experts' advice thus largely determines the final distribution structure of the corporation.

C. *Termination and Dissolution*

1. *Cost Analysis*

Overall, the MCCA's provisions addressing termination and dissolution are relatively costly because the MCCA generally relies on judicial dispute resolution rather than on self-policing. The most effective self-policing mechanism that is absent from the MCCA is dissolution-at-will rights.[72] Although shareholders can voluntarily grant dissolution-at-will rights to one or more shareholders,[73] the MCCA does not provide for a mandatory right of dissolution at-will. Indeed, the MCCA considers dissolution an extraordinary relief that is expressly limited to situations of last resort in which all other forms of relief have failed to resolve the dispute.[74] While this attribute of the MCCA furthers the likelihood of perpetual corporate life, which is generally considered to be a

70. *See* MONT. CODE ANN. § 35-9-402(1) (1989).

71. *See* MONT. CODE ANN. § 35-9-303(2) (1989).

72. *See generally* Telser, *A Theory of Self-enforcing Agreements*, 53 J. BUS. L. 27 (1980).

73. *See* MONT. CODE ANN. § 35-9-404(1) (1989). The MCCA also requires unanimous consent to amend any such dissolution provision. MONT. CODE ANN. § 35-9-404(2) (1989). This requirement of unanimity, however, is diminished in light of the corporation's ability to terminate close corporation status by a two-thirds vote, which eliminates all dissolution rights.

74. *See* MONT. CODE ANN. § 35-9-504 (1989).

positive attribute, it also necessitates giving the courts a very active role in dispute resolution.

The most obvious cost of judicial resolution is the cost of legal representation. Attorney fees, which continue to escalate in today's litigious society, effectively deter smaller claims that are nonetheless meritorious. There are also additional costs associated with the significant time delays involved in litigation. Time delays both decrease the realized value of damages once they are finally awarded (money today is worth more than money three years from now) and increase the possibility of error in the judicial process.[75]

Costs also exist in the inherent uncertainty of judicial outcomes. The MCCA expressly authorizes courts to impose a variety of judicial remedies, such as altering corporate decisions, removing officers, requiring the payment of dividends, awarding damages, or ordering a share purchase.[76] The court's determination of adequate grounds to support a respective form of relief vary with the factual circumstances of each dispute. This ad hoc approach diminishes the certainty of future judicial outcomes that, in turn, causes both courts and litigants to increase expenditures in the litigation process. Also, granting the judiciary great discretion inherently creates the risk that the court's ultimate remedy bears little relation to the cost avoidance goals built into the MCCA.

2. *Distribution Concerns*

Depriving the minority shareholders of dissolution-at-will rights greatly decreases the value of their interests. The liquidity of their stock is diminished because of the limited scope of marketability of close corporation stock. Usually no ready market exists within which shareholders can sell their shares; therefore, the only way to exit from a close corporation is through dissolution.[77] Furthermore, the high costs of litigation often act as a deterrent that prevents shareholders from seeking judicial resolution. The bargaining position of minority shareholders is thus quite weak. Moreover, this situation is compounded if litigation does result because minority shareholders must overcome the likely advantage that majority shareholders have as a result of being the more experienced and wealthier of the two parties.[78]

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75. *See* Solomon & Solomon, *Using Alternative Dispute Resolution Techniques To Settle Conflicts Among Shareholders Of Closely Held Corporations*, 22 WAKE FOREST L. REV. 105, 111-12 (1987).

76. *See* MONT. CODE ANN. §§ 35-9-502 and -503 (1989).

77. *See* Hetherington & Dooley, *supra* note 27, at 43.

78. *See* Solomon & Solomon, *supra* note 75, at 111.

The minority shareholders' interest is further devalued by the provisions authorizing two-thirds vote of each class to effectively terminate a corporation's close corporation status.[79] Terminating a corporation's close corporation status propels several consequences: (1) it voids the right of first refusal;[80] (2) it voids compulsory share purchase after death;[81] (3) it requires the corporation to draft bylaws and elect a board of directors;[82] (4) it voids any dissolution rights;[83] and (5) it requires the corporation to comply with the Montana Business Corporation Act.[84] By terminating close corporation status, the majority shareholders can, therefore, circumvent several possible minority shareholder expectations and decrease the value of the minority shareholders' rights.

Offsetting the above majoritarian provisions are several provisions favoring equality. The most important of these is that shareholders retain dissenter's rights if they vote against the termination of close corporation status.[85] Shareholders also have the right to sue for illegal, oppressive, fraudulent or unfairly prejudicial acts.[86] Deadlock is also grounds for judicial relief, provided that the corporation is subject to irreparable injury or a shareholder is generally disadvantaged because of the lack of normal business conduct.[87] The broad language of the deadlock provision makes litigation based on deadlock easy to support. Minority shareholders can use the threat of litigation based on deadlock to gain greater leverage in shareholder disputes.

The parties can avoid the minority shareholders' leverage by including a nonjudicial dispute resolution mechanism in the shareholder agreement. Nevertheless, while such a provision can be advantageous at the time a future dispute arises, proposing such an agreement at incorporation may produce a dispute in itself. The parties are initially amiable and cooperative, and bringing the issue

79. *See supra* notes 68-71 and accompanying text.
80. MONT. CODE ANN. § 35-9-202(2)(g) (1989).
81. MONT. CODE ANN. § 35-9-205(1) (1989).
82. MONT. CODE ANN. § 35-9-303(2) (1989).
83. MONT. CODE ANN. § 35-9-402(1) (1989).
84. MONT. CODE ANN. § 35-9-403(1) (1989).
85. *See* MONT. CODE ANN. § 35-9-402(3) (1989).
86. *See* MONT. CODE ANN. § 35-9-501(1)(a) (1989). This language is different from the language in the corresponding general corporation statute in that it adds "unfairly prejudicial" acts. *Id.* The effect of the addition is to further the principle that minority shareholders are "entitled to relief upon a showing of serious misconduct by those in control." Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relative Performance of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 41 (1982).
87. *See* MONT. CODE ANN. § 35-9-501(1)(b) (1989).

of future disputes to the surface has a disruptive affect. It implies distrust of the parties' future ability to resolve disputes without excessive conflict. A more apparent deterrent to the use of nonjudicial dispute resolution mechanisms is that the vast majority of laymen and lawyers lack an adequate understanding of the costs and consequences of nonjudicial dispute resolution mechanisms. This ignorance causes them to rely on traditional judicial dispute resolution mechanisms rather than nonjudicial means.[88]

IV. Montana Case Law

Five Montana Supreme Court cases focus on close corporation disputes. The diverse facts in these cases required a case-by-case approach by the court to resolve these corporate conflicts. This case-by-case approach arguably precludes any meaningful objective review. A comparative inquiry of the court's reasoning in each case, however, reveals a trend in the court's development of an analytical framework for close corporation disputes.

In 1966, *Thisted v. Tower Management Corp.*[89] presented the Montana Supreme Court with a close corporation shareholder dispute over management. *Thisted* involved a condominium project wherein each purchaser of a condominium received one share of stock in the management corporation.[90] The original incorporator and his son-in-law controlled a majority of the twenty shares outstanding.[91]

The conflict arose when the majority shareholders sought to undertake extensive remodeling, presumably to enhance the sale of the remaining units, and the minority shareholders objected.[92] At the subsequent annual shareholders meeting, the election for the board of directors resulted in a deadlock.[93] The defendant then used a technicality to disqualify one voter, thereby re-electing himself to the board.[94] As a result, ten of the shareholders brought suit to contest the election and to enjoin the directors from acting.[95]

In siding with the minority, the court first held that the de-

88. If a nonjudicial dispute resolution clause is provided, the shareholders must exhaust the nonjudicial remedy prior to commencing a judicial proceeding. *See* Mont. Code Ann. § 35-9-501(3) (1989).

89. 147 Mont. 1, 409 P.2d 813 (1966).

90. *Id.* at 9, 409 P.2d at 818.

91. *Id.* at 10-11, 409 P.2d at 818-19.

92. Seven units remained unsold at the time of the dispute. This project was to be funded by levying assessments against all shareholders on a pro rata basis. *Id.*

93. *Id.* at 5-7, 409 P.2d at 816-17.

94. *Id.*

95. *Id.*

fendant's manipulations to maintain control and his calloused treatment of the stockholders, indicated a lack of good faith, constituting a breach of his fiduciary relationship to the stockholders.[96] The court then noted that "intracorporate problems arising in a close corporation demand the unusual and extraordinary remedies available only in a court of equity."[97] Accordingly, the court stripped the defendant of his positions as officer and director and appointed a receiver to exercise complete control over the corporation until the deadlock was resolved and an equitable election held.[98]

Although the court recognized the need to consider "equity as to all parties,"[99] it ultimately relied upon the express terms of the bylaws:

> It must be remembered that Peters [the defendant] was one of the incorporators of Management. The language found in the articles of incorporation and the bylaws was composed with his approval. *It must be assumed that such language reflects his purposes and intentions at the time of incorporation.* Such language therefore binds him at this time.[100]

The reasoning of *Thisted* is consistent with the established policy of construing language of a document against its drafter. Nevertheless, future courts could interpret this language as laying the foundation for an expectation-based analysis—look to the express terms of the incorporation documents to discern a shareholder's *purposes and intentions.* It follows that the expectations existing at incorporation supersede expectations that subsequently develop. The *Thisted* court paralleled this reasoning by holding that the language in the bylaws bound the majority shareholders at the time the future dispute arose.[101]

In sum, the facts of this case uniquely allowed the Montana Supreme Court to promote both equity and efficiency. Equity was heightened as the court reprimanded the majority shareholders for

96. *Id.* at 13, 409 P.2d at 820. Defendant engaged in several abrasive acts: (1) failure to inform the minority of expected expenditures; (2) reliance on technical discrepancies in notice requirements as a reason not to convene meetings; (3) walking out of meetings at random; and (4) threatening the stockholders with a lawsuit. *Id.*

97. *Id.* at 14, 409 P.2d at 820.

98. *Id.* at 13, 409 P.2d at 820. The court also imposed all of the renovation project costs and court costs upon defendant. *Id.* at 20, 409 P.2d at 824.

It should be noted that dissolution was unavailable as an option because of the nature of the corporation. The corporation's existence was necessary to manage the condominium complex in which each stockholder owned fee-simple title to one unit.

99. *Id.* at 18, 409 P.2d at 823.

100. *Id.* at 16, 409 P.2d at 822 (emphasis added).

101. *Id.*

their oppressive acts. Stripping majority shareholders of their control increases the value of minority shareholders' rights. The *Thisted* court further advanced equity by giving weight to the parties' expressed expectations.

Likewise, efficiency was advanced because the court eliminated the inherent transactional and organizational costs associated with disruptive management. Furthermore, the court upheld the express agreement between the parties, which promoted certainty and avoided renegotiation costs. The *Thisted* decision, therefore, provides precedent that promotes two competing policy choices—equity and efficiency.

It was not until 1981 that a close corporation dispute again received a leading role on the Montana Supreme Court docket. In *Skierka v. Skierka Bros., Inc.*,[102] two brothers were initially partners in a farm and ranch business. Upon one brother's death (Albert), the surviving brother (John) and the deceased partner's widow (Jeanne) completed the incorporation of the partnership that the two brothers had started prior to Albert's death.[103] Both parties transferred all property used in the partnership operation, plus their personal residences, to the corporation.[104] The different valuations of the two residences, however, caused John to acquire more shares than Jeanne. Evidently, neither party was aware of the significance of unequal ownership, nor of the effect of including a right of first refusal provision in the articles of incorporation.[105]

After two years, a problem arose when Jeanne realized the significance of her minority shareholder position and the restrictions on the sale of her stock. She promptly requested equal ownership, but John ignored her request.[106] Two years later, Jeanne made two alternative proposals: (1) create a new office carrying the same powers as president and appoint Jeanne to that position; or (2) increase the number of directors from four (John and his wife, and Jeanne and her daughter) to five to break the deadlock.[107] Both proposals were voted down. Jeanne then brought suit seeking dissolution while alleging fraud, oppression, waste of corporate assets,

102. 192 Mont. 505, 629 P.2d 214 (1981).

103. *Id.* at 508-09, 629 P.2d at 215-16.

104. The residences were transferred solely for tax purposes. *Id.* at 509, 629 P.2d at 216.

105. The court noted that "the evidence indicates that none of the parties appreciated the significance of the control which the defendant John's family obtained." *Id.* At trial, the attorney and the accountant that were present at incorporation admitted "that they told Jeanne that the unequal stock ownership was not really important." *Id.* at 514, 629 P.2d at 219.

106. *Id.* at 510, 629 P.2d at 216.

107. *Id.* at 510, 629 P.2d at 217.

and deadlock.[108]

Citing *Thisted*, the *Skierka* court noted that it retains broad equitable powers when facing the special circumstances inherent in a close corporation dispute.[109] Importantly, the court found that equitable considerations were even more compelling in this case than in *Thisted* because John was both a surviving partner and the executor of Albert's estate.[110]

The court reasoned that this trust relationship had two effects. First, John breached his duty as trustee by "permit[ting] a result which placed him in [the] superior position" of majority shareholder control.[111] Second, John's duty to disclose adverse matters superseded Jeanne's duty to read and understand the express agreement.[112] The court concluded that lack of disclosure and misunderstanding of the agreement created a situation of mutual mistake that necessarily rescinded the contract.[113]

The *Skierka* court also used independent grounds of oppression to support voiding the parties' agreement. The court found that oppression existed because John's family fixed the stock valuation in accordance with their right of first refusal.[114] John's family also denied Jeanne's proposal to establish a new management position.[115] The court failed to reconsider, however, its earlier observation that, since incorporation, Jeanne was "able to withdraw all the money she [had] needed and that John [had] managed the corporation competently and efficiently."[116]

The court, in effect, held that the dissenting shareholder's original expectation that equal ownership would ensue or, in the alternative, that unequal ownership would be irrelevant, superseded all other considerations. Accordingly, the *Skierka* court ordered the corporation to transfer to the plaintiff her property and to reimburse the plaintiff for the fair market value of other corporate assets existing at incorporation.[117] If the parties failed to reach an agreement regarding the fair market value or the terms of reim-

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108. *Id.*

109. *Id.* at 519-20, 629 P.2d at 221-22.

110. *Id.* at 512, 629 P.2d at 219. John was acting as the estate's trustee at the time of incorporation, which occurred three months after Albert's death. *Id.* at 508, 629 P.2d at 215-16.

111. *Id.* at 514, 629 P.2d at 219.

112. *Id.* at 516, 629 P.2d at 220.

113. *Id.*

114. *Id.* at 517, 629 P.2d at 220.

115. *Id.*

116. *Id.* at 515, 629 P.2d at 219.

117. *Id.* at 507, 629 P.2d at 215.

bursement, the court would force dissolution.[118]

The *Skierka* court's "delegation of value determination" approach imposes significant costs upon the participants. Giving the participants discretion to determine which property to transfer, and at what value, necessitates extensive negotiation and price-discovery costs. For instance, if the majority shareholders believe that adequate quasi-rents exist that are inherent in the property if they maintain the property as one unit rather than piecemealing it,[119] the majority shareholders will try to negotiate to the margin at which price equals the value of asset specificity. Unfortunately, negotiation costs largely offset any potential gains realized from salvaging the benefit of value specific assets.[120]

By comparison, the distributional effects of the "delegation of value determination" approach favors the minority shareholder. The minority shareholder, in *Skierka*, recouped the original property transferred and also was given the opportunity to extract value from the corporation that she had not contributed to in over eight years.[121] For example, assume dissolution value of a corporation is $100,000, going concern value is $500,000, and each party owns a fifty percent interest in the entity. The negotiation floor price is $50,000 because the minority shareholder has no incentive to go below its share of the dissolution value. The maximum price, however, is $450,000. At this price, the majority shareholder is compensating the minority shareholder $450,000 to retain the $500,000 value of the going concern, thereby receiving the same $50,000 of value as if dissolution had occurred. The final price will fall somewhere between these polar extremes, depending upon the majority shareholders' ability to pay, the relative risk that cash flow is able to recoup the value of quasi-rents paid, and the relative degree of opportunism in the negotiation process.

In the next close corporation case, *Fox v. 7L Bar Ranch Co.*,[122] the Montana Supreme Court strengthened its position of resolving close corporation disputes with an expectation-based analysis. In *Fox*, Melvin Fox brought an action to dissolve and liquidate a family corporation. Melvin owned fifty percent of 7L Bar Ranch,

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118. *Id.*

119. In other words, the assets are specific to the property if maintained as a unit.

120. The parties have experienced years of dispute and litigation, and the court has given the minority shareholder the influential club of possible dissolution to pound on the table.

121. *Skierka*, 192 Mont. at 507, 629 P.2d at 215. Albert died in 1973 and this case was decided in 1981. During the interim only John was active in the business.

122. 198 Mont. 201, 645 P.2d 929 (1982).

which farmed 17,600 acres.[123] The family owned a second corporation named Fox Land & Cattle Company, which was involved in the cattle and real estate business. Melvin owned a twenty-five percent interest in the Fox Land & Cattle Company.[124] The family also had a third corporation named Fox Ranches, Inc., a 14,463 acre cattle ranch of which Melvin owned slightly less than fifty percent.[125] Three other family members owned the remaining interests in the corporations.[126]

Fox Land & Cattle was the exclusive lessee of 7L Bar's grazing land and was its sole financing agent. Therefore, the cash flow of 7L Bar, the corporation in which Melvin held a fifty percent interest, was controlled by Fox Land & Cattle, the corporation in which he held only a twenty-five percent interest.[127] This situation allowed Melvin's brother, who was the general manager of all three corporations, to significantly discount the price paid to 7L Bar for grazing rights and to deny the declaration of dividends.[128] Indeed, Melvin never received any dividends or payments of any kind from any of the corporations in spite of their financial success.[129]

The *Fox* court's analysis focused on whether the factors of op-

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123. *Id.* at 203-05, 645 P.2d at 930-31.
124. *Id.*
125. *Id.*
126. Ownership of the three corporations was as follows:

7L Bar Ranch Co.

Melvin Fox	1,500 shares
Richard Fox	1,499 shares
Lydia Fox (Mom)	1 share

[Moral: always send Mom a Mother's Day card.]

Fox Land & Cattle

Treasury Stock	144 shares
Richard Fox	678.5 shares
Melvin Fox	678.5 shares
Lydia Fox	2 shares
Sharon (Fox) Wolfe (Richard & Melvin's sister)	600 shares
Marital deduction trust (beneficiary: Lydia)	925 shares

Fox Ranches, Inc.

Lydia Fox	120 shares
Melvin Fox	1,717.5 shares
Richard Fox	1,700.5 shares

Id. at 205, 645 P.2d at 931.
127. *Id.*
128. *Id.*
129. Fox Land & Cattle and Fox Ranches, Inc. showed retained earnings exceeding $400,000, and Fox Land & Cattle also had cash assets exceeding $400,000. *Id.*

pression and deadlock were sufficient to support dissolution. The court stated that underlying equities must support a statutory grant of dissolution rights.[130] Underlying equities are, in turn, analyzed by determining shareholder expectations:

> Because of the special circumstances underlying closely held corporations, *courts must determine the expectations of the shareholders* concerning their respective roles in corporate affairs.[131]

The court reasoned that, in this case, the majority shareholders breached three of Melvin's expectations: (1) the right to a return on his shares; (2) the right to participate in management; and (3) his expectation that 7L Bar would receive a fair market value for its leased property.[132] These expectations came to fruition after his father's death, as Melvin "had a reasonable expectation of sharing in his inheritance."[133] Therefore, the *Fox* court ordered dissolution.[134]

Nevertheless, the *Fox* court's reliance on an expectation-based analysis appears ill-founded because of the court's failure to ground the analysis in equity. First, Melvin relinquished farm management in 1972 because of family disputes, and returned only after his father's death.[135] It was thus arguably the expectation of all the shareholders that Melvin would no longer participate in management. Second, in contrast to the opinions in *Thisted* and *Skierka*, the *Fox* court ignored the parties' expectations at incorporation. Instead, the court determined expectations at the time of the father's death, ten years after incorporation.

At no time prior to the father's death had the corporation paid dividends, nor had the shareholders expected dividends. Melvin's new-found expectations in corporate income appear grounded upon his taking out a bank loan secured with corporate stock, upon which he had recently defaulted.[136] The court argued that this loan evidenced his expectation of sharing in the corporation's value.[137]

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130. *Id.* at 208, 645 P.2d at 933 ("The ABA Comments, quoted in the Annotations to section 35-1-921, Vol. [7], states: 'When there is a statutory grant of such a power there are still two factors with which one seeking dissolution must contend: (1) Courts have tended to construe the statutes as discretionary rather than mandatory, even though the language of the particular statute may appear to make it mandatory. (2) Courts have tended to look beyond the language of the statute and into the equities of the situation.' ").

131. *Id.* at 210, 645 P.2d at 933 (emphasis added).

132. *Id.* at 211-13, 645 P.2d at 934-35.

133. *Id.* at 214, 645 P.2d at 936.

134. *Id.*

135. *Id.* at 204, 645 P.2d at 930.

136. *Id.* at 205, 645 P.2d at 931.

137. *Id.* at 214, 645 P.2d at 936.

The contrary argument is that he merely sought to exploit a non-controlling interest in a family corporation for personal gain. Any expectation he had of extracting corporate value to ward off creditors was unreasonable.

Given the weak underpinnings for an expectation-based analysis, alternative considerations arguably form the basis for the court's outcome of ordering dissolution. Foremost among these alternative considerations is avoiding the future costs associated with the shareholders' "deep-seated animosity," which would likely have an adverse effect on future corporate operations.[138] In addition, the adverse cost consequences resulting from the dissolution of this corporation were minimal because of a lack of asset specificity in a 14,000 acre block of grazing land. In other words, two separate seven thousand acre blocks are equally marketable. Moreover, the ranching operations were sound financially and very liquid. The splitting of the three corporations had little effect on the viability of the entire operation. In short, the *Fox* court appears to have commingled cost avoidance goals with the equitable concerns of freeing the minority shareholder's interest.

The Montana Supreme Court decided the fourth case addressing close corporations, *Maddox v. Norman*,[139] one year after *Fox*. In *Maddox*, the father incorporated the family ranch in 1961 and, in 1970, he transferred the majority of the shares to his three children—Frank, Faye and Donald.[140] When this case commenced, Frank owned ninety percent, Donald five percent, and Faye five percent.[141] Frank was the only child active in ranch operations. Faye was not even aware of her stock ownership until 1979, when the corporation first notified her of an annual meeting.[142]

At that meeting, Faye demanded an accounting of all corporate income and expenses from 1970 to present.[143] The corporation's accounting was commingled with Frank's personal account and Frank had never kept any separate records.[144] A detailed report was never given.[145] At the subsequent annual meeting, eight months after their father's death, the parties agreed to obtain an

138. *Id.* at 205, 645 P.2d at 931.

139. 206 Mont. 1, 669 P.2d 230 (1983).

140. *Id.* at 4, 669 P.2d at 232.

141. *Id.*

142. *Id.* at 5, 669 P.2d at 232. The corporation hired a new accountant in 1979, who caused it to follow statutory formalities. *Id.*

143. *Id.* at 7, 669 P.2d at 233.

144. *Id.*

145. *Id.*

appraisal of ranch assets.[146] After the appraisal, the parties stipulated to pay Faye and Donald $175,000 for their shares, contingent upon the corporation obtaining financing.[147] The corporation was unable to secure financing and the agreement lapsed.[148] Faye and Donald subsequently filed suit alleging misapplication and waste of corporate funds, and they requested dissolution as a remedy.[149]

Prior to trial, the corporation settled with Donald for $20,000 and twenty acres of farmland. In Faye's subsequent suit, the district court viewed Donald's prior settlement as "a 'strong indication' of the fair market value of the stock."[150] Therefore, although Faye won her case, the court ordered Faye to sell her shares to the corporation for an amount equal to Donald's settlement.[151] Faye appealed.

The Montana Supreme Court affirmed the trial court's remedy of a forced sale of stock.[152] In denying dissolution, the court emphasized that it must determine the availability of dissolution as a remedy on a case-by-case basis.[153] Three elements are controlling in this determination: (1) the existence of a statutory right to dissolve; (2) the existence of underlying equitable grounds; and (3) the nonexistence of adequate alternative remedies.[154] While the court found that the statutes clearly provide that misapplication of corporate funds warrants dissolution, it held that, in this situation, the equitable considerations were insufficient to support dissolution.[155]

The court cited six reasons why the requisite level of equitable considerations were lacking to force the corporation to dissolve: (1) the corporation was a solvent, on-going business; (2) dissolution would unjustly harm Frank; (3) Frank owned over ninety percent of the shares; (4) Faye's "apparent expectation" was only to "get her money out of the corporation quickly"; (5) alternative remedies existed; and (6) "Faye requested in open court a remedy other

146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 9, 669 P.2d at 234.
151. *Id.*
152. *Id.* at 16, 669 P.2d at 238.
153. *Id.* at 11, 669 P.2d at 236.
154. *Id.* at 13, 669 P.2d at 236. Although the court upheld the forced sale of Faye's shares to the corporation, it rejected Donald's settlement as a proper gauge of the value of Faye's shares. Instead, the court reasoned that the value of Faye's shares should be based upon the net value of the corporation, the corporation's cash flow, and the initial $175,000 settlement offer. *Id.* at 17-18, 669 P.2d at 238-39.
155. *Id.* at 12, 669 P.2d at 236.

than dissolution."[156] Based on these six factors, the *Maddox* court's reasoning either expands or nullifies the reasonable expectation-based analysis used by the Montana Supreme Court in close corporation disputes. On the one hand, for the first time the Montana Supreme Court explicitly considered the reasonable expectations of all shareholders, not just the dissatisfied shareholder. The court gave considerable weight to Frank's expectations regarding the labor and improvements he expended during his management of the farm.[157] This type of consideration has an expansive affect on the Montana Supreme Court's expectation-based analysis, which most commentators view as positive.[158] On the other hand, for nine years Faye was completely unaware of her ownership in the corporation, thus, she had no expectations during that time. Once she did become aware of her corporate interest, her only goal was to extract it. This objective was not a result of Faye's inability to realize her expectations; instead, it was merely driven by self-interest.

However, rather than enforcing expectations, the court arguably placed greater weight upon reducing intracorporate conflicts and liberating captive assets. By forcing Faye to sell her shares at a relatively discounted price, the court eliminated the transaction costs inherent in a disruptive force within corporate ownership. More importantly, the court freed assets that were otherwise utilized in a non-optimal manner. Put another way, the majority had no incentive to maximize the return on the minority shareholder's interest because once oppression occurred, the minority shareholder was unable to monitor the majority shareholder's decisions. Likewise, the minority shareholder had no incentive to expend human resources into the corporation because she was not receiving an adequate return on her investment. In contrast, if her captive assets were liberated, the minority shareholder could vigorously reinvest those assets and realize a greater return on her resources. Allocative efficiency, therefore, would be enhanced as the overall value of resources increased. Production efficiency also would increase because of the decreased monitoring costs associated with ownership conflicts.[159]

The final case in this discussion of Montana's close corpora-

156. *Id.* at 13, 669 P.2d at 236.

157. *Id.*

158. *See* Hillman, *supra* note 86, at 75.

159. *See generally* Hetherington & Dooley, *supra* note 27 (addressing the costs of illiquidity).

tion case law is *Gray v. Harris Land & Cattle Co.*,[160] decided in 1987. In *Gray*, the corporation executed an agreement that provided, in part, that so long as all the shareholders remain alive, the written consent of all remaining shareholders was necessary to approve any sale of stock.[161] All five family shareholders signed this agreement in 1978.[162] In 1985, one shareholder (Gray) notified the corporation of his intent to sell his shares to an outside party. He thus requested that the corporation appoint an appraiser to determine the value of his shares.[163] The remaining shareholders denied consent for the sale and, accordingly, voted not to appoint an appraiser.[164] Gray then filed a writ of mandamus with the district court seeking to compel the corporation to allow him to sell his shares.[165] After losing in district court, Gray appealed to the Montana Supreme Court.

In denying Gray relief, the Montana Supreme Court held that a reasonable restraint on alienation is enforceable.[166] The test for determining reasonableness is "whether the restraint is sufficiently needed by the particular enterprise to justify overriding the general policy against restraints on alienation."[167] In applying this balancing approach, the *Gray* court considered three factors. First, the court noted that it was the original intent of the parties to prohibit the entrance of third parties into the closely-held corporation.[168] Second, a perpetual limit on share transferability did not exist because the agreement remained valid only so long as all of the initial stockholders were alive.[169] Third, the enactment of a statutory right to contractually restrict share transferability,[170] which occurred three years after the parties' agreement, evidenced

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160. 227 Mont. 51, 737 P.2d 475 (1987).

161. *Id.* at 52, 737 P.2d at 475.

162. *Id.*

163. *Id.* at 53, 737 P.2d at 476.

164. *Id.*

165. *Id.*

166. *Id.* at 56, 737 P.2d at 478.

167. *Id.*

168. *Id.* at 55, 737 P.2d at 477.

169. *Id.* The actual agreement provided: "1. So long as all of the STOCKHOLDERS are alive, they each shall not encumber or dispose of the stock of the CORPORATION which he or she now owns or may hereafter acquire without the written consent of the remaining STOCKHOLDERS and that of the CORPORATION." *Id.* at 54, 737 P.2d at 477.

The court presumed that the agreement terminated once all of the initial five stockholders were no longer alive. *Id.* at 55, 737 P.2d at 477. An equally plausible interpretation is that as long as one stockholder remained alive, who could represent all of the existing stockholders, the agreement remained valid.

170. *See* MONT. CODE ANN. § 35-1-617 (1981) (codification of the Model Business Corporation Act).

"legislative approval of the action previously taken by the stockholders."[171]

In finding the agreement reasonable, the *Gray* court demonstrated its willingness to enforce unanimous shareholder agreements that are limited to a definite term. Furthermore, by negative implication, the court struck down a provision restricting share transfer for an indefinite term. This implication leaves uncertain the question of whether the court places greater weight on the sanctity of shareholder agreements or the preservation of the alienability of shares. The court's emphasis on the finite nature of the agreement also undermines one of the primary benefits of incorporation—perpetuality.

In addition, the Montana Supreme Court deviated from its previous trend of considering shareholder expectations at the time of dispute. Instead, the court adopted the district court's interpretation of the parties' intent "at the time of entering into" the original express contract.[172] The court omitted any discussion of equities or the interrelationship of shareholders in ownership or management at the time of the dispute. In short, in upholding the shareholders' agreement, the court enforced the expectations of all five shareholders *ex ante*.

One result of the court's decision was a cost savings to the majority shareholders. Although a disruptive force remained in the corporate ownership, the majority shareholders were put in a bargaining position that minimized future transaction costs when dealing with any minority shareholder. The majority shareholders were further able to prevent an outside party from disrupting team value and disrupting the balance of asset specificity. The minority shareholder's rights, on the other hand, were valued consistently with their value at incorporation; he got what he bargained for and no more. This approach assumes, rightly or wrongly, that the minority shareholder was fully aware of the legal consequences of the agreement at its inception.

Perhaps the most important aspect of *Gray* is the court's application of the statutory provisions referred to in the case. In effect, the *Gray* court asserted that when the legislature enacts enabling statutes subsequent to the shareholder agreement, two results are possible. If the statutory provision has an adverse effect on the shareholder agreement, the statute is irrelevant. Conversely, if the statute and agreement are consistent, then the court should

171. *Gray*, 227 Mont. at 56, 737 P.2d at 478.
172. *Id.* at 54, 737 P.2d at 477.

view the statute as legislative approval of the shareholders' actions. The question left open by the court is what effect will a subsequent mandatory provision, rather than an enabling provision, have on a shareholder agreement? Regardless, the court's strong reliance on statutory language suggests that it will utilize the new close corporation legislation as influential language whether the parties elect or reject its provisions.

V. Comparative Analysis And Future Implications

From a narrow perspective, one can determine the compatibility of the MCCA and Montana case law by comparing the common law remedies promulgated by the Montana Supreme Court to the judicial remedies that the MCCA allows. In the five cases addressed, the Montana Supreme Court imposed a variety of remedies, including dismissing directors,[173] retransferring property and reimbursing for fair market value,[174] ordering dissolution,[175] requiring a forced sale of stock,[176] and enforcing an express shareholder agreement that restricted share transfers.[177] The MCCA allows sufficient judicial discretion to encompass all of these remedies.[178]

The Montana Supreme Court's rationale in defining dissolution as a remedy of last resort is also consistent with the MCCA. Dissolution was granted in *Fox* when the court found that there was "no alternative adequate remedy,"[179] yet in *Maddox*, the court imposed a forced sale of stock as an alternative to liquidation.[180] Likewise, the MCCA provides that dissolution is preferably limited to situations in which all other relief "has failed to resolve the matters in dispute."[181]

The Montana Supreme Court has also given deference to the provisions of the MCCA. In *Gray*, the court looked to statutory language for guidance in determining share transfer rights. The court recognized that statutory enactments represent legislative approval or disapproval of certain corporate actions.[182] Accordingly, the court concluded that only when an otherwise valid share-

173. *See supra* note 98 and accompanying text (*Thisted*).
174. *See supra* note 117 and accompanying text (*Skierka*).
175. *See supra* note 134 and accompanying text (*Fox*).
176. *See supra* note 152 and accompanying text (*Maddox*).
177. *See supra* notes 166-72 and accompanying text (*Gray*).
178. *See* Mont. Code Ann. § 35-9-504 (1989). *See also supra* note 76 and accompanying text.
179. Fox v. 7L Bar Ranch Co., 198 Mont. 201, 215, 645 P.2d 929, 936 (1982).
180. Maddox v. Norman, 206 Mont. 1, 16, 669 P.2d 230, 238 (1983).
181. Mont. Code Ann. § 35-9-504(1)(b) (1989).
182. Gray v. Harris Land & Cattle Co., 227 Mont. 51, 56, 737 P.2d 475, 478 (1987).

holder agreement conflicts with an expressed statute will the court strike down the agreement.[183] This reasoning is consistent with the MCCA's provisions allowing shareholders to adopt personalized share transfer restrictions in the shareholder agreement.[184]

In short, the Montana Supreme Court's past common law remedies and its treatment of statutory entitlements are within the MCCA's guidelines. Nevertheless, this limited comparison is misleading; the MCCA grants Montana courts such broad discretion that almost any form of relief is within the MCCA's guidelines. Therefore, to determine whether the courts are utilizing their discretion to obtain results consistent with legislative objectives, it is necessary to analyze the compatibility of the MCCA and Montana case law from a policy standpoint.

This article has set forth the efficient and equitable attributes of the MCCA and Montana case law. The MCCA, simply put, is legislation that seeks to avoid costs in on-going operations while imposing significant costs in dispute resolution. The MCCA prefers efficient corporate operations, yet it is willing to accept the extensive costs inherent in relying on the judiciary to resolve disputes. The result is a very inefficient dispute resolution process.

The MCCA does offer the shareholders the opportunity to ameliorate the costs of dispute resolution. In an effort to prevent majority shareholders from oppressing minority shareholders and thus avoid the litigation costs of dispute resolution, the MCCA allows shareholders to mandate consensual rule.[185] Election of this entitlement, however, is subject to the majority shareholders' partisan ideology arising from individualistic values. The majority shareholders are unlikely to devalue their rights in favor of a more equitable shareholder agreement that favors the minority shareholders.

This biased foundation produces agreements that leave the minority shareholders with judicial paternalism as their sole protection. For the most part, the MCCA recognizes this problem in its broad grant of equitable remedies for the courts to utilize in resolving minority shareholder oppression. Unfortunately, the court's effort to blend equitable principles with efficient contracting, in the hope of striking a balance between the fundamental precepts of opportunism and minority rights, presupposes a judiciary with an equitable wand.

The Montana Supreme Court has progressed along a learning

183. *Id.*
184. *See supra* note 50 and accompanying text.
185. *See supra* notes 60-67 and accompanying text.

curve in its continuing development of the relevant factors the court must consider when resolving close corporation disputes. The court initially inquired into both implied expectations and expressed intent.[186] After broadening the scope of its expectation analysis to include shareholder expectations at the time of the dispute,[187] the court used the parties' expectations as a means to yield a result consistent with minimizing the costs associated with intracorporate conflicts.[188] Then, in its last decision, the court looked to an express shareholder agreement to discern the intent of the parties, and enforced that agreement to uphold the majority's expectations.[189]

The court's change in substantive analysis coincides with a change in underlying policy consequences. The court's broadening of its expectation-based analysis in the earlier cases tends to improve the likelihood of equitable outcomes. Its tightening of its expectation-based analysis in the last two cases, however, elevates the importance of efficiency in its analysis, which results in cost considerations displacing equitable concerns.

One can view this vacillation in policy effects that stem from the court's decisions in three ways. First, arguably no trend exists. The differing fact patterns make any viable trend indiscernible. The court merely imposed its subjective desires to reach what it felt was a just result based on ad hoc facts. This approach lends little merit to our system of stare decisis and further ignores the court's conscious change in the policies underlying its decisions. Furthermore, theory determines the facts and how to distinguish among them. Therefore, policy choices invariably affect every judicial decision.[190]

A second approach argues that a discernible trend in substantive law exists, but the promotion or suppression of any underlying policy is merely coincidental. The Montana Supreme Court enforces the law as it exists and the result is tied only to facts rather than a predetermined policy. Promoting this view fails to account for the scattered reasoning in the court's opinions. Any recognition of a consistent application of objective criteria remains elusive. Even when the court relies upon statutory law, it often does so to support "discretionary rather than mandatory" interpretation of

186. *See supra* notes 99-101 and accompanying text.
187. *See supra* notes 130-34, 156-58 and accompanying text.
188. *See supra* notes 158-59 and accompanying text.
189. *See supra* notes 160-71 and accompanying text.
190. *See* R. UNGER, KNOWLEDGE & POLITICS 32 (1975).

statutes.[191] Moreover, even though it seems possible for the court to separate itself from any particular theory, when one does this, one is stepping into another theory rather than into the realm of plain facts.[192]

A final approach is that the court is predisposed to advance a specific paradigm.[193] This predisposition may be either intentional or inherent. The predisposition is intentional if the court knowingly fabricates its opinions to fit the mold of the paradigm that the court feels is the normative basis for judicial analysis. The predisposition is inherent when judges are consciously unaware of the policies they are promoting. Judges' predispositions reflect the attitudes of the politicians who appoint them or the constituency the judges represent.[194] A judge's inherent predisposition thus aligns itself with society's then existing morality or reason.[195]

Critics of the predisposition approach argue that it assumes too much; that it is too speculative to reach implicit policy conclusions from the court's express opinion. Yet, when opinions manifest a paradigmatic reversal and fail to account for that change through an objective application of substantive law, the predisposition approach appears the most viable of the three alternatives.[196]

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191. *See* Maddox v. Norman, 206 Mont. 1, 10, 669 P.2d 230, 235 (1983) (quoting the comments to the Montana Business Corporation Act).

192. R. UNGER, *supra* note 190, at 33.

193. Paradigms are "universally recognized . . . achievements that for a time provide model problems and solutions to a community of practitioners." T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS at viii (2d ed. 1970). A paradigm is "like an accepted judicial decision in the common law, it is an object for further articulation and specification under new or more stringent conditions." *Id.* at 23.

194. For instance, the Reagan administration's judicial appointments are certainly influencing American jurisprudence. *See* Barnett, *Foreword: Judicial Conservatism v. A Principled Judicial Activism*, 10 HARV. J.L. & PUB. POL'Y 273 (1987).

195. The inherent disposition approach differs from the second approach because of the difference in judicial appointment. The second approach assumes that political pressures are relatively minor, whereas, the predisposition approach assumes that the appointment or election of a judge is premised on the judge's and the appointer's political views.

The predisposition approach, similar to the first approach, admittedly places a diminished emphasis on the precedential value of past decisions. However, once the preferred paradigm is established, the court can entrench itself firmly into that line of reasoning by relying on precedents rather than illuminating underlying policy choices. Reliance on precedents remains strong until the political makeup of the court changes, requiring decisional reversals to promote the new paradigm.

196. Eleanor Fox also emphasizes politics' role in adjudication, stating:

> Since so much of the law being interpreted by the courts was designed to give a boost to the less advantaged, and since Americans today are so receptive to the claim that law should be efficient, advocacy of a generous use of law and economics sounds a political theme.

See Fox, *The Politics of Law and Economics in Judicial Decision Making: Anti-Trust as a Window*, 61 N.Y.U. L. REV. 554, 588 (1986). *See also* Posner, *Wealth Maximization Revisited*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 85, 103 (1985) ("It must also be emphasized

Presuming that the Montana Supreme Court is predisposed to advance a specific paradigm, it probably will discriminatorily interpret any new statutory scheme to produce a result consistent with its current preference. The two broadest and most popular options are equity and efficiency. The current trend of the court to remain consistent with one of these paradigms, therefore, becomes paramount in determining the probable efficacy of new statutes. Furthermore, the importance of judicial trends increases when a statutory scheme proposes an active, discretionary role for courts—a role that the MCCA adopts.[197]

The merits of the Montana Supreme Court's expressed reliance on an equitable expectation-based analysis commingles with a cost avoidance analysis. In striking a balance between these two analytical frameworks, the court likewise balances the competing policies of equity and efficiency. This compromising predisposition has yielded a variety of ingredients in the past, which the court should now mix together to produce a coherent structure for resolving future close corporation disputes.

There are four dominant factors that the court should consider when resolving close corporation disputes. These factors are interdependent and the court should consider them in relative degrees of importance. The court should first look to any express shareholder agreement for guidance in determining the original intentions and expectations of the parties. It should next consider both minority and majority shareholders' expectations of ownership, control, employment and income at the time that the dispute arises. Third, once the court makes an equitable determination of shareholders' rights based on the first two considerations, it should then account for the cost implications in formulating an appropriate remedy. Finally, whenever possible, the court should attempt to avoid imposing costs on both the instant parties and on society in general, to the extent that it does not prejudice the shareholders' equitable rights.

If the Montana Supreme Court uses the collective wisdom of the five cases discussed in this article to solidify its analytical framework, then the court will align its decisions with the underlying policies of the MCCA. If the court instead ignores the merits of an expectation-based analysis and regresses to an analysis based solely on the strict construction of expressed agreements, then the legislature's broad grant of judicial discretion presumably to pro-

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that it is political philosophy that I am expounding.").

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

tect the oppressed shareholder becomes moot. The choice is left to the court.[198]

198. *See* Samuels & Mercuro, *Posnerian Law and Economics on the Bench*, 4 INT'L REV. L. & ECON. 107, 113 (1984) ("The answers to efficiency related questions in law are ultimately a matter of judicial choice . . . .").