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Matteo Gatti

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Interested Voting

Matteo Gatti*

Corporate law is attentive to transactions with a controlling shareholder, but such transactions hardly cover all instances in which an interested shareholder may harm the corporation by casting a pivotal vote to pass a resolution. Interested votes cast by directors, managers, acquirers, cross-holders, arbitrageurs, institutional investors, hedge funds, and several other actors can be as detrimental as votes by a controlling shareholder. Yet, despite the ever-growing influence of shareholders in corporate governance, interested voting has received scant attention.

This Article is the first to offer a systematic mapping of interested voting based on type of shareholder and type of resolution. It categorizes existing policy approaches on interested voting as bright-line rules (which discount votes presumed interested ex ante) or as open-ended standards (which provide remedies for votes found ex post to be interested), and characterizes as “anything goes” the approach that leaves shareholders free to vote whichever way they please. Aside from policing controlling shareholders and, to a lesser extent, acquirers in M&A transactions, the law does not offer any remedies in several areas in which interested voting might occur, thus setting “anything goes” as the default regime for voting by non-controlling shareholders.

This Article evaluates whether and to what extent this “anything goes” regime is worrisome. While in some fields, like director elections and shareholder proposals, such an approach has the merit of limiting litigation rents, it is problematic in many others. In particular, M&A and other high-profile financial transactions subject to shareholder approval run the risk of being determined by an interested voter not aligned with the

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genuine preferences of disinterested shareholders. Deal data show that half of (the few) close merger votes pass because of votes by insiders. In these cases, deal outcomes might systematically be swayed by votes at odds with the common interests of shareholders and market failures would ensue. This is troublesome given the current phase of reconcentration of ownership of public corporations, which makes it easier than ever to assemble coalitions of repeat players such as insiders, institutional investors, and hedge funds. If left unchecked, “anything goes” might result in a reduction of wealth in the long run.

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INTRODUCTION

Developments in U.S. financial markets over the last three decades have profoundly reshaped corporate governance, especially with respect to shareholders. Traditionally distant from corporate decision making,¹ shareholders have made enormous strides in the power dynamics of corporations since the early 1990s.² This has happened in large part because of the rise in prominence of institutional investors³ and hedge funds.⁴ While generally passive in the past, institutional investors now massively exercise their voting rights in U.S. corporations.⁵ Conspicuously, large institutions have allied with activist hedge funds, who aim to direct and discipline management in unprecedented ways.⁶ Thanks to significantly increased ownership stakes,⁷ shareholders of today

1. See, e.g., ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932) (describing the separation between ownership and control in large public U.S. corporations); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 402 (1983) (arguing that shareholders are rationally apathetic in that their stakes are too small to make it worthwhile for them to invest time and money to actively participate in corporate governance); ROBERT C. CLARK, *CORPORATE LAW*, 390–92 (1986) (also asserting that shareholders are rationally apathetic).

2. See, e.g., Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1909–26 (2013).

3. On the rise of institutional investors in the late 1980s and early 1990s, see, for example, Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992); Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445 (1991); John C. Coffee, Jr., *Liquidity Versus Control: The Institutional Investor as Corporate Monitor*, 91 COLUM. L. REV. 1277 (1991).

4. See, e.g., Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control*, 155 U. PA. L. REV. 1021 (2007); Alon Brav, Wei Jiang, Frank Partnoy & Randall Thomas, *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729, 1734–36 (2008).

5. Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863, 889–901 (2013).

6. *Id.*

7. Sean J. Griffith, *Opt-In Stewardship: Toward an Optimal Delegation of Mutual Fund Voting Authority*, 98 TEX. L. REV. 983, 984 (2020):

occupy a central role they have rarely enjoyed before.⁸ In this phase of ownership reconcentration, shareholders' prerogatives demand careful consideration, if not outright scrutiny, in light of discernable risks associated with their newfound power. Unsurprisingly, the corporate law literature has been vigilant on this front.⁹

In this spirit, this Article investigates a crucial aspect of shareholder power: the ability of shareholders of large corporations to freely cast pivotal votes, irrespective of whether their ultimate interests may be at odds with those of the corporation. Corporate law offers a patchy treatment of interested shareholders and their most consequential right: the vote.¹⁰ While the law focuses quite

[M]utual funds now own about one-quarter of the total U.S. stock market. The "Big Three" mutual fund families—BlackRock, Vanguard, and State Street—are the largest shareholders in the vast majority of large publicly traded companies. Vanguard alone owns blocks of 5% or more in 468 of the companies in the S&P 500. (footnotes omitted.)

8. See generally Gilson & Gordon, *supra* note 5.

9. See, e.g., Bernard S. Sharfman, *Opportunism in the Shareholder Voting and Engagement of the 'Big Three' Investment Advisers to Index Funds*, 48 J. CORP. L. (forthcoming 2022); Lawrence A. Cunningham, *Ask the Smart Money: Shareholder Votes by a "Majority of the Quality Shareholders,"* 55 UC DAVIS L. REV. 1019 (2021); Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243 (2020); Marcel Kahan & Edward B. Rock, *Index Funds and Corporate Governance: Let Shareholders Be Shareholders*, 100 B.U. L. REV. 1771 (2020); Kobi Kastiel & Yaron Nili, *Competing for Votes*, 10 HARV. BUS. L. REV. 287 (2020); Lucian Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence, and Policy*, 119 COLUM. L. REV. 2029 (2019) [hereinafter *Bebchuk & Hirst, Index Funds*]; Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B.U. L. REV. 721 (2019) [hereinafter *Bebchuk & Hirst, Giant Three*]; Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. PA. L. REV. 17 (2019); Sean J. Griffith & Dorothy S. Lund, *Conflicted Mutual Fund Voting in Corporate Law*, 99 B.U. L. REV. 1151 (2019); Dorothy S. Lund, *The Case Against Passive Shareholder Voting*, 43 J. CORP. L. 493, 494 (2018); Ann M. Lipton, *Family Loyalty: Mutual Fund Voting and Fiduciary Obligation*, 19 TENN. J. BUS. L. 175, 176–78 (2017).

10. For example, under the Control Share Acquisition Statute, a hostile purchaser of an Ohio corporation must obtain prior approval from the target shareholders, and the purchaser's shares are not counted in that vote because the acquirer is deemed to be interested. OHIO REV. CODE ANN. § 1701.831E(1) (West 2021). On the other hand, a hostile purchaser of a Delaware corporation also must receive prior approval from the target shareholders, because a proxy fight to unseat the incumbent board and redeem a poison pill is the only viable way for an offeror to bypass a recalcitrant target board. *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985) (upholding the validity of the pill because, among other things, it does not "fundamentally restrict[] proxy contests"). But in such a vote the acquirer's shares are counted, even though the acquirer sits opposite the target shareholders. Matteo Gatti, *It's My Stock and I'll Vote If I Want to: Conflicted Voting by Shareholders in (Hostile) M&A Deals*, 47 U. MEM. L. REV. 181, 217–27 (2016) [hereinafter *Gatti, Conflicted Voting in M&A*]. See *infra* notes 230–236 and accompanying text.

heavily on transactions with a controlling shareholder,¹¹ it is silent—and scholarly attention is scant¹²—on instances in which

As another example, when a controlling shareholder seeks to purchase all the minority shares and conditions the transaction on a majority-of-the-minority vote, it will shift to the plaintiff the burden of proof that the transaction is entirely fair. *Kahn v. Lynch Comm'ns Sys.*, 638 A.2d 1110, 1117 (Del. 1994). And if there are additional preconditions, the standard of review can even shift from entire fairness to the business judgment rule. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645–54 (Del. 2014). On the other hand, for M&A transactions not subject to entire fairness, the standard of review is shifted from *Reolon* or *Unocal* to the business judgment rule upon a fully informed and uncoerced vote by the *disinterested* shareholders. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309 (Del. 2015) (see also Matteo Gatti, *Did Delaware Really Kill Corporate Law? Shareholder Protection in a Post-Corwin World*, 16 N.Y.U. J.L. & Bus. 345, 391–94 (2020) [hereinafter Gatti, *Shareholder Protection Post-Corwin*]).

True, there are important differences among these regimes and their remedies: control share acquisition statutes ban or discount certain votes while cleansing statutes allow the transaction to go through, subject to heightened review. But these contrasts show the many ways in which the law can intervene and, importantly, the circumstances in which it does not intervene when it comes to interested voting.

11. The general consensus among scholars and courts is that shareholders are free to cast their votes, subject to exceptions for controlling shareholders. See, e.g., STEPHEN M. BAINBRIDGE, *CORPORATE LAW* 166 (2d ed. 2009) (“As a general matter, it remains the law that shareholders qua shareholders are allowed to act selfishly in deciding how to vote their shares.”); Ann M. Lipton, *The Three Faces of Control*, 77 *BUS. LAW.* 801 (2022) (citing *Skye Min. Inv., LLC v. DXS Capital (U.S.) Ltd.*, 2020 WL 881544, at *26 (Del. Ch. Feb. 24, 2020)); Marcel Kahan & Edward B. Rock, *Systemic Stewardship with Tradeoffs* 18–19 (NYU Law and Economics Research Paper No. 22-01, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3974697, forthcoming in *BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES*, (Luca Enriques & Giovanni Strampelli eds. 2023); Jeffrey N. Gordon, *Systematic Stewardship*, 47 *J. CORP. L.* 627, 666–67 (2022) (discussing a “purported shareholder duty to exercise corporate governance rights only in a way that would maximize own-firm shareholder interests” and positing that “[t]here is no such shareholder duty, particularly for a non-controlling shareholder. And even for a controlling shareholder, there are no shareholder duties, except in frank self-dealing”) (footnotes omitted); Griffith, *supra* note 7, at 1010–11 (noting that shareholders “remain free to invest and vote according to other interests and objectives”); Roberta S. Karmel, *Should A Duty to the Corporation Be Imposed on Institutional Shareholders?*, 60 *BUS. LAW.* 1, 13 (2004) (“[S]hareholders do not represent anyone but themselves and do not have any duties to either the corporation or other shareholders.”); *Weinstein Enters., Inc. v. Orloff*, 870 A.2d 499, 507–08 (Del. 2005) (noting that while non-controlling shareholders may vote as they please, controlling shareholders are subject to fiduciary duties). *But see* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 *STAN. L. REV.* 1255, 1269–72 (2008) (criticizing conventional shareholder fiduciary duties that are only applied to a shareholder with stable control and proposing an extension to minority shareholders who carry swing votes in specific resolutions). See also *infra* Section I.B for a critique to the mainstream approach.

12. There are some notable exceptions: aside from the works cited *supra* note 9 and *infra* notes 25 and 57, for other contributions in the literature dealing with investor conflicts at large, see Kahan & Rock, *supra* note 4, at 1066–69 (discussing the conflicts of hedge funds);

an interested shareholder casts a decisive vote to pass a harmful resolution. In fact, as this Article shows, interested votes cast by directors, managers, acquirers, cross-holders, arbitrageurs, institutional investors, hedge funds, and several other actors can be as detrimental as votes by a controlling shareholder.

This Article offers a holistic view of interested voting, looking into issues largely neglected by prior literature, such as who the most recurring interested voters are, on what transactions interested voting most typically occurs, when policy intervention is warranted, and why intervening in this field is so complex. I survey possible policy approaches and juxtapose two that are antithetical. One is to put in place safeguards (via bright-line rules, open-ended standards, or a combination of the two) to ensure the outcome of the vote is not tainted by interested voting. There are examples of such an interventionist approach under existing law: In certain scenarios, the law requires disinterest as a precondition for the validity of a resolution (almost always by not counting votes that are presumed interested); in others, disinterest is a precondition—one of many—for shifting the standard of review in fiduciary duty litigation in the defendant’s favor.¹³ Another policy approach—opposite the former—can be described as “anything goes”: non-controlling shareholders can behave and vote as they please to further any of their interests, whether or not aligned, or even compatible, with the interests of the corporation.¹⁴

Scant scholarly engagement, coupled with the difficulty in defining sanctionable interested voting,¹⁵ has contributed to a legal system that, for the most part, de facto embraces an “anything goes” approach. A core contribution of this Article is evaluating whether and to what extent such an approach regime is worrisome.

Black, *supra* note 3 (discussing conflicts of interest of institutional investors); Roberta Romano, *Public Pension Fund Activism in Corporate Governance Reconsidered*, 93 COLUM. L. REV. 795 (1993) (discussing conflicts of pension funds). Interested voting is one of the main ways in which so-called principal conflict costs manifest themselves. See Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 791 (2017) (describing principal conflict costs as those resulting “from investor self-seeking conduct attributable to the separation of ownership and control” and adding that “[w]hile they can arise even when a business relationship has just one principal (along with one or more agents), they are more likely to be a significant problem when a firm has multiple principals with conflicting interests”).

13. See *infra* Sections III.A and III.B.

14. See *infra* Section III.C.

15. See *infra* Section I.A.

I concede that “anything goes” has its merits in some fields, such as director elections and shareholder proposals, where policies to tackle interested voting—other than improved disclosures on voting tabulations at the company level¹⁶—would be difficult to implement. In such circumstances, an “anything goes” approach limits the proliferation of transaction and enforcement costs associated with a heftier regulation of voting and keeps litigation rents at bay.¹⁷

However, in other fields, “anything goes” is problematic because it leaves investors unprotected. Leaving the fate of M&A and other high-profile financial transactions subject to a shareholder vote runs the risk of the result being determined by an interested voter not aligned with the genuine preferences of disinterested shareholders. In these cases, voting outcomes could systematically be swayed by votes at odds with common interests of shareholders, and market failures would ensue. If left unchecked, interested voting would, in the long run, result in a reduction of wealth, especially if certain repeat players (e.g., directors, managers, arbitrageurs, institutional investors, and hedge funds) and their interest groups learn to exploit such a lax approach. Regulating interested voting would be necessary to restrain such repeat players from extracting value to the detriment of fellow shareholders and to thus curb possible market failures.

To get a sense of how widespread the phenomenon is, I conducted two separate studies of merger approval rates: one for the 2010–2015 period and one for the 2016–2020 period. Both studies show that nearly half of mergers approved by a close margin (that is, approved by less than sixty percent of the votes) passed thanks to votes of insiders and/or votes subject to a voting agreement. While the overall number of deals involved is not high, the data reveals that the more a deal is at risk of not passing, the more likely interested voting is to play a role to ensure it passes.¹⁸ M&A is not the only critical field: any important transaction with money on the table (a recapitalization, a spin-off, and so forth) that is subject to shareholder approval gives interested shareholders a chance to extract value at the expense of the other shareholders.

16. *See infra* text accompanying notes 200–202.

17. *See infra* Section IV.A.

18. *See infra* notes 147–49 and accompanying text.

This Article is structured as follows. Part I describes interested voting, stressing the difficulty in establishing with precision its contours and illustrating the limits of focusing exclusively on controlling shareholders. Part II provides a taxonomy of interested voting based on type of shareholder and of shareholder resolution. In Part III, I succinctly describe and evaluate existing approaches on interested voting, by categorizing them as bright-line rules, open-ended standards, and “anything goes” regimes. I observe that U.S. law seems to be mostly concerned with votes from controlling shareholders and from acquirers in M&A transactions (though the latter does not really apply to Delaware). On its face, the law does not offer any remedies in several other areas in which interested voting might occur, thus setting “anything goes” as the default regime. In Part IV, section A assesses the implications for the system of an “anything goes” approach and concedes that, in some fields, such as director elections and shareholder proposals, such an approach is sensible. Section IV.B discusses the perils of “anything goes” by looking at the imbalances it creates with some doctrinal pillars of Delaware law, by illuminating the incentives it gives to repeat players to cast interested votes, and by analyzing whether “anything goes” increases systemic risk. This Article concludes that given the current phase of reconcentration of ownership of public corporations, which makes it easier than ever to assemble coalitions of repeat players such as insiders, institutional investors, and hedge funds, “anything goes” is risky and might result in a reduction of wealth in the long run.

Before proceeding, a disclaimer on the scope of my enquiry: this Article focuses on companies with a “one-share, one vote” structure and on conflicts among common stockholders. It deliberately does not cover the conflicts between supervoting and common stock,¹⁹ nor the

19. On dual class shares structures, see, for example, Lucian A. Bebchuk, Reinier Kraakman & George G. Triantis, *Stock Pyramids, Cross-Ownership, and Dual Class Equity: The Mechanisms and Agency Costs of Separating Control from Cash-Flow Rights*, in CONCENTRATED CORPORATE OWNERSHIP 295–318 (Randall K. Morck, ed., 2000) (describing such structures and their substitutes, such as pyramids and cross-ownership); Lucian A. Bebchuk & Kobi Kastiel, *The Untenable Case for Perpetual Dual-Class Stock*, 103 VA. L. REV. 585, 602–609 (2017) (describing the long-term inefficiencies of such structures); Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453 (2019) (describing the efficiency issues with dual-class companies with controllers holding a small minority of the company’s equity capital).

conflicts between common and preferred stockholders.²⁰ Each such conflict is so peculiar that it would require ad hoc treatment, and that treatment does not match the scope of this analysis.²¹

I. THE UNCLEAR CONTOURS OF INTERESTED VOTING AND THE LIMITS OF ONLY POLICING CONTROLLING SHAREHOLDERS

The problems of interested voting are tied to the theory of majority voting. As Professor Zohar Goshen explained, majority voting is the best approximation of a group preference: “[t]he voting mechanism is based on the assumption that the majority opinion expresses the ‘group preference,’ that is, the optimal choice for the group as a whole.”²² In the context of corporations

20. On the conflicts between preferred and common, see, for example, Elizabeth Pollman, *Startup Governance*, 168 U. PA. L. REV. 155 (2019); Sarath Sanga & Eric Talley, *Don't Go Chasing Waterfalls: Fiduciary Duties in Venture Capital Backed Startups* (Eur. Corp. Governance Inst. Law Working Paper No. 634/2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721814.

21. I do not cover differential-voting structures because common investors do not anticipate their vote will ever be pivotal: while such companies have dispersed ownership from a cash flow rights standpoint, they are in fact companies with concentrated ownership by virtue of the supervoting stock. Similarly, the conflict between common and preferred stockholders represents a typical feature of pre-IPO start-up firms, whereas my focus is on public companies.

22. Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CALIF. L. REV. 393, 399 (2003) [hereinafter Goshen, *Controlling Corporate Self-Dealing*]. See also Zohar Goshen, *Voting (Insincerely) in Corporate Law*, 2 THEORETICAL INQ. L. 815, 817–18 (2001) [hereinafter Goshen, *Voting (Insincerely)*]:

Voting is most commonly accepted as the best method for extracting the group preference from among the disparate and diverging subjective opinions of the group of security holders. The majority view of the security holders reflects the optimal choice for the group as a whole, providing the best approximation of the choice that would be implemented if a single individual, rather than a group, were making the decision. The presumed correlation between the group preference and the majority view rests on a statistical proposition: assuming each security holder is more likely to be correct than mistaken, the choice made by the largest number of voters will most probably be the “correct” one.

The theoretical framework behind these assertions derives from the work of Marquis de Condorcet, according to whose Jury Theorem whenever a group of voters independently choosing by majority vote between a correct outcome and an incorrect one is composed by voters who are more likely to vote correctly than incorrectly, the probability that the majority chooses correctly and the probability of a correct decision approaches one as the number of voters increases. For a description, see Michael C. Schouten, *The Mechanisms of Voting Efficiency*, 2010 COLUM. BUS. L. REV. 763, 770–71 (2010) (applying it to the corporate voting context: “in a choice between two alternatives (e.g., the firm merges or not), assuming that shareholders vote for the correct option with probability greater than 0.5, then, as the number of shareholders increases, the probability that a majority vote taken at the shareholders’

subject to a one-share, one-vote regime,²³ the validity of a majority proposition lies on the assumption that those who own more shares have better incentives to make the right decision since they reap the benefits (or bear the burden) of their choice.²⁴ For the majority rule to be effective in aggregating shareholders' preferences,²⁵ scholars believe that the majority vote must be sincere²⁶—that is, not interested.

To answer the fundamental question that this Article addresses—whether interested voting is detrimental—I must first clarify what I mean by interested voting (section I.A) and why current judicial doctrines that only police controlling shareholders might fall short (section I.B).

meeting will select the correct (i.e., value maximizing) alternative tends toward certainty"). See also Luca Enriques & Alessandro Romano, *Institutional Investor Voting Behavior: A Network Theory Perspective*, 2019 U. ILL. L. REV. 223, 230–31 (2019).

23. For the reasons mentioned *supra* text accompanying notes 19–20, this Article does not focus on corporations with differential voting structures.

24. See Easterbrook & Fischel, *supra* note 1, at 408–09; Griffith, *supra* note 7, at 1006.

25. To support shareholder choice, the law (state and federal) provides safeguards and protections of various nature, which include mandatory disclosure, procedural rules for the meeting (including the applicable quorum and approval requirements), as well as directors fiduciary duties to bolster the disclosure apparatus and the effectiveness of the franchise.

26. Zohar Goshen has studied the interplay between majority voting and conflicts of interests under U.S. corporate law:

[I]f the shareholders of a . . . company have a common interest—increasing share value—but differ on the question of whether or not they will benefit from a proposed reorganization, the proposed solution will allow us to ascertain the group preference. The majority opinion will be the best measure because majority choice is the most efficient alternative. On the other hand, the proposed solution will not be appropriate in cases where the parties have conflicting interests and differ not only regarding their judgment about the preferred alternative but also regarding the desired result. . . . When such a conflict of interest exists between voters, the majority's opinion is not necessarily the most efficient choice for the group.

Zohar Goshen, *Controlling Strategic Voting: Property Rule or Liability Rule?*, 70 S. CAL. L. REV. 741, 797 (1997) [hereinafter Goshen, *Controlling Strategic Voting*]; see also Zohar Goshen, *Controlling Corporate Self-Dealing*, *supra* note 22, at 399–400; Goshen, *Voting (Insincerely)*, *supra* note 22, at 815. See also Iman Anabtawi, *Some Skepticism About Increasing Shareholder Power*, 53 UCLA L. REV. 561, 575 (2006) ("shareholders with private interests . . . might prefer the firm to pursue those interests at the expense of the interests they have in common with other shareholders."); Schouten, *supra* note 22, at 773 ("When shareholders have heterogeneous preferences and some vote with a view to maximizing their private interests rather than their pro-rata share of the firm's future cash flows, the probability that a majority of the shares is voted for the correct option decreases dramatically."); Robert B. Thompson & Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129, 174 (2009) (relying on votes to determine the decision of the group requires that voters' interest be aligned with the collective interest).

A. What Constitutes Interested Voting?

In the literature, interestedness means misalignment of interest between the voting stockholder and the corporation or, similarly, disproportionate sharing. According to Professors Gilson and Black “the term ‘interested’ is a shorthand for the fact that the shareholder is disproportionately affected by the proposed action.”²⁷ “By ‘private’ interests, I mean those interests of a shareholder that are not shared by shareholders generally[,]” echoes Professor Anabtawi.²⁸ Similarly, Professors Kahan and Rock state that “a person is interested if she obtains a material benefit from a transaction other than a benefit proportionally bestowed on all shareholders.”²⁹ Recently, in denying the *Corwin* defense for a transaction passed with the pivotal vote of a shareholder contractually bound to support the merger irrespective of its economic merits, the Chancery Court maintained in *Pattern Energy* that “[a] stockholder is interested if it may derive pecuniary interest from one particular result or is otherwise unable to be fair-minded, unbiased, and impartial.”³⁰

Despite this, determining when interested voting is in fact detrimental and actionable remains a rather complex issue for interpreters to grasp and for policymakers to regulate.

Conceptual difficulties arise on several fronts. For one, whether shareholder interests may be characterized as homogenous or heterogeneous carries important implications.³¹ In the latter case,

27. RONALD J. GILSON & BERNARD S. BLACK, *THE LAW AND FINANCE OF CORPORATE ACQUISITIONS* 649 (2d ed. 1995).

28. Anabtawi, *supra* note 26, at 564 n.9.

29. Marcel Kahan & Edward Rock, *Anti-Activist Poison Pills*, 99 B.U. L. REV. 915, 968 (2019) (drawing on Orman v. Cullman, 794 A.2d 5, 25 n.50 (Del. Ch. 2002)).

30. *In Re Pattern Energy Grp. Inc. S’holders Litig.*, C.A. No. 2020-357, 2021 WL 1812674, at *63 (Del. Ch. May 6, 2021). *See also id.* (“only the votes of those stockholders with no economic incentive to approve a [challenged] transaction count.”) (quoting Harbor Fin. Partners v. Huizenga, 751 A.2d 879, 900 (Del. Ch. 1999)). *Pattern Energy* was followed and quoted extensively by another more recent Chancery Court decision: Lockton v. Rogers, 2022 WL 604011, C.A. No. 2021-0058, at *10 n.161, 164 (Del. Ch. Mar. 1, 2022).

31. The mainstream view among corporate law scholars has long been that shareholders’ interests are homogenous and all converge in maximizing the value of their investment qua shareholders. *See* the authors cited *supra* note 25. *See also* FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 70 (1991); HENRY HANSMANN, *THE OWNERSHIP OF THE ENTERPRISE* 62-63 (1996); Griffith, *supra* note 7, at 1007-08. However, as recent scholarship has pointed out, shareholder preferences cannot be

absent one single common interest on which the shareholder group can align, it might be difficult to establish what level of conflict or misalignment would amount to sanctionable interested voting.³² To complicate things further, institutional investors care less about maximizing the value of a single company than maximizing the value of their entire portfolio.³³ Moreover, at this historical juncture, the very fact that directors and officers must manage the corporate enterprise in the exclusive interest of shareholders is called into question by stakeholderism, which predicates a shift from the shareholder primacy norm to an alternative approach under which directors should create value for all constituencies of the corporation, including employees, customers, suppliers, and local communities.³⁴ If corporate fiduciaries may depart from a norm of shareholder wealth maximization, why can't shareholders do the same? Put differently, if the maximization of shareholder wealth is one of the main reasons for curtailing interested voting, any policy intervention becomes less urgent once we embrace a stakeholderist view of the firm. Despite these challenges, below I sketch a roadmap for the interpreter.

reduced to one identical or even similar interest. For a comprehensive account of the various critiques, see generally GRANT M. HAYDEN & MATTHEW T. BODIE, *RECONSTRUCTING THE CORPORATION: FROM SHAREHOLDER PRIMACY TO SHARED GOVERNANCE* 68–87 (2020).

32. Consider shareholders with different investment horizons or investment strategies. The interest of a mutual fund with a long-term strategy may be misaligned with the interest of a merger arbitrageur—suppose the former might consider the merger consideration insufficient, while the latter's investment strategy is predicated on capturing the merger price. Cf. *infra* Sections II.A.7 and II.A.9. Similarly, the interest of an impact investor with a green strategy (see *infra* Section II.A.11) may be misaligned with the interests of a hedge fund activist (see *infra* Section II.A.8) or of an employee shareholder (see *infra* Section II.A.10).

33. See Luca Enriques & Alessandro Romano, *Rewiring Corporate Law for an Interconnected World*, 64 ARIZ. L. REV. 51, 59–66 (2022) (distinguishing between firm value maximizing shareholders and portfolio value maximizing shareholders). See also Gordon, *supra* note 11.

34. See generally Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES GREATER GOOD* (2018); COLIN MAYER, *FIRM COMMITMENT: WHY THE CORPORATION IS FAILING US AND HOW TO RESTORE TRUST IN IT* (2013); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy: A Reply to Professor Rock*, 76 BUS. LAWYER 397 (2021). The stakeholder approach has been famously endorsed by a diverse cast of characters, ranging from progressives like Senators Elizabeth Warren and Bernie Sanders to Wall Street titans such as the CEO of BlackRock and the Business Roundtable (the lobbying group comprised of CEOs of large American corporations). For an account and a critique, see Matteo Gatti & Chrystin Ondersma, *Can A Broader Corporate Purpose Redress Inequality? The Stakeholder Approach Chimera*, 46 J. CORP. L. 1, 10–11, 47–57 (2020).

Without a doubt, all shareholders, whether individuals or entities, have several interests that go beyond their specific equity position in the given company. Each of them has an investment strategy and horizon that is unique. Recent proxy voting experience shows that shareholders have multiple preferences, some of which do not even match with maximizing the return of the specific equity position.³⁵ Therefore, to infer anything detrimental to a corporation from interestedness, we must identify something additional to simply having an interest in the resolution; whatever that “something additional” might be, it must carry, at least potentially, negative consequences for the corporation.

If voting while pursuing one’s own interests is not per se problematic, the question is: *When* is it? When, in other words, would a laissez-faire approach legitimize corporate actions that would bring negative consequences for the corporation? Arguably, interested voting is problematic whenever it is conducive to adopting a resolution that causes, or is reasonably likely to cause, harm to the corporation. But such an answer would still be unsatisfying because it again begs the question of when exactly “harm to the corporation” would occur.

A working hypothesis could be that actionable interested voting would occur whenever (i) a shareholder with a special interest (whether its own or acting on someone else’s behalf) (ii) votes in contrast with the best interests of the corporation, (iii) because of that vote, the resolution passes, and (iv) the corporation is expected to suffer harm. For example, a five-percent shareholder votes in favor of, and is pivotal in the approval of, a resolution that is expected to generate a loss of one hundred dollars to the corporation, but the per-share loss suffered by such shareholder (five dollars) is offset by private gains greater than five dollars. Even when unpacked this way, interested voting still raises several interpretative questions.

One of the most complex issues behind interested voting consists in determining how to weigh the particular interest of the shareholder with the general interests of the corporation. This requires defining each such interest, but that is no easy task. To

35. See e.g., HAYDEN & BODIE, *supra* note 31, at 5; David H. Webber, Visiting Scholar, Del. L. Widener Univ., Rethinking “Political” Considerations in Investment, Transcribed Remarks (Sept. 12, 2016) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3736936); Roberto Tallarita, *Stockholder Politics*, 73 HASTINGS L.J. 1697, 1734 (2022).

begin, establishing what we mean by best interests of the corporation is notoriously hard and controversial, preoccupying generations of legal scholars and economists. The complexity is multifaceted: the interpreter needs to determine not only whether such interest coincides with the interests of one or more categories of stakeholders (that is, the exercise requires taking a stance on the shareholderist/stakeholderist debate),³⁶ but also whether such interest should be considered in abstract terms (i.e., assuming a typical interest of a corporation)³⁷ or in concrete terms after looking at context.³⁸ This latter exercise has a parallel when the interpreter

36. See *supra* note 33 and accompanying text.

37. The point is explained neatly by Kahan & Rock, *supra* note 11, at 15:

If shareholder interests are understood as the interests of shareholders *qua* shareholders of a given company – abstracting from the interests of the actual shareholders who will often have “extraneous” interests – then the principal focus is on the interest that all shareholders have in common, namely, maximizing the value of the company. This results in a highly stylized conception of shareholders’ interests that often departs from shareholders’ actual interests, and, in doing so, avoids all of the complex issues that arise in reconciling heterogeneous interests and preferences.

38. For example, we have traditionally assumed that in abstract terms the best interests of the corporation coincide with maximizations of profits and share value (see *supra* note 37). What if shareholders *by majority* (but not unanimously) determined to relax such pursuits to improve workers’ conditions or to alleviate the negative externalities their company is inflicting on the environment? Would their decision to pursue goals that are not typically those the corporation was originally established to pursue be against the common interest as contractually established? While shareholders are rarely involved in this type of decision-making and, when they are their resolutions are not binding (see *infra* Section II.B.4), this tension has become quite a hot button issue in light of the rise of ESG investing and voting. While the judiciary has yet to take a position on this issue, reasonable minds in academia have different views on the right approach. Compare *e.g.*, Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value* 18 (Eur. Corp. Governance Inst. Fin. Working Paper No. 521/2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3004794 forthcoming in *BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES* (Luca Enriques & Giovanni Strampelli eds., 2023)) (arguing that whatever preferences shareholders express in the given resolution, whether profit maximizing or pro-social, should be considered the best interests of the corporation at that particular moment) and DAVID WEBBER, *THE RISE OF THE WORKING-CLASS SHAREHOLDER: LABOR’S LAST BEST WEAPON* (2018) (arguing that pension funds should be allowed to vote their shares in pursuit not just of the immediate financial return of the portfolio company in question, but also of the interests of their participants *qua* workers) with Kahan & Rock, *supra* note 11, at 38 (arguing that a single firm focus on value maximization “avoids the instability and indeterminacy that heterogeneous shareholder interests can produce”) and STEPHEN M. BAINBRIDGE, *THE PROFIT MOTIVE: DEFENDING SHAREHOLDER VALUE MAXIMIZATION* (2023) (arguing that shareholder value maximization is what corporate law does and should require). Of course, unanimous decisions would raise

assesses the special interest of the voting shareholder (see above under (i)): do we look at the abstract interest of the potentially interested shareholder or do we need to find a specific, actual interest in the given resolution? These complex questions are by no means exhaustive: there are several additional building blocks for the interpreter to put together to address interested voting. Should harm to the corporation be tied to equity or enterprise value? Should harm mean actual or expected damages? Should harm comprise loss of prospects?

To be sure, shareholder voting occurs in limited circumstances; often, voting does not even result in a binding resolution.³⁹ As I show below, the most typical shareholder action—director election—is a mere organizational decision that does not result in any immediate transaction.⁴⁰ It is difficult to predetermine whether electing a particular individual to the board will be harmful to the corporation.⁴¹ Resolutions in M&A and other high-stakes financial transactions are among the few offering some guidance. Prior to the most recent iteration of the stakeholderist movement and the advent of ESG investing, a plausible answer could have been that a vote resulting in a decrease in the aggregate value of the shares represented harm to the corporation.⁴² But how such an explanation will hold up in the new landscape remains to be

no issues, but those are out of the cared for larger public corporations. See Marcel Kahan & Edward Rock, *The Emergence of Welfarist Corporate Governance* 46 (Eur. Corp. Governance Inst. Law Working Paper, No. 683/2023), http://ssrn.com/abstract_id=4328626 (citing *eBay Domestic Holdings, Inc. v. Newmark*, 16 A.3d 1, 34 (Del. Ch. 2010): “If Jim and Craig were the only stockholders affected by their decisions, then there would be no one to object.”).

39. See *infra* Section II.B.4.

40. See *infra* Section II.B.2.

41. Unless of course the director in question is a known looter or criminal, but for those hypotheses there are other judicial doctrines, like those triggered by sales of control, which might help. See generally Einer R. Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465 (1992); John C. Coffee, Jr., *Transfers of Control and the Quest for Efficiency: Can Delaware Law Encourage Efficient Transactions While Chilling Inefficient Ones?*, 21 DEL. J. CORP. L. 359 (1996).

42. Cf. *In re Trados Inc. S’holder Litig.*, 73 A.3d 17, 37 (Del. Ch. 2013) (maintaining that “the duty of loyalty . . . mandates that directors maximize the value of the corporation over the long-term for the benefit of the providers of equity capital[.]”); *eBay Domestic Holdings, Inc.*, 16 A.3d 1, at 34 (stating that the standards that accompany the corporate form “include acting to promote the value of the corporation for the benefit of its stockholders”); *N. Am. Cath. Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007) (stating that “[i]t is well established that the directors owe their fiduciary obligations to the corporation and its shareholders”).

seen—crucially, are resolutions in *Revlon* transactions affected at all by stakeholderism and ESG?⁴³

B. The Limits of Focusing Uniquely on Controlling Shareholders

To be sure, at least in Delaware, the legal system seems to do away with answering the questions raised in section I.A, because the law more simply focuses on whether the given corporation is subject to one's control.⁴⁴ If the corporation is controlled by a person (individual or otherwise), the law intervenes with heightened judicial scrutiny of the controller-sponsored resolution/transaction;⁴⁵ if it is not controlled by a person, the law does not intervene. While reasonable minds might differ on whether and to what extent *Corwin* and *Pattern Energy* have altered this dual approach with control as a threshold issue,⁴⁶ I contend that such an approach is normatively problematic.⁴⁷

The existing system polices and sanctions transactions with controlling shareholders that are not entirely fair. All related party transactions are ex ante considered with suspicion, and if not entirely fair, the controller will be stigmatized as a corporate villain.⁴⁸ But why are controlling shareholders so problematic? Not because of their economic prominence: while this is something antitrust law may have issues with, corporate law and governance tolerate a controller's economic power.

At closer look, controlling shareholders are problematic because they—and their votes—are almost always pivotal.⁴⁹ Controllers know they can use their powers to direct corporate policy (subject

43. For further discussion on how stakeholderism may impact interested voting, see *infra* text accompanying notes 273–274.

44. See generally Lipton, *supra* note 11 (describing thoroughly Delaware's recent jurisprudence on what constitutes control).

45. For a description, see *infra* Section II.A.1.

46. For the reasons expressed *infra* note 88, I find the dual approach description less compelling after *Pattern Energy*.

47. For a similar critique, see Anabtawi & Stout, *supra* note 11, at 1269–72 (proposing to extend fiduciary duties that are normally applicable to controlling shareholders also to non-controlling shareholders who can swing the resolution).

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

49. See Kahan & Rock, *supra* note 4, at 1074 (discussing hedge fund conflicts and juxtaposing them with those of controlling shareholders: “[T]he conflicts in the context of hedge funds pale compared to the conflicts of controlling shareholders in freeze-outs, whose votes will usually be outcome-determinative”).

to limitations under the law) and (albeit only sometimes) board resistance. Being pivotal and knowing to be pivotal facilitates transaction planning. And on the spectrum of all possible transactions a corporation can approve, there are transactions detrimental to the corporation that can nevertheless benefit the controlling shareholder, which is an issue because the controller has sufficient information and incentives to exploit such opportunities.

However, transactions that disproportionately benefit an investor at the expense of the corporation are not unique to controlling shareholders. On the spectrum of all the possible transactions that a corporation can approve, there is a subset under which the corporation loses money while some other (non-controlling) shareholders will benefit. If these other actors are investors who happen to be pivotal in approving the specific transaction, we have an interested voting issue. Though the transaction is not pushed by a controller (because, in this stipulation, there isn't one), it still happens and causes harm to the corporation through the vote of a non-controlling, but nonetheless pivotal, interested shareholder. Without the vote cast by such interested shareholder, an opposite outcome—stemming from disinterested votes—would have prevailed. The interested shareholder can thus alter the preferences the group would have otherwise expressed.

While cases in which a non-controlling interested investor happens to be pivotal appear to be rarer in comparison to controller transactions,⁵⁰ the pivotal influence of non-controlling shareholders can still represent a significant issue because of the far larger number of U.S. listed corporations without a controlling stockholder.

There is more: the smaller stakes held by non-controllers are more troublesome in terms of misalignment and incentives.⁵¹ Because of its larger stake, the decrease in the controlling

50. Arguably, interested voting by a controlling shareholder is easier to police for plaintiffs, because whenever a self-dealing transaction is announced, the whole market will notice. In the absence of such an overt display of shareholder power, plaintiffs might have troubles detecting transactions passed because of the pivotal vote of a non-controlling, nevertheless pivotal, interested shareholder. Yet, from an enforcement perspective, detecting a transaction potentially tainted by interested voting is merely a practical headache that will require looking closely at voting tabulations to detect pivotal interested votes by non-controlling shareholders.

51. See Lucian A. Bebchuk & Kobi Kastiel, *The Perils of Small-Minority Controllers*, 107 GEO. L.J. 1453, 1465–66 (2019) (noting the greater alignment of interests in concentrated ownership structures vis-à-vis widely held structures).

shareholder's wealth qua shareholder that results from a resolution against the best interests of the corporation can be quite substantial. To compensate such loss, the opportunity from the self-dealing transaction must be of a significant size; otherwise, the controller will not act.⁵² In other words, the per share loss qua shareholder is multiplied by a far larger number of shares for a controller than for a non-controller and thus will require a far larger self-dealing opportunity, which often will not be available. The greater misalignment of non-controlling shareholders increases the opportunities to extract value at the expense of the corporation because the loss of any such shareholder qua shareholder is typically smaller and thus, all else being equal, easier to offset with the nonproportional gains the shareholder can extract via interested voting.⁵³ But the fact that a non-controlling shareholder suffers a smaller loss does not mean that this is trivial in absolute terms: when the per-share loss is applied to the entire equity capital of the corporation, the aggregate loss for the corporation can be significant. In fact, adapting what Professors Bebchuk & Kastiel have explained in the context of dual class shares, as the fraction owned by the pivotal shareholder decreases, "expected costs to the company and other shareholders increase in two ways: first, the [lower stake] increases the likelihood that the [pivotal shareholder] will favor value-reducing choices; and second, if a value-reducing choice is favored, the total expected reduction in value from that choice will be higher."⁵⁴

To be sure, the legal system could embrace a realist's tradeoff between protection and enforcement costs and establish a regime in which only controllers are policed while setting free non-controlling pivotal shareholders, who happen to be in that situation

52. *Id.* at 1467.

53. *Id.*

54. *Id.* at 1467-68. Below I borrow from Bebchuk and Kastiel and adapt their model, which is in the context of dual-class share structures, by replacing the controller with a *pivotal* non-controlling shareholder. Assume such shareholder owns a given percentage, a , of the company stock. The market capitalization of the company is V . Assume the company is about to enter into a transaction that would decrease its value by a large amount (ΔV), yet the pivotal shareholder would gain an amount equal to B . The transaction would be beneficial to the pivotal shareholder if and only if $a\Delta V < B$ or, restated, if and only if $\Delta V < B/a$. This displays the range of circumstances when an interested pivotal non-controlling shareholder would vote for an action that is detrimental to the corporation and implies that such range expands and "the expected severity of distortion increases" as the pivotal shareholder's fraction of equity capital (a) decreases. *Id.* at 1467.

episodically and, at times, beyond their sole power. However, this approach would be problematic because potentially pivotal shareholders would take solace from knowing they are beyond the law's reach and would act accordingly. In other words, in a *laissez faire* environment, such shareholders would be free to plan around and coalesce with others, thus exacerbating the risk that they will be pivotal and thus detrimental to the corporation.⁵⁵ This can now happen at an accelerated pace considering the most recent evolution of ownership structures of U.S. corporations.⁵⁶

In sum, controlling shareholders have been on the radar because of their inherent power to determine the outcome of the vote. But episodic pivotal voting by non-controlling yet interested shareholders is equally problematic because they too have power to determine the outcome of the vote in a direction that may cause harm to the corporation,⁵⁷ as the rest of this Article illustrates.

II. INTERESTED VOTING: TAXONOMIES

Interested voting can be more or less severe depending on the shareholder casting the pivotal vote and on the type of resolution.

55. This is explored further *infra* in Section IV.B.2.

56. As mentioned *supra* text accompanying notes 2-9, over the last thirty years, we have witnessed a slow but steady disappearance of pure public company structures with a myriad of pulverized small investors, with institutions now playing a central role in our ownership structure and governance systema. And irrespective of whether there are twelve (see John C. Coates IV, *The Future of Corporate Governance Part I: The Problem of Twelve* 10 (Harv. Pub. L. Working Paper, No. 19-07, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3247337 [<https://perma.cc/SX35-PCV8>] (describing the growing share of ownership of index funds and analyzing the "Problem of Twelve" – the likelihood that in the future roughly twelve individuals, senior money managers in the investment fund industry, will have practical power over most U.S. public corporations), one hundred, or one thousand representatives of asset managers who call the shots at shareholders' meetings of U.S. corporations, they are a small number. For such actors it is (or will soon become) too tempting to coalesce and extract value if they are confident that they can.

57. For other works proposing to look beyond controller's votes, see, for example, Griffith & Lund, *supra* note 9, at 1158 (suggesting that under certain circumstances an institutional investor should not qualify as disinterested for *Corwin* purposes); Gatti, *Shareholder Protection Post-Corwin*, *supra* note 10, at 394-99 (arguing for an expansive reading of the disinterest requirement under *Corwin* that would not consider certain categories of shareholders – directors and managers of the target in first and foremost – as "disinterested"); Gatti, *Conflicted Voting in M&A*, *supra* note 10 (suggesting tools to alleviate interested voting in M&A); Cf. Brandon Mordue, *The Revlon Divergence: Evolution of Judicial Review of Merger Litigation*, 12 VA. L. & BUS. REV. 531, 567 (2018) ("[T]he 'disinterested' prong of *Corwin* has received scant attention in the cases thus far, but there is an abundance of possible scenarios in which the issue might be in play.").

This Part explores and categorizes several different patterns based on type of shareholder (section II.A) and type of resolution (section II.B).

A. Interested Voting and Type of Interested Shareholder

One way to categorize interested voting revolves around the type of interested shareholder who happens to be pivotal for the adoption of the underlying resolution. This section will describe potential interested voting by the following types of interested shareholders:⁵⁸ controlling shareholders, directors and managers, significant shareholders, acquirers, parties to a voting agreement, cross-owners, institutional investors, activist hedge funds, arbitrageurs, employees, and climate, labor, and other political activists.

1. Controlling Shareholders

Voting by controlling shareholders raises well-known interested voting issues.⁵⁹ In fact, this is one of the rare cases in which the law intervenes, especially in the context of judicial doctrines addressing the duty of loyalty. The cleansing statute under section 144(a)(2) of the DGCL provides for a safe harbor from immediate voidability of an interested transaction and narrower judicial review of the directors' conduct if, among other things, the transaction is approved by the stockholders.⁶⁰ But if the corporation has a controlling stockholder, an approval or ratification alone is not sufficient for the obvious reason that the vote would be a *fait accompli*.⁶¹

The presence of a controlling stockholder ordinarily triggers an enhanced level of scrutiny of the underlying transaction: entire fairness with burden of proof that the transaction is entirely fair

58. As mentioned *supra* by the end of the Introduction, this Article focuses on "one-share, one-vote" structures and on common stock only; therefore, this section does not cover the conflicts between supervoting and common stock, nor those between common and preferred stockholders.

59. See generally Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271 (2017); BAINBRIDGE, *supra* note 11, at 166. See also Bebchuk & Kastiel, *supra* note 51, at 1508–09 (addressing conflicts in dual-class shares structures).

60. See generally Melvin A. Eisenberg, *Self-Interested Transactions in Corporate Law*, 13 J. CORP. L. 997 (1988).

61. See Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1981–82 (2019).

on the defendant.⁶² One of the ways to shift the burden of proof back to the plaintiff is to obtain approval from a majority of the minority of shareholders of the subsidiary.⁶³ Moreover, in the aftermath of the seminal *M & F Worldwide* decision by the Delaware Supreme Court, the law addressing conflicted transactions shifts the standard of review to the business judgment rule if, among other procedural safeguards, the transaction is approved by a majority of the minority of stockholders.⁶⁴

The *Corwin* line of cases also addresses votes by controlling stockholders by requiring that such a vote be, among other things, disinterested for the standard-shifting effect of the merger vote to apply.⁶⁵

62. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983) (requiring the defendant directors and controlling shareholder to show both “fair dealing” and “fair price”).

63. *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985) (“[A]pproval of a merger . . . by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs.”); *In re Wheelabrator Techs., Inc. S’holders Litig.*, 663 A.2d 1194, 1203 (Del. Ch. 1995) (“[W]here the merger [between a controlling stockholder and its subsidiary] is conditioned upon approval by a ‘majority of the minority’ stockholder vote, and such approval is granted, the standard of review remains entire fairness, but the burden of demonstrating that the merger was unfair shifts to the plaintiff.”); *Rabkin v. Olin Corp.*, C.A. No. 7547, 1990 WL 47648, at *6 (Del. Ch. Apr. 17, 1990) (“If an informed vote of a majority of the minority shareholders has approved a challenged transaction, and in fact the merger is contingent on such approval, the burden entirely shifts to the plaintiffs to show that the transaction was unfair to the minority.”).

64. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, 645 (Del. 2014) (holding the business judgment standard of review applies if the transaction meets the following requirements: (i) the transaction is approved by both a special committee and a majority vote of the outstanding shares owned by unaffiliated stockholders (generally referred to as a majority-of-the-minority vote); (ii) the special committee is independent and empowered to select its own advisors and to say no “definitively” and thus veto the transaction; (iii) the special committee meets its duty of care in negotiating a fair price; and (iv) the majority-of-the-minority vote is fully informed and there is no coercion of the minority).

65. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309 (Del. 2015). Before *Pattern Energy*, many decisions embraced the view that *Corwin* does not apply in the presence of a controlling stockholder and seemed to imply that such a presence exhausts the list of circumstances in which the purportedly cleansing vote would not come from “disinterested stockholders.” *In re Pattern Energy Grp. Inc. S’holders Litig.*, C.A. No. 2020-357, 2021 WL 1812674, at *63-64 (Del. Ch. May 6, 2021). See, e.g., *In re Merge Healthcare, Inc. S’holders Litig.*, C.A. No. 11388, 2017 WL 395981, at *6-7 (Del. Ch. Jan. 30, 2017) (holding *Corwin* does not apply in controlling stockholder transactions); *Sciabacucchi v. Liberty Broadband Corp.*, No. 11418, 2017 WL 2352152, at *15 (Del. Ch. May 31, 2017) (deeming John Malone not to be a controller and holding that the disinterest precondition was satisfied); *In re Tesla Motors, Inc. S’holder Litig.*, C.A. No. 12711, 2018 WL 1560293 at *13 (Del. Ch. Mar. 28, 2018) (deciding

2. *Directors and Managers*

Director ownership can implicate interested voting in several scenarios. Of course, director elections may be affected by interested voting, especially contested ones. Contested elections can typically occur in the context of a hostile M&A deal (i.e., a proxy fight to unseat the board and redeem a poison pill).⁶⁶ Because of their well-known desire to maintain their respective roles, the votes cast by directors of the target are potentially in conflict with the interests of the other shareholders.

Interested voting by directors can also affect outcomes of friendly deals, such as mergers or any other transaction requiring a shareholder approval: in the period 2010–15, approximately 6.9% of the 392 mergers subject to majority approval with a domestic Russell 3,000 corporation as a target were approved thanks to the pivotal vote of directors and managers.⁶⁷

In some circumstances, director votes are not counted in certain M&A-related resolutions. This is the case for votes in the context of control share acquisition statutes (CSAS), which require a shareholder vote to authorize a tender offer or an acquirer to cross certain thresholds of stock ownership and therefore to obtain control of a corporation.⁶⁸ CSAS contemplate bright-line rules restricting voting by certain shareholders:⁶⁹ While only a few CSAS disqualify

not to apply *Corwin* after finding reasonably conceivable that Elon Musk was in control of Tesla). See generally Lipton, *supra* note 61 (describing how courts interpreted the disinterest precondition under *Corwin*). However, the *Pattern Energy* case expanded the reach of such requirement by finding that the vote of a shareholder who was contractually bound to support a merger transaction irrespective of its merits and who was to receive benefits from the merger that were not shared with the company's public common stockholders was not disinterested and therefore held that the *Corwin* defense did not apply. See also, embracing *Pattern Energy* in not equating disinterest with lack of a controlling stockholder, *Lockton v. Rogers*, 2022 WL 604011, at *10 n.161, 164 (Del. Ch. Mar. 1, 2022). See *infra* notes 84–88 and accompanying text.

66. See *supra* note 10; see also *infra* Section II.B.1.

67. The data is drawn on the database I used in Matteo Gatti, *Reconsidering the Mergers Process: Approval Patterns, Timeline, and Shareholders' Role*, 69 HASTINGS L.J. 835 (2018) (on file with author).

68. See *infra* note 152 and accompanying text.

69. See *infra* notes 152–52 and accompanying text.

directors who are neither officers nor employees,⁷⁰ the vast majority of CSAS would disqualify them if they held any such position.⁷¹

Directors might also have skin in the game in shareholder votes on charter amendments and bylaw amendments, as well as in shareholder proposals. Depending on the type of director (inside, outside, or independent), his/her level of interestedness may be more or less severe.

Managerial ownership raises issues similar to director ownership. In fact, manager ownership might raise more serious issues because, all else being equal, unlike most directors, managers work at the company, where they have a significant and undiversified investment. Like director ownership, management ownership can implicate interested voting in director elections, M&A deals, amendments to the organizational documents, and shareholder proposals. Indeed, as mentioned above, CSAS are more restrictive for officers than for directors who are neither officers nor employees.⁷²

3. Significant Shareholders

Below actual control, whether majority or de facto, significant ownership raises potential interested voting issues. The greater the shareholder stake, the likelier the abstract possibility that the shareholder will be casting the pivotal vote. Also, being a significant shareholder who can be potentially pivotal will make such a shareholder particularly attractive in the eyes of management and deal planners once they reckon that securing its votes may determine the outcome of the resolution/transaction. In other words, these shareholders are important repeat players who can be lured into voting agreements, vote buying, and the like.

In certain settings, the law does intervene to disregard votes from significant shareholders. For example, CSAS generally disqualify the acquirer from voting in such referendums.⁷³ Similarly, under the Delaware Business Combination Statute, the votes of the “interested stockholder,” which the statute defines

70. See ARIZ. REV. STAT. ANN. § 10-2725(B) (2013); IDAHO CODE § 30-1601(11) (2013); NEV. REV. STAT. ANN. § 78.3787 (LexisNexis 2010).

71. See *infra* notes 156 and accompanying text.

72. See *supra* notes 70-71 and accompanying text.

73. See *infra* Section II.A.4 and note 154 and accompanying text.

as anyone with fifteen percent or more of the stock, are not counted toward the two-thirds supermajority that is necessary to obtain an exemption from the three-year moratorium.⁷⁴ In other instances, such as the *Corwin* context, where the law requires that the vote come from “disinterested shareholders” for standard-shifting purposes, judges have been more tolerant, absent the proof of a controlling status. In the 2017 *Sciabacucchi* case, the Chancery Court deemed the disinterest precondition satisfied for *Corwin* purposes, once it could not establish that John Malone controlled Charter Communications.⁷⁵ Arguably, one of the reasons the judiciary tends to equate interested shareholders with controllers is legal certainty. It is one thing to disregard votes in the presence of a controlling shareholder (a relatively rare occurrence); it is another thing to start second-guessing votes of non-controllers.

4. Acquirers

In an M&A transaction, an acquirer sits opposite the shareholders, and its votes might thus be affected by interested voting. All else being equal, buyers are naturally inclined to pay the minimum necessary to secure the deal and, if they already owned some stock in the target, would not be aligned with other shareholders in the context of a shareholder vote.⁷⁶

Indeed, in CSAS, acquirers’ votes are specifically discounted in the underlying referendum.⁷⁷ The law also intervenes in the context of transactions between a parent and a subsidiary, where the parent sits on the acquiring side. A precondition common to such lines of cases as *Solomon v. Pathe* and its progeny, *CNX*, and *M & F Worldwide* is that the transaction is approved (by tenders or votes, as applicable) by a majority of the minority, which, by definition, does not include the parent/acquirer.⁷⁸

While the law expressly intervenes in the scenarios described above, it does not in many other M&A transactions—notably in proxy fights to redeem a pill to let a hostile acquisition go through,

74. See *infra* note 158 and accompanying text.

75. See, e.g., *Sciabacucchi v. Liberty Broadband Corp.*, No. 11418, 2017 WL 2352152, at *15 (Del. Ch. May 31, 2017).

76. See Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 212 & 217. See also *infra* Section II.B.1.

77. See *infra* Section II.B.1.

78. See *supra* note 10 and *infra* Section II.B.1.

in tender offers that do not purport to follow *CNX*, and in mergers that do not purport to follow *M & F Worldwide*. The first scenario constitutes the only route to complete a hostile acquisition,⁷⁹ while the second and third cover the universe of friendly acquisitions for contestable companies (which are not subject to fair dealing requirements typical of conflicted transactions), as well as a subset of deals between a parent and a subsidiary that are structured to avoid a majority-of-the-minority vote.⁸⁰

5. Parties to a Voting Agreement to Support a Transaction

Shareholders sometimes enter agreements to bind their voting choices. When they do, they almost always commit to vote their shares in support of a management-sponsored transaction (e.g., a merger or a recapitalization) or governance change (e.g., a charter amendment). Often, but not always, these shareholders are directors or managers.⁸¹ Other typical shareholders who enter into voting agreements are shareholders with a significant stake in the company. Securing votes via commitments in voting agreements is important to transaction planners because it reduces execution risk. For example, a buyer seeking to acquire a target with a significant portion of the ownership base in the hands of management will seek voting commitments from management to rule out the possibility that they might sell to a rival bidder. If the transaction the shareholder has agreed to support with his/her votes is not beneficial, pre-agreeing to support it would give rise to interested voting.

Voting agreements are frequent and affect transaction outcomes. In the period 2010–15, there were 392 mergers with a domestic Russell 3,000 corporation as target that were subject to approval

79. See *supra* note 10.

80. See Sunjeela Jain, Ethan Klingsberg & Neil Whoriskey, *Examining Data Points in Minority Buy-Outs: A Practitioners' Report*, 36 DEL. J. CORP. L. 939, 950 (2011) (noting that even after *CNX*, companies involved in going private transactions did not take advantage of the safe harbor, the application of the business judgment rule, because of risks that a majority-of-the-minority provision would give some investors incentives to build a position and threaten to veto the deal). But see Edward B. Rock, *MOM's Approval in a World of Activist Shareholders* (Eur. Corp. Governance Inst. Law Working Paper, No. 389/2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3122681 (analyzing majority-of-the-minority conditions in the 2010-17 period and not finding significant evidence that the use of such conditions in Delaware has attracted strategic behavior by hedge funds).

81. See Gatti, *supra* note 65, at 880 n.133.

by a majority of the outstanding shares.⁸² Voting agreements were present in 43.4% of the deals in the sample.⁸³ Twenty-one deals (approximately 5.4% of the sample) were approved thanks to the pivotal vote of parties to a voting agreement.

A recent pronouncement of the Delaware Court of Chancery found that a pivotal vote in favor of a merger that was cast pursuant to a voting agreement did not meet the “disinterest” precondition under *Corwin*.⁸⁴ In particular, the court held that the shareholder’s “contractual obligation to vote in favor of the Merger carried with it financial consequences for breach and financial incentives for performance”⁸⁵ and such “Merger benefits were not shared with the Company’s public common stockholders, who were to be cashed out.”⁸⁶ Therefore, such shareholder’s “votes cannot contribute to cleansing under *Corwin*.”⁸⁷

82. The data is drawn on the database I used for Gatti, *supra* note 67 (on file with author).

83. On average, such agreements aggregated approximately 14% of the outstanding shares (precisely, the median is 13.67%, the mean is 14.74%, and the standard deviation is 10.37%).

84. *In re Pattern Energy Grp. Inc. S’holders Litig.*, C.A. No. 2020-357, 2021 WL 1812674, at *63 (Del. Ch. May 6, 2021); *Id.* at *1 (“The sales process is not presumptively subject to the business judgment rule: the votes in favor fall below a majority of disinterested stockholders because the block at the tipping point was subject to a voting agreement that compelled favorable votes that were not informed, disinterested, or voluntary.”).

85. *Id.* at *63:

CBRE bargained for the right to rollover its preferred stock at a premium into the post-closing company and keep its shares after a merger. And after a change in control, the annual dividend rate on CBRE’s preferred stock would increase by as much as seventy-five basis points, and the holders would receive an accelerated payment on certain otherwise contingent dividends.

86. In the Court’s view, “[a] stockholder is interested if it may derive pecuniary interest from one particular result or is otherwise unable to be fair-minded, unbiased, and impartial. That is, only the votes of those stockholders with no economic incentive to approve a [challenged] transaction count.” *Id.* (quoting *Harbor Fin. Partners v. Huizenga*, 751 A.2d 879, 900 (Del. Ch. 1999)). *Pattern Energy* was followed almost verbatim by *Lockton v Rogers*, 2022 WL 604011, at *10 n.161, 164 (Del. Ch. Mar. 1, 2022).

87. To be sure, the *Pattern Energy* vote in question had additional issues, including that it was neither informed nor uncoerced. It was not informed because the pivotal shareholder, agreed to vote its shares based on the company board’s recommendation well before there were details on the underlying merger transaction. *Pattern Energy*, 2021 WL 1812674, at *62–63. It was coerced because of the contractual obligation to vote in favor of the transaction:

To be a meaningful ratifying vote, the stockholder must be voting on the transaction of her own accord and on the transaction’s merits. A stockholder voting in favor of a specific transaction because it had previously contracted to vote in favor of any transaction in exchange for consideration is not offering the second review that supports application of the business judgment rule. Indeed,

While it remains unclear after *Pattern Energy* if votes subject to *any* voting agreement in support of a transaction will always be disregarded for *Corwin* purposes, at a minimum, the decision demonstrates (i) that *some* voting agreements will carry such effect and (ii) that Delaware judges no longer equate disinterest with mere absence of a controller.⁸⁸

6. Cross-Owners, Empty Voters, and Horizontal Shareholders

Cross-owners are stockholders who own stock of both companies involved in a transaction. If the transaction is considered more attractive for one side, cross-owners may make disproportionate gains by sacrificing their interest qua shareholders of one company if they get overcompensated because of their position in the other.⁸⁹ A cross-owner may also own securities of different natures (say, a debt security and an equity

this Court has excluded from a *Corwin* calculus votes by stockholders who contractually agreed to vote their shares in favor of a transaction. *Id.* at *64 (citing *Larkin v. Shah*, C.A. 10918, 2016 WL 4485447, at *20 (Del. Ch. Aug. 15, 2016)).

Yet, none of these additional flaws makes the holding on the disinterest precondition less relevant: it is rather clear from the opinion that the interested nature of the pivotal vote by CBRE would have been sufficient to flunk *Corwin*.

88. See also *Lockton*, 2022 WL 604011, at *10 n.161, 164. If I understand correctly, Professor Ann Lipton has a slightly different reading of *Pattern Energy*, as she seems to link the lack of disinterest not to the voting agreement, but to the fact that the terms of the investment by CBRE gave it the ability to reinvest in the entity post-closing:

Because CBRE was contractually obligated to vote its shares in favor of the deal – and because it could not have known the details of the deal when bought the preferred, since no final deal had been reached – its vote was uninformed. And, the contractual obligation made its vote coerced. And, CBRE’s ability to participate in the post-merger entity made it an *interested party*. Taking CBRE out of the equation reduced the vote in favor of the merger to 47.3%, which meant, no cleansing.

Ann Lipton, *Controllers, Disinterested Stockholders, and Pattern Energy*, BUS. L. PROF. BLOG (May 15, 2021), https://lawprofessors.typepad.com/business_law/2021/05/controllers-disinterested-stockholders-and-pattern-energy.html (emphasis added). I agree that the Chancery Court considers the right to reinvest in the post-merger entity relevant for establishing CBRE as an interested voter, but such right stems from the very agreement obligating CBRE to support the merger and cannot be disjointed from it (nor can it be plausibly construed that such a right makes CBRE a controlling shareholder of the merging entity). Vice-Chancellor Zurn is quite clear when she states that “CBRE was interested by virtue of the Purchase Agreement, as it stood to receive benefits from the Merger that were not shared with the cashed-out majority.” *Pattern Energy*, 2021 WL 1812674, at *63 (“CBRE’s contractual obligation to vote in favor of the Merger carried with it financial consequences for breach and financial incentives for performance.”).

89. For a review of the economic literature on cross-ownership and its effects in M&A transactions, see Ann M. Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 309–12 (2018).

security) in the same company, and one position (say debt) may misalign her interests with holders of the other (say equity).⁹⁰

An M&A case that attracted a lot of attention is the failed acquisition of King Pharmaceuticals by Mylan Pharmaceuticals, which was subject to shareholder approval of both companies. With its sizeable premium, the transaction would have benefited the hedge fund Perry Corp., owner of about 4.3 million King shares.⁹¹ However, the market view of the deal was that Mylan was overpaying and vocal investors like Carl Icahn campaigned against the deal to hinder Mylan shareholder approval.⁹² To ensure that the deal would not fall through, Perry accumulated 9.9% of Mylan's shares to vote in favor of the merger.⁹³ But it did so via a hedging transaction: While buying all the stock, a brokerage firm working for Perry was shorting the same amount of stock and Perry had a right to sell its shares back to the brokerage firm, which in turn had a right to call the stock back to Perry, thus generating a wash.⁹⁴ The practical effect of this transaction was for Perry to obtain voting rights in Mylan, without bearing any economic interest or risk associated with a decrease in the price of such shares.⁹⁵ The ensuing lawsuit to challenge Perry's voting strategy was eventually dropped after the Mylan/King merger agreement was terminated—however, the Securities and Exchange Commission (SEC) subsequently sanctioned Perry for failure to make

90. In the context of the Zale merger litigation, the Chancery Court discussed, yet dismissed, whether a shareholder, who stood to earn an additional \$3.2 million in prepayment fees on a loan they had previously made to the target Zale, was conflicted in casting its 23.3% stake in favor of the merger (such stake was worth approximately \$225 million at the price of the merger consideration). The alleged conflict was based on the fact that the merger triggered the \$3.2 million payment, but the Court ultimately did not consider such payment material because it only amounted to less than 1.5% of the payment the shareholder was expecting from its consideration under the merger. *In re Zale Corp. S'holders Litig.*, No. C.A. 9388-VCP, 2015 WL 5853693, at *9 (Del. Ch. Oct. 1, 2015), *amended on re-argument*, No. C.A. 9388-VCP, 2015 WL 6551418 (Del. Ch. Oct. 29, 2015).

91. Ianthe Jeanne Dugan, *Hedge Funds Draw Scrutiny Over Merger Play*, WALL ST. J. (Jan. 11, 2006, 12:01 AM), <http://www.wsj.com/articles/SB113695140652343511>.

92. *Id.*

93. *Id.*

94. *Id.* This is what Professors Hu and Black call "empty voting," that is, holding greater voting power than the underlying economic ownership. Henry T. C. Hu & Bernard Black, *Equity and Debt Decoupling and Empty Voting II: Importance and Extensions*, 156 U. PA. L. REV. 625, 626 (2008). See *infra* note 204.

95. See Dugan, *supra* note 91.

disclosures under section 13(d) of the Securities Exchange Act and Rule 13d-1 thereunder.

Notice that cross-ownership in the Mylan/King transaction was artificially created to produce the wash effect typical of empty voting.⁹⁶ But current ownership patterns of public companies unfold analogous situations with no preplanning involved: indeed, cross-ownership is a phenomenon that has been dramatically on the rise.⁹⁷ Cross-ownership was said to tip the balance in the now infamous combination between Tesla and Solar City, where “Tesla’s top twenty five institutional investors—those holding 45.7% of Tesla’s stock—were standing on both sides of the transaction.”⁹⁸ Empirical evidence shows that the more the cross-ownership, the lower the takeover premiums.⁹⁹ In addition, widespread cross-ownership possibly translates into what antitrust scholars have described as horizontal shareholding, a phenomenon that, in their views, has limited competitiveness in product markets and thus has negative consequences on the economy as a whole.¹⁰⁰ In a similar vein, other scholars have recently argued that common owners like index funds have pushed for stronger governance regimes that resulted in labor monopsony and wage compression.¹⁰¹

In certain circumstances, the law intervenes to curb interested voting by cross-owners. In the context of parent-subsidary tender offers, in the CNX case, a pivotal shareholder (T. Rowe Price) had stock

96. See *supra* note 92.

97. In 1985, the five largest shareholders of any given S&P 500 firm would hold 17% of that firm, and 2% of another randomly selected firm in the index. By 2005, the five largest shareholders of a given S&P 500 firm held 26%, and 10% of another randomly selected index firm. Lipton, *supra* note 89, at 310 (citing Jarrad Harford, Dirk Jenter & Kai Li, *Institutional Cross-Holdings and Their Effect on Acquisition Decisions*, 99 J. FIN. ECON. 27, 36 (2011)).

98. Griffith & Lund, *supra* note 9, at 1154.

99. Chris Brooks, Zhong Chen & Yeqin Zeng, *Institutional Cross-Ownership and Corporate Strategy: The Case of Mergers and Acquisitions*, 48 J. CORP. FIN. 187, 189 (2018).

100. See generally Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016) [hereinafter Elhauge, *Horizontal Shareholders*] (focusing on airline and banking industries and raising concerns for when large shareholders own shares of competing companies); Einer Elhauge, *How Horizontal Shareholding Harms Our Economy – And Why Antitrust Law Can Fix It*, 10 HARV. BUS. L. REV. 207 (2020) [hereinafter Elhauge, *Horizontal Shareholding Harms Our Economy*] (responding to critiques to his earlier study on horizontal shareholding with empirical data encompassing several industries and offering legal strategies on how to tackle horizontal shareholding). On the systemic repercussions to our economy of a concentrated investment fund industry, see Coates, *supra* note 56.

101. Zohan Goshen & Doron Levitt, *Agents of Inequality: Common Ownership and the Decline of the American Worker*, 72 DUKE L.J. 1 (2022) (advocating for a break-up of the Big Three).

ownership in both the bidder/parent and the target/subsidiary. Vice-Chancellor Laster, stressing the importance of economic incentives when casting votes, questioned the effectiveness of the majority-of-the-minority clause designed by the deal planners:

T. Rowe Price's has materially different incentives than a holder of CNX Gas common stock, thereby calling into question the effectiveness of the majority-of-the-minority condition. . . . This case is not about "holdings in competitor corporations" or "directional sector bets." It is about a direct economic conflict that at best renders T. Rowe Price indifferent to the allocation of value between [the parent] CONSOL and [the subsidiary] CNX Gas and at worst gives T. Rowe Price reason to favor CONSOL.¹⁰²

While courts have in some cases given more deference to the voting outcome outside the majority-of-the-minority territory,¹⁰³ in others they have at least acknowledged the existence of an issue—albeit in dicta.¹⁰⁴

7. Institutional Investors

Institutional investors' prominence in U.S. equity markets cannot be overstated: almost eighty percent of aggregate equity ownership in U.S. corporations belongs to institutions.¹⁰⁵ As a result, with their voting power, mutual funds have become, as Professor Sean Griffith put it, "the ultimate arbiters of corporate governance."¹⁰⁶ Unfortunately, for a variety of reasons, their votes are riddled with conflicts.

I have already mentioned one of the reasons earlier: cross-ownership.¹⁰⁷ Several funds run by the same sponsor/manager frequently sit on both sides of a transaction, with very little

102. *In re CNX Gas Corp. S'holders Litig.*, 4 A.3d 397, 400, 416–17 (Del. Ch. 2010).

103. *See supra* note 90 and accompanying text.

104. *In re Tesla Motors, Inc. S'holder Litig.*, C.A. No. 12711, 2018 WL 1560293, at *26 n.183 (Del. Ch. 2018) (dismissing the plaintiffs' claim that *Corwin* was inapplicable as a result of lack of disinterest by certain pivotal cross-owner funds on the grounds that *Corwin* was inapplicable because Elon Musk was considered Tesla's controlling stockholder but predicting that the plaintiff's argument might resurface).

105. Half of it belongs to mutual funds. Griffith & Lund, *supra* note 9, at 1155 (citing Charles McGrath, *80% of Equity Market Cap Held By Institutions*, PENSIONS & INV. (Apr. 25, 2017, 1:00 AM), <https://www.pionline.com/article/20170425/INTERACTIVE/170429926/80-of-equity-market-cap-held-by-institutions>).

106. Griffith, *supra* note 7, at 984.

107. *See supra* Section II.A.6.

assurance that the fund casting its vote at the portfolio company does so to maximize the value of *just* that stake. This problem is exacerbated with passive index funds, whose ownership levels have grown significantly over the last ten years,¹⁰⁸ and which are typically not concerned with what happens in the sphere of a specific portfolio company.¹⁰⁹ Their focus is only on the underlying index, and they might, in fact, vote against the interests of the specific portfolio company if other companies in the index were to profit from the decision.¹¹⁰

Yet, cross-ownership is only part of the problem. Legal scholars mention at least two other sources of potential conflicts that might give rise to voting for a resolution irrespective of whether it is a good decision for the actual shareholder/fund: one is the so-called corporate client conflict and the other is the uniform policy conflict.¹¹¹ Under the former, investment managers support certain resolutions to appease their fund management corporate clients to whom they provide various services such as 401(k) plans for their employees, cash management, and other treasury services.¹¹² What a fund can lose or gain by a specific resolution of the corporate client is typically dwarfed by the potential loss of business should the client perceive the fund's vote as adversarial.¹¹³ Because of the so-called uniform policy conflict, it is more practical

108. See Danielle Chaim, *The Corporate Governance Cartel* 9–10 (working paper Jan. 14, 2023), <https://ssrn.com/abstract=4324567> (“Together, the world’s so-called ‘Big Three’ asset management institutions – the BlackRock Group, the Vanguard Group, and State Street Global Advisors – oversee more than \$18 trillion in assets under management . . .”). See also Stephen Choi, Jill E. Fisch & Marcel Kahan, *Who Calls the Shots? How Mutual Funds Vote on Director Elections*, 3 HARV. BUS. L. REV. 35, 55 (2013) (explaining how three mutual-funds complexes oversee significantly more assets than other institutional investors).

109. See e.g., Bebchuk & Hirst, *Index Funds*, *supra* note 9.

110. See e.g., Gordon, *supra* note 11; Enriques & Romano, *supra* note 33.

111. See Griffith & Lund, *supra* note 9, at 1172–87.

112. *Id.* at 1176–81. See also Lucian A. Bebchuk, Alma Cohen & Scott Hirst, *The Agency Problems of Institutional Investors*, 31 J. ECON. PERSP. 89, 102 (2017) (noting that corporations engage asset managers not only to handle their 401(k) plans, but also “to manage cash and short-term investments and also to manage the long-term investments of financial corporations such as insurance companies”). As a result, “mutual funds cast their votes overwhelmingly in favor of management.” Griffith, *supra* note 7, at 989.

113. *But see* Barzuza, Curtis & Webber, *supra* note 9, at 1249 (arguing that when it comes to ESG matters, “index funds are far from reticent shareholders – they are perhaps more active and influential than institutional shareholders have ever been”). For the argument that voting by index funds on ESG matters is itself potentially interested, see Sharfman, *supra* note 9.

for funds to have uniform policies on how votes should be cast, rather than investigating the merits of a single resolution.¹¹⁴ Recent scholarship has also underscored market-wide voting conflicts attributable to institutional investor coalitions.¹¹⁵ These coalitions command over \$70 trillion of assets within U.S. equity markets and have a demonstrated interest in ensuring their members vote in lockstep on a variety of governance issues, regardless of value tied to any one resolution.¹¹⁶

While there is no specific regime addressing interested voting by funds, in the *Tesla* case the Chancery Court acknowledged in dicta the existence of potential implications for *Corwin* purposes of conflicted fund voting.¹¹⁷ Professors Griffith and Lund have argued “that Delaware courts should consider these conflicts before counting the votes of institutional intermediaries as ‘disinterested.’”¹¹⁸

8. *Activist Hedge Funds*

Hedge fund activism has been one of the major forces changing corporate governance around the world, especially on this side of the pond.¹¹⁹ Some authors have welcomed activists as a natural market fix to the collective action problems that dispersed ownership would otherwise raise in large public corporations.¹²⁰

114. See Griffith & Lund, *supra* note 9, at 1172–86. See also Lipton, *supra* note 9, at 177 (“[I]t is common for advisers to centralize and coordinate their voting decisions.”).

115. See Chaim, *supra* note 108, at 2–3, 39 (labeling certain institutional investor coalitions—such as the Council of Institutional Investors (hereinafter CII) and the Investor Stewardship Group (ISG)—as “corporate governance cartel[s],” observing their “collective governance power” over shareholder voting, and noting that “[such] groups not only urge uniformity among their institutional members[,] but also pressure corporations to conform to [their] designated principles”).

116. See *id.* at 2.

117. Griffith & Lund, *supra* note 9, at 1155, n.22 (citing *In re Tesla Motors, Inc. S’holder Litig.*, C.A. No. 12711, 2018 WL 1560293, at *26 n.183 (Del. Ch. 2018)).

118. *Id.* at 1158:

[I]f a plaintiff presents evidence of a disabling economic conflict—either Cross-Ownership Conflict or Corporate Client Conflict—the institutional investor, like conflicted management, should not qualify as disinterested. Such conflicts undermine the rationale justifying the application of a deferential standard of review—that the underlying investors have spoken in favor of the transaction.

I expressed a similar view in Gatti, *Shareholder Protection Post-Corwin*, *supra* note 10, at 397.

119. See *supra* notes 4–6 and accompanying text.

120. See, e.g., Gilson & Gordon, *supra* note 5; Brav, Jiang, Partnoy & Thomas, *supra* note 4, at 1755–60; Alon Brav, Wei Jiang & Hyunseob Kim, *Hedge Fund Activism: A Review*, 4

However, others have been more critical and stressed that, in fact, activists' interests are materially different than those of other shareholders,¹²¹ or can be different in some circumstances.¹²² The bulk of the debate has mainly rotated around an investment horizon issue:¹²³ do hedge funds favor short-termism? While many in the literature answered in the negative,¹²⁴ the short-termist critique has persisted.¹²⁵

The issue is definitely relevant for our purposes, yet solving it would not provide any indication on how to go about curbing interested voting for activists. Assume, arguing, that the short-termists are correct and activists hinder long-term goals of a corporation. Would that be sufficient grounds to consider activists interested stockholders? The answer is most likely no. Pursuing a longer or shorter investment horizon is a prerogative of every shareholder; aggregating shareholders' preferences via a vote will tell, at the level of each corporation, whether the agenda promoted by the given activist should be pursued or not. Disregarding activists' votes on the basis that their actions may jeopardize the long-term prospects of the corporation contradicts basic tenets of

FOUNDATIONS & TRENDS FIN. 185, 192 & 213-22; Lucian A. Bebchuk, Alon Brav & Wei Jiang, *The Long-Term Effects of Hedge Fund Activism*, 115 COLUM. L. REV. 1085 (2015).

121. See K.J. Martijn Cremers, Erasmo Giambona, Simone M. Sepe & Ye Wang, *Hedge Fund Activism and Long-Term Firm Value* 23 (working paper 2018), www.ssrn.com/abstract=2693231 (finding negative long-term effects of shareholder activism); John C. Coffee, Jr. & Darius Palia, 41 J. CORP. L. 545 (2016) (critiquing some of the empirical evidence in favor of activists); Anabtawi, *supra* note 26; Anabtawi & Stout, *supra* note 11; Zohar Goshen & Reilly S. Steel, *Barbarians Inside the Gates: Raiders, Activists, and the Risk of Mistargeting*, 132 YALE L.J. 411 (2022) (criticizing Delaware caselaw's preferential treatment of activists vis-à-vis hostile bidders).

122. Lisa M. Fairfax, *Just Say Yes? The Fiduciary Duty Implications of Directorial Acquiescence*, 106 IOWA L. REV. 1315, 1321 (2021) (arguing that in some cases an activist's intervention may not be in the best interests of the corporation).

123. This, of course, does not exhaust the issues addressed in the literature, especially when it comes to hedge fund conflicts. Kahan & Rock, *supra* note 4, at 1073-74 describe potential conflicts in connection with hedge fund voting, which I separately address in other parts of this Section II.A when I deal with cross-ownership/empty voting and merger arbitrage (see *supra* Section II.A.6 and *infra* Section II.A.9, respectively).

124. See, e.g., Bebchuk, Brav & Jian *supra* note 120; Jesse M. Fried, *The Uneasy Case for Favoring Long-Term Shareholders*, 124 YALE L.J. 1554 (2015); Mark J. Roe, *Corporate Short-Termism – In the Boardroom and in the Courtroom*, 68 BUS. L. 977 (2013).

125. See generally MARK J. ROE, MISSING THE TARGET: WHY STOCK MARKET SHORT-TERMISM IS NOT THE PROBLEM (2022). See also Matteo Gatti, *The Long-Standing Narrative of Stock Market Short-Termism* (Book Review of Mark Roe's MISSING THE TARGET: WHY STOCK MARKET SHORT-TERMISM IS NOT THE PROBLEM (2022)) (working paper 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4258310.

corporate governance since the activist is risking its own money in voting the shares to appoint its candidates.¹²⁶

To be sure, corporations have kept busy trying to curb activists at every turn. The latest in the saga is the Delaware Court of Chancery decision that struck down the anti-activist pill adopted by the Williams Company.¹²⁷ Yet, efforts by corporations have had less to do with strictly curbing interested voting by hedge funds than limiting their ownership level and influence altogether. For the time being, no express regime, doctrine, or corporate practice seeks to directly address interested voting by activist hedge funds.

9. Merger Arbitrageurs

A category of shareholders with short-term interests that determine how they cast their votes are merger arbitrageurs, a category of investors who would typically purchase significant stakes in a target of an M&A transaction shortly before the deal announcement (or earlier upon the spread of rumors about an impending transaction). Normally, arbitrageurs' investment strategy pays off only if the deal closes, irrespective of how advantageous the deal is for the remaining shareholders. Indeed, following the announcement of the M&A transactions, arbitrageurs buy large amounts of shares in the target at slightly below the deal price: typically, the target stock price settles below the deal price post-announcement because of uncertainties that the transaction will ultimately close. Essentially, arbitrageurs bet on the closing of the transaction to profit by selling their shares to the buyer. Therefore, they are inevitably biased to approve the transaction

126. But see the different perspective described by Kahan & Rock, *supra* note 29, at 942-45, according to whom, in some decisions supporting anti-activist poison pills, such as *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *21 (Del. Ch. 2014), boards have convinced judges that it would be contrary to a fair election process if an activist hedge fund bought additional shares to tip the balance of a director election in its favor and thus win it by the power of its purse as opposed to convincing its fellow shareholders with superior arguments. *See infra* note 127.

127. *Williams Cos. S'holder Litig.*, No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. 2021) (invalidating the pill as disproportionate under *Unocal* as a result of the combined effect of: an off-market 5% trigger; a broad definition of "beneficial ownership" encompassing synthetic interests; a broad definition of "acting in concert" inclusive of daisy-chain provision and parallel conduct even in the lack of agreement/understanding; narrow definition of the "passive investor" exemption). For an analysis, see Jeffrey N. Gordon, *The Rejected Threat of Corporate Vote Suppression: The Rise and Fall of the Anti-Activist Pill*, COLUM. BUS. L. REV. 206 (2022) (endorsing the decision).

regardless of its merits and the interests of the remaining unbiased shareholders.¹²⁸ Empirical work by Professors Cox, Mondino, and Thomas confirms the incidence of arbitrageurs on mergers outcomes: in their study, they show that merger arbitrage has a statistically significant positive effect on deal completion.¹²⁹

10. Employee Shareholders

Employee shareholders are a very heterogeneous group (from top executives to rank and file employees, via middle management), with interests, investment goals, and career prospects that vary widely. Aggregate employee ownership has reached significant levels,¹³⁰ and the votes attached to employee shares may, at times, become pivotal to pass resolutions.

Interested voting issues, at least under strict adherence to a shareholder primacy norm, may arise if employees vote their shares to further their interests qua employees rather than qua shareholders. That can typically happen in the context of shareholder proposals (think any pro-labor resolution that management opposes on the grounds that it would be detrimental for the business) and of M&A transactions (where employees might prefer to reject a transaction and a potentially appealing premium if they fear layoffs would ensue).

To be sure, it is disputed whether voting to further the employees' interests to keep their jobs at the expense of maximizing shareholder value would qualify as interested voting.¹³¹ For instance, stakeholderists would argue that such an inclination is reconcilable with the broader interests of the corporation as a whole. Even followers of a shareholder primacy norm might concede that employees' rejecting a valuable offer could just be very well in line with maximizing shareholder wealth—it just means adopting a longer investment horizon. One might even speculate that, from a legal-realist perspective, it is unlikely that judges would decide to disregard votes by workers because

128. See Gatti, *supra* note 67, at 878.

129. James D. Cox, Tomas J. Mondino & Randall S. Thomas, *Understanding the (Ir)relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503, 556–77 (2019).

130. *Employee Ownership by the Numbers*, NAT'L CTR. EMP. OWNERSHIP (Feb. 2023), <https://www.nceo.org/articles/employee-ownership-by-the-numbers> (documenting that ESOPs own approximately \$1.6 trillion in U.S. assets).

131. See, e.g., WEBBER, *supra* note 38.

they do not fit with their view of how they should exercise their rights as capitalists.

In any event, it is worth noting that almost all CSAS do in fact regulate voting by employees in the context of unsolicited acquisitions, as their votes are not counted towards the required majority in all CSAS jurisdictions except for Hawaii, Nebraska, and Pennsylvania.¹³² In other words, CSAS presume employees' votes are interested and disregard them.

11. *Other Activists (Labor, Environmental, Political)*

The shareholder primacy/stakeholderism dichotomy is also at the center of the analysis of votes cast by activists who pursue socially relevant goals in fields such as labor, environmental, social responsibility, lobbying, and political spending.¹³³ Typically, the bulk of such activists' interventions occur in the context of shareholder proposals under SEC Rule 14a-8, with which they press (but cannot bind) management to undertake certain policies in the public interest.¹³⁴

Again, under strict adherence to shareholder primacy, one may question whether certain pro-social initiatives (think, for instance, of the proposal at Bristol-Myers Squibb to stop using experiments on animals)¹³⁵ could amount to a deviation from the best interests of the business. However, recent scholarship has pointed out that, in corporate decisions with significant public impact, these activists seek to cure an agency problem: "[A]gency problems may . . . occur with respect to political, social, environmental, or moral issues. Shareholders have political and social beliefs and values, and managers may make corporate decisions that

132. *See infra* note 156.

133. For an analysis of voting outcomes in these fields during the 2022 proxy season, see Matteo Gatti, Giovanni Strampelli & Matteo Tonello, *How Does Board-Shareholder Engagement Really Work? Evidence from a Survey of Corporate Officers and from Disclosure Data*, in BOARD-SHAREHOLDER DIALOGUE: POLICY DEBATE, LEGAL CONSTRAINTS AND BEST PRACTICES (forthcoming 2023) (manuscript at 17–20), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4256925.

134. *See infra* Section II.B.4.

135. *See Tallarita, supra* note 35, at 1700.

deviate from shareholder preferences in those domains. Stockholder politics is a tool to mitigate this type of problem.”¹³⁶

To date, no express regime or doctrine seeks to curb interested voting by these activists.¹³⁷

12. Summary

This section has reviewed eleven different categories of shareholders whose votes may be interested. Far from being an issue triggered only when a corporation has a controlling shareholder, this section has shown that interested voting might come up in several other circumstances: for example, directors, managers, and cross-owners may swing the outcome in an M&A transaction; some significant shareholder might be bound to vote in a certain way because of a voting agreement, or an activist – with the help of other institutional investors – may be determinant in a director election or a shareholder proposal sponsored by a greenwashing lobbying group. To better grasp when any of these would require legal intervention, the next section explores the contexts in which interested voting most often occurs and the kinds of legal intervention, if any, that are available to impacted shareholders.

B. Interested Voting and Type of Resolution

This section describes the issues that interested voting may raise in the context of M&A transactions (section II.B.1), director elections (section II.B.2), changes to the organizational documents (section II.B.3), and non-binding resolutions like shareholder proposals and say-on-pay votes (section II.B.4).

1. Interested Voting in M&A or Other Major Financial Transactions

Interested voting can impact M&A transactions or other major financial transactions subject to a shareholder vote, and

136. *Id.* at 1752 (internal citation omitted). See also Barzuza, Curtis & Webber, *supra* note 9, at 1252 (suggesting considering of broader set of shareholder *values*); Caleb N. Griffin, *Humanizing Corporate Governance*, FL. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4295710; (same). See *supra* note 38.

137. The regulatory intervention by the Trump SEC on shareholder proposals was to chill 14a-8 activity in general by making it harder to submit such proposals, but that is irrespective of interested voting considerations. See Procedural Requirements & Resubmission Thresholds Under Exch. Act Rule 14a-8, Exchange Act Release No. 89964, 85 Fed. Reg. 70,240 (Sept. 23, 2020) (tightening the requirements for shareholder proposals).

policymakers are aware of that: M&A is one of the few areas in which interested voting gets either some statutory treatment or judicial doctrines intervene. M&A transactions in which interested voting may be implicated range from friendly deals done via a merger, where the vote is generally a statutory requirement,¹³⁸ to hostile deals where, though not a requirement, a vote may occur if the bidder decides to escalate to a proxy fight to replace the target board and eliminate a poison pill.¹³⁹

The risk posed by interested voting in M&A deals is that a suboptimal transaction may ultimately get approved thanks to the pivotal vote of a shareholder whose interest conflicts with that of the other shareholders.

In a friendly deal, barring extraordinary circumstances, directors and managers always vote to support the merger. Sometimes they do so because they have signed voting agreements to that effect.¹⁴⁰ But even without a formal agreement to support the transaction, interested voting can play a crucial role in determining the fate of negotiated deals, where acquirer and target management—in its aim to be “employed” by the former as future controlling shareholder or to get other favors¹⁴¹—might collude by

138. To be sure, in mergers this is true for targets (*see* DEL. CODE ANN. tit. 8, § 251 (2021); REVISED MODEL BUS. CORP. ACT § 11.04 (2021); CAL. CORP. CODE § 1201 (West 2021)), less so for buyers: under section 251(f) of the DGCL, a shareholder vote is not necessary if the certificate of incorporation of the surviving corporation is not changed and the number of shares does not increase more than twenty percent, which essentially means that cash mergers and medium-to-small acquisitions via a merger never trigger a shareholder vote in the acquirer. Note that a similar rule applies in the context of reverse triangular mergers, under the listing rules of the NYSE and the NASDAQ (*see* NYSE, INC., LISTED COMPANY MANUAL § 312.03(c) (2015); NASDAQ STOCK MARKET, INC., MARKETPLACE RULES, R. 4350(i) (2015), respectively), a shareholder vote at the acquirer is triggered if more than twenty percent of the outstanding shares are issued in connection with the merger (in this case it is not the merger itself that is subject to approval, but rather the share issuance).

139. *See supra* note 10 and *infra* note 232.

140. *See supra* note 81.

141. The Chancery Court in *Paramount Communications Inc. v. Time Inc.* noted:

There may be at work [in a friendly deal] a force more subtle than a desire to maintain a title or office in order to assure continued salary or prerequisites. Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm. The mission of the firm is not seen by those involved with it as wholly economic, nor the continued existence of its distinctive identity as a matter of indifference.

Paramount Commc'ns Inc. v. Time Inc., Nos. 10866, 10670, 10935, 1989 WL 79880, at *7 (Del. Ch. 1989), *aff'd*, 571 A.2d 1140 (Del. 1989).

agreeing to a subpar premium for the shareholders and have the merger approved thanks to their interested vote.¹⁴²

In a hostile deal, interested voting stems from certain shareholders and not others, depending on the merits of the transaction. If the offer is value maximizing, shares held by directors and managers voting against it (that is, voting to maintain the board and leave the pill in place) will be in conflict (but the bidder voting in favor will not). Conversely, if the offer is not value maximizing, the bidder voting in favor of the offer (that is, voting to replace the board and redeem the pill) will be in conflict, while directors and managers voting against it will not.

Note that, while in a hostile deal the position of target management and bidder is adversarial (and therefore, depending on whether the bid on the table is value maximizing or not, only one of the two sides can be in actual conflict with the other shareholders), in a friendly deal, whenever the merger consideration is not value maximizing, both target management *and* the acquirer will potentially be conflicted.¹⁴³ Moreover, in a friendly deal, if the merger requires a shareholder vote at the acquiring company as well,¹⁴⁴ interested voting may also influence that outcome.¹⁴⁵

142. For an account of the many conflicts that may arise in friendly deals, see *infra* note 239.

143. As I stated elsewhere when discussing interested voting with respect to hostile deals, "shareholders' conflicts of interest are circumstantial: the mere possibility of a conflict (that is, the simple, positional conflict of bidders sitting on the other side of the transaction or the desire to stay in power for target directors and managers) is not per se sufficient to taint the vote." Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 213–14. The view I expressed in that earlier work is that "[i]t is in fact pursuing a personal interest and voting in the given resolution against the interests of the other shareholders what amounts to a pathology; determining what the interests of the other shareholders are depends on facts and circumstances arising from the actual offer on the table." *Id.* at 214.

144. See *supra* note 133.

145. A case in point was the failed acquisition of King Pharmaceuticals by Mylan Pharmaceuticals, described *supra* Section II.A.6. Another case to consider in this regard is the merger between Hewlett-Packard and Compaq, which was approved by the Hewlett-Packard shareholders with a mere 51.4% of the votes and with allegations of vote-buying by Hewlett-Packard: four days before the Hewlett-Packard shareholder meeting, Deutsche Bank submitted its proxy, voting its shares against the merger. Marcel Kahan & Edward Rock, *The Hanging Chads of Corporate Voting*, 96 GEO. L.J. 1227, 1229 (2008). On that same date, Hewlett-Packard closed a credit facility to which Deutsche Bank was added as a co-arranger. *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513-NC, 2002 WL 549137, at *3 (Del. Ch. 2002). Allegedly, on the morning of the shareholder meeting, at the demand of Hewlett-Packard management, a telephone conference was held between Deutsche Bank and Hewlett-Packard, after which the bank changed most of its votes in support of the proposed

Similar considerations apply to major transactions such as spin-offs, recapitalizations, and reclassifications that require shareholder approval.

The outcome of M&A transactions is, in fact, swayed and determined by interested voting. How frequently this happens is not easy to quantify with precision, but there are some indicia. In a study covering deals approved in the 2010–2015 period, I found that out of thirteen deals that were approved by a vote of less than sixty percent of the shares outstanding,¹⁴⁶ six ultimately passed because of votes cast by insiders and/or votes subject to a voting agreement.¹⁴⁷ For this Article, I ran a similar study for the

merger. In the ensuing litigation, at the motion to dismiss stage, the court emphasized that it would maintain its focus on the “possible deleterious effects of a challenged vote-buying agreement on shareholders,” especially whether a vote-buying agreement was “sufficient to change the result of a vote,” and shareholders were “defrauded or disenfranchised.” *Id.* at *5. The case was eventually dismissed on the merits for the plaintiff’s failure to prove that management improperly enticed or coerced Deutsche Bank into voting in its favor. *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513–NC, 2002 WL 818091 (Del. Ch. 2002).

146. The 13 deals approved by a close margin stem from a sample of 392 deals (a) for a Russell 3000 domestic target, (b) with control contestable in the market, and (c) subject to approval by a majority of the shares outstanding (that is, the default rule in Delaware and several other states). *See Gatti, supra* note 67, at 851–52, 858–59 (2018).

147. *Id.* at 879–80. The table below (from *id.* at 880 n.133) lists all deals approved with a percentage of less than 60% of the outstanding shares in the 2010–2015 period, with details on approving percentages, insider ownership levels, whether there was a voting agreement, and whether the vote by insiders was pivotal for approving the merger.

Deals for Contestable Russell 3000 Domestic Companies Potentially Tainted by Interested Voting in the 2010–2015 Period (Source: Gatti, 2018)

Target Company Name	Meeting Date	Approving % of Shares Outstanding	Insider Ownership (*)	Voting Agreement? (%)	Insider Vote Pivotal?
infoGROUP	6/29/10	57.23%	~34%	Yes (~34%)	Yes
Virtual Radiologic	7/12/10	56.99%	~36%	Yes (~33%)	Yes
Occam Networks	1/27/11	59.47%	~30%	Yes (~27%)	Yes
Conexant Systems	4/18/11	50.85%	~1.41%	No	Yes
Marshall & Ilsley	5/17/11	58.00%	~1.54%	No	No
drugstore.com	6/2/11	52.18%	< 2%	No	Almost (**)
Zoran	8/30/11	57.00%	~14%	Yes (1%)	Yes

2016–2020 period out of a dataset from Deal Point Data¹⁴⁸ and found a similar result: five out of ten close margin deals (i.e., approved by a vote of less than sixty percent of the shares outstanding) passed thanks to an insider's vote or a voting agreement.¹⁴⁹

Cogdell Spencer	3/9/12	59.43%	~6.6%	No	No
Medicis Pharmaceutical	12/7/12	59.52%	~3.8%	No	No
EnergySolutions	4/26/13	58.14%	~4.1%	No	No
H.J. Heinz	4/30/13	59.81%	~1.4%	No	No
Plains Exploration & Production	5/20/13	57.18%	~31.3%	Yes (~31.3%)	Yes
Zale	5/29/14	53.12%	~24.7%	Yes (~23.2)	Yes

(*) Includes ownership by directors, management, and significant shareholders (other than 13G filers).

(**) The resolution approving the merger would still have passed without the insider vote, but with an extremely tight margin.

148. Dataset on file with author.

149. The table below lists all deals approved with a percentage of less than sixty percent of the outstanding shares in the 2016–2020 period, with details on approving percentages, insider ownership levels, whether there was a voting agreement, and whether the vote by insiders was pivotal for approving the merger.

Deals for Contestable Delaware Public Companies Potentially Tainted by Interested Voting in the 2016–2020 Period (Source: Gatti 2022)

Target Name	Company	Approving % of Shares Outstanding	Insider Ownership (*)	Voting Agreement? (%)	Insider Vote Pivotal?
QEP Resources		51.15%	1.34%	No	Yes
Pattern Group	Energy	52.34%	1.50%	Yes (9.60%)	Yes
Arotech		54.98%	8.70%	Yes (7.10%)	Yes
Keryx Biopharmaceuticals		56.12%	21.00%	Yes (5%)	Yes
ZAGG		59.05%	2.90%	Yes (2%)	No
Adesto Technologies		59.21%	3.10%	Yes (3.10%)	No
MobileIron		59.44%	1.40%	No	No
Aquantia		59.66%	14.50%	Yes (13.40%)	Yes
Alaska Communications Systems Group		59.67%	3.66%	Yes (3.80%)	No
Kindred Healthcare		59.70%	3.81%	No	No

(*) Includes ownership by directors, management, and significant shareholders (other than 13G filers).

To be sure, in certain scenarios where interested voting can impact an M&A transaction, the law intervenes with a specific regime. I refer to (a) disinterested shares regimes for CSAS and business combination statutes, (b) majority-of-the-minority clauses, and (c) the *Corwin* doctrine. Also, in general, the law invalidates certain vote buying transactions if the overall transaction is not intrinsically fair or the interest of the vote buyer is misaligned with the other shareholders' interests,¹⁵⁰ but courts have generally refused to find sanctionable vote buying.¹⁵¹ Below is a short description of the specific regimes.

a. *CSAS and Business Combination Statutes.* All states that have adopted a CSAS, which require unsolicited acquirers of significant stakes to obtain a prior authorization before crossing certain ownership thresholds, contemplate bright-line rules restricting voting by certain shareholders.¹⁵² Such authorizations must be passed by a majority (sometimes a supermajority) of disinterested shareholders.¹⁵³ In the absence of such authorization, shareholders crossing the applicable threshold cannot generally exercise the voting

150. See *Schreiber v. Carney*, 447 A.2d 17, 24 (Del. Ch. 1982) (“[V]ote-buying is illegal *per se* if its object or purpose is to defraud or disenfranchise the other stockholders.”). Because the agreement in *Schreiber* benefited the public shareholders, the court decided there was no fraud or disenfranchisement. *Id.* at 26; *Crown EMAK Partners, LLC v. Kurz*, 992 A.2d 377, 387–90 (Del. 2010) (establishing that, while generally not illegal, vote-buying is not permitted when the economic interests and the voting interests of the shares do not remain aligned).

151. See *Hewlett v. Hewlett-Packard Co.*, Civ. A. No. 19513-NC, 2002 WL 818091, at *15 (Del. Ch. 2002) (failing to find vote buying where management convinced an institutional shareholder to vote for a proposed merger on a promise of future business); *Weinberger v. Bankston*, 1987 WL 20182, at *4 (Del. Ch. 1987) (failing to find impermissible vote buying where an out of court settlement to calm an insurgent where the corporation agreed to pay the insurgent's proxy expenses in exchange for the insurgent granting an irrevocable proxy to management because the purpose was to benefit the public shareholders); *Kass v. Eastern Airlines, Inc.*, 1986 WL 13008, at *4 (Del. Ch. 1986) (finding that an agreement to vote was not contrary to public policy where an agreement was made to an entire class and was fully disclosed); *cf. Flaa v. Montano*, No. CIV.A. 9146-VCG, 2014 WL 2212019, at *8 (Del. Ch. 2014) (discussing vote buying but not deciding if the agreement disenfranchised other shareholders, thereby making it impermissible. Instead, the court sidestepped the question and struck down the agreement for failing to make proper disclosure on proxy materials).

152. See Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111, 115–16 (1987). For a list of states that adopted such legislation, along with statutory references, see Appendix I in Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 283–90.

153. For references to statutory provisions, see *id.*

rights attached to their shares exceeding the applicable threshold.¹⁵⁴ All existing CSAS disqualify the acquirer from voting in such referendums.¹⁵⁵ Almost all the statutes also disqualify officers and employees,¹⁵⁶ and a few disqualify directors who are neither officers nor employees.¹⁵⁷

Similarly, the Delaware Business Combination Statute (section 203 of the DGCL) imposes a three-year moratorium for entering into a business combination with an “interested stockholder” (any shareholder with at least a fifteen percent stake), but this moratorium does not apply if, among other things, the underlying combination is authorized by “at least 66 2/3% of the outstanding voting stock *which is not owned by the interested stockholder.*”¹⁵⁸

b. Majority-of-the-Minority Clauses. Majority-of-the-minority clauses in the context of a parent/subsidiary freeze-out merger also address interested voting. Such clauses constitute a practice that offers a procedural advantage for controlling shareholders and other deal planners who are subject to deal litigation. Under traditional entire fairness jurisprudence, the burden of proving that the transaction satisfies entire fairness, which the law initially puts on the defendants because of the conflicted nature of the transaction, can be shifted back to the plaintiff if certain procedural safeguards are followed: namely, that the transaction is either negotiated by an independent committee with broad negotiating powers¹⁵⁹ or that the transaction is approved by the majority of

154. The remedies differ. For instance, if the crossing of the twenty percent threshold is not approved by a majority of the disinterested shares, Hawaii suspends for one year the voting rights of the crossing shareholder. Other states, such as Mississippi and Oklahoma, neutralize all voting rights of the shareholder who do not get approved by a majority of the disinterested shares. *Id.* In Wisconsin, the remedy is a reduction of the voting power to one-tenth of the crossing shareholder’s shares. *Id.*

155. *Id.*

156. The only jurisdictions that have adopted a CSAS not limiting votes by officers and employees are Hawaii, Nebraska, and Pennsylvania. HAW. REV. STAT. § 414E-2 (2008); NEB. REV. STAT. § 21-2441 (2012); 15 PA. STAT. AND CONS. STAT. ANN. § 2562 (West 2012).

157. See ARIZ. REV. STAT. ANN. § 10-2725(B) (2013); IDAHO CODE § 30-1601(11) (2013); NEV. REV. STAT. ANN. § 78.3787 (LexisNexis 2010).

158. DGCL DEL. CODE ANN. Tit. 8 § 203(a)(3) (2017) (emphasis added).

159. The independent committee was a suggestion by the *Weinberger* court:

Although perfection is not possible, or expected, the result here could have been entirely different if [subsidiary] UOP had appointed an independent negotiating committee of its outside directors to deal with [parent] Signal at arm’s length. Since fairness in this context can be equated to conduct by a theoretical, wholly

the minority of the target shareholders.¹⁶⁰ But if the transaction meets the more onerous procedural requirements of the *MFW* safe harbor, which include, in a nutshell, approval of the transaction by *both* an independent committee of directors *and* a majority of the minority of shareholders, the transaction will be subject to simple business judgment review.¹⁶¹ All in all, for transactions involving a controlling shareholder, the law addresses interested voting with a preferential treatment to defendants who subjected the transaction to a majority-of-the-minority vote, yet it falls short of making it a legal prerequisite.¹⁶²

c. Corwin. The *Corwin* line of cases also addresses interested voting, by requiring as a precondition to the standard-shifting effect of the merger vote (from the more taxing *Revlon* or *Unocal*

independent, board of directors acting upon the matter before them, it is unfortunate that this course apparently was neither considered nor pursued. Particularly in a parent-subsidiary context, a showing that the action taken was as though each of the contending parties had in fact exerted its bargaining power against the other at arm's length is strong evidence that the transaction meets the test of fairness.

Weinberger v. UOP, Inc., 457 A.2d 701, 709 n.7 (Del. 1983) (citations omitted).

160. Compare *Kahn v. Lynch*, 638 A.2d 1110, 1117 (clarifying that an effective independent committee would only shift the burden of proof, which in the specific case did not happen because the independent committee faced a retributive threat by parent—to launch a tender offer at a lower price if the committee kept rejecting it terms—thus impairing its judgment and negotiating abilities), with *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 937 (Del. 1985) (“[A]pproval of a merger . . . by an informed vote of a majority of the minority shareholders, while not a legal prerequisite, shifts the burden of proving the unfairness of the merger entirely to the plaintiffs.”).

161. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635, at 645–55 (Del. 2014) (explaining that the business judgment standard of review applies if the controlling stockholder subjects the merger to the necessary approval of: (i) a special committee of independent directors with separate financial and legal advisors, fully empowered to reject the transaction and negotiating a fair price with due care and (ii) a majority of the unaffiliated stockholders, fully informed and not coerced).

162. The entire fairness scrutiny does not necessarily entail a limitation on the parent's voting rights at the shareholders' meeting of the subsidiary: *Rosenblatt* specified that approval by a majority of the minority is not “a legal prerequisite,” *Rosenblatt*, 493 A.2d at 937, and so parent companies can get away with not subjecting the deal to a majority of the minority provision if they entrusted a well-functioning independent committee with broad negotiating powers. See Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 16 (2005) (showing evidence that transactions planners prefer independent committees to majority-of-the-minority approvals).

standards of review to the more lenient business judgment rule) that, among other things, such a vote be disinterested.¹⁶³

Other than these specific regimes and outside of the scope of the vote-buying prohibition, the law does not intervene in curbing interested voting in M&A transactions.

2. Interested Voting in Standalone Director Elections (Outside of M&A or Other Major Financial Transactions)

Proxy fights in the M&A field aimed at removing a board and redeeming a pill do not exhaust instances of interested voting in director elections. Contested elections may be affected by interested voting even in the absence of an underlying transaction: consider a proxy contest to install an activist slate. In such a scenario, assuming the purpose of the activist is to extract value to the detriment of the corporation, the insurgent votes would be interested in the abstract. If, vice versa, the insurgent is acting in the best interest of the corporation but incumbent directors, managers, and their associates are motivated by entrenchment, the resolution might run the risk of being impacted by interested voting.

In practice though, standalone director elections (that is, outside of M&A or other major transactions)¹⁶⁴ are not ideal candidates for legal intervention. First, the bulk of director elections are uncontested, meaning the practical advantages of second guessing the outcome of the election would at best be minimal. Second, whilst contested director elections in the M&A context would give the adjudicator some metrics (because there is a set price the acquirer is willing to pay and, arguably, a price range should the target stay independent), contested director elections with no underlying transaction are hard to police. Both insurgents and incumbents would be arguing that the corporation would fare better under their control, yet the judge would have a hard time establishing who is right and who is wrong. Moreover, from a purely doctrinal angle, a standalone director election is an organizational step that is merely prodromic to future corporate

163. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 309 (Del. 2015) (“[W]hen a transaction not subject to the entire fairness standard is approved by a fully informed, uncoerced vote of the disinterested stockholders, the business judgment rule applies.”). See *supra* notes 65 and 84–88 and accompanying text.

164. A director election in the context of an M&A deal (typically to replace the board and redeem a poison pill) is different because it effectively works as a referendum on the acquisition.

actions by the elected board. The law typically intervenes to sanction conflicted actions taken by the elected directors, not their actual election to office. This is commonsensical: shareholders (no matter how big or small) should be able to vote for themselves to lead the corporation—anything stricter would likely bring along hefty disincentives to investment and to choosing the corporate form.

Possibly for the reasons stated above, there is no specific regime under current law to address this type of interested voting. While under well-known cases such as *Schnell v. Chris-Craft*,¹⁶⁵ *Blasius*,¹⁶⁶ and *Hewlett-Packard*,¹⁶⁷ the incumbent group is prohibited from tampering with the franchise, no such doctrine is specifically aimed at policing the incumbents' actual exercise of their voting rights.¹⁶⁸ The only general doctrine addressing interested voting is vote buying.¹⁶⁹

3. Interested Voting in Rulemaking: Charter and Bylaw Amendments (Outside of M&A or Other Major Financial Transactions)

Charter and bylaw amendments can be crucial moments in the life of a corporation. In some circumstances, they are adopted as a precondition to, or to facilitate, a financing, a recapitalization, or an

165. *Schnell v. Chris-Craft Indus., Inc.* 285 A.2d 437 (Del. 1971) (invalidating a director action, on its face permitted by the DGCL, which anticipated the date of the annual meeting and moved its location to dampen turnout and fend-off an insurgent campaign). The Delaware Supreme Court stressed that “inequitable action does not become permissible simply because it is legally possible.” *Id.* at 439.

166. *Blasius Indus., Inc. v. Atlas Corp.*, 564 A.2d 651, 661 (Del. Ch. 1988) (stating if the board acts “for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action”). See, for a reductionist read of *Blasius* on grounds that the *Unocal/Unitrin* standards are sufficient to protect the franchise, William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 884–90 (2001).

167. *Hewlett v. Hewlett-Packard Co.*, No. CIV.A. 19513-NC, 2002 WL 549137, at *4 (Del. Ch. Apr. 8, 2002). The Delaware Court of Chancery stated:

Shareholders are free to do whatever they want with their votes, including selling them to the highest bidder. Management, on the other hand, may not use corporate assets to buy votes in a hotly contested proxy contest about an extraordinary transaction that would significantly transform the corporation, unless it can be demonstrated, as it was in *Schreiber*, that management's vote-buying activity does not have a deleterious effect on the corporate franchise.

Id. (emphasis added) (footnotes omitted).

168. Notably, only the first of the three decisions is not an M&A case.

169. For a discussion on vote buying see *infra* notes 206–208 and accompanying text. See also *supra* note 167.

M&A transaction, in which case the considerations made above will apply.¹⁷⁰ But in some other, possibly more numerous, cases, they are adopted to alter the governance rules of the corporation going forward. While the amendment is sometimes undertaken to improve and streamline certain governance practices and everyone is substantially in favor of the change, in other cases the amendments can be contentious—especially given that, in most instances, managers and investors do not see eye to eye.¹⁷¹ In particular, management may be pressing for certain changes favoring director entrenchment (with or without a hostile transaction on the horizon), which shareholders might not endorse. Board classification can be used as an example.¹⁷² Assume that the incumbents have sufficient votes to feel confident they will tip the balance in their favor and approve board classification. Should their votes (coming from directors and managers and their associates) be considered problematic because of interested voting?

Here, similar remarks to those I made in the immediately preceding section apply: there is no specific regime under current law to address this type of interested voting. While incumbents cannot tamper with the franchise, the only general doctrine addressing interested voting is vote buying.¹⁷³ However, there is case law dismissing challenges to charter amendments on the grounds that they were approved by a duly informed vote of the disinterested stockholders.¹⁷⁴

170. See, e.g., *Stroud v. Grace*, 606 A.2d 75 (Del. 1992).

171. See generally Lucian A. Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002) (describing the pro-management asymmetry of the charter amendment process).

172. To be sure, because of market pressure, an opposite phenomenon of board declassification has been occurring as of lately, at least for large firms. See Yaron Nili & Kobi Kastiel, *The Corporate Governance Gap*, 131 YALE L.J. 782 (2022) (noting that classified boards in mid-size and small firms are more resilient).

173. See *supra* notes 167–169 and accompanying text.

174. *Weiss v. Rockwell Int'l. Corp.*, 1989 WL 80345, at *3, *7 (Del. Ch. July 19, 1989), *aff'd*, 574 A.2d 264 (Del. 1990); *Stroud*, 606 A.2d at 83. For more background, see Cunningham, *supra* note 9, at 49–50.

4. Interested Voting in Non-Binding Resolutions (Shareholder Proposals and Say-On-Pay)

Shareholders of corporations reporting to the SEC may make proposals on a wide array of topics that include political, environmental, social, and governance issues under SEC Rule 14a-8.¹⁷⁵ Shareholders avail themselves of this opportunity in very large numbers, and the trend is upward. In the last decade, it is reported that S&P 500 corporations received more than 2,400 shareholder proposals on socially relevant issues alone.¹⁷⁶ By design, the motives behind such proposals transcend traditional investment paradigms to embrace broader societal goals. Indeed, at first glance, pursuing a political agenda via shareholders proposals can be seen as a typical example of interested voting. Politically motivated activists might pressure a particular company to gain publicity or score some political points even if the company would ultimately suffer from the policy change. This is, in fact, a debated point at the moment, with some commentators noting that this phenomenon resembles less a conflict of interest than a form of representation of broader shareholder interests.¹⁷⁷ In their view, shareholders are interested in these proposals because they offer a socially relevant option to express their moral and political values.¹⁷⁸ In a somewhat similar vein, authors addressing ESG investing and voting (especially on the E&S front) have pointed out that current sensitivity to topics such as climate, human capital, and public interest issues in general can be reconciled with financial orthodoxy as a way to address systemic risk in the

175. See SEC Rule 14a-8, 17 C.F.R. § 240.14a-8 (2023).

176. Tallarita, *supra* note 35. See also Matteo Tonello, *2021 Proxy Season Preview and Shareholder Voting Trends (2017-2020)*, THE CONF. BD. (Jan. 26, 2021), <https://www.conference-board.org/topics/shareholder-voting/2021-proxy-season-preview> (documenting emboldened efforts on climate and human capital during the 2020 proxy season).

177. Tallarita, *supra* note 35, at 1735.

178. *Id.* See also Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (noting that maximizing market value is not sound when shareholders have pro-social concerns); Hart & Zingales, *supra* note 38 (expanding on Elhauge and focusing on how to maximize shareholder welfare and not market value via shareholder voting); Barzuza, Curtis & Webber, *supra* note 9, at 1252 (arguing that “if shareholders own the firm, then their preferences, broadly construed, should be taken seriously”).

long term.¹⁷⁹ However, other authors dissent and point out that voting and voting outcomes at odds with a corporation's financial gain should be contained.¹⁸⁰

Whether or not at odds with traditional views on what constitutes the best interests of the corporation, Rule 14a-8 resolutions are not binding. Therefore, no matter how interested the actual resolution may be, it will not *automatically* result in any policy change at the corporation. This is not to say that these resolutions do not matter: for a variety of reasons, they surely do,¹⁸¹ considering also that approval rates have been on the rise since 2018.¹⁸² Yet, questions remain as to whether interested voting represents an issue as critical as in other types of binding resolutions and whether such an issue should call for any legal intervention other than on the disclosure front. Similar considerations apply to other

179. See, e.g., Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1, 5 (2020) (arguing that climate activism by some in the institutional investor industry is explainable as a way to tame systemic risk); John C. Coffee, Jr., *ESG, Common Ownership, and Systematic Risk: How They Intersect* (Eur. Corp. Governance Inst., Law Working Paper No. 541/2020, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3678197 (arguing that large index funds have been pushing for mandating ESG disclosures to help reduce systemic risk); Gordon, *supra* note 11.

180. See Sharfman, *supra* note 9 (arguing that index funds advisors who support E&S shareholder proposals are conflicted because they care more about attracting new clients to increase their assets under management than what is in the best interests of their existing investors in the fund and ultimately of the portfolio companies in which the funds are invested).

181. First, the board typically spends time and efforts to convince shareholders to vote against the proposal. Also, corporations unwilling to participate in the dialogue prompted by townhall resolutions, and to implement resolutions that pass, do that at their own risk given that they may attract the ire of the investor community. Moreover, market movement reacting to the outcome of shareholder proposals is generally observed, though but many confounding factors are normally present and thus inferences on what to make of cumulative abnormal returns are problematic. See Randall S. Thomas & James E. Cotter, *Shareholder Proposals in the New Millennium: Shareholder Support, Board Response, and Market Reaction*, 13 J. CORP. FIN. 368, 386 (2007); Joseph A. McCahery, Zacharias Sautner & Laura T. Stark, *Behind the Scenes: The Corporate Governance Preferences of Institutional Investors*, 71 J. FIN. 2905, 2912 (2016).

182. The 2018–2022 period showed an increase in the passage rate of all voted Rule 14a-8 resolutions relating to environmental and social matters at Russell 3,000 corporations: we went from around five to six percent in 2018 and 2019, to almost twelve percent in 2020 and 2022, with a peak of twenty-one percent in 2021. Though the 2022 proxy season showed an actual decrease in the passage rate (from twenty to 11.6 percent), the absolute number of passed resolution was the highest on record (thirty-five). Of course, this is just a partial picture, because to really capture the whole phenomenon, one needs to also track the withdrawn resolutions that resulted in a settlement with, and policy adoption by, the company. I gathered the data above from a database run by The Conference Board/ESGAUGE in collaboration with the Rutgers Center of Corporate Law and Governance.

non-binding resolutions, such as say-on-pay.¹⁸³ No matter how important, one wonders if they are candidates for a policy change tackling interested voting,¹⁸⁴ other than improving mandatory disclosures relating to voting outcomes (for instance, by requiring breakdowns of the shareholders who voted in favor, voted against, or abstained).¹⁸⁵

Currently, there is no specific regime under the law to address interested voting in either 14a-8 or say-on-pay resolutions.

* * *

In sum, while interested voting has been addressed by the law in some specific M&A contexts and where vote buying occurs, there is no existing regime addressing interested voting in its other forms for the aforementioned types of transactions.

III. LAW AND POLICY ADDRESSING INTERESTED VOTING

This Part briefly recaps regimes curbing interested voting, which I categorize between bright-line rules (section III.A) and open-ended standards (section III.B). Additionally, in section III.C, I introduce the “anything goes” approach that is seemingly applicable whenever the law is silent on interested voting and enables shareholders to cast votes regardless of any conflicted interest they may have (I further assess the implications of an “anything goes” approach in Part IV). In section III.D, I analyze the trade-offs between bright-line rules, open-ended standards, and “anything goes” regimes.

183. Dodd-Frank Act, Pub. L. No. 111-203, § 951, 124 Stat. 1899 (2010) (requiring public companies to offer their shareholders an advisory vote to approve or disapprove of the compensation package of executives). *See generally* Randall S. Thomas, Alan R. Palmiter & James F. Cotter, *Dodd-Frank’s Say on Pay: Will it Lead to a Greater Role for Shareholders in Corporate Governance*, 97 CORNELL L. REV. 1213 (2012) (describing that, before mandates, the impetus for say-on-pay emerged bottom up from 14-a8 proposals).

184. Consider two opposite scenarios. In the first, a resolution on climate passes thanks to the pivotal vote of a climate activist who makes no mystery it does not care about any potential losses for the company. Would it make sense for directors to judicially challenge the pivotal vote when they can simply *not* implement the resolution? One may say that directors could be worried about repercussions at their next annual election – but that would likely happen even if they sued to reverse the voting outcome. In the second scenario, a resolution on “say-on-pay” passes with the pivotal vote of directors. Would it make sense for a plaintiff to litigate the outcome when such outcome is non-binding anyway?

185. *See infra* text accompanying notes 200–201.

A. Curbing Interested Voting with Bright-Line Rules

Some corporate law regimes tackle interested voting with bright-line rules requiring that shareholder approval come either from “disinterested shares” or from a “majority-of-the-minority” of shareholders.

Disinterested shares regimes, which vary in scope and structure, include CSAS and the Delaware Business Combination Statute: for both categories, the regime works as a prerequisite for an M&A transaction.¹⁸⁶ Under a CSAS, acquirers of significant stakes need shareholder approval before crossing certain ownership thresholds; for such approval, express rules restrict voting by some types of shareholders, such as acquirers,¹⁸⁷ officers, employees,¹⁸⁸ and (in a few cases) directors.¹⁸⁹ Similarly, under the Delaware Business Combination Statute, there is an exemption from the three-year moratorium for entering into a business combination with an “interested stockholder” so long as the underlying combination is authorized by a two-thirds supermajority of the outstanding voting stock “*which is not owned by the interested stockholder.*”¹⁹⁰

Majority-of-the-minority requirements, which condition the approval of the transaction on the affirmative vote of all shareholders excluding the controlling one, come up in the context of standard shifting judicial doctrines under Delaware M&A law, such as the *Weinberger/Lynch* line of cases and the *M & F Worldwide* line of cases.¹⁹¹ Under each, the presence of such a vote may change the standard of review in connection with the actions (or omissions) by the transaction planners (directors, managers, and sometimes controlling stockholders).¹⁹²

186. See *supra* notes 152–157 and accompanying text.

187. See *supra* note 154.

188. See *supra* note 156.

189. See *supra* note 157.

190. Del. Code Ann. Tit. 8 § 203(a)(3) (2022) (emphasis added).

191. See *supra* Section II.A.1.

192. To be sure, in the absence of a controlling shareholder with at least fifty percent of the voting stock, when it may be unclear *ex ante* whether the corporation is subject to *de facto* control, calculating a majority of the minority can be less clear cut and thus the relevant requirement would not qualify as a bright-line rule. However, this distinction is likely moot from a practical standpoint. Majority-of-the-minority conditions are voluntary deal structuring devices that a controller puts in place to benefit from a more lenient standard of review. If a

The present regimes do not exhaust the realm of possible interventions via bright-line rules. For example, there have been calls to automatically disqualify certain shareholders, such as index funds, because of the lack of proper incentives to be informed and vote in the best interest of the corporation.¹⁹³ In fact, given the outsized influence gained over the years by the Big Three,¹⁹⁴ some scholars propose wholesale regimes applicable to institutions' votes irrespective of the given resolution,¹⁹⁵ while others suggest reforming the investment fund industry by using antitrust tools,¹⁹⁶ or even breaking these institutions up altogether.¹⁹⁷ This makes sense if one is persuaded by the view that index funds have a negative impact on corporate governance: because the endemic nature of their voting practices makes their conflicts hardly episodic, intervening on the single resolution by looking at all facts and circumstances would be a fool's errand. All the while, BlackRock has been rolling out a system of pass-through voting by its ultimate investors who would vote directly in the portfolio

significant stockholder refuses in the first place to consider itself a de facto controlling shareholder, such stockholder will also *not* condition the deal to a majority-of-the-minority device.

193. This is the proposal with respect to passive index funds made by Professor Dorothy Lund. *See generally* Lund, *supra* note 9.

194. Bebchuk & Hirst, Giant Three, *supra* note 9.

195. Griffith & Lund, *supra* note 9 (suggesting that under certain circumstances an institutional investor should not qualify as disinterested for *Corwin* purposes). Somewhat similarly, Larry Cunningham has proposed opt-in provisions where, in high-stakes resolutions, directors submit the proposal to a special vote by "quality shareholders," essentially long-term shareholders other than index funds. *See generally* Cunningham, *supra* note 9.

196. Chaim, *supra* note 108, at 55-59 (suggesting an antitrust approach to curb investor coalition influence on member vote casting, by banning coalition communications, requiring such communications to trigger disclosure obligations, and classifying coalitions as "standard-setting organizations"); Elhauge, *Horizontal Shareholders*, *supra* note 100; Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. 669 (2017).

197. *See* Goshen & Levitt, *supra* note 101 (advocating for a break-up of the Big Three).

companies in lieu of the fund manager.¹⁹⁸ This is a private initiative that could be replicated at the legislative level.¹⁹⁹

Of course, in lieu of or in addition to substantive rules, there is disclosure-type regulation. The SEC could expand its disclosure rules by requiring disclosure with some granularity of the type of shareholders who backed a certain resolution and those who did not. Under existing regulations, this is required only with respect to some institutional investors like mutual funds, whereas general disclosures on voting outcomes at the company level simply require information as to the breakdown of votes in favor, against, and abstained.²⁰⁰ The investor public could benefit from knowing who backed what at the company level—especially given the current phase of reconcentration of corporate ownership. This could be especially helpful for non-binding resolutions where, as explained,²⁰¹ substantive restrictions would not work, but investors might benefit from more detailed information on who backs Rule 14a-8 resolutions, which have experienced a recent uptick in votes in favor and in passages.²⁰²

B. Curbing Interested Voting with Open-Ended Standards

In other circumstances, the law uses open-ended standards for certain interested voting episodes. A standard is an ex-post command in which “efforts to give content to the law are undertaken . . . after individuals act.”²⁰³ For example, a standard to

198. Andrew Ross Sorkin, et al., *BlackRock Sees a ‘Revolution’ Coming in Corporate Governance*, N.Y. TIMES (Nov. 3, 2022), <https://www.nytimes.com/2022/11/03/business/dealbook/blackrock-investors-esg-corporate-governance.html>. This effort is possibly an attempt to fend-off policymakers attentions concerning the excessive powers garnered by the Big Three, see *supra* notes 98–99, as well as allegations (from the conservative sphere, for the most part) that BlackRock’s voting policies do not foster shareholder value but rather follow an environmentalist political agenda (for a description of these criticism, see, for example Sharfman, *supra* note 9, at 36–38).

199. For a discussion, see Griffin, *supra* note 136, at 38–39.

200. See Form N-PX (requiring annual reports pursuant to section 30 of the Investment Company Act of 1940 and Rule 30b 1-4 under such Act by all registered management investment companies (other than small business investment companies)). 17 C.F.R. 270.30b1-4.

201. See *supra* Section II.A.4.

202. See *supra* note 177.

203. Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 560 (1992) (emphasis omitted). On the rules versus standards debate and their respective advantages and disadvantages, see generally Isaac Ehrlich & Richard A. Posner, *An Economic*

curb interested voting could provide for remedies whenever a resolution is adopted because of an interested vote. In this instance, the legal command can only be formulated ex post after a judge considers all the specifics of the resolution and determines what “interested” means and whether the pivotal shareholder is in fact “interested.”²⁰⁴ In other words, the standard nature of the command stems from the open-endedness of the factual and legal determinations of when, in the specific case, a vote by a shareholder would be in actual conflict with the other shareholders’ interests.

Currently, there are two standards-based regimes addressing interested voting: One is vote buying and the other is the “disinterest” requirement under *Corwin*.²⁰⁵

Vote buying was once considered illegal, but in 1982 the Delaware Court of Chancery moved away from a per se prohibition in *Schreiber v. Carney*, which generally permitted vote-buying, subject to certain exceptions on a case-by-case basis.²⁰⁶ The court determined that vote-buying agreements are to be invalidated on an individual basis if the purpose of the act is to defraud or disenfranchise other stockholders or if the agreement is against public policy.²⁰⁷ More recently, in *Crown EMAK Partners*, the Delaware Supreme Court stated that vote-buying would not be permitted when the economic interests and the voting interests of the shares do not remain aligned, thus making an interested voting analysis central to solve the vote buying issue.²⁰⁸ To be sure, Courts generally refrain from finding and sanctioning vote buying.²⁰⁹

To award its standard-shifting benefit from *Revlon* (or *Unocal*) to the business judgment rule, the *Corwin* doctrine requires that the

Analysis of Rulemaking, 3 J. LEGAL STUD. 257, 268 (1974); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1690 (1976); Frederick Schauer, *Rules and the Rule of Law*, 14 HARV. J.L. & PUB. POL’Y 645, 646–49 (1991); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25 (2000); Ronald J. Gilson, *A Model Company Act and a Model Company Court* 6–11 (Stan. L. Sch., Working Paper No. 489, 2016), papers.ssrn.com/sol3/papers.cfm?abstract_id=2750256.

204. For a more granular look at what this exercise might entail, see *infra* Section IV.A.

205. Some authors propose a standard-based approach to curb interested voting by index funds. See Sharfman, *supra* note 9, at 41–47 (arguing that the SEC and the DOL should carefully enforce the body of fiduciary duty law applicable to investment advisers under ERISA and the Advisers Act of 1940).

206. *Schreiber v. Carney*, 447 A.2d 17, 25 (Del. Ch. 1982).

207. *Id.*

208. *Crown EMAK Partners, LLC v. Kurtz*, 992 A.2d 377 (Del. 2010).

209. See *supra* note 146.

transaction be authorized by a fully informed and uncoerced vote of the *disinterested* stockholders. Courts have long embraced the view that *Corwin* does not apply in the presence of a controlling stockholder, implying that such a presence is the only circumstance in which the vote would not come from “disinterested stockholders.”²¹⁰ However, as noted earlier, the Chancery Court in the *Pattern Energy* case indicated judicial eagerness to disapply the *Corwin* defense if the outcome is reached as a result of pivotal interested voting by a non-controller.²¹¹ Whether or not this broader reading of disinterest is here to stay, it is clear that the precondition itself lacks the clarity and precision of a bright-line rule and must be categorized as a standard.

C. “Anything Goes” for the Rest?

The patchy legal landscape described so far—summarized in *Table I* below—indicates that corporate laws across the U.S. that deal with interested voting are mostly concerned with resolutions approving transactions with controlling shareholders and, to a lesser extent (at least in Delaware), with acquirers in M&A transactions. In general, the law does not offer, on its face,²¹² remedies in several other areas in which interested voting might occur.²¹³

210. See *supra* note 63.

211. *In re Pattern Energy Grp. Inc. S’holders Litig.*, No. 2020-0357, 2021 WL 1812674, at *63-64 (Del. Ch. May 6, 2021) (finding, in the specific, not disinterested a shareholder who was bound to vote in support of the transaction by a voting agreement and who was to receive benefits from the merger that were not shared with the company’s public common stockholders). See also, embracing *Pattern Energy* in not equating disinterest with lack of a controlling stockholder, *Lockton v. Rogers*, 2022 WL 604011, at *10 n.161, 164 (Del. Ch. Mar. 1, 2022).

212. I reckon that it would be within the powers of a court of equity such as the Chancery Court in Delaware to intervene in some cases that are currently not regulated in any explicit way. For instance, Professors Hu and Black have argued that existing equitable powers entrusted to courts could be used to tackle the most egregious empty voting practices, such as voting with negative economic ownership, that is, when the decoupling of voting and economic rights is done in a way that creates economic incentives for voting against the interests of other shareholders: “even without a legislative amendment, one can imagine courts using their equitable powers to disallow voting by shareholders with negative economic ownership.” Hu & Black, *supra* note 94, at 703. For a description of negative economic ownership, see *id.* at 637-38. Thus, in a way, any portion of the vast area that I label as “anything goes” could constitute ground for a yet to be enacted judicial regime dealing with interested voting.

213. Some scholars acknowledge, and normatively approve of, this lack of intervention. See *e.g.*, Kahan & Rock, *supra* note 4, at 1073-75 (discussing hedge fund conflicts).

For example, hostile takeovers can be impacted by interested voting. On the one hand, a low-balling bidder can vote its shares to oust a board and redeem a pill so that its undesirable acquisition can go through.²¹⁴ On the other hand, an embattled management (and board) can vote its shares to resist a desirable acquisition.²¹⁵

Friendly transactions can also be impacted by interested voting: here the risk is that both the acquirer *and* management (and board) can vote their shares to support an undesirable transaction.

Director elections more generally can be impacted by interested voting: For example, appeasing institutional investors can keep backing incumbent directors even when electing the insurgent slate would be more beneficial for the company. That can also happen for crucial votes on charter amendments or non-binding, yet strategically important, shareholder proposals under SEC Rule 14a-8.

The list, of course, can keep going. It could cover all the resolutions and shareholder types surveyed in Part II, which are not subject to any of the regimes described in sections III.A or III.B. For all interested voting that relates to such transactions and shareholder types, the law seems to adopt what I interchangeably call an unengaged or “anything goes” approach: Shareholders are free to cast their votes whichever way they like. For the reasons I posit in Part IV, this Article assumes that, in the absence of other constraints, “anything goes” is how our legal system works, and Part IV analyzes this policy choice and its implications.

Table I – Synopsis of Legal Regimes Addressing Interested Voting

Hypo/ Cases	Interested Voting Regime	Type
Control Share Acquisition Statutes	Votes by certain types of stockholders (the prospective acquirer, officers, and employees, and, in some states, directors) are not counted to approve the acquisition of the stake triggering the CSAS	Bright-line rule

214. See Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 212.

215. *Id.* at 212-13.

Business Combination Statute (DGCL 203)	Votes by interested stockholders not counted toward the required supermajority for the moratorium exemption	Bright-line rule
Parent/subsidiary mergers	Majority-of-the-minority condition shifts the burden of proof with respect to the entire fairness analysis or, in the presence of all the other preconditions under <i>M & F Worldwide</i> , shift the entire standard of review (from entire fairness to business judgment rule)	Bright-line rule within a broader standard
Parent/subsidiary tender offers	Majority-of-the-minority tendering condition is one of the requirements under <i>Solomon v. Pathe</i>	Bright-line rule within a broader standard
Vote buying	Inherent fairness: vote buying permitted if buyer's interest is aligned with the other shareholders'	Standard
Corwin defense	Vote must come from disinterested shareholders	Standard
Rest – bulk of cases, including: <ul style="list-style-type: none"> • Proxy fight in connection with hostile takeover; • Approval of a friendly transaction; • Director elections; • Amendments to the corporate documents; • Shareholder proposals under Rule 14a-8 and 	No express regime “Anything goes” approach (unless/until the judiciary intervenes) ²¹⁶	

216. See *supra* note 204.

other non-binding resolutions		
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D. Assessing the Different Policy Approaches

Before analyzing the implications of a legal system embracing an “anything goes” approach, it is important to understand and evaluate the pros and cons of each of the other two policy approaches to tackle interested voting: bright-line rules and open-ended standards.²¹⁷

As a preliminary remark with respect to bright-line rules, I point out that they need careful tailoring to achieve balance and not give an undue advantage to a voting faction. An undue advantage would result, for instance, if only votes by a prospective acquirer were disregarded but not those of the incumbents: This is currently the case, by the way, under the Delaware Business Combination Statute.²¹⁸ When balanced, bright-line rules contain interested voting in a series of circumstances by disregarding votes cast by shareholders who the law presumes are interested. Yet, like any bright-line rule, the provision might be both overdeterrent and underdeterrent. On the one hand, they may prohibit, disregard, or otherwise limit votes that, in fact, are not interested or in conflict with the interests of the corporation and should thus have been counted. On the other hand, they might not disregard votes by shareholders who, in the specific case, are in fact interested. Overdeterrence can, for example, jeopardize a number of resolutions in which the universe of the remaining shareholders, that is, the disinterested ones, might not opt for the most advantageous

217. This section draws on Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 240–81.

218. *See supra* note 153 and accompanying text.

outcome or might be dominated by some shareholders who, while formally not disallowed to vote, might vote strategically to extract benefits of various sorts.²¹⁹ Underdeterrence would plainly fail to curb interested voting in the particular case. In addition, a disinterested share regime must be linked to a specific type of resolution where the risk of interested voting is higher. Otherwise, applying it to *any* resolution would clearly have severe repercussions on existing ownership structures if certain shareholders' votes were disregarded no matter what.²²⁰

A standard has the advantage that, if correctly applied by the judiciary, only "true" interested voting will be detected and remedied, with no problems stemming from overdeterrence or underdeterrence. That, however, assumes that standards are well enforced and adjudicated. But establishing *ex post* if the vote in question amounted to interested voting is not an easy exercise. Hence, the approach has two drawbacks. From the shareholder viewpoint, the standard will raise uncertainty and will increase costs of obtaining legal advice, especially when the standard is a complex one,²²¹ because who may or may not vote is not specified *ex ante*. At the same time, from the judicial viewpoint, we might get insufficient or misguided enforcement if judges are reluctant to second guess votes and resolutions, especially in less than clear-cut situations and because judicial error is more likely when courts' discretion is wide.²²²

219. The experience of majority-of-the-minority provisions in freeze-out mergers tells us that deal planners are very wary of putting the deal in jeopardy for the risk of some strategic vetoing by a blocking minority. See Jain, Klingsberg & Whoriskey, *supra* note 80, at 950 (noting that even after CNX, companies involved in going private transactions did not take advantage of the safe harbor, the application of the business judgment rule, because of risks that a majority-of-the-minority provision would give some investors incentives to build a position and threaten to veto the deal); see also Sharon Terlep, *Dell Buyout Group Calls for Change in Voting Rules*, WALL ST. J. (July 24, 2013, 7:28 PM), <http://online.wsj.com/article/SB10001424127887323610704578625550322614778.html>. See also Goshen, *Controlling Corporate Self-Dealing*, *supra* note 22, at 402 ("[W]hen the minority is composed of a small group, the threat of strategic voting increases."). But see Rock, *supra* note 80.

220. See *supra* Section II.A.2.

221. Kaplow, *supra* note 203, at 566, 569.

222. See, e.g., Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 38-39 (2000) ("[B]ecause of unsystematic imperfection or rational concern with the cost of adjudication, adjudicators might fail to apply a standard precisely in particular cases. Consequently, standards can be over- or underinclusive as applied."); Gilson, *supra* note 203, at 8 ("[T]he standard cannot be more effective than the courts that enforce it and

Below and in *Table II*, I briefly summarize conclusions reached in an earlier work of mine, which specifically focused on interested voting in connection with hostile deals.²²³ To boil down the comparison between the two regimes (and appreciate the implications of an “anything goes” approach), I use the following assumptions: (i) the bidder’s or the target incumbents’ vote is pivotal (as the case may be); (ii) a majority of disinterested shareholders²²⁴ can identify, and vote according to, the best course of action for all shareholders; and (iii) enforcement/adjudication costs are trivial, that is, the judge can determine easily what is the best course of action for the shareholder (in the hostile deal setting, that entails establishing the target’s value as an independent company and comparing it with the bid price to determine who between the bidder and the incumbents are the interested voters). *Table II* summarizes the interrelations between the various approaches (including an “anything goes” approach) and the underlying assumptions (both when present and when relaxed). An explanation and various implications ensue.

Table II

Assumptions (i) (ii) and (iii)	Vote Pivotal (Interested Voting Is an Issue)	Vote Not Pivotal (Interested Voting Is Not an Issue)
<i>Both Disinterested Shareholders (DSHs) and Adjudicator right</i>	<i>(All assumptions are met)</i> Rules and standards work, unengaged approach does not.	All approaches work.
<i>Both DSHs and Adjudicator wrong</i>	No approach works, yet rules are either	<i>(No assumptions are met)</i> “Anything goes” approach works, standards do not.

the underlying procedural rules through which enforcement takes place.”); Troy A. Paredes, *A Systems Approach to Corporate Governance Reform: Why Importing U.S. Corporate Law Isn’t the Answer*, 45 WM. & MARY L. REV. 1055, 1133 (2004) (“[B]right-line rules generally are more straightforward and clearer than standards and are therefore more predictable.”).

223. See Gatti, *Conflicted Voting in M&A*, *supra* note 10 at 266–70.

224. Admittedly, determining ex ante who qualifies as disinterested shareholder is not an easy task. For instance, in a *Corwin* cleansing vote it is easy to establish that directors, the immediate beneficiaries of such a vote, are not disinterested. It is harder to establish whether repeat players such as arbitrageurs or mutual funds should be considered interested as well.

	counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).	Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).
DSHs right Adjudicator wrong	Rules work, standards and “anything goes” approach do not.	Rules and “anything goes” approach work, standards do not.
DSHs wrong Adjudicator right	Standards work, “anything goes” approach does not. Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).	Standards and “anything goes” approach work. Rules are either counterproductive (if over-inclusive in the specific) or irrelevant (if all shareholders are wrong).

(a) When all three assumptions are met, the “anything goes” approach does not work, while all the other approaches (rules and standards) do. More importantly, if *any* of the assumptions under (ii) (disinterested shareholders are right) or (iii) (adjudicator is right) hold, an “anything goes” approach is never warranted (its only advantage is doing nothing when there is no need to intervene).

(b) When interested voting is pivotal, the “anything goes” approach never works. When interested voting is not pivotal, the “anything goes” approach always works because there would be no need to intervene. But if the adjudicator is always right, a standards-based approach also works, because the adjudicator would not intervene when it is not necessary.²²⁵

225. If there is no pivotal vote by the potentially interested voting actor, the outcome of the deal is not affected by interested voting. In all such cases, no regime would be necessary because there is no issue to address and so an “anything goes” approach would actually work (it would not show its typical defect of under-deterrence because there is nothing to deter). Note that the assumption that interested voting is pivotal is based on both the ownership structure of the company on the record date and the voting outcome. But since

(c) When disinterested shareholders are right, rules always work, irrespective of all other assumptions.²²⁶ When they are wrong, rules are either (i) counterproductive if, *because* of the voting prohibition, a potentially (yet not actually) interested vote that is not counted would have determined a different, efficient outcome or (ii) irrelevant when, even without the rules in place, the same inefficient voting outcome would have been reached anyway.

(d) When the adjudicator is right, a standard always works, irrespective of all other assumptions (either because it steers toward an efficient outcome or because it does not unnecessarily intervene). However, if adjudication does not work properly, a standards-based approach would suffer: A judge might err and alter the outcome of an election if he or she (i) erroneously sanctions a vote that would have otherwise been determinative in reaching an efficient outcome or (ii) fails to detect a vote that decides the inefficient one. In the former scenario, an “anything goes” (and maybe even a rules-based approach if the assumption that the disinterested shareholders are right holds) would fare better, whereas, in the latter, only a rules-based approach would succeed (again, provided that the said assumption holds).

IV. THE IMPLICATIONS OF “ANYTHING GOES”

Although some express regimes address interested voting in specific areas, neither statutory nor case law offers general remedies for the remaining, and potentially vast, area of resolutions. This explains the general view among legal scholars that existing law leaves shareholders free to cast their votes as they wish, subject to

there is no reliable way to predict how frequently an interested voting might become pivotal (because it is something that can be ascertained only after the resolution takes place), this peculiar strength of the “anything goes” approach is hard to test. It is safe to believe that potentially interested voting are more likely to become pivotal when the voting outcome is close, but admittedly that is not frequent. In the 2010–20 period, only 23 mergers with a contestable domestic Russell 3000 corporation as target were approved with a vote by less than 60% of the shares outstanding. *See supra* Section II.B.1.b.

226. However, though easier to grasp and naturally less prone to generate disputes, even rules can carry a litigation risk because of evasion attempts by the relevant players. Shareholders who are disqualified by the bright-line rules might in fact enter into arrangements with complacent allies (who are not formally disqualified) to have the latter cast a vote in their favor. This is of course an enforcement issue, arising out of bright-line rules that are clear to understand and hence easy to avoid.

the limited exceptions described earlier.²²⁷ Thus, aside from such exceptions, there seems to be no way to prevent resolutions from being affected by interested voting under current law.

This Part investigates the implications of an “anything goes” approach to answer the question whether a lax approach on interested voting can negatively impact our system. I conclude that it does.

A. The Merits of “Anything Goes”

In the absence of a regime that bans or limits interested voting generally, “anything goes” avoids undue litigation and overdeterrence in connection with resolutions in which the benefits of policing interested voting would be dubious. It also avoids favoring any set of corporate participants, which would occur if their adversaries were barred from obtaining any legal remedies and could have unintended consequences or be subject to opportunism and mischief (think of any regime unduly restricting director votes or activists’ votes: the former would be a handout to insurgents and the latter to incumbents).

For instance, in uncontested director elections, litigating whether certain votes by a complacent fund should be discarded would be pointless for the very reason that no candidates other than incumbents are running for office.

In a similar vein, it makes sense to avoid judicial scrutiny of the outcomes of shareholder proposals under SEC Rule 14a-(8), because they are not binding. Any attempt to conceive in the abstract a regime to disregard interested voting could ultimately be, aside from costly, moot. In all such cases, the market may, at times, react negatively if the resolution is adopted. Yet, it is doubtful that litigation would represent a proper fix.

It is also debatable whether we would need legal intervention for contested director elections allegedly determined by interested voting because there is no underlying transaction such as a hostile takeover (in which case the director election would be to remove the board and redeem the pill). Indeed, the absence of a transaction would make it very difficult for an adjudicator to establish whether the corporation is harmed by the outcome of the proxy fight, to quantify such harm, and to compare it with the alleged benefit

227. *See supra* note 11 and accompanying text.

of the alternative election. In addition, a strict approach might jeopardize the corporate governance dynamics of the firm if, say, investors with significant stakes were not allowed to cast their votes to elect themselves to office – in closely held corporations, this would mean preventing a shareholder from running its own company.

In the examples above, I mentioned drawbacks stemming from litigation. *A fortiori*, not only would it be unrealistic but also overkill to pass policies that would take the further step of expressly discarding funds' votes, as some scholars have recently suggested.²²⁸ Even conceding that, to date, the voting records of the investment fund industry have resembled more rubber stamping of management's desiderata than active and informed participation, a blanket prohibition would not be the correct policy solution. Rather than improving the corporate governance discourse, it would insulate management even further: At the very least, today's rules leave the door open to funds' reactions to managerial abuses or mistakes.

In sum, *in certain fields*, rather than having a regime that on its face is applicable but difficult to enforce, which might create uncertainty and unnecessary disputes, we may be better off with an "anything goes" approach.²²⁹

B. The Perils of "Anything Goes"

On the other hand, an "anything goes" approach leaves important areas of shareholder voting potentially open to exploitation by interested shareholders. For the remainder of this Article, I illustrate the negative implications of "anything goes" for our legal system. What does it mean for corporate law if the franchise is shaped in a way that allows deviations from a disinterested outcome? I analyze what a systemic tolerance for such voting pathologies might mean under two different perspectives: corporate

228. See *supra* note 193.

229. Another justification for "anything goes" may come from how equity markets have developed. In today's world of fully diversified investors who mainly care about systemic risk, one may conclude that shareholders do not necessarily care if on some occasions the vote at a specific company is swayed by interested voting. On average, and in the long term, the market would correct such votes. Cf. Gordon, *supra* note 11. *But see* Kahan & Rock, *supra* note 11, at 3, 11–15 (admonishing that, as currently designed, corporate law has a single firm focus). See *infra* Section IV.B.2. for the argument that, if overly tolerated, interested voting might in fact increase systemic risk.

law doctrine, on the one hand, and law, economics, and finance, on the other.

1. Interested Voting and Corporate Law Doctrine

Tolerance for interested voting puts into question the internal coherence of our corporate law system. Important judicial doctrines are based on, or aim to protect, the role of the franchise. In *Unocal*, the case that started modern takeover law, the Delaware Supreme Court granted target companies the power to defend because, among other things, bidders could still use a proxy fight to challenge defenses. In a famous passage, Justice Moore wrote that “[i]f the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.”²³⁰ The subsequent *Moran* decision applied *Unocal* and validated the poison pill because, among other things, it does not “fundamentally restrict[] proxy contests.”²³¹ As Professor Jeffrey Gordon recently put, in these decisions the “core legitimacy [of takeover defenses] has been premised on the ultimate power of the shareholder franchise.”²³²

Indeed, a few years later, in *Blasius*, another landmark takeover case from the 1980s, Chancellor Allen emphatically stated that “[t]he shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests.”²³³ The franchise

230. *Unocal Co. v. Mesa Petrol. Co.*, 493 A.2d 946, 959 (Del. 1985). See also *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985) (upholding the validity of the pill because, among other things, it does not “fundamentally restrict[] proxy contests”).

231. *Moran v. Household Int’l, Inc.*, 500 A.2d 1346, 1357 (Del. 1985).

232. Gordon, *supra* note 127, at 222. After the *Unocal* and *Moran* decisions, proxy fights became the center stage of contests for control. See, e.g., Lucian A. Bebchuk & Marcel Kahan, *A Framework for Analyzing Legal Policy Towards Proxy Contests*, 78 CAL. L. REV. 1073, 1082 (1990) (acknowledging, in the aftermath of the mid-1980s Delaware decisions, that “proxy contests have reemerged as an important tool for acquiring control”); Joseph A. Grundfest, *Just Vote No: A Minimalist Strategy for Dealing with Barbarians Inside the Gates*, 45 STAN. L. REV. 857, 858 (1993) (“Hostile bidders who proceed despite the[] heightened [legal and financial] barriers will likely have to couple proxy contests with tender offers”); Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When Is Using a Rights Plan Right?*, 46 VAND. L. REV. 503, 509, 524 (1993) (“[T]he target company board can force dissidents to rely completely on the pure proxy contest as a means of pressuring the incumbent board to negotiate a transaction or to push through a change of control.”).

233. *Blasius Indus., Inc. v. Atlas Co.*, 564 A.2d 651, 659 (Del. Ch. 1988) (stating if the board acts “for the primary purpose of impeding the exercise of stockholder voting power . . . the board bears the heavy burden of demonstrating a compelling justification for such action.” *Id.* at 651).

was central to the Delaware Supreme Court's analysis in *Paramount v. QVC* to determine whether a change of control would trigger *Revlon*: "[b]ecause of the overriding importance of voting rights, this Court and the Court of Chancery have consistently acted to protect stockholders from unwarranted interference with such rights."²³⁴ More recently, one of the main reasons the Delaware Chancery Court invalidated the anti-activist pill in *Williams Companies* was because it tampered with the franchise.²³⁵

Is it time to abandon the belief that the *Unocal* progeny can effectively rely on the proxy fight route, given that the system cannot ensure a disinterested choice by shareholders? The availability of the ballot box route and director elections are often cited as the safety valve for hostile deals in the presence of a pill. Scholars have argued that this safety valve is protected by the heightened standard of *Blasius*, which requires a "compelling justification" for directors who seek to thwart the shareholder franchise.²³⁶ Doing nothing to address interested voting outside of the specific areas that already cover it should warrant skepticism towards the ballot-box route as a safeguard for the correct functioning of the market for corporate control. If the system stresses the importance of shareholders using "the powers of corporate democracy . . . to turn the board out"²³⁷ and determining the preferred outcome of an acquisition, one would expect that it would also ensure that voting enables shareholders to express their preferences effectively. If it is the franchise that legitimizes directorial powers, voting should ensure that resolutions are aggregations of sincere preferences that are not affected by some particular interests misaligned with the common ones.

More recent doctrines give the franchise significant standard-shifting functions in connection with D&O liability in the M&A and adjacent fields. Some of these doctrines, like *M & F Worldwide*,²³⁸

234. *Paramount Commc'ns Inc. v. QVC Network Inc.*, 637 A.2d 34, 42 (Del. 1994).

235. *Williams Cos. Stockholder Litig.*, No. 2020-0707-KSJM, 2021 WL 754593 (Del. Ch. Feb. 26, 2021). *See also* Gordon, *supra* note 127, at 222 ("Unlike the original pill, which was designed to restore the board to its traditional structural role in vetting proposed mergers, the anti-activist pill is designed to protect the board against shareholder pressure expressed through director elections.").

236. *See, e.g.,* Michal Barzuza, *The State of State Antitakeover Law*, 95 VA. L. REV. 1973, 2005 (2009); Edelman & Thomas, *supra* note 10, at 459-61.

237. *Unocal*, 493 A.2d at 959.

238. *Kahn v. M & F Worldwide Corp.*, 88 A.3d 635 (Del. 2014).

explicitly tackle interested voting, while others, like *Corwin*,²³⁹ are more ambiguous.

Under *M & F Worldwide*, transactions that would normally fall under the entire fairness standard of review are made subject to the more lenient business judgment rule if, among other things, the transaction is approved by a majority-of-the-minority vote.²⁴⁰

In *Corwin*, Chief Justice Strine highlighted a tradeoff between voting and litigation in the following terms:

[W]hen the real parties in interest—the disinterested equity owners—can easily protect themselves at the ballot box by simply voting no, the utility of a litigation-intrusive standard of review promises more costs to stockholders in the form of litigation rents and inhibitions on risk-taking than it promises in terms of benefits to them.²⁴¹

Corwin requires a disinterested vote, but as noted earlier, it is far from clear whether this entails ensuring that the vote is not tainted by interested voting or, more simply, whether a controlling stockholder is present.²⁴² While initial case law seemed to lean towards a narrow reading, recent decisions have expanded the scope of the requirement to cover other scenarios.²⁴³

The overarching question with allowing an “anything goes” approach in several types of resolutions is whether we should take at less than face value all those corporate law doctrines that are predicated around the centrality of the franchise, if in fact interested voting can alter the outcomes of shareholder voting in ways that may harm the corporation.²⁴⁴ This is particularly problematic if one considers that some of the doctrines mentioned above charge shareholders with an important function because, in

239. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304 (Del. 2015).

240. See *supra* note 62 and accompanying text. To be sure, majority-of-the-minority conditions have been part of fair dealing procedures in the context of parent/subsidiary transactions since long before *M & F Worldwide*. See *supra* note 61 and accompanying text.

241. *Corwin*, 125 A.3d at 313.

242. For a description of the interpretative issue, see Gatti, *Shareholder Protection Post-Corwin*, *supra* note 10, at 391–94.

243. See *supra* notes 65 and 84–88 and accompanying text. See also *infra* note 266 and accompanying text.

244. Cf., for a critical view of Delaware’s “obsession with the shareholder vote,” Cox, Mondino & Thomas, *supra* note 129, at 504.

the specific transaction, they are deemed a better decisionmaker than directors and the judiciary itself.

On the one hand, as Professors Black and Kraakman pointed out, the “law supports bilateral decision-making by shareholders and the board on decisions that are fundamental to the corporation’s identity and existence, especially decisions that place managers and directors in a final period problem, where agency costs are likely to be high.”²⁴⁵ In a similar vein, Professors Thompson and Edelman noted that, in mergers, “voting by shareholders is best explained as error correction of managers rather than as an inherent shareholder right to participate.”²⁴⁶ In other words, the vote operates as a protection against the peculiar conflicts faced by directors and management

245. Bernard Black & Reinier Kraakman, *Delaware’s Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521, 559 (2002). See also Thompson & Edelman, *supra* note 10, at 141 (noting that in mergers “voting by shareholders is best explained as error correction of managers rather than as an inherent shareholder right to participate”).

246. Thompson & Edelman, *supra* note 10, at 141.

(because of potential side payments, career opportunities, and the like)²⁴⁷ by adding another decision maker.²⁴⁸

On the other hand, even the Delaware judiciary considers shareholders better decisionmakers than judges. In *Corwin*, Chief Justice Strine stated that “judges are poorly positioned to evaluate the wisdom of business decisions and there is little utility to having them second-guess the determination of impartial decision-makers with more information (in the case of directors) or an actual economic stake in the outcome (in the case of informed,

247. This point was first made clear in the seminal M&A article by Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 118 (1965):

[T]he managers are in a position to claim almost the full market value of control, since they have it in their power to block the merger by voting against it. When we find incumbents recommending a control change, it is generally safe to assume that some side payment is occurring. . . . The most obvious kind of side payment to managers is a position within the new structure either paying a salary or making them privy to valuable market information. This arrangement, easily established with mergers, can look like normal business expediency, since the argument can always be made that the old management provides continuity and a link with the past experience of the corporation.

For more recent accounts of the many conflicts that may arise in friendly deals, see John C. Coates IV, *Mergers, Acquisitions and Restructuring: Types, Regulation, and Patterns of Practice* 11 (ECGI Law, Working Paper No. 260, 2014), available at http://ssrn.com/abstract_id=2463251 (mentioning, among other things, that “[f]iduciaries may favor one bidder over another, not in return for an explicit quid pro quo (e.g., in the form of a payment) but to curry good will in the hope of obtaining post-deal employment, or perhaps out of malice towards a bidder or gratitude for some past favor”). See also STEPHEN M. BAINBRIDGE, *MERGERS & ACQUISITIONS* 58–59 (3d ed., 2012):

Although the tension between shareholders and managers is perhaps most obvious in hostile takeovers, . . . similar conflicts of interest arise in negotiated acquisitions. To purchase the board’s cooperation the bidder may offer side payments to management, such as an equity stake in the surviving entity, employment or non-competition contracts, substantial severance payments, continuation of existing fringe benefits or other compensation arrangements. Although it is undoubtedly rare for side payments to be so large as to materially affect the price the bidder would otherwise be able to pay target shareholders, side payments may affect management’s decision making by causing them to agree to an acquisition price lower than that which could be obtained from hard bargaining or open bidding. (footnotes omitted).

248. Shareholder voting at times comes into play on “matters whose impact on the company’s value may be better evaluated by a large number of detached, unbiased shareholders than by managers, who may have more access to hard-to-convey or commercially sensitive private information but at the same time are more likely prone to confirmation bias, hyperopia, and echo-chamber phenomena.” Enriques & Romano, *supra* note 33, at 230–31.

disinterested stockholders).”²⁴⁹ A scholarly article by Vice-Chancellor Laster predating *Corwin* describes the doctrinal foundation behind this approach in the following terms:

When a stockholder plaintiff claims that a corporate decision constituted a breach of fiduciary duty, a court applying Delaware law searches for an independent, disinterested, and sufficiently informed decision maker. If one exists, then the court defers to the decision that the qualified decision maker made. Only in the absence of a qualified decision maker will the court assume that role for itself.²⁵⁰

All in all, there would be little coherence in a system that assigns an important decision-making role to shareholders, but then fails to offer adequate safeguards to ensure that the outcome of a shareholder vote is representative of the genuine preferences of the group. Even more problematic is the risk that some groups might systematically take advantage of an “anything goes” approach, as the following section illustrates.

2. Interested Voting and Law, Economics, and Finance

If interested voting is tolerated and the genuine preferences of the shareholder group cannot prevail, there would be repercussions in terms of incentives. Knowing that the legal system fosters an “anything goes” approach in certain areas, repeat players would take advantage of it by freely voting, soliciting votes, attracting coalitions, and offering their voting support to others, all in spite of their interested voting. In other words, the activity level of interested shareholders could be, or become, suboptimal.

For example, Professors Griffith and Lund highlight several risks associated with voting by the investment fund industry, where the multifaceted conflicts faced by asset managers can lead to distorted outcomes in important voting decisions.²⁵¹ Professors Bebchuk and Hirst do the same but with respect to a subset of that

249. *Corwin v. KKR Fin. Holdings LLC*, 125 A.3d 304, 313–14 (Del. 2015). *See also In Re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 698 (Del. Ch. 2005) (stating that “redress for [directors’] failures . . . must come . . . through the action of shareholders . . . and not from this Court”).

250. J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1443 (2014).

251. *See Griffith & Lund, supra note 9.*

industry: namely, passive index funds.²⁵² Management is also a typical repeat player that would benefit if “anything goes” were stretched to all resolutions not covered by a specific regime. Management has vested interests in certain resolutions that amend the organizational documents to provide more entrenchment.²⁵³ Of course, management has vested interests in passing M&A transactions,²⁵⁴ in which swaying the vote also bears much greater consequences because of the peculiar conflicts typical of a final period situation.²⁵⁵ Analogous considerations apply to directors.²⁵⁶

Keeping with the M&A front, arbitrageurs represent, around the time of the shareholder vote to approve the deal, a quantitatively important portion of the shareholder base that systematically votes in favor regardless of the actual merits.²⁵⁷ For obvious reasons, so do

252. See Bebchuk & Hirst, *Giant Three*, *supra* note 9.

253. See generally Bebchuk & Hamdani, *supra* note 171.

254. See Gatti, *supra* note 67, at 875 n.115 (noting that “[d]irectors do care about market scrutiny when a merger vote is pending, as they anticipate the risk that if they propose an unappealing deal, they might be turned down by shareholders—something that can have a big reputational impact not just on the company’s business and operations, but also on their professional profiles”). See also Timothy R. Burch et al., *Acquiring-Firm Shareholder Approval in Stock-for-Stock Mergers Perfunctory?*, 33 FIN. MGMT. 45, 46 (2004) (“A failed vote would presumably damage management’s reputation, providing ammunition for any shareholders interested in replacing the management team.”).

255. See *infra* note 245 and accompanying text.

256. For these reasons I find unpersuasive those views that minimize conflicted voting by hedge funds on the grounds that “the board of directors, which does have fiduciary duties, can take measures to counteract any dangers.” Kahan & Rock, *supra* note 4, at 1075. Whenever the board and the hedge funds are not adversarial, this protection would be illusory, despite the fiduciary duties. If, for instance, the deal on the table is detrimental to the corporation, the board would never take any measures against a hedge fund voting in support of the transaction. The authors mention additional reasons for not worrying about hedge fund conflicts, including that: “conflicted funds are often on both sides of the contested issue and their votes thus cancel each other out; the market is often aware of, and can respond to, these conflicts; [and] all diversified shareholders—including all institutional investors—will often find themselves with similar conflicts.” The first reason is circumstantial, unprovable in all instances, and most importantly irrelevant: if two hedge funds sit opposite each other in a vote, that does not mean that both are interested. Quite the contrary: because interestedness is problematic only when one shareholder cast a vote that would harm the corporation (see *supra* Section I.A), the other shareholder casting the opposite vote should not be considered interested. As a result, the conflict would not be canceled out whenever the first hedge fund is pivotal in passing the resolution. The second argument, that the market is aware and can respond to the conflicts, strikes as underdeveloped. Does the market always detect conflicts? And how can it react? The third argument, that all diversified shareholders are equally conflicted, should be a reason for worrying about interested voting and not the other way around.

257. See *supra* Section II.A.9.

acquirers, though they may lowball shareholders.²⁵⁸ Section II.A described several other of these repeat players, including significant (yet non-controlling) shareholders and parties to voting agreements. All these actors may routinely find themselves in an interested voting situation and take advantage of it. This is especially worrisome given the current phase of reconcentration of ownership, which makes it easier to assemble coalitions to pass resolutions not in the best interests of the corporation.²⁵⁹

In earlier work, I documented how “anything goes” can lead to efficiency problems in hostile and friendly acquisitions, in which interested voting may distort outcomes.²⁶⁰ As mentioned earlier, deal data covering the 2010–2015 period and the 2016–2020 period show that half of close merger votes (that is, approved with less than sixty percent of the votes) passed because of the votes by insiders (often as a result of voting agreements).²⁶¹ In the 2010–15 period, almost 7% of all the transactions in the sample were approved thanks to the pivotal vote of directors and officers and 5.5% thanks to votes subject to a voting agreement.²⁶² In other writings, I proposed to strengthen the franchise by embracing policies that effectively protect the integrity of the process and ensure the outcome of the vote reflects the genuine preferences of disinterested shareholders.²⁶³

The recent *Pattern Energy* decision by the Delaware Court of Chancery shows sensitivity to these problems by not awarding the *Corwin* defense if the vote approving the transaction was obtained with the pivotal support of a shareholder bound by a voting agreement to

258. See *supra* Section II.A.4.

259. See *supra* text accompanying notes 2–9.

260. See Gatti, *Conflicted Voting in M&A*, *supra* note 10.

261. See *supra* notes 146–149 and accompanying text.

262. See, respectively, *supra* notes 67 and 80 and accompanying text.

263. See Gatti, *Conflicted Voting in M&A*, *supra* note 10, at 277–81 (suggesting, to curb interested voting in hostile deals, a combination of a rules-based and a standards-based approach, whereby certain shareholders presumptively considered interested – acquirer and target’s directors and managers – would be allowed to vote, but their shares would not be counted for determining the outcome of the acquisition; however, each such group of potentially conflicted shareholders could rebut the presumption by proving that its votes are in fact aligned with the best interests of the corporation); Gatti, *Shareholder Protection Post-Corwin*, *supra* note 10, at 394–99 (2020) (arguing for an expansive reading of the disinterest requirement under *Corwin* that would not consider certain categories of shareholders – directors and managers of the target in first and foremost – as “disinterested”).

approve the transaction regardless of its economic merits.²⁶⁴ This approach makes sense: Defendants who want to avail themselves of the *Corwin* defense should show that the merger vote is truly disinterested.²⁶⁵ In fact, judges applying *Corwin* should treat as presumptively interested many of the actors surveyed in section II.A, such as directors and managers, acquirers, parties to a voting agreement to support the transaction in question, cross-shareholders and empty voters, conflicted funds, and merger arbitrageurs.²⁶⁶ Consider that disregarding such votes would not impact the validity of the transaction, but merely make *Corwin* unavailable to them. Why should directors and managers, for example, rely on their own votes to shield potential liability?

The possibility for certain “masters of the universe” to be more influential than others would also have repercussions on the incentives of directors and managers. Directors rely on shareholder votes, among other things, to get elected, to have fundamental transactions approved (with the additional help of the standard-shifting effect in *Corwin* transactions), and to obtain non-binding yet strategically important votes like say-on-pay, climate, and other socially sensitive matters. Not only do directors already have control of the proxy machinery and of their nomination process,²⁶⁷ but they can game the system knowing that, when necessary, the outcomes can be bended in their favor. In fact, according to the literature, this is already happening²⁶⁸—some have even

264. *In re Pattern Energy Grp. Inc. S'holders Litig.*, C.A. No. 2020-357, 2021 WL 1812674, at *63-64 (Del. Ch. May 6, 2021) followed by *Lockton v. Rogers*, 2022 WL 604011, C.A. No. 2021-0058, at *10 n.161, 164 (Del. Ch. Mar. 1, 2022). *Corwin* requires the vote to be fully informed and uncoerced and to come from disinterested stockholders. For more detail on *Pattern Energy*, see *infra* notes 65 and 84-88 and accompanying text.

265. See the literature cited *supra* note 57.

266. These considerations draw on Gatti, *Shareholder Protection Post-Corwin supra* note 10, at 397.

267. See, e.g., Mark J. Roe, *Corporate Purpose and Corporate Competition* 8 n.14 (ECGI Law Working Paper No. 601/2021, Aug. 2021), https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3817788; Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 688-93 (2007) (citing discretion over the timing of a vote, contact information for shareholders, proxy expenses reimbursement, and conflicts by institutional shareholder who fear losing their business with a corporate client).

268. See Yair Listokin, *Management Always Wins the Close Ones*, 10 AM. L. & ECON. REV. 159, 160 (2008); Yair Listokin, *Corporate Voting vs. Market Price Setting*, 11 AM. LAW ECON. REV. 608, 620 (2009) (“manipulation of the vote share [held by management] is a possibility, as there are more close management victories than close dissident victories.”); Richard W.

provocatively wondered whether the whole voting system is “rigged.”²⁶⁹ If the franchise is a device to keep agency costs in check, unengaging with interested voting may tolerate their expansion (and promote an expansion of principal costs as well).²⁷⁰

Endemic interested voting can also systematically lead to voting outcomes that depart from maximizing shareholder wealth. This may or may not be an issue from a doctrinal or normative perspective, depending on where one sits on the stakeholder capitalism debate. In any event, if interested voting enables departing from maximizing shareholder wealth, there comes a series of questions that future research should refine. First, how often does interested voting contribute to departures from efficient outcomes of shareholder resolutions? Second, do such departures carry any implications in terms of cost of capital for the affected corporations? Does the abstract possibility of departures increase the cost of capital across the board? In other words, is the chance that interested voting determines the outcome of the vote something investors discount or should discount? Does interested voting affect systemic risk in any meaningful and verifiable way? In our age of apparent “portfolio primacy,”²⁷¹ all these questions are critical.²⁷²

In addition, as just noted, an overarching question is whether occasional departures from shareholder wealth maximization should be considered an issue at all given the debate on

Barrett, *Elephant in the Boardroom? Counting the Vote in Corporate Elections*, 44 VAL. U. L. REV. 125, 128 (2009) (noting “the curious absence of accountability for accurately counting votes in corporate elections”); Laurent Bach & Daniel Metzger, *How Close Are Close Shareholder Votes?*, 32 REV. FIN. STUD. 3183, 3184, 3194 (2018) (presenting evidence estimating that 11% of closely contested proposals that were presented by insurgents and that were eventually rejected by shareholders would have passed if management had not been able to systematically affect the voting results).

269. See Laurent Bach & Daniel Metzger, *Are Shareholder Votes Rigged?*, Harv. L. Sch. Forum on Corp. Gov. (Jan. 4, 2017), <https://corpgov.law.harvard.edu/2017/01/04/are-shareholder-votes-rigged>.

270. See Goshen & Squire, *supra* note 12.

271. Cf. Roberto Tallarita, *The Limits of Portfolio Primacy* 43 (Working Paper, Aug. 9, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3912977.

272. For the argument that voting distortions stemming from index funds voting are “likely to have adverse consequences for the market for corporate influence, shareholders, and the economy,” and suggesting that there is already empirical evidence quantifying such harm as substantial, see Lund, *supra* note 9, at 523–24 (citing empirical work by Elisabeth Kempf, Alberto Manconi & Oliver Spalt, *Distracted Shareholders and Corporate Actions*, 30 REV. FIN. STUD. 1160 (2017)).

stakeholderism.²⁷³ Is a voting outcome departing from shareholder wealth maximization problematic if, say, some shareholders carrying an interest not perfectly aligned with the other shareholders can kill a value-creating transaction? For example, if shareholder workers who oppose a wealth maximizing merger in fear of future layoffs happen to cast pivotal votes that reject a merger beneficial to shareholder interests, such a vote might raise issues in a Milton Friedman world, but not in a Martin Lipton one. Put differently, does embracing stakeholderism mean that shareholder protections surrounding voting should be relaxed? Clearly, “anything goes” is more easily justifiable in a world embracing stakeholderism than in one that prioritizes shareholder wealth.

However, “anything goes” in the context of stakeholderism would come with its own glitches. If, in the interested voting realm, stakeholder theory scales back on the need to protect shareholders from resolutions in which their interest is trumped by other stakeholders’ interest, the net effect of this diminished protection might hurt all stakeholders, not just shareholders. “Anything goes” would entail giving interested shareholders *more* opportunity to pursue transactions that benefit themselves to the detriment of others – not just their fellow shareholders, but plausibly also other constituencies stakeholderism purports to protect. Indeed, this would be one of the unintended consequences of the corporate world transitioning to a stakeholder approach while maintaining shareholders as the exclusive group with voting rights in corporate governance.²⁷⁴

CONCLUSION

Even if shareholder voting is a much-debated topic in corporate law, interested voting has drawn little attention and, especially in this current phase of reconcentration of corporate ownership, a deeper investigation is long overdue. While corporate law is attentive to transactions with a controlling shareholder, such transactions hardly cover all instances in which an interested shareholder may harm the corporation by casting a pivotal vote to pass a resolution. Votes cast by directors, managers, acquirers,

273. See *supra* note 33 and accompanying text.

274. See HAYDEN & BODIE, *supra* note 31 (advocating for giving voice to workers in corporate governance).

cross-holders, arbitrageurs, institutional investors, hedge funds, and several other actors can be as detrimental as votes by a controlling shareholder. This Article offers a first-of-its-kind organic analysis of the most typical interested shareholders, the different types of resolutions impacted by interested voting, the current regimes attempting to tackle the phenomenon, and the possible policy fixes in areas not covered by an existing regime.

In general, aside from addressing votes by controlling shareholders and CSAS in some states, the law seems to be unengaged with the issue: shareholders can cast their votes freely. I describe this as an “anything goes” approach and illustrate its implications for the corporate law system. To be sure, I concede that, in certain fields like standalone director elections and shareholder proposals, “anything goes” makes sense because it avoids unnecessary enforcement and litigation rents.²⁷⁵

However, in many other fields, “anything goes” is problematic. In particular, the fate of M&A and other high-profile financial transactions subject to shareholder approval would run the risk of being determined by an interested voter not aligned with the genuine preferences of disinterested shareholders. Deal data show that half of (admittedly rare) close merger votes pass because of votes by insiders. In these cases, voting outcomes could systematically be swayed by votes at odds with the common interests of shareholders, leading to market failures. This is troublesome given the current phase of reconcentration of ownership of public corporations, which makes it easier than ever to assemble coalitions of repeat players such as insiders, institutional investors, and hedge funds. If left unchecked, “anything goes” will result in a reduction of wealth in the long run.

As a final remark, this Article has shown two crucial contradictions in the current regimes surrounding shareholder voting. In general, Delaware law assumes an atomistic corporation with shareholders whose payoffs should be evaluated under the goal of what’s best for *that* corporation.²⁷⁶ But then Delaware law itself intervenes only for a very small subset of decisions, that is,

275. Yet, I suggest that such resolutions would still benefit from improved disclosures on voting tabulations at the company level. See *supra* text accompanying notes 200–202.

276. This is because the law, to borrow from Professors Kahan and Rock, “has a strong ‘single firm focus’ . . . that stands in sharp contrast to the potential ‘multi-firm focus’ . . . of large portfolio investors.” Kahan & Rock *supra* note 11, at 3, 11–15.

transactions with a controller, leaving quite a vacuum – “anything goes,” as I label it – for the rest. This is a normative contradiction that has several reasons behind it: from the practical difficulty in policing non-controlling shareholders to a lack of consensus over how to interpret “what’s best” for the particular corporation in the given resolution, considering that shareholder interests might be heterogeneous and the dilemma between shareholder primacy and stakeholderism is hardly settled. All the while, despite the law’s imposition of a “single firm focus,”²⁷⁷ real-world markets behave as if none of this is really relevant.²⁷⁸ Those who dominate equity markets, that is institutions and portfolio managers, cast votes without giving a deep thought over what’s best for the single corporation, since they manage portfolios with hundreds if not thousands of them and, at best, care only about maximizing the value of the portfolio as a whole,²⁷⁹ not of the single corporation. This is a market structure contradiction. While these contradictions are arguably byproducts of recent market developments, policymakers and the legal system should be aware of them and carefully assess their potential long-term effects.

277. See *supra* note 276.

278. Cf. Gilson & Gordon, *supra* note 5, at 873 (noting that “capital markets evolve at a faster rate than governance structures adapt” and that “path-dependent institutions move less quickly than markets”).

279. Though this might not even be true for index funds (see Barzusa, Curtis & Webber, *supra* note 9, at 1305: “Because index funds are largely indifferent to returns, they are better positioned to respond to the preferences of their investors without worrying about whether those preferences might negatively affect firm value.”) and is disputed by the fund conflicts literature (see Griffith & Lund, *supra* note 9, at 126–32 (describing the so-called corporate-client conflict, when the fund invests in equities of issuers whose retirement assets the fund sponsor manages: the fund has an incentive to cast votes in favor of management, its client even when against its investors’ interests)).

