DECOUPLING AND MOTIVATION: RE-CALIBRATING STANDARDS OF FIDUCIARY REVIEW, RETHINKING “DISINTERESTED” SHAREHOLDER DECISIONS, AND DECONSTRUCTING “DE-SPACS”

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ABSTRACT

At the heart of corporate governance are fundamental doctrines that limit court scrutiny of fiduciary and stockholder decisions: the business judgment rule limits scrutiny of informed director decisions and, as with Corwin cleansing, informed voting by “disinterested” shareholders is accorded substantial deference. Only when, for example, the motivations of a director or controlling shareholder are sufficiently suspect would either the “entire fairness” or “enhanced scrutiny” standards of review apply. How to assess such motivations, however, is underdeveloped in the case law.

This Article addresses this task in three areas, relying partly on a methodology for assessing a person’s overall economic motivation flowing from the person’s financial stakes in or directly relating to the corporation. The methodology, from the analytical framework for “decoupling” (e.g., “empty voting”) introduced in 2006 deconstructs the person’s “overall economic interest” in a company’s shares (“host shares”) from such stakes by considering the net effect of the person’s: (a) host shares; (b) “coupled assets;” and (c) “related non-host assets.

First, the Article offers a re-calibration of standards of judicial review of fiduciary decisions when a fiduciary has financial stakes on both sides of the challenged transaction (as with Elon Musk in the 2022 Tesla-SolarCity merger case). Dubious outcomes flow from the traditional approach to choosing from the triad of the business judgment rule, enhanced scrutiny, and entire fairness. We show, for example, how courts use entire fairness in circumstances not meriting such review, such as where a controller’s percentage ownership stakes in the corporation and a counterparty are identical. We also offer a generalized approach methodically mapping the triad of zero, materially positive, and materially negative “overall economic interest” to the triad of standards of review.

Second, the Article shows that court deference to “disinterested” shareholder decisions needs rethinking, due largely to the now overwhelmingly institutional ownership of public companies combined with the prevalence of new financial stake patterns and new organizational voting dynamics at institutions. As to new financial stake patterns, related non-host asset issues (e.g., increased index investing in conjunction with increased asset manager size) and coupled asset issues will often result in institutional investors having a zero or negative “overall economic interest” in host shares. We show this both by looking at “related non-host assets” of large asset

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managers not party to the 2010 CNX-T. Rowe Price case and by offering broader evidence. Rigid application of existing law would disqualify asset managers from being considered “disinterested” shareholders with surprising, likely undesirable, frequency. We propose steps to improve the integrity of shareholder voting while mitigating that undesirable prospect. We also propose a general method for determining when an institutional investor’s overall economic interest should be deemed “material.” As to organizational voting dynamics, court precedents suggest that being “disinterested” rests on the premise of a motivation to maximize the value of host shares. If institutional investors heed calls to consider non-share price-directed goals, this conceptual basis for deference is brought into question. Other new organizational voting dynamics, such as “pass-through voting,” raise mechanical complexities. The very idea of a “disinterested” shareholder is increasingly a convenient myth.

Third, this Article addresses a novel and especially challenging context for assessing motivation: the “de-SPACing” of special purpose acquisition companies (SPACs). The 2023 Delman case takes the welcome step of analyzing deference to shareholder “cleansing” by relying in part on certain aspects of the decoupling framework. This Article shows how full deployment of the framework’s deconstruction methodology, however, could not only provide more comprehensive guidance as to shareholder cleansing but also provide guidance in selecting the proper standard of review of fiduciary decisions.

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INTRODUCTION

Court scrutiny of fiduciary and stockholder decisions is at the heart of corporate governance. Fundamental doctrines generally mandate a light touch. The business judgment rule normally precludes judicial review of informed board decisions. Only when the motivations of the board—or the person controlling the board—are deemed sufficiently suspect and in other limited situations do courts engage in more exacting review, typically either to evaluate “entire fairness” or to apply intermediate level “enhanced scrutiny.” Similarly, courts have given increasingly substantial deference to informed decisions by “disinterested” shareholders—most notably in the exercise of voting rights.

The deference of courts to those persons—fiduciaries (i.e., directors and controlling stockholders) and stockholders—thus generally depends on the assessment of their motivations, especially motivations of an objectively verifiable economic nature. Yet as vast as Delaware jurisprudence is, the central task of assessing such motivations is remarkably underdeveloped.¹

This Article addresses this task in three areas, relying partly on a methodology for systematically assessing a person’s overall economic motivation flowing from the person’s often-complex financial stakes in or directly relating to the corporation. This methodology deconstructs the overall economic motivation as flowing from the disparate impact of three constituent elements. Introduced in 2006 as a part of an analytical framework for “decoupling,”² the methodology contemplates the person’s “overall economic interest” in the corporation’s shares from such stakes as flowing from the net effect of the shares held in that corporation (the “host shares”), “coupled assets,” and “related non-host assets.” In the case of shareholders, for example, the economic impact of a contemplated transaction on a shareholder who holds coupled assets or related non-host assets will usually differ from—and sometimes even be in the opposite direction of—the impact on a plain vanilla shareholder who only holds host shares and whose incentives thus flow solely from the impact on host shares. A shareholder such as one the framework refers to as an “empty voter with a negative overall economic interest” in host shares has incentives that are opposite to an “empty voter with a positive overall economic interest” in host shares, and both

have incentives different from an “empty voter with a zero overall economic interest” in host shares.

First, this Article shows the need for, and offers, a re-calibration of standards of judicial review of fiduciary decisions in an important class of situations: when a fiduciary has financial stakes on both sides of the challenged transaction. Dubious outcomes can flow from the traditional approach to choosing from the triad of the business judgment rule, enhanced scrutiny, and entire fairness. We show how courts use the entire fairness standard in circumstances that do not merit such review. We also offer and justify a generalized approach that methodically maps the triad of zero (or immaterially different from zero), materially positive, and materially negative overall economic interest to the triad of standards of review.

Second, this Article strikes at core elements of shareholder decision-making at public companies. Here, judicial deference issues can arise in a variety of contexts: “majority of minority” votes in controller conflict transactions, “majority of minority” tender conditions in controller tender offers, and so-called Corwin3 cleansing votes to relieve fiduciaries of being subjected to entire fairness analysis or enhanced scrutiny. We show the need for a wholesale rethinking of court deference to “disinterested” shareholder decisions and that this rethinking cannot occur independent of the grand debate over the purpose of the corporation. Among other things, a rigid application of existing corporate law would disqualify asset managers from being considered “disinterested” shareholders with surprising, likely undesirable, frequency. We therefore propose palliative steps that can be adopted to improve the integrity of the validating role of shareholder voting and tendering while, through a temporary partial strategic pause, mitigating that undesirable prospect.

The need for rethinking stems largely from the combination of ownership of public companies now being overwhelmingly institutional and the prevalence of new financial stake patterns of institutions and new organizational voting dynamics at institutions. We believe that traditional deference to shareholder decisions does not easily accommodate and, indeed, in certain key respects, conflicts with such new financial stake patterns and new organizational voting dynamics. To the extent that Delaware jurisprudence and corporate governance scholarship have considered the distinctive nature of institutional investor voting, it has largely been viewed as a solution to the Berle-Means problem of separation of ownership and control: like natural person shareholders, institutional investors would benefit from agents being loyal to shareholder interests but, unlike natural persons, institutions have strong incentives from their large shareholdings and the wherewithal to ensure adherence.

In fact, institutions and individuals within institutions have motivations that increasingly differ from the motivations of natural persons.4 Moreover, institutions differ in the challenges they

3 Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 312–13 (Del. 2015).
4 As to why individual investors pose less severe complexities relating to their “financial stakes,” see, for example, infra Part III.B.1.a (discussing why related non-host asset issues are far less likely with individual investors because of the typical number of stocks individual investors hold) and infra Part III.B.1.b (discussing how coupled asset issues are likely to be insignificant in the context of individual investors because of, among other things, rational apathy to voting on the part of most individual investors). As for complexities relating to organizational voting dynamics discussed in infra Part III.B.2, individual investors do not generally operate through organizations. In any event, as discussed in infra Part III.A, we do not advocate subjecting retail investors to the scrutiny for shareholder disinterestedness that we advocate for institutional investors.
pose. For example, large generalist asset managers have financial stake complexities and organizational voting dynamics that are different from those of sophisticated hedge funds.

As for financial stakes, it is not just the esoteric, often opaque, stakes of sophisticated hedge funds using fancy strategies that pose challenges. Ironically, more significant challenges flow from plain vanilla shareholdings and the plain vanilla, now widely embraced strategy of index investing. We show that the combined effect of increased index investing and the increased size of institutional investors would, under existing jurisprudence, often disqualify them from being considered “disinterested.” Using the deconstruction methodology, we show that institutional investors will often have a zero or negative overall economic interest and would therefore frequently be disqualified.

The organizational voting dynamics of institutional investors, especially large generalist asset managers, also raise profound challenges for judicial deference to disinterested shareholder voting. The conceptual cornerstone for this court deference is that disinterested shareholders are motivated to vote or tender based on the impact on economic returns from the host shares. The debate over corporate purpose—i.e., over shareholder primacy as classically understood—is becoming increasingly intense and widespread, sometimes under the rubric of “ESG.” Some, but certainly far from all, of the participants in this debate have principles calling on corporations to depart from an exclusive focus on the traditionally understood economic interests of shareholders. Similarly, some debate participants urge institutional investors to conform to those principles and depart from their traditional focus on the pecuniary interests of their clients, notwithstanding both longstanding and newly adopted legal constraints on such departures. Institutional investors who heed these calls are no more likely to promote the value of host shares than institutional investors with conflicting financial interests. Courts today do consider those conflicting interests in determining deference: should they also consider these departures from share price-directed goals? Whether there should be symmetry raises fundamental philosophical issues as well as practical ones. Problems that are largely of a mechanical nature can also flow from new institutional organizational dynamics complexities. These complexities include the rise of “pass-through voting” and the heterogeneity among asset managers in how they respect the voting preferences of their individual portfolio managers.

Beyond exploring complexities introduced by these financial stake patterns and organizational voting dynamics, we also show how to assess whether an institutional investor’s overall economic interest should be deemed “material” enough to qualify as an “actual economic stake” sufficient to warrant judicial deference. We propose an approach to the materiality/“actual economic stake” inquiry that would evaluate materiality from two distinct perspectives.

In short, a disheartening conclusion results from examining these new institutional financial stake patterns and institutional organizational voting dynamics and considering the size of today’s institutions. We conclude that the very idea of “disinterested” shareholder is increasingly a convenient myth. To be sure, a few aspects of some of these patterns and dynamics have been occasionally acknowledged by Delaware courts as limiting the reliability of shareholder votes as a basis for judicial deference. But the myth is still a dominant force in the case law. We therefore

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5 See infra Part III.B.1.a (showing how each of T. Rowe Price, BlackRock, State Street, and Vanguard had a zero or negative overall economic interest in CNX, and thus none of them was a “disinterested” shareholder under existing law and discussing, for instance, studies on institutional cross-ownership).
advocate a more sustained and systematic approach that considers how a fuller range of both longstanding and newly emerging financial stake and organizational complexities affect that reliability and considers the extent to which and how judicial deference to shareholder voting should continue. However, because of the virtues of incrementalism—most notably, to avoid the sudden, surprisingly frequent disqualification of institutional investor votes that would result—we advocate a temporary and limited strategic pause in the application of the classic corporate law doctrine requiring a shareholder to have an “actual economic stake” in order to qualify as disinterested.

Third, this Article addresses a novel and especially challenging context for assessing motivation: the “de-SPACing” of special purpose acquisition companies (SPACs). Recent case law takes the welcome step of analyzing deference to shareholder “cleansing” by relying in part on certain aspects of the decoupling framework. This Article shows how full deployment of the framework’s deconstruction methodology, however, could not only provide more comprehensive guidance as to shareholder cleansing but also provide guidance in selecting the proper standard of review of fiduciary decisions.

Part I introduces the decoupling framework and its deconstruction methodology. We use a real-world example (Perry-Mylan) to illustrate how this perspective can help assess motivations in a highly complex two-company setting, and briefly note how the Delaware Supreme Court has dealt with this perspective.

Part II examines how that methodology can help shape court deference to fiduciary decisions. We focus in significant part on two cases involving controlling shareholders who concurrently owned nearly identical percentage ownership stakes in the two firms contemplating a merger—specifically, the 2022 Tesla–SolarCity merger case, in which Elon Musk was allegedly the controlling shareholder in both firms, and the 2020 CBS–Viacom merger case, in which Shari Redstone was the controlling shareholder in both. We suggest that the application of the entire fairness standard by Delaware courts in these cases was inapt and that jumping to the business judgment rule should likewise be rejected. Instead, enhanced scrutiny is called for.

We also offer more generalizable guidance in this context: (1) only departures from zero overall economic interest that are “material” in the sense that we outline should determine departures from enhanced scrutiny of transactions in which controllers have competing interests; and (2) if material, the direction of the overall economic interest in the host company shares should dictate application of the business judgment rule (if the overall economic interest is positive) or entire fairness (if the overall economic interest is negative). We suggest a modified version of this guidance with respect to director decisions.

Part III addresses court deference to “disinterested” stockholder voting and tendering decisions. After showing how one major aspect of Vice Chancellor Laster’s thoughtful CNX

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7 Id. at *17–19.
9 Id. at *12–13.
10 In re CNX Gas Corp. S’holders Litig., 4 A.3d 397 (Del. Ch. 2010).
opinion could be reframed under, and supported by, the deconstruction methodology, Part III shows how increasing institutional investor-related complexities call into question whether many institutional investor decisions can be “disinterested.” It is increasingly likely, for example, that the typical—i.e., institutional—shareholder today would hold related “non-host assets” or “coupled assets” (notably, derivatives, short positions, and borrowed shares) that would cause the shareholder to have either a zero or negative overall interest in host company shares and, if known to the court, prevent a finding of “disinterestedness” under existing corporate law. We show that such related non-host asset and coupled asset complications are less likely in the context of individual investors. Likewise, since ample court precedent suggests that being “disinterested” presupposes a motivation to maximize the value of host company shares, we may see courts question whether institutional investors that decide to consider non-share price-directed goals can be considered “disinterested.” The rise of “pass-through” voting and the heterogeneity in asset manager policies over respect for individual portfolio manager voting preferences introduce difficulties of a practical nature in determining the disinterestedness of votes. After exploring how to evaluate materiality in the context of institutional investor voting, Part III concludes with a call for a fundamental rethinking of court deference to “disinterested” shareholder action. Importantly, we also advocate a limited strategic pause in the blanket application of a disinterestedness corporate law rule.

Part IV illustrates how the deconstruction methodology can yield fresh insights in the de-SPACing context, and how Vice Chancellor Will’s insightful analysis in Delman\textsuperscript{11} of both the standard of review for fiduciary decisions and cleansing by stockholder vote could have been enriched by full deployment of the methodology.

I. DECOUPLING FRAMEWORK, ITS DECONSTRUCTION METHODOLOGY, AND DELAWARE\textsuperscript{12}

Ownership of equity generally conveys a bundle of economic, voting, and other rights and, sometimes, disclosure and other obligations. Typically, a shareholder has both an economic interest (e.g., dividends) as well as voting rights. Longstanding legal principles, business practices, and economic theories assume that elements of this bundle cannot be “decoupled” from each other.

This foundational assumption can no longer be relied on. Sophisticated market participants such as hedge funds can now use derivatives, share borrowing, and other means to, in effect, break up the basic equity (and debt) building blocks. 2006 Decoupling I (Southern Cal.) introduced the concept of “decoupling” to refer to this unbundling phenomenon and showed how it posed unprecedented complexities for classic law-based and market-based mechanisms of corporate governance. For instance, an investor can, without the consent or knowledge of the company, have materially greater voting power than its economic interest through the use of derivatives, share borrowing, and other means. The analytical framework termed this pattern “empty voting”: the votes have been “emptied” of a corresponding economic interest.

Consider a company with a one share–one vote system and one class of shares. Say a person has a 100,000 share long position but sold short 30,000 shares. That person has a material net

\textsuperscript{11} Delman v. GigAcquisitions3, LLC, 288 A.3d 692 (Del. Ch. 2023).

\textsuperscript{12} This Part draws on, for example, 2006 Decoupling I (Southern Cal.), supra note 2, at 816–17, 823–36; 2008 Decoupling II (Penn.), supra note 2, at 632–54; and 2022 Governance and Decoupling, supra note 2, at 418–23.
economic interest in the company’s shares—i.e., 70,000 shares—but that person is still an “empty voter” because its 100,000 votes well exceed its net economic interest. However, because of the positive overall economic interest, such an empty voter still has incentives to exercise its votes to enhance the value of its own shares and thereby also promote the interests of other shareholders.

But what if the overall economic interest in the shares were negative? If that person with 100,000 shares simultaneously sold short 150,000 shares, he would have incentives to use his voting rights to cause the share price to fall, not to rise. He is what the framework calls an “empty voter with negative economic ownership.” If instead of short selling to such a degree he held a large put position, he could also have negative economic ownership. The term “coupled asset” refers to the put options and short selling arrangements. More generally, a “coupled asset” is a holding of rights that directly relate to the shares and that increase or decrease economic exposure to the shares. To address contexts involving more complex financial stakes, a fuller exposition of the framework and its deconstruction methodology is necessary.

A shareholder’s “economic ownership” in the shares of the company in which it votes consists of the economic returns associated with the shares in that company (the “host company shares” or “host shares”). This ownership can be achieved by directly holding the shares, or indirectly by holding a “coupled asset.” The “coupled assets” can either increase or decrease economic ownership. “Net economic ownership” stems from the net returns of the holdings of host shares and coupled assets. This net ownership can be positive, zero, or negative.

Investors may sometimes not only hold “coupled assets” but also hold “related non-host assets.” The related non-host assets could be, for example, securities of another company whose value is related to the value of the host company’s shares. For example, if the host company is planning to acquire a target in a share-for-share merger with a fixed exchange rate, the target’s shares are a related non-host asset. To assess the investor’s “overall economic interest” in the host shares flowing from its financial holdings, one looks at the net returns from its: (a) host shares; (b) coupled assets; and (c) related non-host assets. The concept of “overall economic interest” in the host shares thus captures a broader range of financial stakes than “net economic ownership.”

The shareholder’s overall economic interest in the host shares can be positive, zero, or negative. In the case of a contemplated corporate transaction, the “positive,” “zero,” and “negative” characterizations are a short-hand way of characterizing in broad terms how the overall economic impact of that transaction on such a complex shareholder compares with the impact on a plain vanilla shareholder who only holds host shares—and whose economic interests thus flow solely from the impact on the host shares. If the overall economic impact of the transaction on such a complex shareholder runs in the same direction as the economic impact on the host shares, that complex shareholder has a “positive” overall economic interest in the host shares. If the overall economic impact runs in the opposite direction, that complex shareholder has a “negative” economic interest in the host shares. If the overall economic impact is such that the complex shareholder is indifferent to the economic impact on the host shares, its overall economic interest in the host shares is “zero.”

We use Perry-Mylan to illustrate the decoupling methodology that can be applied both to
fiduciaries and to shareholders.\textsuperscript{13} Perry Corp. (Perry), a hedge fund, owned 7 million shares of King Pharmaceuticals (King). In 2004, Mylan Laboratories (Mylan) agreed to buy King at a substantial premium, but Mylan’s shares dropped when the deal was announced. To help Mylan obtain shareholder approval for the merger, Perry bought 9.9 percent of Mylan shares (Mylan was thus the “host company”). By holding swaps and other hedges directly relating to Mylan shares—coupled assets—Perry fully hedged the market risk associated with its Mylan shares. Even a casual look suggests that Perry would thus be an “empty voter.” After all, it had voting rights of 9.9 percent of the Mylan shares even though it had zero economic interest in those shares. Perry’s voting rights had been completely emptied of the economic interest that usually goes along with those rights.

But this casual look misses a third component to Perry’s “overall economic interest.” In addition to (a) host shares and (b) coupled assets, Perry held (c) “related non-host assets.” Thus, Perry’s overall economic interest flowed from the combined effect of:

(a) **host shares** (9.9 percent of Mylan shares), Perry had 9.9 percent of all Mylan voting rights;

(b) **coupled assets** (enough hedges to eliminate its economic exposure to Mylan shares), Perry had zero economic interest in Mylan shares; and

(c) **related non-host assets** (7 million King shares), Perry had exposure to King shares.

The net effect of (a), (b), and (c) is that the more Mylan (over)-paid for King, the more Perry profited. Perry was an empty voter with a negative overall economic interest in the host shares. That is, Perry had a negative overall economist interest in Mylan shares because the impact of a transaction harmful to the economic returns on Mylan shares would be beneficial to Perry because of its idiosyncratic holdings of host shares, coupled assets, and related non-host assets.

2008 Decoupling II (Penn.) urged corporate law to intervene directly and bar voting in this circumstance.\textsuperscript{14} After all, negative economic ownership in the shares would give the shareholder incentives to vote against the interests of other shareholders. More broadly, a decision-maker’s overall economic interest in host shares—negative, positive, or zero (or immaterially negative or positive)—creates tipping points for when its votes hurt, help, or are very roughly neutral regarding the alignment of the decision-maker’s voting incentives with the welfare of other shareholders:

1. **Materially negative overall economic interest.** Because of (a), (b), and (c), Perry had material incentives to vote in ways opposite to the incentives of other Mylan shareholders.

2. **Materially positive overall economic interest.** If Perry held only a minor coupled asset position—i.e., only modestly hedged its exposure to Mylan shares—it would have had a materially positive overall economic interest and its incentives would thus align with those of other Mylan shareholders.

3. **Zero overall economic interest.** If the effect of Perry’s holdings of (a) and (b) were

\textsuperscript{13} For a more detailed analysis of Perry-Mylan, see 2006 Decoupling I (Southern Cal.), supra note 2, at 816, 825–26, 828–29. For analysis of a situation similar to Perry-Mylan, see 2008 Decoupling II (Penn.), supra note 2, at 634–35.

\textsuperscript{14} 2008 Decoupling II (Penn.), supra note 2, at 701.
zeroed out by the effect of Perry’s holdings of (c), Perry would be indifferent to the share price of Mylan and thus would not have incentives consistent with other Mylan shareholders.

The Delaware judiciary and legislature and private ordering by Delaware companies have long explicitly or implicitly used the decoupling analytical framework in multiple contexts. In Crown EMAK, the Delaware Supreme Court stated that “[f]or many years, Delaware decisions have expressed consistent concerns about transactions that create a misalignment between the voting interest and economic interest of shares” and cited with approval the Court of Chancery’s recognition that what legitimates a decision-making mechanism is the premise “that stockholders with economic ownership are expressing their collective view as to whether a particular course of action serves the corporate goal of stockholder wealth maximization.” The supreme court quoted from 2006 Decoupling I (Bus. Law.) and used definitions central to the framework. As to the critical matter of the deconstruction methodology, the court quoted from that article:

Economic ownership . . . the economic returns associated with shares. This ownership can be achieved directly by holding shares, or indirectly by holding a coupled asset, which conveys returns that relate directly to the returns on the shares. Economic ownership can either be positive . . . the same direction as the return on shares . . . or negative . . . the opposite direction from the return on shares.

Crown EMAK has broader significance with respect to Delaware law and the decoupling framework. For now, however, we limit ourselves to considerations of three specific applications of the framework and its deconstruction methodology.

II. RE-CALIBRATION OF STANDARDS OF COURT DEFERENCE TO FIDUCIARY DECISIONS

A. Standards of Review: Business Judgment, Enhanced Scrutiny, and Entire Fairness

When conduct by directors is challenged as a breach of fiduciary duty, courts presume that “in making a business decision the directors of a company acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.” Under the

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15 2022 Governance and Decoupling, supra note 2, at 455–66.
16 Crown EMAK Partners, LLC v. Kurz, 992 A.2d 377, 388 (Del. 2010); see also Kurz v. Holbrook, 989 A.2d 140, 178 (Del. Ch. 2010).
17 Crown EMAK, 992 A.2d at 391 (quoting 2006 Decoupling I (Bus. Law.), supra note 2, at 1022).
18 Theodore Mirvis, Delaware Address Vote Buying and Synthetic Ownership, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. (May 3, 2010) (https://corpgov.law.harvard.edu/2010/05/03/delaware-addresses-vote-buying-and-synthetic-ownership/ (Crown EMAK) endorsed recent scholarship by Professors Henry Hu and Bernard Black on what they have called ‘empty voting,’ and the danger to corporate policy presented by the [decoupling] of voting interests and economic interests”). See also infra notes 107–10 and accompanying text (discussing how Crown EMAK was relied on in Zohar II, Hawkins, and TR Investors).
19 Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). Phraseology in Delaware opinions and statutes like “the company” and “the company and its shareholders” in the context of loyalty and other corporate objective-related matters are generally best interpreted as referring to the foundational interest in the economic welfare of shareholders, not the welfare of the corporate entity. For a notable formulation of the corporate objective of for-profit Delaware corporations consistent with this, see eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 32–34 (Del. Ch. 2010). Crown EMAK and the deconstruction methodology also center on the economic returns from shares of stock. For brevity, this Article
standard known as the “business judgment rule”—the default standard under Delaware law—courts thus defer to directors’ judgment unless that judgment cannot be attributed to any rational purpose—a degree of deference virtually impossible to overcome.

At the opposite end of the spectrum of standards of review of fiduciary conduct is what is known as the “entire fairness” standard. Described as “the most exacting form of review,” this standard requires the proponent of a challenged transaction to show it was fair to the company and its stockholders both in terms of price (economic fairness) and dealing (procedural fairness). Several circumstances trigger this strict form of scrutiny, most notably, disloyalty—which conflicts interest—on the part of the decision-maker. Where the decision-maker is the board of directors, entire fairness review is required where “at least half of the directors who approved the transaction were not disinterested or independent.” Where the transaction is imposed by a controlling stockholder, entire fairness review is required where the transaction is one in which the controller is “conflicted.”

Determining whether an individual director or a controller is “disinterested” or “conflicted” is thus a core question. For directors, the decision-makers we examine first, Delaware case law has consistently maintained that “[d]irectorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders.” This formulation has a direct antecedent in the sweeping pronouncement that “there shall be no conflict between duty and self-interest.” It is thus settled doctrine that where a director “stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts.”

refrains from discussing varying conceptions of “shareholder wealth maximization” and distinctions between maximizing the wealth of shareholders and the welfare of shareholders, diversified and undiversified. As to these and related matters such as the looseness of corporate objective phraseology and distinctions between the welfare of shareholders and the welfare of the corporate entity, see, for example, Henry T. C. Hu, Behind the Corporate Hedge: Information and the Limits of “Shareholder Wealth Maximization,” J. APP. CORP. FIN., Fall 1996, at 39; and 2007 Columbia, supra note 2, at 1348–64.

21 See In re Info USA, Inc. S’holders Litig., 953 A.2d 963, 1000 (Del. Ch. 2007).
24 See, e.g., Brehm v. Eisner, 746 A.2d 244, 264 n.66 (Del. 2000) (entire fairness standard implicated where “directors are interested or lack independence relative to the decision, do not act in good faith, act in a manner that cannot be attributed to a rational business purpose or reach their decision by a grossly negligent process”).
25 See, e.g., Weinberger, 457 A.2d at 710–11.
26 See In re KKR Fin. Holdings LLC S’holders Litig., 101 A.3d 980, 990 (Del. Ch. 2014), aff’d sub nom. Corwin v. KKR Fin. Holdings LLC, 125 A.3d 304 (Del. 2015).
27 See In re Oracle Corp. Derivative Litig., 2023 Del. Ch. LEXIS 114, at *3 (May 12, 2023).
The policy rationale for this approach to judicial review is as simple—or even simplistic—as it is venerable. In brief, courts try to determine whether the motives of directors will incline them to serve their personal interests at the expense of stockholders generally. Although that inquiry into motivation can be multifaceted, it has been guided principally by an empirical premise focused on economic interest.\textsuperscript{31}

The focus on motivation driven by economic interest is longstanding. Nearly a century ago, in 1939, the Delaware Supreme Court proclaimed in \textit{Guth v. Loft, Inc.}\textsuperscript{32} that there is “a public policy, existing through the years, . . . derived from a profound knowledge of human characteristics and motives,” that “demands that there shall be no conflict between duty and self-interest.”\textsuperscript{33} \textit{Guth} noted that it is “a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.”\textsuperscript{34} That policy is “wise” presumably because of the concern that a conflicting financial self-interest may incline the decision-maker to favor a transaction that hurts other stockholders.

In its 1985 opinion in \textit{Unocal Corp. v. Mesa Petroleum Co.},\textsuperscript{35} in response to a wave of hostile takeover bids, the Delaware Supreme Court articulated an intermediate standard—“enhanced scrutiny”—that fell between the business judgment rule and the entire fairness standard. Under that intermediate standard, which applies when directors take corporate action to deter an unsolicited takeover bid, directors must present evidence that their action was taken in response to a reasonably perceived threat to the interests of the company and its stockholders, and that their action was reasonable in relation to that threat.\textsuperscript{36} In articulating this intermediate standard of review, the Delaware Supreme Court declined to treat defensive action as equivalent to an attempt to profit at the expense of the company, and thereby apply the entire fairness standard; rather, the court adopted the “enhanced scrutiny” standard due to what it described as the “omnipresent specter that a board may be acting primarily in its own interests, rather than those of the company and its shareholders.”\textsuperscript{37} Thus, like the concern that animates application of the entire fairness standard, this “omnipresent specter” is an empirical observation about human motivation that results in judicial review more demanding than business judgment rule deference.

One further note about director motivation: although Delaware case law speaks approvingly of

\begin{footnotesize}
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\item\textsuperscript{31} For a candid assessment of the importance of empirical premises in assessing fiduciary conduct, see Leo E. Strine, Jr., \textit{The Inescapably Empirical Foundation of the Common Law of Corporations}, 27 DEL. J. CORP. L. 499 (2002).
\item\textsuperscript{32} 5 A.2d 503 (Del. 1939).
\item\textsuperscript{33} See id. at 510.
\item\textsuperscript{34} Id.
\item\textsuperscript{35} 493 A.2d 946 (Del. 1985).
\item\textsuperscript{36} See id. at 954–55. In \textit{Paramount Communications Inc. v. QVC Network Inc.}, 637 A.2d 34 (Del. 1994), the court extended application of the “enhanced scrutiny” standard to situations involving “approval of a transaction resulting in a sale of control.” See id. at 42.
\item\textsuperscript{37} See \textit{Unocal}, 493 A.2d at 954.
\end{itemize}
\end{footnotesize}
the motivation of directors who own equity in the corporation they serve, such ownership is not a prerequisite to application of the business judgment rule. Absent a conflicting interest, even a director owning no equity interest at all will be considered disinterested and entitled to business judgment rule deference, presumably based on an intuition that an awareness of fiduciary duty and perhaps reputational concerns motivate the director to focus on the interest of the host company’s shareholders.

For controlling stockholders, doctrinal treatment of standards of judicial review is similar to that applicable to directors: where a controller uses its control to accomplish a transaction in which it “stands on both sides,” courts apply the entire fairness standard because of the concern that the controller is serving its own economic interests that are in conflict with those of other stockholders. Conversely, in the absence of a competing economic interest, a transaction supported by a controlling stockholder will be accorded business judgment rule deference, because of the alignment of the controller’s interests with those of stockholders generally.

B. The Decoupling Perspective and CBS-Viacom and Tesla-SolarCity as Illustrations

To the (large) extent that courts select a standard of review by examining the economic interests of a director or controlling shareholder flowing from their financial stakes, the decoupling framework and its deconstruction methodology can be helpful. If the deconstruction

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38 E.g., *In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 366 (Del. Ch. 2008) (quoting Orman v. Cullman, 794 A.2d 5, 26 n. 56 (Del. Ch. 2002) (“[a] director who is also a shareholder of his corporation is more likely to have interests that are aligned with the other shareholders of that corporation as it is in his best interest, as a shareholder, to negotiate a transaction that will result in the largest return for all shareholders”)).

39 *See Aronson*, 473 A.2d at 812 (“It is a presumption that . . . directors . . . acted . . . in the honest belief that the action taken was in the best interests of the company.”); *infra* note 58 and accompanying text.

40 E.g., *In re Synthes, Inc. S’holder Litig.*, 50 A.3d 1022, 1039 n.81 (Del. Ch. 2012) (“A basic ground for judicial interference with business judgment on the complaint of minority interests is an advantage obtained by the dominant group to the disadvantage of the corporation or its minority owners.”) (quoting *Getty Oil Co. v. Skelly Oil Co.*, 267 A.2d 883, 887 (Del. 1970))).

41 *Id.* at 1035 (“Generally speaking, a fiduciary’s financial interest in a transaction as a stockholder (such as receiving liquidity value for her shares) does not establish a disabling conflict of interest when the transaction treats all stockholders equally . . . . This notion stems from the basic understanding that when a stockholder who is also a fiduciary receives the same consideration for her shares as the rest of the shareholders, their interests are aligned . . . . Controlling stockholders typically are well-suited to help the board extract a good deal on behalf of the other stockholders because they usually have the largest financial stake in the transaction and thus have a natural incentive to obtain the best price for their shares.”).

42 We note the scope of the decision-maker conflicts that the methodology focuses on. First, the methodology looks at the overall economic interest flowing from financial stakes, not the full range of incentives that may affect the decision-maker. As 2006 *Decoupling I* ((Southern Cal.) noted, other kinds of incentives can influence the vote of institutional investors. 2006 *Decoupling I*(Southern Cal.), supra note 2, at 862–63 (citing Hewlett v. Hewlett-Packard Co., No. Civ. A. 19513-NC, 2002 WL 818091, at *12 (Del. Ch. Apr. 30, 2002)) (discussing plaintiff’s allegation, rejected by the court, that Deutsche Bank’s vote in the Hewlett Packard–Compaq battle was coerced by threats from Carly Fiorina that the bank’s future business relationship with HP would suffer if the bank voted against the merger).

Second, in focusing only on economic interests, we do not deny that a host of other less measurable considerations, such as familial loyalty, ego satisfaction, social status, and personal reputation, may also affect a decision-maker, and
methodology’s systematic inventory of interests in the host company and a counterparty—i.e., the overall returns flowing from the “host shares,” “coupled assets,” and “related non-host assets”—reveals that a fiduciary had a materially positive overall economic interest in host shares, there would ordinarily be no concern that the person’s decision was motivated by any economic interest not aligned with the interests of the host company’s shareholders. That is, the impact of the challenged transaction on the economic returns flowing from the fiduciary’s combination of holdings is material and points in the same direction as the impact on the economic returns to host shares.

Conversely, by analogy to the Perry-Mylan example, if the methodology reveals that a fiduciary had a materially negative overall economic interest in host shares, there would ordinarily be concern that the fiduciary was motivated to favor interests antagonistic to those of the host company’s shareholders. And, in the middle of the spectrum, if such an inventory reveals a fiduciary has substantial holdings on both sides of a transaction and its overall economic interest in the host shares was zero or immaterially different from zero (based on the returns from its host shares, coupled assets, and related non-related assets), one would ordinarily expect that the fiduciary (other than in the case of a director43) would not be motivated to favor or disfavor the interests of the host’s shareholders.

Moreover, the place on the spectrum at which a fiduciary’s economic interest neither favors nor disfavors the host shares is not an infinitesimal point. Thus, a trivial negative overall economic interest in the host shares should not, in our view, imply that a decision-maker is motivated to disfavor the host shares. To the contrary, there is a zone around that central point of zero overall economic interest in which the decision-maker is not motivated to favor or disfavor the host shares. Thus, we believe a positive or negative overall economic interest must be subjectively material to the fiduciary before such interest will motivate the person to favor or disfavor the host shares.

That view finds support in case law holding that a conflicting personal financial interest will not trigger more intensive judicial review unless it is subjectively material to the director.44 Thus, for example, simply owning a slightly larger percentage interest in an acquirer than in a host target will not necessarily make the director conflicted as to a merger; depending on the magnitude of the holdings, such a differential may translate into an absolute dollar impact that is trifling in

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43 See supra note 39 and infra note 58 and accompanying text.
44 Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1167 (Del. 1995) (“requiring a shareholder plaintiff to show ‘the materiality of a director’s self-interest to the given director’s independence’ [is] a ‘restatement of established Delaware law.’” (quoting Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 363 (Del. 1993), decision modified on reargument, 636 A.2d 956 (Del. 1994))).
relation to the director’s wealth. In sum, the courts’ “profound knowledge of human characteristics and motives” has yielded a policy that defers to a director’s judgment if the “possibility of profit,” even if present, is not sufficiently compelling that it is likely to influence that director’s judgment. We see no reason a similar analysis of materiality should not apply as well to controlling stockholders.

The decoupling perspective provides an additional framework supporting the court’s treatment of conflicted transactions in which a director or controlling stockholder obtains significant financial gain at the expense of the company’s stockholders. The strict “entire fairness” form of review of fiduciary conduct has its deepest roots in cases challenging transactions in which the overall economic interest of a director or controlling stockholder in the host shares is entirely negative. Thus, a merger in which a controlling stockholder acquires the shares held by minority stockholders provides the archetypal case for applying entire fairness: the controller benefits dollar for dollar to the extent that the minority stockholders are underpaid. Even where the controlling stockholder’s economic interest in a counterparty to a transaction is partially offset by an economic interest in the host, if the stockholder has a materially negative overall economic interest in the host shares, the entire fairness standard governs judicial review of a transaction. This can happen in ways far simpler than of the Perry-Mylan variety: for instance, when a host company purchases an asset from a second entity in which the host’s controller has a significantly larger proportionate equity interest.

We submit that, in some more complicated situations, the shorthand, colloquial doctrinal guidance in the case law does not map correctly to the actual overall motivation of the decision-maker. One such situation is when the controller’s percentage ownership in the counterparty’s shares is about equal to its percentage ownership in the host shares. Delaware case law tends to impose the entire fairness standard whenever a person “stands on both sides of a transaction.” This would require application of the entire fairness standard to any transaction in which a director or controlling stockholder has any material economic interest in the counterparty—i.e., in all cases involving a merger in which a director or controlling stockholder owns shares in both parties.

45 Id. (“[T]he ‘actual person’ test requires an independent judicial determination regarding the materiality of the ‘given’ director’s self-interest.”).

46 The Model Business Corporation Act reflects this focus on the likelihood that a director’s judgment will be influenced by some personal interest: “‘material interest’ means an actual or potential benefit or detriment (other than one which would devolve on the company or the shareholders generally) that would reasonably be expected to impair the objectivity of the director’s judgment when participating in the action to be taken.” MODEL BUS. CORP. ACT ANN. § 1.43(b)(2) (2022).

47 Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983), is perhaps the best known controlled merger/entire fairness case, but it was not the first. See, e.g., Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Del. 1952).

48 E.g., In re BGC Partners, Inc. Derivative Litig., 2022 Del. Ch. LEXIS 198, at *42 (Aug. 19, 2022) (“Given his relative ownership of Berkeley Point and BGC (54% and 23% respectively), Lutnick had an incentive to cause BGC to overpay for Berkeley Point.”); In re Oracle Corp. Derivative Litig., 2023 Del. Ch. LEXIS 114, at *10 (May 12, 2023) (noting that the controller owned 28 percent of host (Oracle) and almost 40 percent of the entity (NetSuite) purchased by Oracle).
As suggested by our analysis in Part I of the actual Perry-Mylan situation and the two hypothetical variations, such a blanket approach to mergers involving concurrent ownership sweeps too broadly. In the Perry-Mylan situation, if Perry had more modest sized coupled assets, Perry would have had a materially positive overall economic interest in Mylan shares. Thus, Perry would have had incentives that align with the interests of other Mylan shareholders: Perry would like Mylan to only make acquisitions that would enhance the value of Mylan shares. Yet, under the blanket doctrinal approach, being “on both sides of a transaction” would compel application of entire fairness even in this circumstance, and it would do so as well if Perry had zero (or immaterially different from zero) overall economic interest in Mylan shares.

There is no apparent reason, however, why a transaction supported by a controller with a zero or positive overall economic interest should be subjected to the same strict level of judicial review as a transaction supported by a controller with a materially negative overall economic interest. With a zero or positive overall economic interest, the controller is at worst indifferent to, and perhaps strongly inclined to favor, the welfare of the host’s stockholders, unlike the controller with a materially negative overall economic interest, whose incentive is to disfavor the host’s stockholders. Those two quite different motivations should not, we submit, result in the same level of judicial scrutiny.

Several recent cases illustrate how attention to overall economic interest might have clarified the proper scope of judicial review. In litigation challenging Viacom’s merger with CBS, the Court of Chancery noted the debate between the parties about whether “mere presence” of a controller on both sides of the transaction was enough to require the defendants to establish “entire fairness,” or whether some greater conflict was required. In arguing that the entire fairness standard should not apply, the defendants pointed out that the controller’s percentage ownership interests in the merging parties were essentially equal (10.5 percent in CBS and 9.9 percent in Viacom), and suggested (correctly, we believe) that there is not “a single case finding that a controller engaged in self-dealing where the alleged facts . . . demonstrated that the controller was indifferent to the deal consideration,” and “in each case involving an alleged self-dealing controller in which the entire fairness standard was applied, the reviewing court did so because the controller had a tangible economic incentive to favor the counterparty over the minority, unlike here.” Finding that the controller received a non-ratable benefit in the transaction, the Vice Chancellor found the “mere presence” debate “interesting” but “ultimately academic,” and opted to apply entire fairness scrutiny, at least at the pleading stage.

The issue raised by the defendants in Viacom might also have been addressed in the widely

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50 Id. at *13. Moreover, Shari Redstone—the human controller of the parent enterprise of both CBS and Viacom—owned, through a trust, only 20 percent of the parent. Id. at *13.
52 Viacom, 2020 Del. Ch. LEXIS 373, at *8.
publicized litigation challenging Tesla’s acquisition of SolarCity, in which Elon Musk was charged
with breach of fiduciary duty as a controlling stockholder.53 Musk’s percentage ownership in both
companies was also nearly equivalent (22 percent of Tesla, 21.9 percent of SolarCity).54 Despite
this, Vice Chancellor Slichts concluded that “[i]f Elon [Musk] is deemed a controlling stockholder
of Tesla, . . . his conduct will be subject to the ‘onerous’ entire fairness review since there is no
question he was conflicted with respect to the Acquisition.”55 Having chosen to apply entire
fairness scrutiny, the court nevertheless sustained the challenged transaction as entirely fair.56 As
we explain momentarily, however, consideration of Musk’s overall economic interest in Tesla
could have yielded a different choice of standard of review that is more considerate of the realities
of human motives that Guth invoked nearly a century ago.

In situations like those in Viacom and Tesla, we urge adoption of an analytical framework
centering on the controller’s overall economic interest in host shares, rather than a reflexive resort
to entire fairness review. Where that overall economic interest is materially negative, the court
should do what it has always done: apply the entire fairness standard, in line with traditional
doctrinal formulations. We also see the analysis working similarly when a director or controller
whose overall economic interest in the host shares is materially positive.57 In our view, a materially
positive overall economic interest will likely incline a director or controller to act to favor the
host’s stockholders—exactly the motivation that leads to judicial deference. To take an extreme
example, we think it makes no sense, as a matter of assessing motives, to deny business judgment
rule deference to a transaction where a controlling stockholder owns a trivial equity interest in a
counterparty but has a huge equity interest in the host, simply because it could be said to “stand
on both sides” of the transaction. The negative impact of the challenged transaction on the
economic returns on the decision-maker’s holdings in the counterparty would be dwarfed by the
positive impact of the challenged transaction on the economic returns of the decision-maker’s
holdings in the host.

That leaves open, however, how to treat a director or controller who owns significant equity in
both parties to a transaction but whose overall economic interest in host shares is zero or not
materially positive or negative. In this situation, presented in both Viacom and Tesla, the director
or controller is not economically motivated to disfavor the host stockholders; the concern is at
most the milder one that the director or controller may not exercise diligence to assure a fair
outcome for the host stockholders.

54 Id. at *7–8.
55 Id. at *52.
56 Id. at *86–87.
57 Professor Hamermesh served as an expert witness for defendants on other issues in a case presenting this scenario:
a controller with a significantly greater interest in the host than in the counterparty to the challenged transaction. In re
owned 17.6 percent of host (Straight Path) equity but only 11.3 percent of the equity of the counterparty (IDT)).
A director, however, is presumed to exercise appropriate diligence, so a director whose overall economic interest is zero should still be entitled to business judgment rule deference. Perhaps in contrast, a controller is not generally or statutorily charged with a duty to manage the affairs of the corporation, so there is at least some reason for applying a standard of judicial scrutiny more stringent than the business judgment rule, albeit less demanding than entire fairness. A doctrinal hypothesis that plausibly provides such a standard might be the “omnipresent specter” identified in *Unocal* to be sure, not precisely that specter (“a board may be acting primarily in its own interests, rather than those of the company and its shareholders”[^59]), but the specter that a controller might not be adequately attentive to fairness to the host. If that analogy holds, a proper level of judicial review would be the “enhanced” or “intermediate” scrutiny called for by *Unocal* and its progeny[^60] rather than business judgment rule deference accorded to decision-makers having no economic interest in a counterparty whatsoever.

Figure 1 (illustrates how the triad of relative economic interests in host shares—negative, zero (or immaterially different from zero), and positive—maps to the triad of stands of review—entire fairness, enhanced scrutiny, and the business judgment rule. Notice that Figure 1 reflects the different standards we advocate for directors and controlling stockholders whose overall economic interests in host shares are immaterially different from zero.

![Figure 1. Mapping Overall Economic Interest Triad to Standards of Review Triad](https://ssrn.com/abstract=4526157)

In any event, using the deconstruction methodology to help choose the standard of review may avoid potentially harmful effects of reflexively resorting to entire fairness when a less stringent

[^58]: Cf. Del. Code Ann. Tit. 8, § 141(a) (2023); see Jens Dammann, *The Controlling Shareholder’s General Duty of Care: Dogma that Should Be Abandoned*, 2015 U. Ill. L. Rev. 479, 496 (“[T]he precedential basis for the general duty of care is exceedingly weak. While Delaware’s courts have acknowledged the existence of such a duty in various dicta, there is not a single case in which a controlling shareholder was actually found liable for a mere violation of his general duty of care.”). *See also supra* note 39 and accompanying text.

[^59]: Id. at 954.

standard would be apt. If a court tacitly sympathizes with a controller since her overall economic interest is zero or positive, the court may excuse failures of process that a stringent approach to entire fairness might not forgive. That may degrade the efficacy of the entire fairness standard in the situations (controller with a strong negative overall economic interest) where it is most needed. Choice of the less demanding enhanced scrutiny standard could avoid that degradation.

C. Summary of Proposed Re-Calibration of the Standards of Review Triad

In sum, the application of the decoupling framework and its deconstruction methodology would yield three significant doctrinal improvements with respect to court deference to fiduciary decision-making. First, it would replace the vague idea of “standing on both sides of a transaction” with a more precise analysis of both the overall economic interest and that interest’s constituent elements. The decoupling perspective also illuminates the sources of discomfort that animated the idea in the first place.

Second, the decoupling perspective would supply alternative standards of judicial review that are better attuned to the reality of motivation—i.e., depending on whether the overall economic interest in the host shares is negative, zero, or positive. For instance, use of the perspective suggests that contrary to longstanding Delaware law, the business judgment standard, not “entire fairness,” is more appropriate when a director has an overall economic interest in host shares that is either positive or close to zero—irrespective of whether the director has material stakes in both parties to a transaction. Similarly, and also contrary to longstanding albeit colloquial doctrine, the business judgment standard, not “entire fairness,” is more appropriate when a controller’s overall economic interest is material positive, and where its overall economic interest is zero or close to zero, the standard of review should be no stricter than “enhanced scrutiny.” By offering a concept of subjective materiality, we also suggest the boundary lines for negative, zero, and positive overall economic interest.

Third, the perspective offers a versatile tool for the systematic assessment of overall economic interest both in complex two-company contexts and, as we show in Part IV, even more complicated contexts such as de-SPACing. When a fiduciary has especially esoteric financial stakes the discipline and guidance provided by the deconstruction’s methodology of “host shares,” “coupled assets,” and “related non-host-assets” methodology offers a systematic path forward.

61 The Tesla/SolarCity opinion reflects a tendency, accepted in that case by the Delaware Supreme Court “[i]n keeping with our practice of addressing only issues fairly presented” (2023 Del. LEXIS 178, at *49), to fall back on application of the entire fairness standard in the face of uncertainty about the appropriate choice of standard of review. See In re John Q. Hammons Hotels S’holder Litig., 2011 Del. Ch. LEXIS 1, at *6 n.5 (Jan. 14, 2011) (although defendants “may actually have been entitled to business judgment rule protection, I have nonetheless applied the more exacting entire fairness standard of review because defendants easily satisfy it.”). We thank Bill Lafferty for referring us to this case.

III. RETHINKING COURT DEFERENCE TO “DISINTERESTED” SHAREHOLDER DECISIONS

The decoupling perspective also provides insights into another realm where motivation helps inform the standard of judicial review: the assessment of whether a stockholder’s vote or decision to tender shares is “disinterested.” Of course, assessing economic motivations even for a director or controlling shareholder who is a natural person can be challenging, as shown in the previous Part. But when we turn to assessing whether a shareholder is “disinterested,” complexities relating to increasingly significant patterns in financial stakes (“financial stake complexities”) and in organizational voting dynamics (“organizational voting dynamics complexities”) pose far broader and deeper challenges. These complexities call into question the very idea of deference to shareholder decisions and are inextricably linked to the debate over corporate purpose.

Part III first reviews the doctrinal contexts in which the assessment of disinterestedness plays a role, and how the courts have defined disinterestedness for purposes of that role.

A. The Role of “Disinterested” Shareholder Decisions and the Analysis in CNX

In challenges to transactions otherwise subject to review under the enhanced scrutiny or entire fairness standards, Delaware courts have long given validating effect to uncoerced, informed stockholder votes to approve the transaction.\(^63\) For example, such voting approval by a majority of minority stockholders either shifts the burden of proof on the question of entire fairness from the proponents to the challenger of a transaction with a conflicted director or controlling stockholder,\(^64\) or in some circumstances reinstates deference under the business judgment rule.\(^65\) In addition, uncoerced, informed stockholder approval of the sale of the company avoids enhanced judicial scrutiny of the sale that would otherwise apply,\(^66\) reinstating application of the business judgment rule,\(^67\) in what has been described as “Corwin cleansing.” Finally, tenders by a majority of minority stockholders contribute to a finding that a controlling stockholder’s tender offer is non-coercive and therefore not subject to entire fairness scrutiny.\(^68\)

In all of these situations, however, the courts have made clear that the stockholders whose vote or tender has these validating effects must be “disinterested.”\(^69\) Corwin succinctly articulated the policy underpinning this requirement: “there is little utility to having [judges] second-guess the determination of impartial decision-makers with . . . an actual economic stake in the outcome (in

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\(^63\) E.g., Gottlieb v. Heyden Chem. Corp., 91 A.2d 57, 59 (1952) (“[T]he entire atmosphere is freshened and a new set of rules invoked where formal approval has been given by a majority of independent, fully informed stockholders.”).

\(^64\) Kahn v. Lynch Commc’n Sys., 638 A.2d 1110, 1116 (Del. 1994).


\(^66\) Paramount Commc’ns Inc. v. QVC Network Inc., 637 A.2d 34, 42 (Del. 1994).

\(^67\) Corwin v. KKR Financial Holdings LLC, 125 A.3d 304, 312–13 (2015).


\(^69\) E.g., Corwin, 125 A.3d at 313; Lockton v. Rogers, No. 2021-0058-SG, 2022 Del. Ch. LEXIS 47, at *24 (Mar. 1, 2022) (holding that Corwin cleansing will not be triggered by a stockholder vote where the majority of votes cast were not truly disinterested); Marciano v. Nakash, 535 A.2d 400, 405 n.3 (Del. 1987) (stockholder approval under section 144(a)(2) of the Delaware General Corporation Law must be by disinterested shareholders).
the case of informed, disinterested stockholders).”70 That policy view is a corollary of the more general view expressed by the Delaware courts that the “rational, economic self-interest arguably common to all shareholders” is the legitimizing underpinning of corporate voting.71

This policy view, however, requires defining what it means to be “impartial” or “disinterested” and have “an actual economic stake in the outcome” of a vote or tender offer. To someone unfamiliar with corporate law, the conjunction of “disinterested” and having an “actual economic stake” seems internally inconsistent.

The explanation lies in the curious way that corporate law uses the term “disinterested” in the shareholder decision-making context. A shareholder is “disinterested” only if it has an “economic self-interest arguably common to all shareholders”—i.e., would, like all plain vanilla shareholders, benefit from an increase in economic returns from holding shares.72 Law and common sense suggest that the votes of shareholders with an overall economic interest of zero or close to zero should not be entitled to judicial deference even if the shareholder is “disinterested” in the sense of being free of any conflicting interest.73

Corporate law’s use of the word “interested” in the shareholder context is as almost as curious as its use of the word “disinterested.” Stated most generally, 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.”74 The “interest” that is contemplated in this phraseology is interest that is, in effect, idiosyncratic to that specific shareholder. A controlling stockholder thus cannot rely on the votes of its own shares to avoid entire fairness review of a freezeout merger. For the purposes of this Article, we will use “disinterested shareholder” and “interested shareholder” and correlative terms in the longstanding manner that courts have used such terms.

We submit in any event that the courts’ general definition of disinterestedness is either underinclusive or at least ambiguous, to the extent that it suggests that a shareholder’s vote cannot be entitled to deference if it has any economic interest—as may flow from its coupled assets or its related non-host assets—that is counter to the interests of host shareholders generally.

The decoupling framework suggests that it is the overall economic interest in the host shares

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70 Corwin, 125 A.3d at 313–14.
72 See supra note 16 and accompanying text (discussing Crown EMAK).
73 Corporate law treats directors differently from shareholders: directors who have no economic interest whatsoever in the host company will nevertheless be considered to be “disinterested.” See Aronson, 473 A.2d at 812 (“directors are “disinterested” if they “neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally.”).
that matters: considering the impact of the challenged transaction on the net returns flowing from holdings of (a) host shares; (b) coupled assets; and (c) related non-host assets relative to the impact on returns that would flow solely from holdings of host shares. Thus, a shareholder’s vote cannot be entitled to deference if its overall economic interest in host shares is either negative or immaterially different from zero. In contrast, where the overall economic interest is materially positive, and the shareholder’s overall economic incentive thus aligns with that of the plain vanilla host shareholder (i.e., one whose economic interest arises solely from its host shares), it should be considered to have “an actual economic stake” in the host shares and therefore be entitled to deference. But consistent with the approach outlined for controlling shareholders in Part II, a shareholder whose overall economic interest in host shares is zero, not materially positive, or negative should not be entitled to deference, because it is indifferent to what happens to the value of the host shares and, unlike a director, it is ordinarily not subject to a fiduciary duty to vote to further the interests of the corporation.

The concerns expressed here regarding disinterested shareholder voting have focused primarily on institutional investors, rather than individual/retail investors, and we do not advocate subjecting retail investors’ holdings to the scrutiny for disinterestedness that we advocate for institutional investors. There are multiple reasons for this choice:

- With rare exceptions, individual investors are not required to disclose publicly their financial interests, and gathering information about those interests in order to evaluate disinterestedness would appear to be prohibitively costly if not impossible.
- Setting up additional barriers or costs to voting by retail investors would only further diminish their already low level of voting participation.
- Finally, and perhaps most importantly as a practical matter, there will be few if any instances in which the relatively minuscule holdings of individual retail investors could have any significant effect on the outcome of a stockholder vote or tender condition.\(^\text{75}\)

Figure 2 illustrates how we see judicial deference to institutional shareholder voting mapping to various levels of overall economic interest.

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\(^{75}\) A possible exception is an identifiable class of individual investors whose holdings are significant in the aggregate and act in concert or have common motivations to act in concert. We discuss one possible example in Part IV: the class of individual investors who vote in favor of a de-SPAC despite redeeming their shares.
Vice Chancellor Laster’s insightful CNX opinion in material part tracks our alternative approach to disinterestedness, and after the following brief review of that opinion we turn to a sobering assessment of the extent to which disinterested shareholder voting meaningfully exists in light of new institutional financial stake patterns and new institutional organizational voting dynamics and the assets under management of today’s institutional investors.

In CNX, a key issue was whether T. Rowe Price, which held about 37 percent of the minority shares but had “roughly equivalent equity interests” (in percentage terms) in the controller/offeror and the host/target (6.5 percent and 6.3 percent, respectively), was “disinterested” for purposes of whether the controller’s tender offer satisfied a “majority-of-the-minority” tender condition.76 Given T. Rowe Price’s nearly equivalent percentage interests in the two companies, the court concluded that it had "materially different incentives" than a stockholder invested in only one company, "thereby calling into question the effectiveness of the majority-of-the-minority condition."77 The court reasoned that “T. Rowe Price's roughly equivalent equity interests (6.3% of CNX shares versus 6.5% of CONSOL as of April 26, 2010) leave it fully hedged and indifferent to the allocation of value between CONSOL and CNX Gas.”78 The court also observed that T. Rowe Price’s proportionate interest in CONSOL was “slightly larger” than its interest in CNX, but that observation was superfluous if indifference alone disqualified it from being “disinterested.”79

The near 1:1 ratio in percentage ownership stakes (i.e., 6.3:6.5 or 1.00:1.03) and the relatively modest absolute dollar stakes in the two companies ($360 million in CNX and $493 million in CONSOL) meant that the resulting dollar incentives for T. Rowe Price to favor one side over the

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76 See In re CNX Gas Corp. S’holders Litig., 4 A.3d 397, 401, 416 (Del. Ch. 2010).
77 Id.
78 Id. (“To the extent the Tender Offer shortchanges CNX Gas holders, T. Rowe Price gains proportionately through its CONSOL ownership. To the extent CONSOL overpays, T. Rowe Price gains proportionately through its CNX Gas ownership.”).
79 See id.
other were quite limited. That is, in the context of this transaction, T. Rowe Price’s overall economic interest in CNX shares was immaterially different from zero. Conversely, the combination of (a) a similarly small ownership percentage ratio in favor of the host shares and (b) the modest absolute dollar stakes in the two companies would also lead to trifling incentives in favor of one side or the other and should not automatically warrant deference.

More important, however, and as we now discuss, the treatment of T. Rowe Price in CNX suggests fundamental problems with the idea of disinterested shareholder approval. We should also note that, in this CNX context, characterizing T. Rowe Price’s overall economic interest in the host CNX shares as immaterial happened to be fairly easy. A more careful consideration of materiality is needed for more difficult cases, a matter will we turn to in Part III.B.3.

B. Institutional Financial Stakes and Asset Manager Organizational Voting Dynamics

Institutional investors have long played the role of the hero in the saga of how to address the classic Berle-Means separation of ownership and control problem. New financial stake patterns on the part of institutional investors, however, now often undermine their incentives to play that role. New organizational voting dynamics at institutional investors also complicate matters, including those flowing from the increasing conflict between those who urge asset managers to depart from the classic focus on the pecuniary interests of their clients and those who seek to preserve such a pecuniary focus. These patterns and dynamics take on increasing importance as the extent of institutional investor ownership increases, as we next show.

1. Increasing Complexities from Institutional Financial Stakes


In the context of individual investors, the matter of related non-host assets is generally not a material issue. This is because available empirical evidence consistently suggests that the number of stocks that individual investors typically hold is extremely low: as a result, so too would the


81 E.g., Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651, 659 (Del. 1988) (referring to the “emergence of new institutional voices and arrangements that will make the stockholder vote a less predictable affair than it has been”). As earlier noted, this Article looks at overall economic interests flowing from financial stakes, not the full range of incentives that may affect the decision-maker. See supra note 42.

82 In Part IV, we discuss an exception to this that occurs in the de-SPACing context.
chances of an individual investor happening to own both the shares in the host company and the counterparty. The only systematic academic analysis of this issue, published in 2008, found that the average investor held a four-stock portfolio based on accounts at a major U.S. discount brokerage house for 1991–1996. More recent data appears to suggest the situation may have not changed much. One academic study of Robinhood investors noted as an aside (without support) that “if reports are to be believed” the average Robinhood investor held three positions. A 2020 Vanguard study of its more affluent retail households found that individual investors who did own individual securities (stocks and/or bonds) had a median of seventeen holdings.

In contrast, the related non-host assets of institutional investors are creating increasingly severe challenges, to the point that a rigid application of the longstanding “disinterestedness” doctrine could serve to disqualify institutional investor votes from being considered disinterested to an alarming degree. Institutional investors accounted for at least 60 percent of U.S. equity holdings as of year-end 2021. As of the same date, an estimated 33.3 percent were passively managed—i.e., indexed funds, direct indexers, and active managers who are closet indexing. These two factors and the overarching belief in diversification will often have a profound effect. Institutional investors in public companies (especially companies included in popular indexes) will often hold both host shares and related non-host assets in the form of shares in companies with interests contrary to those of the host company. Indeed, in the event of concurrent ownership, it will frequently turn out that in merger vote and tender decisions, institutional investors will thereby have either a zero or a negative overall economic interest in host shares.

A mechanical tabulation of ownership percentages in host shares and related non-host assets and the absolute dollar stakes involved would therefore suggest that many of these institutional investors may be found to be “interested”—not disinterested—with respect to many merger vote and tender decisions. If interestedness is considered in such a mechanical fashion, this would mean that institutional investors will very often be disenfranchised for the purposes of deference to shareholder approval.

89 See Miguel Anton et al., Mergers & Acquisitions Under Common Ownership, 113 AEA PAPERS & PROCEEDINGS 1, 5 (May 2023) (“[M]ergers of US public corporations have become increasingly concentrated among firm pairs with a high degree of product market interaction and a moderate-to-high degree of common ownership.”).
The CNX case illustrates the prevalence of related non-host assets leading to either zero or negative overall economic interest in the host shares. Although the court wisely urged that its decision “should [not] be read to encourage . . . generalized fishing expeditions into stockholder motives,” its determination that the T. Rowe Price shares were not “disinterested” could also apply to BlackRock, Vanguard, and State Street. As we have seen, T. Rowe Price’s ownership percentage ratio was 1.00:1.03. But a review of 13F filings by BlackRock, Vanguard, and State Street showed that, roughly contemporaneously, their pertinent ownership percentage ratios were far more lopsided in favor of holdings in CONSOL:

BlackRock: 0.03% of CNX and 0.795% of CONSOL: ratio of 1.0:26.6
State Street: 0.147% of CNX and 4.524% of CONSOL: ratio of 1.0:29.0
Vanguard: 0.61% of CNX and 6.25% of CONSOL: 1.0:10.2

BlackRock’s ratio of 1.0:26.6 flowed from a stake of 0.03 percent of CNX and of 0.795 percent of CONSOL. In absolute dollar terms, BlackRock had a stake in CNX worth a mere $206,000 and a stake in CONSOL worth $61,644,000. When this ratio is considered together with the absolute dollar ownership stakes that BlackRock had, the dollar magnitude of BlackRock’s incentives to favor CONSOL far exceeded T. Rowe Price’s incentives to do so. Like T. Rowe Price, BlackRock was not “disinterested,” and its votes should not be accorded deference. However, BlackRock’s position departed further from that of a “disinterested” shareholder: T. Rowe Price had near-zero negative overall economic interest in CNX shares while BlackRock’s had a decidedly negative interest.

Similar to BlackRock, State Street had an CNX:CONSOL ownership percentage ratio of 1.0:29.0 and dollar holdings of $10 million of CNX and $350 million of CONSOL while Vanguard had a corresponding ratio of 1.0:10.2 and dollar holdings of $42 million of CNX and $484 million.

90 Mirroring the doctrinal approach that we argue is overbroad, one article asserts that whenever a “fund company has significant cross-holdings in both the target or acquirer,” its votes should not be treated as disinterested. See Sean J. Griffith & Dorothy S. Lund, Conflicted Mutual Fund Voting in Corporate Law, 99 B.U. L. REV. 1151, 1189 (2019). That blanket rejection in the case of any common ownership would result in a remarkable proportion of institutional investors being disqualified. In contrast, we maintain that the votes of asset managers with a material positive overall economic interest in the host shares, which therefore have both the incentive and the wherewithal to maximize host share value, should be deemed disinterested. In addition, we advocate a limited “strategic pause” set out in infra Part III.C.

91 In re CNX Gas Corp. S’holders Litig., 4 A.3d 397, 416–17 (Del. Ch. 2010).
92 As to these shareholdings, we relied on the 13F filings for holdings as of March 31, 2010. As for the outstanding shares, we used the shares outstanding as of April 26, 2010, as noted by the court for CNX and as implied by the court’s calculations for CONSOL. BlackRock, Inc., Institutional Investment Manager Holdings Report (Form 13F-HR) (Mar. 31, 2010), https://www.sec.gov/Archives/edgar/data/1364742/000108636410009315/blkinc.txt; The Vanguard Group, Inc., Institutional Investment Manager Holdings Report (Form 13F-HR) (Mar. 31, 2010), https://www.sec.gov/Archives/edgar/data/102909/000093247111002093/march2010vgi.txt; State Street Corp., Institutional Investment Manager Holdings Report (Form 13F-HR) (Mar. 31, 2010), https://www.sec.gov/Archives/edgar/data/93751/000119312510121662/d13fhr.txt.
in CONSOL. Thus, like BlackRock, State Street and Vanguard also departed markedly from the status of a “disinterested” shareholder.

In short, if T. Rowe Price’s indifference disqualified it from being a “disinterested” shareholder as CNX suggested, each of BlackRock, State Street, and Vanguard would be even more clearly disqualified.

The CNX situation is now far from anomalous. A 2023 study found that mergers of companies with high common ownership had reached 39 percent of all mergers between 2006 and 2015. Moreover, there is empirical evidence that when there is concurrent ownership, the relative holdings in the acquirer and target can sometimes affect institutional investor decisions, including with respect to voting.

Given the size of many asset managers today and the increased importance of index-based strategies (and an overarching belief in diversification), concurrent ownership will often occur. At year-end 2022, assets under management at BlackRock, Inc., State Street Corporation, and Vanguard Asset Management, were $8.6 trillion, $3.5 trillion, and $7.2 trillion respectively. These three asset managers run the four largest ETFs in the world by market capitalization, all of which were indexed to either the Standard & Poor’s 500 or a far broader total market index; as of January 16, 2023, the total market capitalization of these four ETFs was over $1.2 trillion. Vanguard alone managed $5.7 trillion in indexed assets at year-end 2022. In this environment, the overall economic interest in host shares of large asset managers will be zero or negative with alarming frequency.

If the votes of such asset managers were not entitled to judicial deference in such

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93 The corresponding figure for 1996 to 2005 was 35.4 percent. See Miguel Anton et al., Mergers and Acquisitions Under Common Ownership, 113 AEA PAPERS & PROCEEDINGS 294, 295–96 (2023); see also Chris Brooks et al., Institutional Cross-Ownership and Corporate Strategy: The Case of Mergers and Acquisitions, 48 J. CORP. FIN. 187, 189 (2018) (finding that, in a sample of 2,604 mergers from 1984 to 2014, on average, 18 percent of acquirer stocks were held by target institutional owners and 21 percent of target stocks were held by acquirer institutional owners).

94 See, e.g., Gregor Matvos & Michael Ostrovsky, Cross-Ownership, Returns, and Voting in Mergers, 89 J. Fin. Econ. 391 (2008) (discussing how cross-holdings explain how institutional investor voting behavior); Harford et al., supra note 80, at 38–39 (stating that while institutional cross-holdings are too small to matter in most acquisitions, cross-holdings “could occasionally become an issue in mergers of prominent firms (e.g., those in the S&P 500)”); cf. Brooks, supra note 93, at 188, 213 (noting that growth of institutional cross-holdings may greatly change corporate strategies and decision processes).


97 Vanguard in Nutshell, supra note 95.
circumstances, the consequent shift of “disinterested” voting power from institutional investors to retail investors would have startling, likely untoward, results. Few retail investors vote—in the 2022 proxy season, retail investors voted 29 percent of the shares they owned while institutional investors voted 82 percent of their shares98—and disinterested shareholder approval would be difficult to establish. More important, just as institutional investors may make decisions harmful to shareholder interests, individual investors may do so as well.99 The reasons may be different—institutional investors may, for example, have zero or materially negative economic interests in host shares, other financial relationships relating to the two companies, and limited incentives to invest in stewardship due to indexed strategies100—but the impact on shareholder voting as a key mechanism for limiting principal-agent problems is the same.

b. Coupled Assets: Institutions and Derivatives, Short Selling, and Share Lending

The coupled assets of institutional investors pose challenges of two sorts. One challenge flows from coupled assets that result in courts inadvertently respecting even the votes of empty voters with negative overall economic interest who intentionally seek to use their voting power to hurt the company. The other challenge flows from coupled assets that result in courts inadvertently giving full weight to the votes of shareholders who are empty voters but do have a materially positive economic overall economic interest.

Coupled assets such as put options, debt and equity swaps, and short-selling arrangements could help hedge funds and other sophisticated market participants engage in “net short activism,” a term we shall use to refer to activism not only by those who would benefit from a drop in the price of the host company’s shares (the focus of this Article) but also activism by those who would benefit from a drop in the price of the host company’s debt.101 Through such coupled assets, a

99 Individual investors who vote are highly atypical, and it is not clear how representative their views are. Moreover, given their relatively small holdings, they are unlikely to invest the time and money, and they may not have the expertise, to make informed decisions. With the introduction in 2019 of zero-cost brokerage fees for retail investors and the associated increase in portfolio turnover, the incentives to engage in informed voting are diminished further. See Lisa Beilfuss & Alexander Osipovich, The Race to Zero Commissions, WALL ST. J. (Oct. 5, 2019), https://www.wsj.com/articles/the-race-to-zero-commissions-11570267802 (discussing the history of zero-cost brokerage fees). More broadly, there is longstanding evidence, amplified by evidence on recent “meme stock”–related behavior, that the decisions of individual investors may often not be entirely rational, to put it gently. To be sure, no court has ever suggested that shareholder votes that are ill-considered or suffer from cognitive biases cannot be considered “disinterested.” We are not suggesting otherwise and exclude consideration of such individual investor-related matters from our analysis. Moreover, as noted in infra Part III.A, we do not advocate subjecting retail investors’ holdings to the scrutiny for disinterestedness that we advocate for institutional investors.
101 This Article has focused on equity decoupling; in fact, debt decoupling and hybrid decoupling can also occur. For example, the use of credit default swaps could result in a creditor becoming an “empty creditor with negative economic interest.” See 2022 Governance and Decoupling, supra note 2, at 422, 460–61; 2008 Decoupling II (EFM), supra note 2, at 679–90.
sophisticated market participant could become an “empty voter with a negative economic interest” unbeknownst to the host company or courts because under current disclosure rules such holdings rarely are required to be publicly disclosed. Courts would be unwittingly considering the votes of such hedge funds as those of “disinterested” shareholders when, in fact, they have a materially negative overall economic interest and may seek to use their voting rights to try to cause the price of the host shares to drop. The extent to which this occurs is difficult to quantify but the growth of assets of management of hedge funds (from $1.88 trillion at year-end 2013 to $5.03 trillion at at the end of the first quarter 2023) and of U.S. activists (from $154 billion at year-end 2020 to just over $200 billion at year-end 2021) suggests the general dimensions of this problem.

Share lending introduces different complications. Although institutional investors have long lent shares to generate fees, sophisticated market participants began to use the share lending market to buy votes. Under standard lending arrangements, a person who borrows shares is the owner of the shares and has the voting rights associated with the shares even though the borrower has no economic interest in those shares. Thus, a person who holds, say, 1 percent of the host shares but borrows 8 percent just before the record date could vote 9 percent of the shares. Precisely this occurred in 2002, when Laxey Partners, a hedge fund, used this “record date capture strategy” with respect to the shares of British Land.

A conceptual question arises in such circumstances, even assuming that a company is aware of the extent that a shareholder is voting borrowed shares. Yes, the borrower’s motivation may be aligned with the interests of other shareholders, but should a Delaware court give full weight to the empty votes of borrowed shares in determining the outcome of the shareholder vote? This is far from a theoretical concern: although it is difficult to determine the extent of record date capture because there are currently no pertinent disclosure requirements, the extent of the U.S. equity securities on loan ($646 billion in 2021) and empirical evidence that share borrowing increases around record dates suggest that the issue must be commonplace.

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102 2022 Governance and Decoupling, supra note 2, at 423–51 (discussing how the existing SEC disclosure regime does not, in general, require disclosure of certain equity and debt derivative positions and pending SEC proposals seek to partially address such gaps); id. at 454 (discussing how even pending SEC proposals would not require public disclosure of an investor’s short selling or share borrowing in host shares).


104 See 2006 Decoupling I (Southern Cal.), supra note 2, at 816–17. Laxey did have a positive overall economic interest because of the 1 percent host shares it owned but was an empty voter because it had no economic interest whatsoever in the 8 percent borrowed shares.

Vice Chancellor Slights’ opinion in Tesla as well as some earlier Delaware opinions may offer clues as to the weight a court would accord in this Laxey-type share borrowing context, involving empty voters with a positive economic interest. The court in Tesla stated:

I have given less weight to the Tesla stockholders’ approval of the Acquisition than I might have otherwise in recognition of … their argument that the magnitude of the approval vote might be overstated given the likelihood that many stockholders who approved the Acquisition also owned SolarCity stock.106

Indeed, prior to Tesla and CNX, Vice Chancellors Slights and Laster as well as then-Chancellor Strine had already shown concern over empty voting. Vice Chancellor Slights’ discussion of voting rights in the 2017 Zohar irrevocable proxy case cited Crown EMAK’s use of the empty voting concept.107 Vice Chancellor Laster’s analysis of an irrevocable proxy arrangement in the 2022 Hawkins case was rooted in part on “[t]he concerns raised by decoupling voting power from ownership [having] implications for how a court applying Delaware law interprets a proxy arrangement.”108 Then Vice Chancellor Strine voiced skepticism in the 2010 TR Investors case not only about voting by empty voters with negative economic interest but with empty voters in general.109 Both Hawkins and TR Investors cited Crown EMAK’s concerns over the misalignment between the voting interest and economic interest of shares.110

Individual investors are generally unlikely to implicate notable coupled asset complexities.111 As we have seen these complexities often arise from persons who seek to deploy coupled assets in order to effect changes in corporate governance. Any single individual investor is unlikely to try to do so on rational apathy and other grounds. Its votes will have a de minimis impact and, even if successful, any attendant benefits would be similarly de minimis.

2. Increasing Complexities from Asset Manager Organizational Voting Dynamics

The organizational voting dynamics of today’s institutional investors, especially large

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111 Again, one possible exception is in the de-SPACing context discussed in infra Part IV.

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generalist asset managers, introduce even deeper conceptual challenges and practical difficulties.

a. The Bedrock Premise of Court Deference and New Challenges to Corporate and Institutional Investor Purpose

The bedrock premise for court deference to the decisions of disinterested equity owners and, indeed, the core reason for the shareholder franchise, is that disinterested shareholders are motivated to make decisions in ways that enhance the economic returns on their shares. The deconstruction methodology and Crown EMAK’s recognition of the methodology are also premised on this. All of the foregoing ultimately flows from Delaware using shareholder primacy as the pole star for all corporate behavior.  

The debate over the wisdom of shareholder primacy, however, poses a fundamental dilemma for the idea of deference to “disinterested” shareholder approval and, indeed, the shareholder franchise. Some of the debate has occurred under the remarkably elastic and broad rubric of “ESG.” Debate participants range from those who simply view consideration of ESG matters as being instrumental to maximizing shareholder wealth as commonly construed to those, such as Senator Elizabeth Warren, who explicitly call for the subjugation of the interests of shareholders.

As a legal matter, institutional investors are generally subject to extremely tight constraints in their ability to undertake actions that depart from the interests of their clients. For instance, under the “sole interest rule” of trust fiduciary law, trustees of pensions must consider only the interests of the beneficiary. Thus, if a trustee’s use of ESG or other considerations is motivated not by a desire for better risk-adjusted returns but by the trustee’s ethics or to benefit others, the duty of loyalty is violated. Consistent with this, the new 2022 Department of Labor rules mandate that an ERISA fiduciary may consider ESG matters to improve risk-adjusted returns but not to obtain collateral benefits.

There has been increasing concern on the part of some that, notwithstanding such tight legal

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112 See supra note 19.
114 Rather than discussing in this Article the ambiguities and other limitations to using “shareholder wealth maximization” and associated terms, the reader is directed to the articles referred to in supra note 19.

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constraints, some asset managers do take ESG or other social considerations into account in selecting securities and exercising their voting rights even in circumstances where doing so runs contrary to the financial interests of their clients. This concern as well as other reasons have led an increasing number of states to mandate that investment and proxy voting decisions for state pension funds only consider “pecuniary factors.” A 2020 empirical study led by a former President of the American Finance Association found that institutional investor voting on shareholder proposals at Russell 3000 companies exhibited striking differences in the willingness of public pension funds and “money-conscious” institutional investors to support proposals that the authors viewed as financially costing shareholders. The concern exists notwithstanding asset manager pledges of fealty to the pecuniary interests of their clients.

If an institutional investor does depart from the goal of maximizing the risk-adjusted returns, the matter of “disinterested shareholder” status arises. If being “disinterested” requires motivation to vote or tender based exclusively on whether host company share value will be maximized, an institutional investor motivated to vote in ways not fully consistent with their economic interest in host shares is no less disqualified from being considered “disinterested” than an investor doing so because of its coupled asset or related non-host assets. Counting such an investor’s votes as “disinterested” would violate the premise of deference to disinterested shareholders.

Of course, even if a court should take the (currently) improbable step of deciding that it would be inappropriate to count such votes, it may be impossible to fully identify what votes would fall in this category. This task would be difficult, in the case of most asset managers, even with respect to those that run funds marketed to “socially conscious” investors.

b. Practicalities: Pass-Through Voting and Portfolio Manager

119 Patrick Bolton et al., Investor Ideology, 137 J. FIN. ECON. 320 (2020).
121 We are not claiming that, as a legal matter, such voting cannot be counted for purposes of satisfying statutory vote requirements. “[S]tockholders have the right to exercise wide liberality of judgment in the matter of voting and may admit personal profit or even whims and caprice into the motives which determine their choice, so long as no advantage is obtained at the expense of their fellow stockholders.” Heil v. Standard Gas & Elec. Co., 151 A. 303, 304 (Del. 1930).
Heterogeneity

Other organizational voting dynamics of institutional investors introduce practical problems in assessing motivation. First, there is now a remarkable interest in, and experimentation with, “pass-through” voting arrangements. With such arrangements, an asset manager in effect delegates the voting of the pertinent shares to its clients—such as investors in its mutual funds or endowments for which it separately manages money.\(^{122}\) A court would presumably need to exclude such shares from its tabulation of the asset manager’s holdings in considering the “disinterestedness” of that asset manager and to include such shares in determining the “disinterestedness” of the asset manager’s larger institutional clients. Cost-effective mechanisms would need to be developed to omit and include such “delegated” shares.

Second, a single asset manager often cannot be considered to have a unitary aggregate interest in a transaction. Asset managers run multiple funds and portfolios separately managed by different portfolio managers with heterogeneous investment goals and beliefs. T. Rowe Price and Vanguard have written policies that, broadly speaking, give portfolio managers the discretion to make their own voting decisions.\(^{123}\) At this type of asset manager, individual portfolio managers can vote—and have voted—opposite to each other. At the other end of the spectrum, certain asset managers—among them, State Street—insist on a unitary “house” view as to how to vote.\(^{124}\)

It is unclear how “disinterestedness” should be assessed with respect to asset managers given the spectrum of approaches—and how nothing prevents an asset manager from changing its approach. One possibility with respect to asset managers that allow for totally unfettered individual portfolio voting discretion is to focus on the overall economic interest of each separate portfolio, rather than that of the institution in the aggregate.\(^{125}\) However, determining whether this discretion

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\(^{123}\) See T. ROWE PRICE, PROXY VOTING GUIDELINES 18 (2023), https://www.troweprice.com/content/dam/trowecorp/Pdfs/proxy-voting-guidelines-TRPA.pdf (“Ultimately, the portfolio managers decide how to vote on the proxy proposals of companies in their portfolios. Because portfolio managers may have differences of opinion on portfolio companies and their unique governance issues, the T. Rowe Price Funds may cast different votes at the same shareholder meeting.”); VANGUARD, PROXY VOTING POLICY FOR U.S. PORTFOLIO COMPANIES 4 (2023), https://corporate.vanguard.com/content/dam/corp/advocate/investment-stewardship/pdf/policies-and-reports/us_proxy_voting_2023.pdf (“Proposals are voted case by case, under the supervision of the Investment Stewardship Oversight Committee and at the direction of the relevant Fund’s Board. In all cases, proposals are voted as determined in the best interests of each fund consistent with its investment objective.”).

\(^{124}\) STATE ST. GLOB. ADVISORS, GLOBAL PROXY VOTING AND ENGAGEMENT PRINCIPLES 2 (2023), https://www.ssga.com/library-content/pdfs/asr-library/global-proxy-voting-and-engagement-principles.pdf (“Despite the vast array of investment strategies and objectives across State Street Global Advisors, the fiduciary responsibilities of share ownership and voting for which State Street Global Advisors has voting discretion are carried out with a single voice and objective.”).

\(^{125}\) In CNX, defendants pointed out that nearly half of T. Rowe Price’s shares were held by a separately managed fund (the Capital Appreciation Fund) that owned no CONSOL shares at all, and thus had an undiluted incentive “to obtain the highest price possible for T. Rowe Price's shares of CNX Gas.” In re CNX Gas Corp. S’holders Litig., 4 A.3d 397, 417 (Del. Ch. 2010).
is sufficiently unfettered and identifying overall economic interest on a portfolio-by-portfolio basis could be difficult and burdensome.

3. Materiality in the Disinterested Stockholder Voting Context

In this Part we have thus far explored how evaluation of overall economic interest might affect the assessment of whether the vote or tender of shares held by an institutional investor should be considered “disinterested.” What remains to be explored is how to assess whether an overall economic interest should be deemed "material” enough to qualify as an “actual economic stake” sufficient to warrant deference. In the case of large institutional investors, this is a complex inquiry.

For BlackRock, State Street, Vanguard, and other very large asset managers, a simplistic approach to this inquiry—one based on the impact on the trillions in assets under management—would almost inevitably disqualify such asset managers from being “disinterested” shareholders with respect to most of the companies in which they had stakes. Among other things, the “actual economic stake” in any one company would, in the usual case, be almost trivial in relation to the trillions under management.

Instead, we suggest an approach to the materiality/“actual economic stake” inquiry in which courts would evaluate materiality from two distinct perspectives: (a) that of the institutional investor (a perspective largely focused on issues of magnitude of economic influence on the decision), and (b) the potential for affecting the overall result of a vote (a perspective largely focused on issues of probability).

To explain: we start with the foundational concept of materiality under federal securities law as established in *TSC Industries* and adopted in corporate fiduciary law by the Delaware Supreme Court:\(^{126}\)

![An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. . . . [This standard] does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.](https://ssrn.com/abstract=4526157)

This concept of materiality focuses on a “substantial likelihood” that a fact “would have assumed actual significance in the deliberations of the reasonable shareholder.” Reframed to the question of “disinterestedness,” courts would ask whether there is a “substantial likelihood” that the pertinent overall economic interest “would have assumed actual significance in the deliberations” of a reasonable shareholder in deciding how to vote or whether to tender shares.


As explained below, the probability/magnitude test used in federal securities law with respect to contingent or speculative events helpfully refines this inquiry. Under that test, materiality “will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”

As for the “magnitude” half of that test, courts would examine an investor’s relative percentage ownership in the host and the counterparty as well as the magnitude of the dollar ownership stakes to determine the resulting differential impact. The question would then become whether there would be a substantial likelihood that, under all the circumstances, the differential impact assumed actual significance in the deliberations of a reasonable shareholder with similar ownership stakes in deciding how to vote or whether to tender. To illustrate, the overall dollar impact of a $5 million differential on stakes of $10,000,000 or $20,000,000 in the host shares and related non-host assets clearly would be sufficiently large to satisfy the magnitude element of the materiality test. In contrast, a $100,000 differential would clearly be too small to satisfy that element.

As for the “probability” half of the magnitude/probability test, we consider the perspective of the overall outcome of a vote or tender offer: i.e., the potential that the investor’s shares, together with other similarly situated investors, might affect the overall outcome. The recent Tesla case illustrates the point: despite recognizing the possibility that institutional cross-ownership of Tesla and SolarCity shares might detract from deference, the court nevertheless relied on the strongly favorable (85 percent) stockholder vote in ruling that the deal was substantively fair.

More generally, where a vote is lopsidedly favorable, the overall economic interest of an investor with a minuscule percentage interest in host shares is almost inherently immaterial and can be safely ignored, regardless of the materiality element of the magnitude/probability test. Conversely, where the overall vote (or tender response) is barely sufficient to support a challenged transaction, the motivations of an institutional investor with a quite modest percentage interest might nevertheless be considered to be material because of the potential to change the result. And even where a single investor’s overall percentage interest standing alone be deemed unlikely to affect the outcome of a vote, it may nevertheless satisfy the “probability” element of the materiality test if its interest, together with the interests of other investors with similar overall economic interests, would be deemed likely to affect the outcome.

128 Basic Inc. v. Levinson, 485 U.S. 224, 238 (quoting SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 849 (2d Cir. 1968)).


130 Id., 2022 Del. Ch. LEXIS 178 at *77. The Delaware Supreme Court agreed. 2023 Del. LEXIS 178, at *108.
Using the foregoing general concept of materiality and the specific magnitude/probability test, if an institutional investor has a material positive economic interest in the host shares, those shares should be considered disinterested with respect to the vote at the host company.

The question arises: should the votes of an institutional investor who has zero or near-zero overall economic interests be entitled to deference? If we analogize such institutional investors to the directors with zero or near-zero overall economic interests situation that we discussed in Part II(B), such institutional investors should be entitled to deference. The argument for such a position would be that, just as a director has a fiduciary duty with respect to the value of the host shares, an institutional investor has a duty to vote with a similar motivation because of its fiduciary obligations to its clients. The problem with this analogy is that the director owes its fiduciary duties only with respect to the shares of one company: the host company on whose board the director is making a decision. In contrast, the fiduciary duty of the institutional investor is not with respect to the shares of the host company, but instead to the clients for whom it invests. Clients are interested in the overall returns from the holdings of the institutional investor—e.g., the overall returns from holding the host company shares and the counterparty shares—not solely the returns flowing from any single holding—e.g., the holdings of the host company shares. So with an institutional investor in this concurrent ownership context, there is no fiduciary obligation to vote in ways that would enhance the value of its shares in the host company.

C. Whither Deference? Incremental Steps, Wholesale Rethinking, and a Strategic Pause

Such institutional financial stake complexities and organizational voting dynamics complexities, in tandem with the doctrinal insistence in Delaware case law that “disinterestedness” requires having an “actual economic stake in the outcome of the vote,” will, among other things, often disqualify institutional investor voting in public companies from being considered sufficiently “disinterested” to validate fiduciary decision-making.

One general response to this situation would be to reduce the importance accorded to shareholder votes and tendering as guides to shareholder preferences. A diametrically opposite approach would be to continue to adhere to the disinterested shareholder voting fiction and ignore the many issues noted above, on the theory that somehow the overall results are good enough and doing anything in response could not be justified on a cost-benefit basis.

More broadly, one of us has written extensively on disclosure, substantive, and other strategies that courts, legislators, regulators, the share-lending market, corporate private ordering, and those responsible for the voting architecture can implement to promote the efficacy of the stockholder franchise. We do not try here to offer an overview of these strategies. Proper analysis of

131 See 2006 Decoupling I (Southern Cal.), supra note 2, at 895.
132 See, e.g., 2006 Decoupling I (Southern Cal.), supra note 2, at 864–906; 2008 Decoupling II (Penn.), supra note 2, at 682–721; 2022 Governance and Decoupling, supra note 2, at 430–66.
deference to “disinterested” shareholder decision-making is inextricably linked with the larger stockholder franchise issue as well as addressing the fundamental conceptual complexities identified in this Article directly related to this deference. The issues are manifold and many involve re-consideration of bedrock matters of corporate law. It is beyond the scope of this—or any one—article to deal definitively and exhaustively with this. Instead, we briefly outline a few of the many steps that might help preserve the integrity of the validating role of shareholder voting and tendering yet mitigate some of the “disinterestedness” problems identified above.

Two related steps which resonate throughout this Article relate to the recognition of the existence and size of potential problems in voter motivation. First, if and when the courts assess voter motivation, they should use the deconstruction methodology for assessing overall economic interest in host shares flowing from the net returns of holdings of: (a) host shares; (b) coupled assets; and (c) related non-host assets. Negative, positive, or zero (or not materially negative or positive) status of the overall economic interest in host shares, and not the mere presence of concurrent ownership, would provide the pole star for ascertaining the motivation, an essential initial step in considering the extent of judicial deference. The second, closely related step is to gauge the materiality of the overall economic interest in host shares using the magnitude/probability concept of materiality for institutional investors outlined in Part III.B.3.

A third step similarly permeates this Article, one relating to what to do in response to an identified problem in voter motivation—but we do not advocate its immediate implementation. Instead, we propose a temporary strategic pause of a limited nature for the reasons to be explained shortly. That said, under a faithful treatment of the policy basis adopted by Delaware law for judicial deference—an “actual economic stake” in host shares—courts should not regard as “disinterested” the votes or tenders of institutional holders that do not have material positive overall economic interests in the host shares. As was discussed in connection with CNX/CONSOL, T. Rowe Price did not qualify as “disinterested” because it had a near-zero overall economic interest in the CNX host shares while BlackRock would not qualify because its overall economic interest in CNX host shares was decidedly negative. In neither situation did the investor have an “actual economic stake” in the host shares, and declining to give deferential effect to the vote or tender of such investors would enhance the credibility of using shareholder voting and tendering as a basis for reducing or eliminating litigation requiring judicial scrutiny of fiduciary conduct.

To be sure, courts have already taken these or related steps on a limited basis, and there are substantial obstacles to doing so in a more comprehensive way. There are ways, however, in which

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133 Crown EMAK adopted the decoupling framework, but no related non-host assets were involved, so there was no need to consider such assets. Delaware courts could clarify that examining economic motivation and disinterestedness should also take related non-host assets into account.

134 A court could also rely on an alternate reason why BlackRock’s overall negative economic interest was not material: the tender (or not) of its 0.03 percent ownership of such shares standing alone would not likely have affected the satisfaction of the majority of the minority tender condition.
such steps could be more systematically implemented or facilitated. We have already discussed how Vice Chancellor Slichts’ Tesla opinion put less weight on shareholders who, in the terminology of the decoupling framework, held related non-host assets and how the earlier Hawkins, TR Investors, and Crown EMAK cases addressed decoupling. The British Columbia Supreme Court opinion in TELUS, one of the most hotly contested proxy fights in Canadian history, relied explicitly on the decoupling framework in weighing votes. The court found “in all likelihood” that a hedge fund was an “empty voter with negative economic ownership” within the meaning of the framework and that this status was relevant to the court’s consideration of the hedge fund’s objections to the company’s proposal.

The SEC and private ordering could play roles as well. With respect to financial stakes, enhanced SEC disclosure requirements as to coupled assets such as short-selling arrangements regarding host shares, derivatives and other hedges relating to host shares, and share borrowing should be considered on a cost-benefit basis. In terms of private ordering, many companies already require shareholders to provide information pertaining to their decoupled equity and voting interests in contexts such as advance notice bylaws and poison pills. Section 212(a) of the Delaware General Corporation Law would allow corporations to adopt a charter provision conditioning entitlement to vote on providing specified information pertinent to the assessment of overall economic interest.

Fourth, where defendants seek to rely on shareholder voting or tendering to support a transaction, the courts could require that defendants gather and process, at a minimum, publicly available information from asset managers relating to their financial stakes and organizational voting policies. Defendants could use information from such SEC filings as 13D, 13G, and 13F; public information about whether institutions accommodate the preferences of clients and individual portfolio managers’ and public statements about the willingness of asset managers to depart from a pure focus on the returns on host shares on ESG or other grounds. In the rare instance of clear departures from the goal of furthering the pecuniary interest of clients, courts could decline to treat voting shares as “disinterested.”

135 See text accompanying supra notes 107-110.
136 TELUS Corporation (re), 2012 BCSC 1919 (2012). This finding explicitly relied in part on the affidavit that Professor Hu provided. Id. at paras. 336–42, 365–66. For a discussion of TELUS, see, for example, 2015 Financial Innovation and Governance Mechanisms, supra note 2, at 375–81. Professor Hu provided the affidavit as an expert to assist the court and not as an advocate for any party pursuant to the strict requirements of Rule 11-2(2) of the British Columbia Supreme Court. He was retained by the legal counsel for TELUS, Norton Rose Canada and Farris Vaughan Willis & Murphy.
137 See, e.g., 2022 Governance and Decoupling, supra note 2, at 423–54, 461–66.
138 See, e.g., 2022 Governance and Decoupling, supra note 2, at 458–60 (discussing second-generation advance notice bylaws, Booz Allen Hamilton Holding’s 2022 bylaw revisions, and the inclusion of synthetic ownership provisions in poison pills); cf. id. at 460–66 (private ordering to address empty creditors and other debt decoupling). As to the use of shareholder attestations to deal with decoupling, see, for example, 2008 Decoupling II (Penn.), supra note 2, at 699–700.
139 As to some of the pluses and minuses to the use of charter amendments to address decoupling, see, for example, id. at 697–99, 700.
Perhaps most important as a practical matter, however, we advocate a strategic pause of a limited nature in implementing our approach to the increasingly common problem associated with the related non-host assets of institutional investors. Specifically, we suggest that instead of a blanket rule disqualifying institutional investors on the basis of an insufficiently positive overall economic interest in the host shares, plaintiffs seeking to disqualify an institutional investor’s votes would have the burden of proving that its ownership of related non-host assets resulted in a negative overall economic interest that was material in the strict sense we described above. That approach would involve temporarily suspending the insistence under current corporate doctrine that a vote is “disinterested” only when it is by a person with an “actual economic stake in the outcome of the vote,” and relying instead on a presumption that an institutional investor will likely vote its host company shares in a manner that it believes will promote the value of those shares, unless the plaintiff can meet the above burden of proof as to the magnitude of the negative overall economic interest in host shares and the potential to affect the outcome of the vote.

The incrementalism inherent in this strategic pause has real advantages in addressing novel, complicated issues flowing from capital market dynamism. Less information is required, the results are more predictable, and if the change proves misguided, the changes are easier to reverse.\footnote{Henry T. C. Hu, \textit{Misunderstood Derivatives: The Causes of Informational Failure and the Promise of Regulatory Incrementalism}, 102 YALE L.J. 1457 (1993).} For us, a related motivation for a strategic pause stems from the concerns earlier expressed about how extensive disqualification of institutional investor votes would shift significant “disinterested” voting power to retail investors.\footnote{See supra notes 98-100 and accompanying text (discussing startling, likely undesirable consequences of such a shift).} We emphasize the temporary nature of the pause and possible reversal. Close analysis of this matter would be an integral part of the wholesale rethinking of deference to shareholder decisions we are urging.

\section*{IV. Decoupling and De-SPACing: Idiosyncratic Stakes in a Single Entity}

To this point we have been examining contexts in which fiduciary and shareholder motivations flow from having stakes in both firms that are party to a transaction. In this Part, in contrast, we illustrate how full deployment of the deconstruction methodology can yield fresh insights in a context—“deSPACing”—where highly idiosyncratic stakes in a single entity can cause fiduciaries and shareholders to have widely disparate economic incentives.

\subsection*{A. Delman’s Approach to Fiduciary and Shareholder Decisions}

The modern form of the “special purpose acquisition corporation” (SPAC) and associated “de-
SPACing” process grew spectacularly in popularity from 2018 to early 2021. In essence, a sponsor would form a company (a special purpose acquisition corporation or “SPAC”) with no assets and no operating business and do an initial public offering (“IPO”). Having raised this money, the SPAC would, within a specified period (typically a year or two), seek to merge with a private company with an operating business. At this “de-SPAC” stage, the SPAC issues shares to the owners of the private company. After the de-SPAC, the SPAC carries on as a public company—but is now one with a real operating business. And the private company has gone public without having to undertake the time-consuming, underwriter-driven process of doing a traditional IPO.

The complex ownership stakes in the SPAC create difficult motivation issues in fiduciary and shareholder decision-making. Although de-SPACing involves a merger—a familiar transaction involving two firms—the real core of such difficulties lies with the nature of financial stakes in a single firm, the SPAC itself.

Public investors who buy shares in a SPAC IPO are protected in several ways. First, the IPO proceeds are placed in an escrow account and these investors may later redeem their shares. Investors may redeem if, for example, they do not like the proposed merger. Other public investors may like the proposed merger and continue to hold the shares after the merger. Second, if no de-SPAC merger occurs within a specified period, the SPAC is liquidated. Third, in the SPAC IPO, the investors typically receive both a share of common stock and additional securities (a “right” and/or a “warrant”) that give them an option to buy additional shares after a de-SPAC merger. There is a secondary market for the shares as well as for the warrants, which trade separately.

The sponsor obtains its substantial shareholdings in the SPAC for a nominal amount. However, unlike the shares held by unaffiliated investors, the sponsor’s shares have no right to the escrow account. Thus, if a de-SPAC merger does not occur, the sponsor’s shares become worthless.

Vice Chancellor Will issued all three of the Delaware decisions relating to judicial deference in de-SPAC transactions. We focus on the key January 2023 Delman opinion, the one that dealt

142 See, e.g., Michael Klausner, Michael Ohlragge & Emily Ruan, A Sober Look at SPACs, 39 YALE J. ON REG. 228 (2022); Special Purpose Acquisition Companies, Shell Companies, and Projections, Securities Act Release No. 11048, 87 Fed. Reg. 29458 (May 13, 2022) [hereinafter 2022 SEC SPAC Proposal]. The subsequent decline of this alternative to traditional IPOs has been a relief to those observers who were concerned about conflicts of interest, disclosure, fraud, and the gullibility of celebrity- and technology-enthralled retail investors. As of June 2023, about a quarter of companies that have de-SPACed since late 2018 have seen their shares drop more than 90 percent. Bailey Lipschultz, Billionaire SPAC Kings Dragged to Court After Boom Goes Bust, BUS. WK. (June 1, 2023), https://www.bloomberg.com/news/articles/2023-06-01/spacs-fuel-new-boom-lawsuits-are-piling-up-in-courts-across-us?ref=gp6mQFZx.

143 Delaware courts first addressed the application of Delaware law in the SPAC context in Vice Chancellor Will’s Multiplan opinion. In re MultiPlan Corp. Stockholders Litig., 268 A.3d 784 (Del. Ch. 2022). Her post-Delman (March) 2023 Laidlaw decision noted that “[t]he legal theories presented and defendants named are largely indistinguishable”
with deference in connection with both the issue of the standard of review for controller decision-making and the application of Corwin cleansing by shareholder vote, and was the only one to draw on the decoupling framework.

In May 2020 the SPAC involved in the 2023 Delman case—GigCapital3, Inc. (Gig3)—sold 20 million units in an IPO at $10 per share, each unit consisting of a share of common stock and three-quarters of a warrant to buy a share of common stock at $11.50 a share. If Gig3 did not complete a de-SPAC merger within 18 months, Gig3 would liquidate and the public stockholders would receive their $10 per share plus interest but keep the warrants.\footnote{144} Gig3 completed a deSPAC merger with Lightning eMotors Inc. (“Lightning”) a year after the IPO.\footnote{145} Over 98 percent of the votes were cast for the merger.\footnote{146} About 29 percent of the public stockholders elected to redeem their shares.\footnote{147} But the merger did not turn out well: Gig3’s share price fell to $6.57 a share within three months and had sunk to $0.41 the day before the court’s decision.\footnote{148}

Regarding the decision-making of the controller, the court applied the standard of entire fairness,\footnote{149} on the view that the controller received a “unique benefit” by “extracting something uniquely valuable to the controller, even if the controller nominally received the same consideration in the merger with Lightning as other stockholders.\footnote{150} In the court’s view one such unique benefit was that if the merger went through, the sponsor’s shares would have value, but if Gig3 were liquidated its holdings would be worthless.\footnote{151} In contrast, public stockholders would receive their investment plus interest from the escrow account in a liquidation.\footnote{152} So no deal was preferable to one worth less than the liquidation price. The other unique benefit flowed from the sponsor’s interest in minimizing redemptions after the merger agreement was signed, which had the result that, among other things, the sponsor “effectively competed with the public stockholders for the funds held in trust.”\footnote{153}

As for the shareholder vote, finding that “the structure of the Gig3 stockholder vote was from those in Delman. Indeed, she noted wryly that “[a]t first glance, readers may think I inadvertently re-published” Delman. Laidlaw v. GigAcquisition2, LLC, No. 2021-0821-1-LWW, 2023 WL 2292488 (Del. Ch. Mar. 1, 2023).
inconsistent with the principles animating Corwin,” Vice Chancellor Will rejected the defendants’ contention that the stockholder vote should result in business judgment deference. Explicitly relying in part on the decoupling framework, the court reasoned:

Stockholders’ voting interests were decoupled from their economic interests. Gig3’s public stockholders could simultaneously divest themselves of an interest in New Lightning by redeeming and vote in favor of the deal. Many did. Although 98 percent of all Gig3 stockholders (according to the defendants) voted for the merger, 29 percent of the public stockholders redeemed their shares.

Public stockholders had no reason to vote against a bad deal because they could redeem. Moreover, redeeming stockholders remained incentivized to vote in favor of a deal—regardless of its merits—to preserve the value of the warrants included in SPAC IPO units.

B. Deconstruction Methodology’s Approach to Fiduciary and Shareholder Decisions

As to fiduciary decision-making, the court in Delman applied the entire fairness standard without relying on the decoupling framework. The Court offered ample justification and certainly did not need to do so. We suggest, however, that deployment of the three-constituent element deconstruction methodology offers an additional pathway to entire fairness that is straightforward and can be used in a wider variety of contexts. The controller in Gig3, like Perry, had a negative overall economic interest in host shares. As with Perry, Gig3’s net returns flowed from: (a) host shares; (b) coupled assets—i.e., contractual provisions zeroing out its interest in the host shares if no merger occurred; and (c) related non-host assets—i.e., the shares in the post-de-SPAC Gig3 that would have value only if the merger occurred, irrespective of whether Gig3 overpaid for Lightning. Applying our Part II analysis, entire fairness review is called for.

Use of the deconstruction methodology has several advantages. First, the methodology offers a standardized, systematic approach to instances of negative overall economic interest, not just de-SPACing, and it does not burden judges with identifying “unique benefits.” Second, Delman’s “unique benefit” reasoning would seemingly apply to all de-SPACing transactions. But if SPAC contractual provisions change as a result of the dismal returns experienced by public investors, the overall economic interest of the controller may not be negative. Entire fairness may be called for under Delman when the deconstruction methodology may call, for example, for enhanced

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154 Id. at 721–22.
155 Id.
In contrast, the court in Delman did rely in part on the decoupling framework in assessing the significance of the shareholder vote. However, it did not take full advantage of the framework’s deconstruction methodology. The deconstruction methodology is especially helpful because the warrants were separately traded on the New York Stock Exchange. Under that methodology, public shareholders voting on the de-SPAC had overall economic interests in Gig3 shares that, roughly speaking, fell into four categories:

1. **Public shareholders who redeem their Gig3 shares but hold warrants**: these are “empty voters with negative overall economic interest” because they have voting rights but hold (a) zero host shares; (b) coupled assets in the form of warrants that have value only if a merger occurs; and (c) no related non-host assets.

2. **Public shareholders who redeem their Gig3 shares and do not hold warrants**: these are “empty voters with zero overall economic interest” because they have voting rights but hold no (a) host shares, (b) coupled assets, or (c) related non-host assets.

3. **Public shareholders who do not redeem and hold some warrants**: these would be empty voters, but whether they are empty voters (with zero or negative interests) or voters that do have positive overall economic interests would depend on comparing the returns from (a) host shares with the returns from (b) the coupled assets in the form of warrants that have value only if a merger occurs.

4. **Public shareholders who do not redeem and hold no warrants**: these are not “empty voters” because they (a) hold host shares; and do not hold either (b) coupled assets or (c) related non-host assets.\(^{158}\)

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\(^{156}\) As far as we are aware, only one (unpublished) academic work has previously considered this standard of review issue in any way. Like Delman, it did not rely on the deconstruction methodology as to this issue. Its rationale for entire fairness (“[a] SPAC’s sponsor and board ‘compete’ with stockholders . . . for a share of the trust”) would appear to apply to all de-SPACing, irrespective of the status of the overall economic interest. See Michael Klausner & Michael Ohlrogge, *Spac Governance: In Need of Judicial Review* 13 (Stanford L. & Econ. Olin Working Paper No. 564, 2022), http://ssrn.com/abstract=3967693. Two student notes have considered the issue but neither relied on the methodology either. See AJ Harris, *Spac The Deck: Why the Control Exerted by Spac Sponsors Subjects De-Spac Transactions to Entire Fairness Review*, 27 FORDHAM J. CORP. & FIN. L. 563 (2022); Logan A. Krulish, *Defending the De-Spac Merger: What Standard of Review Applies?*, 74 BAYLOR L. REV. 491 (2022).


\(^{158}\) The reader may be perplexed why PIPE (Private Investor Private Equity) investors are not included in this classification of public investors, notwithstanding the fact that PIPE investors often provide much of the financing needed in connection with de-SPAC mergers. The reason is that the foregoing classification relates to unaffiliated shareholders who exist prior to the consummation of the merger. PIPE investors come in afterwards. Specifically, the SEC found...
The percentage of redeeming shareholders has been increasing dramatically, and thus the extent of empty voting has as well. A review of all 102 de-SPAC transactions that closed in 2022 found redemption levels that were 80 percent on average, double that for 2021. A different study found that the corresponding percentage for the quarter ended August 31, 2022 was 91.8 percent.

The Delman opinion rests its Corwin analysis in part on the concept that “[s]tockholders’ voting interests were decoupled from their economic interests,” as exemplified by the redeeming shareholders having the right to vote. The votes of the 29 percent of the public shareholders who redeemed were considered by the court to be ineffective to support Corwin cleansing. And this invalidated the effect of the approval of 98 percent of all Gig3 shareholders voting for the transaction.

Under the formal deconstruction methodology, the redeeming shareholders would be either empty voters with negative economic interest (in case of category 1) or zero economic interest (in case of category 2), and thus the vote of the 29 percent of the shareholders should indeed be considered ineffective. However, the methodology raises issues that were not addressed by the court, most important, those pertaining to the votes of the non-redeeming shareholders. That is, the court did not try to identify what percentage of the pertinent non-redeeming public shareholders voted for the merger. In terms of “pertinent,” we mean to refer to those non-redeeming public shareholders with positive overall economic interest: that is, all shareholders who fall in category 4 as well as some of the shareholders who fall in category 3. Thus, rather than a blanket rejection of Corwin cleansing because of redeeming shareholders, deconstruction methodology-based analysis suggests that Corwin cleansing could be given effect under certain circumstances.

There is a broader concern with the Delman approach in its failure to consider the possible impact of holdings of warrants on the economic interest of the non-redeeming shareholders. In effect, Delman classifies shareholders into two groups: “bad” redeeming shareholders—who are basically deemed to be empty voters—and “good” non-redeeming shareholders—who basically are deemed not to be. Consistent with this, Delman explicitly held out the possibility of Corwin cleansing if redeeming shareholders were required to vote against the de-SPAC.

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Footnotes:

162 Id.
163 Id.
164 See id. at 722 n.207. That approach, unlike that involving deployment of the decoupling methodology, fails to consider the possibility of non-redeeming shareholders having negative overall economic interests (i.e., a possibility contemplated by category 3 above).
But this two-class classification system and this possibility do not reflect the fact that warrants are tradable and a non-redeeming shareholder who chooses to acquire a large enough number of warrants could have a negative economic interest.\textsuperscript{165} Warrants, like options, have value whether or not they are in the money. Indeed, one study found the median trading price of warrants of SPACs that merged in December 2021 to be $1.00 prior to their merger announcements.\textsuperscript{166} In contrast to Delman’s approach, the deconstruction methodology approach recognizes in its category 3 the possibility of, in effect, “bad” non-redeeming shareholders.

**CONCLUSION**

Assessing the economic motivation of fiduciary and shareholder decision-makers plays a crucial role in determining the scope of judicial review of corporate actions. The analytical framework for decoupling offers a methodology for assessing the overall economic interest in host shares of decision-makers from their financial stakes, a methodology that deconstructs that interest as flowing from three constituent elements: host shares, coupled assets, and related non-host assets. Using this decoupling perspective helps expose deep-seated flaws in existing approaches.

We begin by looking at deference to fiduciary decision-making in the context of the fiduciary having stakes in both parties to a challenged transaction. Using the decoupling perspective, we can show the traditional doctrinal approach has led to application of the entire fairness standard of review in situations where such intensive scrutiny is unnecessary. More broadly, we offer a more general and systematic approach under which the choice among the triad of standards of review—entire fairness, enhanced scrutiny, or the business judgment rule—depends on the decision-maker’s status among the triad of overall economic interest: materially negative, zero, or materially positive.

At the end of the Article, we show how the full deployment of this deconstruction methodology could help address the novel, particularly complex context of de-SPACing. Case law has only used certain elements of the decoupling framework to help determine deference to shareholder decisions (specifically, Corwin cleansing) but has not used the decoupling framework in respect of deference to fiduciary decisions. We show that full deployment of the deconstruction methodology could help courts refine their analysis of shareholder decision-making and also offer an alternative, more methodical, approach to the analysis of fiduciary decision-making.

We hope that these opening and closing suggestions for changes in substantive law are constructive. What we say in between about judicial deference to decisions of “disinterested”


\textsuperscript{166} Michael Klausner, Michael Ohlrogge & Harald Halbhuber, *Net Cash Per Share: The Key to Disclosing SPAC Dilution*, 40 Yale J. on Reg. 18, 35 (2022).
shareholders goes beyond suggestions for changes in substantive law. We show the urgent need for a comprehensive rethinking of such deference. At the root of the complexities posed for the traditional approach in determining “disinterestedness” is the now-overwhelming dominance of institutional share ownership in tandem with both new financial stake patterns of institutional investors and new organizational voting dynamics at institutional investors, especially large asset managers. New financial stake patterns associated with coupled assets undoubtedly result in miscounting of “disinterested” votes. Even more important, we show that new financial stake patterns associated with related non-host assets threaten to effectively disqualify the votes of institutional investors with surprising and likely undesirable frequency. Some of the new organizational voting dynamics, such as those relating to pass-through voting, raise practical issues. More troubling, other dynamics run headlong into the bedrock premise of deference to the decisions of disinterested shareholders: that such shareholders seek to maximize the value of their shares. To the extent that institutional investors should consider and have considered non-share price-directed goals, what can be characterized as an elemental “cross-philosophy” dilemma arises.

Recognizing that pervasive institutional investor ownership of related non-host assets may too frequently deprive such investors of “disinterested” status if the longstanding doctrine of “disinterestedness” continues to depend on having an “actual economic stake in the outcome” of a vote or tender, we urge a temporary strategic pause in the requirement of such a stake as a condition to judicial deference. To avoid disruption and to take advantage of the virtues of incrementalism in this kind of context, courts should impose on persons seeking to challenge disinterestedness of an institutional investor the burden of proving that the investor not only had a negative overall economic interest in host shares but one that met the strict “materiality” requirement we specified.

But what is ultimately needed is a wholesale rethinking of what it means to be “disinterested.” That rethinking may in turn require determining whether the importance of disinterested shareholder voting and tendering warrants the costs of gathering and analyzing all the facts relating to such institutional investor-related complexities. It may even require reaching a consensus about the classic role of share value maximization and the associated bedrock premise for deference to disinterested shareholder decisions. In the interests of analytical integrity, something has to budge in what is an important battle in the war of philosophies.

The decoupling framework and its deconstruction methodology offer a fresh perspective on how courts can more systematically and comprehensively assess the motivations of fiduciaries and shareholders flowing from their financial stakes. Applying that perspective, especially in view of transformative changes in institutional investor ownership, the nature of financial stakes, and the organizational voting dynamics of their holders exposes fundamental, yet largely unrecognized, limitations to longstanding corporate jurisprudence while simultaneously offering guidance for shoring up the integrity of that jurisprudence.