CONCENTRATED OWNERSHIP REVISITED:
THE IDIOSYNCRATIC VALUE OF CORPORATE CONTROL

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This Article offers a novel theory of corporate control and uses it to shed a new light on concentrated ownership—the prevalent form of corporate ownership around the world—and a wide spectrum of other corporate ownership patterns. Our core claim is that control allows entrepreneurs to capture the idiosyncratic value that they attach to their execution of their business idea. Under conditions of asymmetric information, control over corporate decision-making allows entrepreneurs to pursue their business idea in whatever manner they see fit even against investors' objections. Our framework identifies a fundamental tradeoff underlying all corporate ownership patterns, namely, the tension, stemming out of asymmetric information, between entrepreneurs' pursuit of idiosyncratic value and investors' need for protection against agency costs. We show that ownership structures lie on a spectrum representing different allocations of control and cash-flow rights to address this inevitable tension.

Our analysis offers an innovative understanding of firms with controlling shareholders. The predominant view within economic and legal scholarship contends that controlling shareholders' incentive for holding a control block is their desire to extract private benefits of control. We, however, show that controllers may hold a control block to increase the pie’s size (pursue idiosyncratic value) rather than dictate the pie’s distribution (consume private benefits). Importantly, when the entrepreneur’s idiosyncratic value is ultimately realized, it will be distributed pro-rata to all investors.

Our framework provides important insights for investor protection and corporate law doctrine and policy. We argue that corporate law for publicly-traded firms with controlling shareholders should balance the

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controller’s need to secure idiosyncratic value against minority protection. While the corporate law literature has focused solely on minority shareholders’ protection, we show that an equally important focus should be given to controllers’ rights.

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TABLE OF CONTENTS
INTRODUCTION ............................................................... 2
I. THE FINANCIAL CONTRACTING FRAMEWORK ......................... 8
   A. Idiosyncratic Value .................................................. 10
   B. Asymmetric Information ........................................... 12
   C. Agency Costs ...................................................... 14
   D. Financial Contracting: Control and Cash-flow Rights .......... 15
      1. The Role of Control ......................................... 14
      2. The Role of Cash-flow Rights .............................. 16
      3. The Interplay of Control and Cash-flow Rights .......... 17
         a. The Spectrum of the Rights ............................ 17
         b. Control and Cash-flow Rights as Substitutes ...... 18
   E. Bargaining Power and Competition ................................ 19
II. THE SPECTRUM OF OWNERSHIP PATTERNS ......................... 20
   A. Dispersed Ownership ............................................ 20
   B. Private Equity Funds ........................................... 22
   C. Dual-class Firms .................................................. 24
   D. Controlling Shareholders ....................................... 25
III. REFLECTIONS ON THE THEORY AND EMPIRICS OF CONCENTRATED
     OWNERSHIP ........................................................... 28
   A. Private Benefits Inducing Concentrated Ownership .......... 29
   B. Monitoring as Insufficient Explanation ........................ 30
   C. Control Premium and Investor Protection ........................ 33
IV. CORPORATE LAW: CONTROLLER RIGHTS AND MINORITY
    PROTECTION ............................................................ 35
   A. The Tradeoff between Minority Protection and Controller
      Rights ................................................................. 36
   B. Controller Rights .................................................. 38
      1. Management Rights: Business Judgment Rule and Board
         Composition ................................................... 38
      2. Property Rule Protection: Preserving Control .............. 39
      3. Right to Sell Control for a Premium ...................... 41
   C. Minority Rights ................................................... 43
      1. Pro-Rata Share: Identifying Self-Dealing .................. 43
      2. Mid-Stream Changes .......................................... 45
      3. Type of Protection ........................................... 46
   D. “Difficult Cases” .................................................. 46
      1. Freezeout Transactions ...................................... 47
      2. Sale to a Third Party ......................................... 49
CONCLUSION .................................................................. 51
INTRODUCTION

Why do entrepreneurs insist on retaining control over corporate decision-making? Economists and legal theorists have developed a variety of theories in response to this fundamental question, which underlies the theory of the firm.\(^1\) Under the influential property-rights approach, for example, granting entrepreneurs control rights encourages them to make asset-specific investments.\(^2\) Another leading approach focuses on the private benefits that entrepreneurs derive from their control position.\(^3\) These theories, however, leave many patterns of corporate ownership unexplained. They only apply to some business environments—where specific investments are important—and certain entrepreneurs—those who value the private benefits associated with their control position. In this Article, we offer a novel theory of corporate control and use it to develop a coherent framework to explain a wide spectrum of ownership structures. We further use this theory to shed new light on the predominant form of corporate ownership worldwide—concentrated ownership—and offer a novel understanding of the challenge facing lawmakers wishing to regulate firms with controlling shareholders.

Modern corporate law scholarship has evolved against the background of the separation of ownership and control characterizing large publicly-traded corporations in the Unites States and the United Kingdom. In most countries around the world, however, publicly-traded corporations normally have a controlling shareholder,\(^4\) i.e., an investor holding an effective majority of the firm’s voting and equity rights.\(^5\) Furthermore,

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\(^1\) See, for example, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE, 11-12 (1996) (explaining that the allocation of control rights is a key element of corporate ownership).

\(^2\) See OLIVER HART, FIRMS CONTRACTS AND FINANCIAL STRUCTURE 29-49 (1995)


\(^4\) See, e.g., Marco Becht & Colin Mayer, Introduction to THE CONTROL OF CORPORATE EUROPE (Fabrizio Barca & Marco Becht eds., 2001) (noting that in 50% of Dutch, French, and Spanish companies, more than 43.5%, 20%, and 34.5% of votes are controlled by controlling shareholders, respectively); Stijn Claessens et al., The Separation of Ownership and Control in East Asian Corporations, 58 J. FIN. ECON. 81, 82 (2000) (“[M]ore than two-thirds of [East Asian] firms are controlled by a single shareholder.”); Mara Faccio & Larry H.P. Lang, The Ultimate Ownership of Western European Corporations, 65 J. FIN. ECON. 365 (2002) (reporting that only around thirty-seven percent of Western European firms are widely held); Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, Corporate Ownership Around the World, 54 J. FIN. 471 (1999) [hereinafter LLSV, Corporate Ownership] (finding that, after a review of large corporations in 27 countries, “relatively few…firms are widely held”).

\(^5\) At this stage we do not analyze ownership structures, such as dual-class shares, pyramids, and LBOs, which enable investors to hold uncontestable control without owning a majority of equity rights. See infra notes 99-104 and accompanying text (discussing dual-class ownership structure). Likewise, we do not discuss companies with a dominant block-holder that exerts considerable influence without having a lock on control.
firms with controlling shareholders have a substantial presence in the United States.\(^6\)

Adequate regulation of firms with controlling shareholders is intertwined with one's theory about the value of control for entrepreneurs. Unlike diversified minority shareholders, a controlling shareholder typically shoulders the costs of being largely undiversified and illiquid.\(^7\) Why, then, does she hold control?\(^8\)

The prevailing answer to this fundamental question alludes to agency costs, i.e., the availability of “private benefits of control.”\(^9\) The controlling shareholder can use her dominant position to consume private benefits at the expense of minority shareholders.\(^10\) She can, for example, enter into self-dealing transactions,\(^11\) engage in tunneling,\(^12\) employ family members, \(\ldots\)

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\(^{7}\) But see Mara Faccio et al., *Large Shareholder Diversification and Corporate Risk-Taking*, 24 REV. FIN. STUD. 3601 (2011) (finding heterogeneity in the degree of portfolio diversification across large shareholders).

\(^{8}\) In other words, why not separate management from investment? As a wealthy investor, the entrepreneur can hold a diversified portfolio of securities and enjoy a market rate of return. At the same time, the firm could hire her as a CEO and compensate her for her effort and talent.


\(^{10}\) Ronald Gilson argues that non-pecuniary benefits of control can explain the prevalence of concentrated ownership even in countries with strong investor protection. As he explains, these benefits do not come at the expense of the minority. See Ronald Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 HARV. L. REV. 1641, 1663-1664 (2006) (defining non-pecuniary private benefits of control as: “[F]orms of psychic and other benefits that, without more, involve no transfer of real company resources and do not disproportionately dilute the value of the company’s stock to a diversified investor”). For a formal modeling of such non-harmful non-pecuniary private benefits see Alessio M. Pacces, *Control Matters: Law and Economics of Private Benefits of Control*, ECGI-Law Working Paper Series No. 131/2009 (2009), at http://ssrn.com/abstract=1448164 [hereinafter Pacces, *Control Matters*].

\(^{11}\) See Simeon Djankov, Rafael La Porta, Florencia Lopez-de-Silanas, & Andre Shleifer, *The Law and Economics of Self-Dealing*, 88 J. FIN. ECON. 430 (2008). Based on their study of 72 countries, the authors suggest that regulation of self-dealing transactions is best done by disclosure and ratification by disinterested shareholders. The analysis of the relative efficiency of rules regulating self-dealing
and use her influence on corporate decisions to boost her ego and social status.13

With private benefits commonly perceived as a precondition inducing concentrated ownership, it is not surprising that this ownership structure is often frowned upon.14 Empirical studies have also reinforced the negative view associating concentrated ownership with unsavory business practices. Economists have shown that concentrated ownership is more widespread in countries that provide minority shareholders with weak legal protection,15 and that the size of control premiums correlates inversely with the quality of corporate law, i.e., control premiums in so-called bad-law countries are higher than in good-law countries.16

Others have avoided this dark view and offered a positive, more balanced view of concentrated ownership: Controllers play a constructive governance role because their substantial equity investment encourages them to monitor management more effectively than imperfect markets.17 However, this positive view suggests that, in addition to illiquidity and

was developed several years earlier. See, Zohar Goshen, The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality, 91 CAL. L. REV. 393 (2003) (introducing and applying the property-rule/liability-rule analysis to minority-shareholders’ protection) [hereinafter Goshen, Controlling Self-Dealing].


See e.g., Harold Demsetz & Kenneth Lehn, The Structure of Corporate Ownership: Casus and Consequences, 93 J. POL. ECON. 1155 (1985).


See, for example, Rafael La Porta et al., Law and Finance, 6 J. POL. ECON. 1113 (1998) (finding that concentrated ownership is prevalent worldwide, and attributing this ownership structure to weak legal regimes and underdeveloped markets); LLSV, Corporate Ownership, supra note 4, at 511 (finding that the quality of investor protection is a robust determinant of widely-held firms).


See Ronald J. Gilson, Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy, 119 HARV. L. REV. 1641, 1651 (2006) (“[A] controlling shareholder may police the management of public corporations better than the standard panoply of market-oriented techniques employed when shareholdings are widely held.”).

Both approaches view corporate control as associated with private benefits. However, the characterization of controlling shareholders as either induced or rewarded by private benefits of control is troubling. On the one hand, is it really the case that most controlling shareholders around the world are opportunists and therefore motivated to hold control by the prospect of exploiting loopholes in minority protection? On the other hand, should investors, courts, and lawmakers indeed tolerate some level of minority expropriation in order to incentivize controlling shareholders to monitor management?

This Article offers a novel explanation for the value of control for entrepreneurs. Based on this explanation, we develop a theory of corporate ownership patterns, with an emphasis on concentrated ownership. Our core thesis is that control matters for entrepreneurs because it allows them to overcome asymmetric information vis-à-vis investors and pursue their business idea in whatever manner they see fit, thereby securing their ability to capture the idiosyncratic value that they attach to their execution of their business idea. Under our view, control is valuable even for entrepreneurs with no intention to consume private benefits. Rather, when the entrepreneur’s idiosyncratic value is ultimately realized, it will be distributed pro-rata to all investors. Unlike existing explanations, therefore, our theory shows that entrepreneurs hold control in order to increase the pie’s size (pursue idiosyncratic value) rather than dictate the pie’s distribution (consume private benefits). The controller in our framework does not rely on self-dealing, or other forms of inequitable distributions, to capture an appropriate return on her investment and effort.

Our theory of corporate ownership relies on the importance of corporate control for entrepreneurs wishing to ensure that the value that they attach to their business ideas will indeed materialize. A business idea in our framework is any idea that the entrepreneur genuinely believes could produce an above-market rate of return. Idiosyncratic value has two
distinctive features in our framework. First, it reflects the expected pecuniary return that, if the project succeeds, will be shared on a pro-rata basis between the entrepreneur and investors. Second, it reflects the parts of an entrepreneur's business idea or her unique position to execute it that cannot be verified by outsiders. This could be because the entrepreneur cannot persuade investors that she is the best person to continue running the firm or that her business plan would produce superior returns. These features are perhaps best demonstrated by Steve Jobs failure, in 1985, to convince Apple’s board to allow him to continue as the head of the firm's Macintosh division.\footnote{See Wikipedia, Steve Jobs, http://en.wikipedia.org/wiki/Steve_Jobs}

Control matters for idiosyncratic value because business ideas take time to implement. This ongoing process requires many decisions, ranging from day-to-day management issues to major strategic choices. Perhaps the most important decision is whether to continue the project. Under conditions of asymmetric information between entrepreneurs and investors, there may be a divergence of opinion over whether the project should be continued and in what fashion. The entrepreneur will therefore want to retain control over a wide range of management decisions to pursue idiosyncratic value.

Henry Ford’s story is the best illustration of our theory concerning the value of control. Ford did not invent the automobile, nor did he own any valuable intellectual property in the technology. He was competing with hundreds of other entrepreneurs attempting to create a “horseless carriage.” Ford, however, had a unique vision regarding car production. The first firm that he founded, the Detroit Automobile Company, was controlled by investors. While Ford’s investors demanded that cars be immediately produced and sold, Ford insisted on perfecting the design prior to production, leading to delays, frustration on both sides, and the eventual shutdown of the firm by the investors.\footnote{M. Todd Henderson, The Story of Dodge v. Ford Motor Company: Everything Old is New Again, in CORPORATE LAW STORIES 40 (Mark Ramseyer, ed. 2009).} Ford’s second attempt, the Henry Ford Company, was also controlled by investors. Again, after designing a car, Ford resisted investors’ pressure and interference, and he did not move directly into production. Eventually, his obstinacy led to the investors replacing Ford with Henry Leland, changing the company name to the Cadillac Automobile Company, and producing the car designed by Ford with great success.\footnote{Id. at 45.}

In his third attempt, the Ford Motor Company, Ford insisted on retaining control. This time, with no outside investor interference, Ford transformed his ideas for car design and production (his idiosyncratic value) into one of the great corporate success stories of all time.\footnote{Id. at 47.} Finally, with yet another move along the spectrum of ownership structures, Ford’s grandson, Henry II, took the corporation public in 1956 with a dual-class share structure, ensuring that control stayed with the Ford family to this day. \textit{Id.} at 72.
Taking idiosyncratic value and the value of control into account, our analysis utilizes financial contracting literature studying the manner in which entrepreneurs and those who provide financing (investors) allocate control and cash-flow rights.\textsuperscript{23} We show that when allocating these rights, the parties must address an inherent tension between the entrepreneur’s pursuit of idiosyncratic value and investors’ need for protection against agency costs. Granting more control rights to the entrepreneur will increase her ability to pursue idiosyncratic value but will also increase investors’ exposure to agency costs.

The framework that we develop illuminates the fundamental tradeoff between agency costs and idiosyncratic value underlying all corporate ownership patterns. We show that ownership structures lie on a spectrum representing different allocations of control and cash-flow rights to address the tension between the entrepreneur’s pursuit of idiosyncratic value and investors’ need for protection against agency costs. On one end lies dispersed ownership where the contestability of control curtails both the entrepreneur’s ability to secure idiosyncratic value and management agency costs. On the other end of the spectrum lies the dual-class share structure where the entrepreneur holds uncontestable control without holding substantial cash-flow rights, thereby allowing her to pursue idiosyncratic value while increasing investors’ exposure to agency costs.

Concentrated ownership—where the entrepreneur must hold a substantial fraction of cash-flow rights to secure her ability to pursue idiosyncratic value—is located in between these poles. It allows the controller to pursue idiosyncratic value while reducing (due to the controller’s considerable share of cash-flow rights) minority shareholders’ exposure to agency costs. The controlling shareholder is willing to bear the costs of holding a large block of shares in exchange for gaining uncontestable control, which allows her, through the pursuit of idiosyncratic value, to generate an appropriate return on her investment and effort while complying with the pro-rata distribution rule.

At the level of policy, our analysis leads us to revisit the conventional approach to the considerations that should guide lawmakers and courts in crafting the legal regime governing firms with controlling shareholders. The existing corporate law literature solely focuses on minority protection from agency costs. Our framework, however, shows that controlling shareholders’ rights also play, and should play, a critical role in corporate law. Specifically, we argue that any legal regime governing firms with controlling shareholders encounters an inevitable tradeoff between the goals of minority protection and allowing controllers to pursue idiosyncratic value.

Our theory allows us to resolve some of the important puzzles underlying the often confusing legal doctrine governing firms with controlling shareholders in Delaware. Two fundamental principles underlie the law governing firms with controlling shareholders. Directors’ fiduciary

\textsuperscript{23} See Oliver Hart, \textit{Financial Contracting}, 39 J. \textit{ECON. LIT.} 1079, 1079 (2001) (”[F]inancial contracting can be described as the theory of what kind of deals are made between financiers and those who need financing.”).
duties require them to act in the corporation’s best interests—that is, maximize share value; but, controlling shareholders are also not required to sacrifice their interests to serve the interests of shareholders as a group. The conflict between these two principles often leads to confusing and indeterminate results. We do not aim at providing a comprehensive account of legal doctrine. Rather, we illustrate the power of our framework to explain how corporate law doctrines are shaped by the interaction of minority protection from agency costs against the controllers’ rights to secure idiosyncratic value.

Our argument unfolds as follows. In Part I, we set up the financial contracting framework for corporate investments and use it to analyze the building blocks of the paradigmatic contract between entrepreneurs and investors. We identify the entrepreneurs’ idiosyncratic value as an important source of asymmetric information that exacerbates agency costs between the parties. We then show that investors and entrepreneurs can use different allocations of cash-flow and control rights to contain those agency costs while preserving idiosyncratic value.

In Part II, we analyze a range of corporate ownership structures: dispersed ownership, private equity funds, dual-class shares, and lastly, concentrated ownership. We explain how each of these governance structures balances idiosyncratic value against agency costs. We also explain how the controlling-shareholder structure fits within this framework.

In Part III, we present the implications of our financial contracting framework for corporate theory. We challenge both the contention that it is private benefits that induce controlling-shareholders to make the requisite equity investment, and the competing view that improved monitoring explains the controlling-shareholder structure. In this Part, we also question the common view that the size of the control premium is indicative of the quality of investor protection.

In Part IV, we outline the corporate law implications of our financial contracting framework. Unlike the existing corporate law literature that focuses solely on protecting the minority from agency costs, our framework requires lawmakers and courts to balance minority protection against controllers’ rights to secure idiosyncratic value. We show that corporate law should assign property-rule protection to controlling shareholders’ rights and liability-rule protection to minority shareholders.

I. THE FINANCIAL CONTRACTING FRAMEWORK

The financial contracting literature studies the basic agreement underlying the relationship between entrepreneurs (providing business

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26 See Goschen, Controlling Self-Dealing, supra note 11 (introducing and applying the property-rule/liability-rule analysis to minority-shareholders’ protection).
ideas) and investors (providing financing). Economists and legal scholars have used this framework to explore the allocation of control and cash-flow rights across a variety of specific financing arrangements. Our approach is novel in several respects. First, it identifies the entrepreneur’s idiosyncratic value as a source of asymmetric information between business ideas and financing both when the entrepreneur raises funds and during the idea’s ongoing development. Second, it argues that entrepreneurs value control because it allows them to pursue idiosyncratic value. Importantly, unlike pecuniary or non-pecuniary private benefits of control, idiosyncratic value is a pecuniary payoff that will be shared pro-rata when realized. Third, it explores the inherent tension between entrepreneurs and investors when responding to asymmetric information and agency costs associated with idiosyncratic value. Finally, it shows that entrepreneurs and investors can use different combinations of cash-flow and control rights to curb agency costs and preserve idiosyncratic value.

A. Idiosyncratic Value.

An entrepreneur has a business idea. This idea could be an invention of a new product, an innovative method of producing or marketing an existing product, the identification of a new market or a niche in an existing market, a new method of motivating employees, or even a better execution of a known method for motivating employees. The idea could also relate to

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27 For a review of this literature, see Hart, supra note 23.
29 Our framework also differs from the incomplete-contracts literature. While we share the starting point under which control matters because contracts are inevitably incomplete, we do not assume that entrepreneurs should be in control because they make asset-specific investments. See generally Oliver Hart & John Moore, Property Rights and the Nature of the Firm, 98 J. POL. ECON. 1119 (1990); Raghuram G. Rajan & Luigi Zingales, Power in a Theory of the Firm, 118 Q. J. ECON. 387 (1998).
30 The financial contracting literature normally assumes that entrepreneurs care not only about the project’s expected cash flows, but also about non-pecuniary benefits of control. See Aghion & Bolton, supra note 3, at 476; Hart, supra note 23, at 1085.
31 Our work follows the seminal transaction cost economics theory of Oliver Williamson, see generally Oliver Williamson, Transaction Cost Economics, 1 HANDBOOK INDUST’L ORG. 135 (1989).
32 See Raghuram G. Rajan, The Corporation in Finance, 67 J. Fin. 1173, 1177 (2012) (“[T]o create net present value, the entrepreneur has to go out on a limb, distinguishing herself from the rest of the herd of potential competitors, and thus potentially earning sustainable profits... the process of creating positive net present value invariably implies differentiation – whether in creating new products or product varieties that nobody else manufactures, in developing production methods
the financial aspects of the business, such as its capital structure (e.g., leverage levels and dividend policy), or its sources of capital. To be clear, it does not have to be an invention or a discovery. Think of an entrepreneur opening a shoe store in a street where ten other shoe stores already exist because she believes she can do better than the competition. Or a newly-appointed CEO of an established and successful firm who believes her business plan will make the firm even more successful. Or a private equity fund that buys control of a corporation with financial difficulties and intends to appoint new management that will improve performance. It could be anything, although the entrepreneur might eventually be wrong. To be considered a business idea in our framework, however, what matters is that the entrepreneur genuinely believes that successfully implementing the idea will produce an above-market rate of return on the total resources invested in the project (money, time, effort, etc.).

If the entrepreneur has sufficient wealth she can fund the entire project—the research required for development, the costs of implementation, and the effort required for marketing. As the sole owner, the entrepreneur will assume all the risks and capture all the returns associated with the project. With complete control, the entrepreneur will make all the decisions, minor and major, associated with the project’s execution. The only challenge that the entrepreneur faces is executing the business idea and capturing its value. The entrepreneur can pursue her idea for as long as she wants and in whatever manner she prefers, even if the business is losing money and every expert in the field expresses the opinion that she is pursuing a surefire failure of an idea. No matter how much money she is losing and for how long, no one can force her to sell the business, hire a professional manager, or close the business down. If at the end she fails, she might be called “stupid” or “smart but ahead of her time,” and if she succeeds she might be called “a visionary” or “a genius.”

that are more efficient than that of the competition, or in targeting customer populations or needs that have hitherto been overlooked.”) Rajan refers to this value as the “entrepreneur’s idea.” See id. at 1179. See also Joseph Schumpeter, THEORY OF ECONOMIC DEVELOPMENT (1911) (explaining entrepreneur’s innovative role).

33 Such as publicly-traded or private debt, local investors or foreigners, trade or bank credit, venture capital or strategic investors.

34 Financial economists call it a positive net present value project (NPV). See William Carney, CORPORATE FINANCE: PRINCIPLES AND PRACTICE 104 (2010) (explaining NPV). Our story will hold true even if the entrepreneur believes the project has a zero NPV (i.e., will provide normal market rate of return) as long as the normal rate of return applies to all the resources invested in the project. However, we believe that the entrepreneur’s pursuit after above market rate of return is a more intuitive understanding of reality. Nonetheless, some studies have found empirical support for a positive NPV performance. See, e.g., Danny Miller, et al., Are Family Firms Really Superior Performers? 13 J. CORP. FIN. 829 (2007) (finding that only family-controlled corporations with a lone founder outperform).

35 Indeed, the failures and successes of Henry Ford, Steve Jobs, and other entrepreneurs over their careers provide a real illustration of our point.
We call the subjective value the entrepreneur assigns to her business idea the “idiosyncratic value.”\footnote{We called this component of the idea the idiosyncratic value but one could also call it the entrepreneur vision/idea, the business plan, the subjective value, or hidden value. Cf. Bernard Black & Reinier Kraakman, Delaware’s Takeover Law: The Uncertain Search for Hidden Value, 96 NW. U. L. REV. 521 (2002). In other words, we assume that the project is not a fully standardized one. See also Rajan, supra note 32, at 1200 (“[S]tandardization . . . reduces the idiosyncratic and personalized aspects of the entrepreneur’s role, allowing her job to resemble that of a typical CEO, and making it easier for an employee or outsider to replace her as CEO.”).} Idiosyncratic value has two distinctive features in our framework. First, it reflects the expected pecuniary return that, if the project succeeds, will be shared on a pro-rata basis between the entrepreneur and investors.\footnote{Idiosyncratic value, however, should not be confused with non-pecuniary benefits of control. Non-pecuniary benefits of control refer to the value (e.g., personal satisfaction, pride, fame, political power) that only the entrepreneur derives from the mere execution of his business idea. Alessio Pacces analyzes what he labels idiosyncratic private benefits of control. See ALESSIO M. PACCES, FEATURING CONTROL POWER 289-290 (2007). But notwithstanding the similarity in terms, his analysis merely captures a specific form of non-pecuniary private benefits of control. See Pacces, Control Matters, supra note 10 (referring to a controller's "personal satisfaction" as an example of idiosyncratic private benefits of control).} Second, it reflects the parts of the business idea or the entrepreneur’s unique position to execute the idea that cannot be verified by outsiders. This could either be because sharing the information with outsiders would destroy its value (e.g., competitors could copy the idea), the uncertainty concerning the feasibility of the innovation, differences of opinions, or simply because the entrepreneur can present outsiders with nothing more than her strong conviction concerning the value of the idea.

An entrepreneur’s idiosyncratic value can be due to a special vision, experience, unquantified management talent, knowledge, character, or intuition.\footnote{Stand-alone managerial talent, however, should not be confused with idiosyncratic value. An entrepreneur’s unique managerial talent can be a source of idiosyncratic value when outsiders cannot fully appreciate the returns that this talent is expected to produce. But when both the entrepreneur and outsiders agree on the expected value of the entrepreneur’s managerial talent, it no longer qualifies as idiosyncratic value in our framework.} To be sure, some business ideas will have low idiosyncratic value and thus can be implemented by others, while other business ideas will have high idiosyncratic value, thereby making the entrepreneur's control vital to their execution. As we explain below, the entrepreneur’s right to execute her business idea—her control over the project—protects her idiosyncratic value.

B. Asymmetric Information.
The entrepreneur’s idiosyncratic value creates asymmetric information that cannot be overcome by more monitoring, investigation, or disclosure.\textsuperscript{39} When the entrepreneur is the firm’s sole owner, the informational asymmetries inherently associated with idiosyncratic value are of little concern. However, asymmetric information does create difficulties when the entrepreneur must raise funds from outsiders to develop the project. For simplicity, we shall refer to those who provide the entrepreneur with financing as “investors.”

Assume the entrepreneur presents his business idea to potential investors. The investors consult with experts in the field and they all opine that the idea is impossible. This is the \textit{ex-ante} information asymmetry that the entrepreneur faces when persuading investors to make the initial investment.

Asymmetric information creates hurdles even if the entrepreneur persuades investors to make the initial investment. If the entrepreneur eventually does not deliver the product on time or at the quality initially promised, persuading investors to continue the project at this stage might prove more difficult because investors might perceive the setback as casting doubt on either the entrepreneur’s unique ability to execute the project or her conviction in the project’s future success.\textsuperscript{40} This is the \textit{ongoing} information asymmetry that the entrepreneur faces when persuading investors to continue the execution of the project. Different business ideas and entrepreneurs present different idiosyncratic values according to the complexity and nature of the asymmetric information involved. However, asymmetric information disappears once idiosyncratic value is realized.

To be sure, problems of asymmetric information characterize many cases in which entrepreneurs seek capital.\textsuperscript{41} Our focus here is on the problem of asymmetric information that arises from the idiosyncratic value’s subjective nature, that is, the fact that the entrepreneur’s belief concerning the project’s value is non-verifiable not only \textit{ex ante}—at the

\textsuperscript{39} We would like to note at the outset that the meaning of asymmetric information in our framework is somewhat broader than that in the literature. The common definition of asymmetric information refers to parties’ different degrees of knowledge of objective facts. In our framework, asymmetric information also describes parties’ different estimates of the economic or business implications of undisputable facts. In other words, if there is an auction over the business idea and all facts are equally known to all participants the entrepreneur will bid more than outside investors due to her idiosyncratic value.

\textsuperscript{40} The reasons for a delay in executing a business idea could vary: unanticipated technological obstacles, unexpected delay in implementing organizational changes, inability to recruit high quality employees, or a delay in anticipated market developments such as future changes in demand.

time of making the investment—but also when the idea is being developed and implemented.\textsuperscript{42}

C. Agency Costs.

The information asymmetry stemming from the inability to verify idiosyncratic value is exacerbated by the presence of opportunistic players, presenting the well-known phenomenon of agency costs.\textsuperscript{43} Assume the entrepreneur pitches his business idea to investors. Does the entrepreneur genuinely believe in the project? Or is he simply lying to exploit investors? Or assume the entrepreneur informs investors about a delay in the project’s execution and asks for more time and money. Is the delay due to some temporary obstacles, with the project's success still attainable? Or is it an attempt at investors’ exploitation by the entrepreneur, who at this stage already knows the project is doomed?\textsuperscript{44}

Agency costs can take many forms besides conveying inaccurate information as opportunities for unscrupulous behavior are limitless. Commonly, agency costs are divided into two types.\textsuperscript{45} The first type is \textit{mismanagement}, including reduced commitment, shirking, pursuing acquisitions just to increase firm size or achieve diversification,\textsuperscript{46} and investing resources in entrenchment.\textsuperscript{47} The second type is \textit{takings}, in which the agent directly diverts to himself pecuniary private benefits by, for

\textsuperscript{42} Furthermore, while, as we will show next, investors are concerned with asymmetric information as a source of agency costs, in our contracting story the entrepreneur is also concerned with asymmetric information as an impediment to her ability to persuade investors to allow her to pursue idiosyncratic value.


\textsuperscript{44} See Oliver Williamson, \textit{THE ECONOMIC INSTITUTION OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING} 47 (1985) (explaining actors without full information are subject to counterparty “opportunism” which “refers to the incomplete or distorted disclosure of information, especially calculate efforts to mislead, distort, disguise, obfuscate, or otherwise confuse”). In fact, agency costs arise whenever asymmetric information is coupled with conflicting or misaligned interests. See Jensen & Meckling, supra note 43, at 310 (explaining that agency costs arise whenever an agent is utilized).


example, consuming excessive pay and perks or conducting related-party transactions. It is the inevitable tension between agency costs and idiosyncratic value that makes contracting between entrepreneurs and investors challenging. The entrepreneur wants freedom to pursue idiosyncratic value. Although they would enjoy their pro-rata share if idiosyncratic value were realized, investors need to restrict the entrepreneur’s freedom in order to minimize agency costs. In a world with transaction costs, it is impossible to simultaneously provide investors with full protection from agency costs and the entrepreneur with unlimited freedom to pursue idiosyncratic value. Therefore, the parties must agree on an acceptable balance between these two goals.

To reach such a balance, the contract between investors and the entrepreneur will typically allocate two key elements: control and cash-flow rights. We now turn to explain this contracting process.

D. **Financial Contracting: Control and Cash-flow Rights.**

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50 The conventional view is that corporate law’s principal goal is regulating agency costs. See John Armour et al., *What is Corporate Law*, in *THE ANATOMY OF CORPORATE LAW* 1, 2 (Reinier Kraakman et al., eds., 2d ed. 2009) (“[M]uch of corporate law can usefully be understood as responding to three principal sources of opportunism: conflicts between managers and shareholders, conflicts among shareholders, and conflicts between shareholders and the corporation's other constituencies. . . .”). As we will show, corporate law aims at balancing between idiosyncratic value and agency costs.


52 As in any negotiation, the intensity of competition and each side’s relative bargaining power will determine the ultimate balance. See, for example, George G. Triantis & Albert H. Choi, *Market Conditions and Contract Design: Variations in Debt Covenants and Collateral*, N.Y.U. L. REV. (forthcoming 2012).

53 An advanced contractual theory refers to the parties’ effort to strike an efficient balance between the front-end cost (the contracting process) and the back-end cost (the enforcement process). See Robert E. Scott & George G. Triantis, *Anticipating Litigation in Contract Design*, 115 YALE L.J. 814 (2006). Here, however, we present a simple contracting model as we aim to analyze ownership structures and not contracts in general. As we will show next, ownership structures are, to a large degree, different contractual templates, which a simple contracting model can sufficiently explain.
1. The Role of Control. – Business ideas take time to implement. This ongoing process requires many decisions, ranging from day-to-day management issues to major strategic choices. Given that idiosyncratic value is non-verifiable, control is a crucial element in the entrepreneur’s ability to secure idiosyncratic value. Perhaps the most important decision is whether to continue the project. Under conditions of asymmetric information, there may be a divergence of opinion over whether the project should be continued and in what fashion. Accordingly, how will the parties decide the project’s fate?

In theory, they can contract in advance regarding the decisions to be made under various circumstances. In practice, however, they will face two problems. First, not all contingencies can be predicted in advance and specified in the contract. Second, the information required for the determination that a contingency has occurred and for making an appropriate decision could be non-verifiable. Since contracts are incomplete, the party with control over decision-making will have more power in determining the project’s fate. In the presence of asymmetric information and agency costs, the entrepreneur will want to retain control over a wide range of management decisions to pursue idiosyncratic value, while investors will wish to do exactly the same in order to minimize agency costs.

Assume that investors insisted on having all control rights. Assume further that the entrepreneur genuinely believes, despite some initial setbacks, that the firm should continue with the project. With control in their hands, however, investors may cut their losses by discontinuing the project, thereby preventing the entrepreneur from realizing idiosyncratic value. Or investors might lose faith in the entrepreneur, questioning the

54 The contract will deal with questions such as: for how long can the execution continue? How much losses/expenses are acceptable? What level of performance should be considered failure/success? Which milestones should be reached?
55 See, for example, Aghion & Bolton, supra note 3, at 473 (recognizing that “financial contracts are inherently incomplete”).
56 Id. at 479-80.
58 There is, of course, a relationship between the scope of management rights and the liberty to keep managing: If the management’s authority is revocable at will or limited to a shorter period of time, its powers are inherently circumscribed.
59 A very notable example is the story of Henry Ford mentioned in the introduction. Similar stories are Jack Bogle who was fired from managing the Wellington Management Company and returned to transform Vanguard into the largest mutual fund company in America, and Jon Luther whose investors closed a food chain he managed, Benchmark, only for him to become the turn-around CEO of Popeye’s and Dunkin Donuts. See Rick Newman, REBOUNDERS: HOW WINNERS PIVOT FROM SETBACK TO SUCCESS, Chpts. 3 & 4 (2012). Cf. Andrei Shleifer & Robert Vishny, The Limits of Arbitrage, 52 J. FIN. 35 (1997).
quality of her performance (due to either insufficient talent or agency costs), and decide to terminate her employment and hire someone else to execute the project. These decisions could be the outcome of asymmetric information or a difference of opinion between investors and the entrepreneur concerning the project’s expected value. In short, granting investors complete control would minimize both their exposure to agency costs and the entrepreneur’s ability to secure idiosyncratic value.

Now assume that the entrepreneur raised funds while retaining full control. In this scenario the entrepreneur can continue the project against investors’ objections. In other words, her control position allows the entrepreneur to pursue the idiosyncratic value she attaches to the project regardless of any setbacks. However, leaving full control in the hands of an opportunistic entrepreneur would subject investors to a high degree of agency costs, such as keeping the project afloat when it should be abandoned. In short, granting the entrepreneur complete control will maximize both her ability to secure idiosyncratic value and investors’ exposure to agency costs.

Control rights can be divided along many dimensions to achieve a desirable balance between the entrepreneur and investors. For example, control can be divided by the parties’ identity, a decision’s type or importance, governance structures, or contingencies. These building

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60 Apple firing Steve Jobs is the story that immediately comes to mind, but a more notable example is again Henry Ford and the investors replacing him with Henry Leland, discussed in text accompanying supra note 20.

61 It will also subject the entrepreneur to the risk of opportunism on the part of investors. See generally Jesse Fried & Mira Ganor, Agency Costs of Venture Capitalist Control in Startups, 81 N.Y.U. L. Rev. 967 (2006).

62 Indeed, agency costs are the reason why we treat the entrepreneur as the one concerned with idiosyncratic value, and not both parties, although, if materialized, investors will benefit pro-rata. Due to asymmetric information, investors cannot verify the amount of control (freedom to manage) the entrepreneur truly needs to secure the idiosyncratic value. Investors might fear that the entrepreneur is asking for more control than she actually needs to create room for agency costs.

63 See Jean Tirole, Corporate Governance, 69 ECONOMETRICA 1 (2001) (explaining that financial economists have failed to study the various dimensions along which control could be allocated between entrepreneurs and investors).

64 For example, granting complete control either to the entrepreneur or to the investors, or splitting the control equally between the parties (joint decisions) or unequally (70%-30%), or granting rights of consultation, or monitoring, or veto.

65 For example, one party retaining decisions over operations (e.g., hiring employees, selecting suppliers) and the other retaining control over financing (e.g., taking loans, raising more equity), or one party retaining control over “small” decisions (e.g., day to day management) and the other over “big” decisions (e.g., strategic decisions).

66 For example, the right to appoint directors, the CEO, etc. and dividing the parts among the parties.

67 For example, defaulting on interest payment, breaching a covenant, missing dividend payments, missing a milestone, such that one side begins with control but if a predetermined event occurs control flips to the other side either permanently, or for a fixed time.
blocks of control represent a spectrum of rights that take a precise shape according to the parties’ contract.

2. The Role of Cash-flow Rights. – The execution of the business idea is expected to generate income, which after paying all fixed claims (suppliers, employees, etc.) represents the return on the business idea and the parties’ investment. The contract should allocate the project’s cash-flows between the entrepreneur (to compensate for the business idea and any other investment on his part) and investors.  

Cash-flows are important in two respects. First, they determine the parties’ risk and expected return. The value of the expected cash-flows (discounted for time and risk) relative to the value of the investment made will determine the project’s profitability. Investors will agree to fund the project only if their expected share of the project’s income provides them with an adequate return on their investment. Whatever is left for the entrepreneur will determine her risk and expected return, thereby affecting her incentives and effort.

Second, by affecting the scope of the entrepreneur’s control and the nature of her incentives, the allocation of cash-flow rights can, like control rights, affect both the entrepreneur’s ability to pursue idiosyncratic value and investors’ exposure to agency costs. For instance, if all of the investment is made at the start of the project, the entrepreneur will have more control than if the investment is made in stages according to milestones. Similarly, an investment against a commitment to unconditionally pay fixed amounts on pre-determined dates will provide the entrepreneur with less discretion than an investment against a commitment to pay discretionally residual cash-flows. While more control increases the ability to secure idiosyncratic value, it also increases the exposure to agency costs.

Like control rights, cash-flow rights can be divided along many dimensions. Investment can be made at once, or staged according to milestones, for a fixed duration (debt) or indefinite duration (equity). Similarly, cash-flow rights can be fixed (a salary, interest), residual (dividends), hybrid (preferred dividends), or contingent (convertibles). These building blocks of cash-flow rights represent a spectrum of rights that take a precise shape according to the parties’ agreement.

For example, “enhanced cash flow and control rights may reduce the moral hazard problems associated with financing entrepreneurs . . . [and the] use of preferred stock may provide founders with stronger incentives to generate value, and board control may enable [investors]to more easily monitor and replace poorly performing entrepreneur-managers.” See Fried & Ganor, supra note 61, at 971.

For example, investors will consider receiving residual cash-flow rights to be riskier than receiving fixed cash-flow rights and far future cash flows will have lower value than near future cash flows.

3. The Interplay of Control and Cash-flow Rights. – The parties allocate control and cash-flow rights with the aim of finding an optimal balance between the entrepreneur’s need to secure idiosyncratic value and investors’ need to guard against agency costs. For any given project, both control and cash-flow rights are a pie with a fixed size.\(^{71}\) The more control rights (or cash-flow rights) provided to investors, the less control rights (or cash-flow rights) provided to the entrepreneur, and vice versa. Moreover, as control and cash-flows affect both the ability to secure idiosyncratic value and the exposure to agency costs, the two rights can act not just as complements but also as substitutes.

a. The Spectrum of the Rights. – To understand the interplay of control and cash-flow rights, assume a contract located on one end of the spectrum where investors receive full control rights and all residual cash-flows, and the entrepreneur receives only a fixed salary for executing the project. Such a contract is commonly described as the investors “hiring” the entrepreneur. But the entrepreneur has some degree of control even in this case. True, investors can fire the entrepreneur at will, but as long as she is employed, the entrepreneur maintains control over the day-to-day decisions. Due to the misaligned interests of the entrepreneur who receives a fixed salary only, investors are exposed to agency costs (of the mismanagement type). Investors’ exposure to agency costs is limited, however, as they have control rights—they can terminate the entrepreneur at will. The uncertainty of her employment term, in turn, limits the entrepreneur’s ability to secure idiosyncratic value.\(^{72}\)

Let us now turn to the other end of the spectrum in which the entrepreneur has all control and cash-flow rights, whereas investors hold only a fixed claim. Such a contract is commonly described as the entrepreneur “borrowing” from creditors (investors). But as financial economists have long recognized, even creditors with fixed claims retain contingent control rights.\(^{73}\) As long as the entrepreneur is paying the creditors on time he can make all decisions, but in the event of default, control may shift to investors-creditors.\(^{74}\) By holding full control rights, the entrepreneur has freedom to pursue idiosyncratic value. But, this same

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\(^{71}\) The rights are a fixed size pie although their content might vary. For instance, cash flow rights are a fixed size, but the actual cash flows might increase or decrease when different allocations of these rights affect incentive and effort.

\(^{72}\) However, just to illustrate a slight move to the other end of the spectrum, investors could limit their right to fire the entrepreneur only for cause and add to her salary some stock options, representing a slice of the expected residual cash-flows. This would incentivize effort and create a commitment to stay with the project.


\(^{74}\) Patrick Bolton & David S. Scharfstein, *Corporate Finance, the Theory of the Firm*, 12 J. ECON. PERSP. 95, 100 (1998) (explaining creditors take control in cases of default).
freed freedom exposes investors to the agency costs of debt (e.g., increasing the riskiness of the project). Investors receive contingent control rights to limit their exposure to agency costs. The latter rights, in turn, set a ceiling on the entrepreneur’s freedom to pursue idiosyncratic value.

**b. Control and Cash-flow Rights as Substitutes.** – Both control and cash-flow rights can serve as substitutes when attempting to balance idiosyncratic value and agency costs. For instance, staged financing provides existing or future investors with de-facto control over the decision whether to continue the project. Similarly, stock options (a form of residual cash-flow rights) can reduce agency costs by aligning the entrepreneur’s interests with those of investors. The building blocks of control and cash-flow rights can thus be used to create different mixtures that balance idiosyncratic value and agency costs. If the parties can design a compensation package (salary, options, and bonuses) that provides the entrepreneur with an adequate return for his business idea (and any other investment on her part), control rights could possibly be assigned to investors. And vice versa: If investors can receive cash-flows that adequately compensate for risk, control rights could be assigned to the entrepreneur.

**E. Bargaining Power and Competition.**

The specific contract between investors and entrepreneurs—the outcome of the negotiations between the parties—will also depend on each party’s relative bargaining power. When capital in general is scarce (such as when interest rates are high) or when capital for a specific area of business is scarce (such as a shortage of venture capital funding), investors

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75 See Robert A. Haugen & Lemma W. Senbet, Bankruptcy and Agency Costs: Their Significance to the Theory of Optimal Capital Structure, 23 J. Fin. & Quant. Anal. 27 (1988); Roberta Romano, FOUNDATIONS OF CORPORATE LAW 183 (2d ed., 2010) (“By altering the risk of a firm’s investments after credit is obtained, manager-shareholders can transfer wealth from bondholders to themselves.”).

76 See generally Oliver Hart & John Moore, Debt and Seniority: An Analysis of the Role of Hard Claims in Constraining Management, 85 AM. ECON. REV. 567 (1995). Just to illustrate moving along the spectrum to the other end, assume investors-creditors can contract for covenants limiting the scope of decisions the entrepreneur can make (e.g., limiting dividends or leverage) or asset use by the entrepreneur (e.g., restricting a sale). See Clifford W. Smith, Jr. & Jerold B. Warner, On Financial Contracting: An Analysis of Bond Covenants, 7 J. FIN. ECON. 117 (1979) (detailing bond covenants used to reduce debt agency costs).

77 See supra note 70 and accompanying text (describing control from staged financing).

78 In fact, different securities represent different mixtures of these two elements. For example, a common share represents an indefinite investment entitled to residual cash-flows (high exposure to agency costs) with control rights (high degree of protection), while a bond represents a fixed-duration investment with fixed cash-flows (low exposure to agency costs) and only contingent control rights (low degree of protection).
can get a better deal.\textsuperscript{79} In contrast, when capital is chasing business ideas (too much “dry powder”), or when the entrepreneur has a very appealing idea or track record, she can bargain for more beneficial terms.\textsuperscript{80} Due to differences in bargaining power, the same project could result in different allocations of control and cash-flow rights.

Furthermore, agency costs and idiosyncratic value are not necessarily symmetrically valued.\textsuperscript{81} Thus, the entrepreneur might value control rights much more than the price that investors attach to their increased exposure to agency costs.\textsuperscript{82} In other words, competition and relative bargaining power can result not just in different pricing, but also in variations in a contract’s quality (from the investors’ or entrepreneur’s perspective) for the same basic deal.

\section{II. The Spectrum of Ownership Patterns}

In this Part we utilize our framework to show that different ownership structures lie on a spectrum of possible financial contracts between the entrepreneur and investors. Specifically, we will review dispersed ownership, private equity funds, dual-class firms, and concentrated ownership. As we will explain, each ownership structure presents a different balance between idiosyncratic value and agency costs.

\subsection{A. Dispersed Ownership.}

On one end of the spectrum lies the dispersed ownership structure. This structure is similar to our earlier illustration of the entrepreneur as an employee: Investors hold all control and residual cash-flow rights, and the entrepreneur receives a salary.\textsuperscript{83}


\textsuperscript{81} While entrepreneurs may be undiversified given their human-capital investment, investors hold a diversified portfolio.

\textsuperscript{82} For example, Facebook recently went public with a dual-class structure in place, leaving investors without control, see \textit{Unequal Shares}, The NewYorker, at http://www.newyorker.com/talk/financial/2012/05/28/120528ta_talk_surowiecki.

\textsuperscript{83} See supra text accompanying note 72.
We analyze the dispersed ownership case as the entrepreneur being the board of directors and the CEO jointly (we will call them “Management”). An entrepreneur can be in a dispersed ownership structure either because she sold her control block to the market (or was diluted) due to risk diversification or wealth-constraints, or because she was appointed to manage an established widely-held firm. The analysis in both scenarios is similar and we will continue with the latter case. Assume that Management competes over the right to manage an existing firm. In a typical case, it may appear that Management’s idiosyncratic value is small, as it basically amounts to an offer to “manage better than others,” while investors are asked to hand over (“invest”) their already operational firm. To be sure, managerial talent can be an important element in the success or collapse of many well-established, publicly-traded corporations. Yet, investors at existing publicly-traded firms operating in an environment characterized by an active market for managers are more likely to accurately price the expected value of managers’ talent, thereby leaving less room for asymmetric information and idiosyncratic value. Also, note that if management’s idiosyncratic value is large, management can move to the other end of the spectrum by initiating a management buyout (MBO), with management owning control and residual cash-flow rights and investors providing debt.

We start with the allocation of cash-flows in the dispersed ownership structure. Shareholders receive all residual cash-flows, while Management receives a salary and a small fraction of residual cash-flows through options and bonuses included in the compensation package. Leaving management with a small fraction of residual cash-flows exposes investors to management agency costs.

Moving to control rights, Management controls the day-to-day management decisions (CEO’s authority), and many substantial business and governance decisions (board’s authority), while shareholders retain control over a few significant decisions (e.g., a merger or sale of

84 For indirect evidence supporting this proposition, see Steven Kaplan et al., Should Investors Bet on the Jockey or the Horse? Evidence From the Evolution of Firms from Early Business Plans to Public Companies, 64 J. FIN. 75 (2008) (finding that post-IPO firms’ core line of business or business idea was remarkably stable while the management turned over quite frequently).
85 For example, Ford Motor and Henry Ford; Lee Iacocca and Chrysler; Kodak; Eastern Air Lines; Lehman Brothers; Apple; Nokia; and Blackberry. Yet, despite their pursuit of idiosyncratic value, managers may lack the resources to buy a control block.
86 See, for example, Steven Kaplan, The Effect of Management Buyouts on Operating Performance and Value, 24 J. FIN. ECON. 217 (1989) (presenting evidence on changes in operating results of firms that went through a management buyout).
87 Kevin J. Murphy, Executive Compensation: Where We Are, and How We Got There, in HANDBOOK OF THE ECONOMICS OF FINANCE (Milton Harris & Rene Stulz, eds.) (Forthcoming) (generally reviewing executive compensation).
88 Del. Gen. Corp. L. § 141(a) (granting expansive board authority).
substantially all of the firm’s assets). More importantly, shareholders can, in theory, displace Management or sell their shares to a bidder seeking control of the corporation.

In widely-held firms, shareholders’ ability to terminate Management curtails Management’s ability to secure idiosyncratic value, and limits shareholders’ exposure to management agency costs. If shareholders—the investors—are convinced that Management is wrong in pursuing a business strategy, or if they believe Management is incompetent or unmotivated, they can elect new leadership or tender their shares to a bidder for control.

To be sure, although shareholders have formal power it may not translate into real power. Shareholders may encounter legal and other obstacles in voting Management out of office. Moreover, companies may adopt antitakeover provisions in their charter and Management can employ other antitakeover tactics. Some legal systems provide directors with a large degree of freedom to resist hostile bids, while others, like the United Kingdom, insist on a rule under which shareholders should have the right to decide whether to sell the firm. Yet, some argue that even where the law allows it to resist hostile bids, Management cannot practically decline a tender offer when the price offered is sufficiently high.

89 See Del. Gen. Corp. L. § 271 (requiring a shareholder vote for sale of substantially all the firm’s assets); Del. Gen. Corp. L. § 251 (requiring majority shareholder vote for statutory mergers).
91 See also Jean-Jacques Laffont & Jean Tirole, Repeated Auctions of Incentive Contracts, Investments, and Bidding Parity with an Application to Takeovers, 19 RAND. J. ECON. 516 (1988) (demonstrating that ease of replacement undermines management incentives to make unobservable investments).
93 See, for example, Lucian A. Bebchuk, The Myth of the Shareholder Franchise, 93 VA. L. REV. 675 (2007).
94 Id.
95 Delaware, for example, allows firms to have staggered boards and implement a poison pill to effectively block takeovers, subject only to minimal judicial review. See Airgas, Inc. v. Air Products and Chemicals, Inc., 16 A.3d 48 (Del. Ch. 2010).
97 See also Steven N. Kaplan & Bernadette A. Minton, How Has CEO Turnover Changed? Increasingly Performance Sensitive Boards and Increasingly Uneasy CEOs, NBER Working Paper No. 12465 (2006), at http://www.nber.org/papers/w12465 (the average tenure for CEOs of large US corporations is slightly over six years); Marcel Kahan & Edward B. Rock,
For our framework, however, it is sufficient to point out that in a dispersed ownership structure control is contestable: The stronger the market for corporate control and the more effective the proxy mechanism, the greater the risk of Management removal. Making it more difficult for investors to displace Management enhances Management’s ability to pursue idiosyncratic value while also increasing investors’ exposure to agency costs.\textsuperscript{98}

B. Private Equity Funds.

Private equity funds present a different tradeoff between idiosyncratic value and agency costs. Private equity funds normally obtain control of corporations, private or public, and take them through some form of reorganization according to the fund’s strategy.\textsuperscript{99} These funds are organized as partnerships, with the entrepreneur being the general partner and the investors being limited partners.\textsuperscript{100}

Beginning with control, the fund’s investors have virtually no say on its affairs,\textsuperscript{101} nor can they terminate the employment of the general partner who manages the fund. However, the fund has a limited duration (normally ten years),\textsuperscript{102} which is essentially an exit right for investors, allowing them to end the general partner’s control over their investment.

In terms of cash-flows, the general partner receives a compensation package that includes fixed management fees for managing the fund (normally about 2%) and sizeable residual cash-flows (normally 20% of profits), while investors receive the remainder of the residual cash-flows.\textsuperscript{103}

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\textit{Embattled CEOs}, 88 TEX. L. REV. 987 (2010) (arguing that, since 2000, CEOs have been losing power to boards and shareholders).
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\textsuperscript{98} In this light, the debate over allowing or restricting takeovers defenses should be seen as debate over where to place the balance between agency costs and idiosyncratic value. See also Black & Kraakman, supra note 36 (explaining Delaware’s approach to takeovers by the notion of hidden value—under which the firm’s true value is apparent to directors but not shareholders or acquirers). But see Philippe Aghion et al., Innovation and Institutional Ownership, at http://www.nber.org/papers/w14769 (finding that the positive relationship between innovation and institutional ownership is stronger when CEOs are less entrenched due to protection from hostile takeovers, and that the decision to fire the CEO is less affected by a decline in profitability when institutional investment is high).


\textsuperscript{100} \textit{Id.}

\textsuperscript{101} See \textit{id.} at 126 (“[A]fter committing their capital, the limited partners have little say in how the general partner deploys the investment funds, as long as the basic covenants of the fund agreement are followed.”).

\textsuperscript{102} See Andrew Metrick & Ayako Yasuda, The Economics of Private Equity Funds, 23 REV. FIN. STUD. 2303, 2309 (2010) (“[T]he typical fund has a lifetime of ten years, with GPs allowed to make investments in new companies only during the first five years.”).

\textsuperscript{103} \textit{id.} at 2311.
Compared to a CEO of a widely-held corporation, the general partner of a private equity fund enjoys both full control over all decisions affecting the value of the fund’s investment and a much more generous compensation package.\textsuperscript{104} While a CEO has an uncertain term, as she can be fired at will (subject to the costs of a proxy fight and a hostile takeover) the general partner has a fixed term to manage the fund.\textsuperscript{105} Additionally, shareholders’ investment in a widely-held firm is for an indefinite term with management normally able to raise more money by issuing debt or equity and preserving retained earnings. In contrast, investors’ contribution to the private equity fund is for a fixed duration, and the general partner cannot raise additional funds once the fund is “closed,” nor can she keep proceeds from realized investments.\textsuperscript{106} Indeed, the general partner will have to open a new fund in order to raise more money.\textsuperscript{107}

The general partner is granted full discretion to pursue idiosyncratic value, with the restriction that the time frame for the realization of such value (i.e., the reorganization strategy) fits the duration of the fund. While the general partner’s complete control and an assured fixed term increase her ability to secure idiosyncratic value, they also increase investors’ exposure to agency costs. However, agency costs are contained by the fund’s 2/20 fee structure, which operates to align the interests of the general partner with those of the fund’s investors. The presence of sophisticated investors,\textsuperscript{108} and the fund’s fixed term and inability to raise more financing, further limit the exposure to agency costs: An entrepreneur that subjects fund investors to agency costs (mismanagement or takings) will suffer reputational losses leading investors to shun her future funds.\textsuperscript{109}

\textbf{C. Dual-class Firms.}

In the dual-class share structure the entrepreneur holds shares with superior voting rights while investors’ shares have inferior or no voting rights.\textsuperscript{110} By owning a majority of voting rights, the entrepreneur has full

\textsuperscript{104} Why would an entrepreneur manage a widely-held corporation and not a private equity fund? It could be the type of idiosyncratic value (a business idea that has economies of scale that can be replicated in the many corporations owned by the private equity fund), the market power of the entrepreneur (reputation, experience), or taste (non-pecuniary benefits, asset specific investment in human capital).

\textsuperscript{105} True, the CEO might serve much longer than the term of a fund, and many CEOs do serve long periods. The point is that they cannot count on it. \textit{See} Kaplan & Minton, \textit{supra} note 97, at 2 (explaining the average tenure for CEOs of large US corporations is slightly over six years).

\textsuperscript{106} \textit{See} Metrick & Yasuda, \textit{supra} note 102, at 2304.

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} Investors in a private equity fund are commonly well-informed sophisticated individuals and institutional investors whose investments’ horizon and goals align with the fund’s strategy.


\textsuperscript{110} For example, assume 1 share out of 10 shares has 51% of the votes, while the remaining 9 shares have together 49% of the votes. Each share has equal rights for
control over business decisions, and she can block any hostile takeover without even the minimal judicial review that might restrict management in a widely-held company. Despite holding a small share of residual cash-flows, the entrepreneur has fully uncontestable control for an unlimited time.111

The entrepreneur’s small fraction of residual cash-flows increases investors’ exposure to management agency costs.112 Investors’ exposure to these costs is exacerbated by the entrepreneur’s uncontestable and indefinite control, which also subject investors to control agency costs (the takings type). Accordingly, it might appear that investors are getting the worst of all worlds in this structure by bearing both management and control agency costs.

Yet, uncontestable and indefinite control provides the entrepreneur with maximum ability to secure idiosyncratic value. If investors believe in the entrepreneur’s unique professional abilities, vision, and responsiveness to non-legal forces such as reputation,113 they might agree to buy shares in the dual-class structure.114 Similarly, when the entrepreneur has very high idiosyncratic value but insufficient wealth to hold the majority of equity

residual cash-flows. The entrepreneur owns the super-share (51% of the votes and 10% of residual cash-flows), and investors own the remaining shares (49% of the votes and 90% of residual cash-flows).

111 The dual-class structure can be viewed as a spectrum of contracts depending on the level of equity ownership held by the controller.

112 The exposure to agency costs is a negative function of entrepreneur’s share of cash-flow rights. See Stijn Claessens et al., Disentangling the Incentive and Entrenchment Effects of Large Shareholdings, 57 J. Fin. 2741 (2002) (finding that controlled corporations’ market to book ratio increases in controllers’ cash-flow rights but declines in the wedge between those rights and voting rights). The entrepreneur’s share of cash-flow rights in a dual-class firm is normally higher than that of the CEO in a widely-held firm. See Paul A. Gompers et al., Extreme Governance: An Analysis of Dual-Class Firms in the United States, 23 REV. FIN. STUD. 1051, 1053 (2010) (insiders at U.S. dual-class firms hold on average 40% of cash-flow rights).


114 In 2012, Google issued additional common stock, and could easily have diluted the dual-class protection by issuing both Class A and Class B stock. But it declined to do so, and the founders of Google wrote a letter to shareholders explaining why. The letter said, among other things, that the entrepreneurs that founded Google insisted on dual-class stock because they wanted to pursue long term projects without the possibility of losing control over these projects. They specifically say, for example, that the structure was necessary because “[t]echnology products often require significant investment over many years to fulfill their potential. For example, it took us over three years to ship our first Android handset, and then another three years on top of that before the operating system truly reached critical mass.” Letter from Larry Page, CEO and Co-founder of Google, and Sergey Brin, Co-founder of Google (Dec. 31, 2011), http://investor.google.com/corporate/2012/founders-letter.html.
rights (e.g., when the corporation is too big), she might insist on holding uncontestable control without a large equity investment and thus could offer only the dual-class structure. Indeed, at least in the United States, firms going public with a dual-class structure are the exception, not the rule. Additionally, as the recent examples of Facebook and Google demonstrate, firms that go public with such a structure are often those with a relatively high demand for their shares. In other words, as explained above, an entrepreneur’s unique bargaining power or the strong demand for a specific firm (justified or not) can cause investors to agree to a dual-class structure.

D. Controlling Shareholders.

In a concentrated ownership structure, the entrepreneur controls the company by virtue of owning a large block of voting equity, which, unlike dual-class shares, is issued at one-share-one-vote. Accordingly, control and cash-flows rights are distributed pro-rata between the entrepreneur and investors (minority shareholders) according to each side’s investment. Although the controlling shareholder structure could be formed in different ways—an entrepreneur who wholly-owned a corporation could sell a minority stake to the market, or buy control of a widely-held corporation through a tender offer or from another controller—the analysis in each case is similar.

The concentrated ownership structure is just another contract on the idiosyncratic-value/agency-cost spectrum, falling between dispersed ownership (low idiosyncratic value and low agency costs) and dual-class firms (high idiosyncratic value and high agency costs). Concentrated ownership—bundling control with cash-flow rights—allows the entrepreneur to secure idiosyncratic value while alleviating investors’ exposure to management agency costs.

To illustrate the point, assume that the investors—like in a dispersed ownership structure—control the firm by holding a majority of the shares, and they hire the entrepreneur to manage the business on their behalf. The

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115 See Robert M. Daines & Michael Klausner, Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs, 17 J. L. ECON. & ORG. 83 (2001) (finding only 6% of the firms in IPOs have dual-class shares).


117 Viewing the spectrum through the entrepreneur’s share of cash-flow rights the order would be: dispersed ownership (a salary + 1-3% residual), private equity (2% + 20% residual), dual-class (less than 50%), and controlling shareholders (sufficient to get a lock on control). Viewing the spectrum through control rights the order would be: dispersed ownership (at will or contestable), private equity (10 years), dual-class (indefinite), and controlling shareholders (indefinite). In the idiosyncratic value view, the controlling shareholder structure lies between the dual-class share and MBO structure. However, viewing the spectrum through agency cost exposure, the dual-class share structure provides for much higher agency costs than the controlling shareholder structure.
entrepreneur will hold actual control over day-to-day management. Yet, investors can unilaterally decide whether to continue the business or terminate the entrepreneur’s employment. The entrepreneur might agree to manage the firm and implement his business idea even without control, if investors offered him a compensation package that provided him with appropriate compensation for his business idea and any other investment on his part. 118 Indeed, this is the typical case in a dispersed ownership structure.

Now, assume that the entrepreneur—like in a dual-class firm—retains control over the business. From her standpoint, control secures idiosyncratic value. The entrepreneur holds the power to make all decisions, including the execution of the business idea and whether to continue the business. Even if the business fails to produce the expected returns, investors cannot close the business, displace the entrepreneur, 119 or demand their investment back. The most that investors can do is sell their shares on the market. 120 Although this structure maximizes the entrepreneur’s ability to capture idiosyncratic value, it also exacerbates agency cost concerns for investors. After all, when investors provide the entrepreneur with uncontestable control for unlimited time, they give up important market-based mechanisms—such as the market for corporate control—that serve to discipline managers at widely-held firms. Indeed, this is the typical investors’ exposure in the dual-class share structure.

While dispersed ownership and dual-class structures represent variations on “separation of cash-flow and control,” 121 the controlling

118 However, such an arrangement might present several challenges. First, designing a compensation package that would provide the entrepreneur (manager) with an appropriate return on her idea could be prohibitively costly and complex. Depending on the business idea, and the idiosyncratic value associated with it, investors might need to offer the entrepreneur very high-powered incentives, which in turn, given asymmetric information, could distort the entrepreneur’s incentives and produce a range of agency costs. Second, when the entrepreneur has no control, relying exclusively on compensation to capture her return on her business idea would expose her to agency costs. Investors could opportunistically terminate her employment before idiosyncratic value is realized or fail to take value-enhancing actions that would positively affect her compensation. Given asymmetric information, investors might simply lose faith in the project and prematurely close it down.

119 The power to displace the CEO is one of the important features of equity. See Zsuzsanna Flack, Optimal Financial Contracting: Debt versus Outside Equity, 11 REV. FIN. STUD. 383, 389 (1998) (explaining that outside equity has the right to dismiss and replace management independently of their realization of cash flow).

120 It is commonly assumed that en-masse exit by investors could discipline managers at widely-held firms. See, e.g., Alex Edmans & Gustavo Manso, Governance through Trading and Intervention: A Theory of Multiple Blockholders, 24 REV. FIN. STUD. 2395 (2011). The impact of investor exit—and the resulting decline in market price—on controlling shareholders is less clear. See, for example, Antoine Faure-Grimaud & Denis Gromb, “Public Trading and Private Incentives,” 17 REV. FIN. STUD. 985 (2004).

121 As compared with the famous Berle and Means term “separation of ownership and control,” our term uses “cash flow” instead of “ownership,” as we disregard
shareholder structure provides a middle ground solution: It bundles cash-flow rights and control. Under a one-share-one-vote regime, the entrepreneur retains control only if she holds an equity position sufficient to give her control. However, holding a control block inflicts costs on the entrepreneur. She needs to put her equity at risk, reducing liquidity and diversification, and to “work” either directly or by monitoring professional managers. While investors do not necessarily bear equal share in this expense, the entrepreneur must share with them pro-rata the expected return of the business. This is the “price” the entrepreneur pays to hold uncontestable control for unlimited time in order to protect her pursuit of idiosyncratic value. After all, this is a small cost, as the entrepreneur is (subjectively) certain to make above market returns on her investment and costs.

From investors’ perspective, the entrepreneur’s bundling of control and cash-flow rights alleviates asymmetric information and agency cost concerns. First, asymmetric information as to the idiosyncratic value is reduced when the entrepreneur has a lot of “skin in the game.” Second, substantial equity investment by the entrepreneur greatly aligns the interests of the entrepreneur with those of investors, thereby reducing management agency costs. Moreover, aligning interests through the substantial equity holding replaces the complexity of designing a compensation package for the entrepreneur with much simpler equity-based returns. Third, as control blocks are less liquid, bundling control and cash-flow rights restricts the ability of the entrepreneur to quickly walk away from the business. This type of lock-in effect increases the entrepreneur’s commitment.

Is this, therefore, the ideal ownership structure? The answer is no. As we noted earlier, in the perfect structure the entrepreneur is not wealth-constrained and can fully finance the business, thereby maximizing idiosyncratic value with no agency costs. Once investors enter the picture, financial contracting between entrepreneurs and investors will result in different mixtures of balancing contracts (i.e., ownership structures), none of which can both fully secure idiosyncratic value and fully eliminate agency costs. The controlling shareholder structure is no different.

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the formal rights and focus on the actual rights. See Adolph A. Berle & Gardiner C. Means, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

122 Although an empirical study has found that controlled firms do better than widely-held firms, which in turn do better than dual-class firms. See Controlled Companies in the S&P 1500: A Ten Year performance and Risk Review, http://irrcinstitute.org/pdf/FINAL-Controlled-Company-ISS-Report.pdf.

123 See Henry Hansmann, Ownership of the Firm, 4 J. L. ECON. & ORG. 267 (1988) (explaining that such firms are rare).

124 Much like the variety of cars: medium-safety/medium-speed/medium-price, low-safety/high-speed/medium-price, high-safety/low-speed/medium-price, high-safety/high-speed/high-price etc.

125 Why would a controlling shareholder not take the firm private? It could be for many reasons: he is spreading his risk of failure, there is insufficient liquidity in
Compared to dispersed ownership, the controlling-shareholder structure curtails management agency costs by forcing the controller to own a significant equity stake. This structure, however, does create exposure to the control agency costs present in dual-class structures. Investors face the risk that although the entrepreneur will efficiently manage the firm and realize the idiosyncratic value, she will evade the commitment to share residual cash-flows pro-rata and consume private benefits of control.

In sum, the controlling shareholder structure is a contract in which the entrepreneur enjoys uncontestable control for an unlimited time, allowing him to secure idiosyncratic value. However, the entrepreneur must pay for her position in lost diversification, liquidity, and additional execution and monitoring costs. Investors (minority shareholders) receive protection from management agency costs due to the entrepreneur’s large equity holding and the corresponding incentive alignment, but are exposed to control agency costs that might circumvent their right to a pro-rata share of residual cash flows.

III. REFLECTIONS ON THE THEORY AND EMPIRICS OF CONCENTRATED OWNERSHIP

Before we proceed to evaluate corporate law in light of our financial contracting analysis, we would like to highlight several theoretical insights and empirical predictions that follow from our framework. These insights both question and supplement prior scholarship on concentrated ownership.

Section A considers the claim that private benefits of control and poor investor protection are the cause for concentrated ownership. Section B assesses the possibility that improved monitoring explains the controlling-shareholder structure. Section C concludes by evaluating the conventional premise that the size of the control premium is indicative of the quality of investor protection and by offering several directions for empirical research.

A. Private Benefits Inducing Concentrated Ownership.

The premise underlying the standard account of concentrated ownership is that holding a control block is costly because it involves monitoring management, loss of liquidity, and reduced-diversification. At the same time, the control position allows controllers to enjoy private benefits of control. It thus follows that the more the controller can exploit the minority the greater his interest in holding the block. According to this view, a concentrated ownership structure is a consequence of low-quality investor protection (“bad law”) allowing controllers to exploit minority shareholders. In short, private benefits induce the concentrated ownership structure.126

126 See supra notes 14-16 and accompanying text.
There are two problems with this explanation. First, it assumes that most controllers around the world are opportunists, taking advantage of the imperfect legal and market protections for minority shareholders. Second, it cannot explain the presence of concentrated ownership in the United States and other countries with “good law,”\textsuperscript{127} or the investment practice of private equity funds.\textsuperscript{128}

Our analysis, in contrast, identifies reasons other than private benefits to hold a controlling position: Entrepreneurs may insist on retaining control because it secures their ability to realize idiosyncratic value. In other words, entrepreneurs may value control even when they genuinely intend to share all the firm’s cash flows and assets on a pro-rata basis with the minority shareholders. Our analysis thus explains why concentrated ownership exists even in “good-law” countries, and, for “bad-law” countries, our analysis suggests that focusing exclusively on minority protection offers an incomplete account. While the quality of investor protection affects agency costs, the quality of markets impact the ability of entrepreneurs and investors to overcome asymmetric information, thereby affecting idiosyncratic value. Thus, one should look to the quality of both law \textit{and} markets to explain the prevalence of concentrated ownership in certain jurisdictions.\textsuperscript{129}

\textbf{B. Monitoring as Insufficient Explanation.}

An alternative, more positive view explains minority investors’ willingness to tolerate the controller’s consumption of private benefits by focusing on the value of monitoring. Instead of relying on imperfect markets to monitor management, investors rely on the controller to take on this role. As holding a control block imposes costs (illiquidity, reduced diversification, and monitoring), an entrepreneur would not agree to hold a control block without the prospect of securing some non-pro-rata share of residual cash flows—or equally valuable non-pecuniary benefits—to offset the additional costs only she shoulders. In exchange for her valuable monitoring service, minority investors must therefore allow the controller

\textsuperscript{127} See Gilson, \textit{supra} note 10.

\textsuperscript{128} Private equity funds normally buy all the shares of the corporations in their portfolio, but sometimes they buy a control position. When funds buy a control position they pay a control premium. Rather than engaging in self-dealing, the fund focuses on implementing its reorganization plan, increasing the value of the firm, and selling it for a profit before the term of the fund ends. Such behavior cannot be explained by the incentive to consume private benefits of control. See Kaplan & Stromberg, \textit{Leveraged Buyouts, supra} note 99.

\textsuperscript{129} The basic claim is that idiosyncratic value depends on financial development. Developed market institutions facilitate outside investors’ ability to reduce the information gap regarding entrepreneurs’ idiosyncratic value, thereby making control less valuable. See also Aghion et al., \textit{supra} note 98 (finding that the decision to fire the CEO is less affected by a decline in profitability when institutional investment is high). Additionally, it may be difficult to structure an optimal compensation package for the management of a widely-held firm when markets are underdeveloped (because enforcement is weak, etc.).
to consume some degree of private benefits.\textsuperscript{130} While in the earlier explanation private benefits of control \textit{induced} entrepreneurs to hold control, here (optimal) private benefits of control \textit{reward} entrepreneurs in a concentrated ownership structure. But both explanations are similarly incomplete.

Monitoring indeed plays an important function in assuring efficient management. Nonetheless, “monitoring,” like “management,” is a service, that can be delegated. Indeed, corporate law assigns the role of monitoring to the board of directors. Why does monitoring require one to own a controlling block?

One possible answer is that the controller’s substantial equity stake aligns her interests with those of minority shareholders, thereby providing superior incentives to monitor. This answer presents the issue as a question of how to design optimal monitoring incentives—by using a control block or a compensation package.\textsuperscript{131} But why not improve the compensation of directors who are already assigned the role of monitoring management?\textsuperscript{132} The answer could be that designing a compensation package that would replicate the incentives produced by a substantial equity block is too difficult and/or prohibitively expensive.\textsuperscript{133} This could be the case, for example, in countries where financial markets or legal institutions are underdeveloped. This answer, however, fails to explain the variance of ownership structures within countries. In other words, why is it the case that investors can rely on market mechanisms to provide adequate monitoring at some companies but not others?

Even accepting the proposition that controlling shareholders do provide effective monitoring that cannot be replicated—or is costlier to replicate—through a compensation package,\textsuperscript{134} we question the claims that private

\textsuperscript{130} See, e.g., Gilson & Gordon, \textit{supra} note 18, at 785; Gilson & Schwartz, \textit{supra} note 18, at 4 (arguing that private benefits of control “compensate controlling shareholders for the monitoring they provide and the diversification they yield to maintain control”).

\textsuperscript{131} Monitoring is just a means to achieve the ultimate goal of efficient management. Why not simply improve management’s own compensation package to incentivize it to manage efficiently? See generally, Michael C. Jensen & Kevin J. Murphy, \textit{CEO Incentives: It’s Not How Much You Pay, But How}, 33 J. APP. CORP. FIN. 36 (1990) (viewing incentive compensation as device to reduce agency costs).


\textsuperscript{133} A similar answer regarding the need for equity ownership to incentivize managers was rejected by Oliver Hart. \textit{See} Hart, \textit{supra} note 23, at 1082 (“[W]hy use financial structure rather than an incentive scheme to solve what is really just a standard agency problem”).

\textsuperscript{134} One such difficulty is that the control block exposes the controller both to upside and down-side risk. However, finance theory suggests that diversified shareholders would prefer that risk-averse managers be provided with a share of
benefits are a necessary reward for monitoring and that corporate law should facilitate the consumption of an optimal level of private benefits.

These claims are based on the assumption that the parties cannot contract out of the fiduciary duty of loyalty. The duty of loyalty, however, does not prevent the parties from compensating the controller for her monitoring in a transparent fashion. The controller can sign, as many do, a performance-based consulting agreement while getting approval by either a committee of independent directors or by a majority of the minority vote. The bottom line is that minority shareholders who value the controller’s monitoring can contract with her for compensation without the controller resorting to private benefits of control.

In our framework, control allows entrepreneurs to protect idiosyncratic value. The controller expects to receive an above-market return if successful and does not need to consume additional private benefits. The controller’s costs—illiquidity, non-diversification, and monitoring—are the price she is paying for buying indefinite uncontestable control, enabling her

the upside without the downside, so as not to increase the risk aversion of a manager who likely has a non-diversified financial and human capital investment in the firm. This is why options are a predominate form of compensation for management.

Even assuming that the monitor should be provided with a share of downside risk, directors can receive restricted or phantom stocks to replicate the control block incentives. Even so, the argument goes, mimicking the incentive effects of a substantial control block will be prohibitively expensive. This might be true, but we note that the private equity compensation package suggests it is possible.

Another presumed reason for the superiority of controlling shareholders refers to the ease by which a controlling shareholder can fire management, while removing the board of a widely-held corporation is much more difficult. This description may be accurate. See, e.g., Assaf Hamdani & Ehud Kamar, Hidden Government Influence over Privatized Banks, 13 TH. INQ. L. 567, 582 (2012) (explaining why displacing senior executives may be easier for controlling shareholders than for boards). Yet, it confuses the picture. A properly-incentivized board could quite easily fire the CEO. True, replacing a board that fails to monitor management may be difficult, but not as difficult as replacing an incompetent controlling shareholder.

Indeed, the proposal is to make the duty of loyalty a default rule.

See, e.g., In re CNX Gas Corp., 4 A.3d 397 (Del. Ch. 2010).

See Assaf Hamdani & Yishay Yafeh, Institutional Investors as Minority Shareholders, 17 REV. FIN. 691 (2013) (finding evidence that institutional investors play an active role in monitoring executive pay arrangements for controlling shareholders in Israel). Just as an illustration, the S-1 of ThermaWave corporation, a company that Bain Capital recapitalized in the 1990s, describes an “Advisory Agreement” that paid Bain for its monitoring. See http://www.sec.gov/Archives/edgar/data/828119/0000929624-99-000994.txt. Moreover, at the IPO stage the controller can agree with investors that she will keep an extra amount of shares as upfront compensation for monitoring. Assume the value of the firm is $100 and she is selling 50% for $50. If minority shareholders value her monitoring services, say at 2%, they might agree to invest $50 and receive just 48% of the shares.
to pursue idiosyncratic value. This goal, and not private benefits of control, is the essence of the contract underlying concentrated ownership.

C. Control Premium and Investor Protection.

The conventional wisdom among financial economists is that the size of a control premium—as measured, for example, by the difference between the market value of the minority shares and the price at which control is sold—reflects the private benefits the controller can consume.\(^\text{138}\) This understanding has made the size of the control premium one of the standard proxies for the quality of investor protection.\(^\text{139}\)

Our analysis, in contrast, shows that the link between control premium and investor protection is far more complicated. On the one hand, even entrepreneurs who share all cash flows with the minority on a pro-rata basis may attach significant value to control, as it enables them to pursue idiosyncratic value. The control premium may therefore be a proxy for the idiosyncratic value that either the existing or the new controller expects the firm to produce. This in turn suggests that the existence of a control premium does not necessarily imply poor investor protection.

On the other hand, as we explain in the next Part, minority-protection rules can constrain the controller’s freedom to pursue idiosyncratic value. In a regime with weak minority protection we should therefore expect a high control premium. However, this could either be because controllers enjoy great freedom to pursue idiosyncratic value or because they can enjoy large private benefits of control, or both. And vice versa, in a regime with strong minority protection we should expect a low control premium. But again, it could either be because controllers receive little freedom to pursue idiosyncratic value or because their consumptions of private benefits of control is constrained, or both. In short, the tension between protecting minority shareholders and idiosyncratic value implies that control premiums are a mixed signal as to the efficiency of investor protection in a given country.\(^\text{140}\)

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\(^\text{138}\) See Craig Doidge, *U.S. Cross-Listings and the Private Benefits of Control: Evidence from Dual-Class Firms*, 72 J. Fin. Econ. 519, 520 (2004) (explaining that private benefits can be measured when control is sold).


\(^\text{140}\) The actual split between these two competing effects depends on the specifics of a given country. To illustrate the point, assume that two countries with similar minimal minority-shareholders’ protections display high control premiums. In country A, the business norm is averse to exploiting minority shareholders, such that reputation is a substitute to legal protections. In this case, the premium will mostly reflect idiosyncratic value. In country B, there is no business norm averse to exploiting the minority. In this case, if there are no other substitutes to legal protections (markets, securities regulators, etc.) the premium will mostly reflect private benefits of control.

Since the studies of control premiums do not give any measure of pricing, it is further hard to determine the value of the signal. It could be that minority shareholders in different countries receive different discounts for their shares reflecting concessions in quality of protections in exchange for freedom to the controller to pursue idiosyncratic value.
To be sure, we do not argue that the standard account is wrong. Rather, we claim that it is incomplete. Private benefits may be important for controlling shareholders and a control premium may reflect the value of private benefits of control. Yet, as our analysis shows, private benefits may not be the only explanation for concentrated ownership. Indeed, our model sheds a new light on a question that has long occupied legal scholars as well as economists: What is the explanation for the presence of concentrated ownership in countries like the United States that have high quality minority shareholders’ protections ("good law")?\(^{141}\)

In fact, our framework informs some existing empirical findings. First, as mentioned earlier, firms with controlling shareholders exist even in countries with strong investor protection, such as Sweden and the United States.\(^{142}\) Second, control premiums significantly vary across firms within countries, although the quality of investor protection is generally the same for all public companies governed by a single legal regime. While private benefits of control are correlated with investor protection, idiosyncratic value, in contrast, varies across firms and entrepreneurs within a single legal regime, thereby providing better explanation for the empirical findings.\(^{143}\) Third, family controlled firms tend to be more valuable when the founder is actively engaged in management or monitoring,\(^{144}\) suggesting that controllers who exhausted their idiosyncratic value will be more likely to consume private benefits. We believe that, going forward, empirical studies should be designed to account for the mixed signals

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\(^{141}\) The explanation for the prevalence of concentrated ownership in certain countries and not others should thus focus not just on legal measures of minority protection but also on markets and their ability to overcome asymmetric information associated with idiosyncratic value. Additionally, it could also support theories such as path-dependency. See Lucian A. Bebchuk & Mark J. Roe, A Theory of Path Dependence in Corporate Ownership and Governance, 52 STAN. L. REV. 127 (1999).

\(^{142}\) See Mark J. Roe, POLITICAL DETERMINANTS OF CORPORATE GOVERNANCE: POLITICAL CONTEXT, CORPORATE IMPACT 5 (2003) (noting that controlling shareholders exist also in jurisdiction with good laws); Gilson, supra note 10, at 1644 (same).

\(^{143}\) See Dyck & Zingales, supra note 16, at 554-556, Table III (reporting significant variance—measured by standard deviation—within countries in the magnitude of control premium across firms). Note that the authors did not find any statistically significant link between a firm’s industry and the magnitude of the control premium.

\(^{144}\) See Belen Villalonga & Raphael Amit, How Do Family Ownership, Control and Management Affect Firm Value?, 80 J. FIN. ECON. 385, 388 (2006) (finding that family ownership creates value for all of the firm’s shareholders only when the founder is still active in the firm either as CEO or as chairman with a hired CEO); Christian Andres, Large Shareholders and Firm Performance—An Empirical Examination of Founding-family Ownership, 14 J. CORP. FIN. 431 (2008) (finding that family firms are more profitable than widely-held and companies with other types of blockholders, but only when the founding-family is still active either on the executive or the supervisory board); Danny Miller, et al., supra note 34 (finding that only family controlled corporations with a lone founder outperform).
associated with control premiums and should seek to separate the effects of agency costs and idiosyncratic value.

IV. CORPORATE LAW: CONTROLLER RIGHTS AND MINORITY PROTECTION

In this Part, we present the principal implications of our analysis for corporate law. We first offer a tentative blueprint of the policy considerations that should guide lawmakers and courts in crafting the legal regime governing firms with controlling shareholders. The existing corporate law literature solely focuses on minority protection from agency costs. Our framework, however, shows that controlling shareholders’ rights also play, and should play, a critical role in corporate law.

In section A we argue that any legal regime governing firms with controlling shareholders encounters an inevitable tradeoff between the goals of minority protection and allowing controllers to pursue idiosyncratic value. We then turn to evaluate legal doctrine in light of our framework. Our analysis focuses mostly on Delaware, as it is the jurisdiction with the most developed case law. In Delaware, two fundamental principles underlie the law governing firms with controlling shareholders. Directors’ fiduciary duties require them to act in the corporation’s best interests—that is, maximize share value; but, controlling shareholders are also not required to sacrifice their interests to serve the interests of shareholders as a group.145 The conflict between these two principles often leads to confusing and indeterminate doctrine. We do not aim at providing a comprehensive account of legal doctrine. Rather, we illustrate the power of our framework in explaining how corporate law doctrines are shaped by the interaction of minority protection against agency costs with controllers’ rights to secure idiosyncratic value. Section B discusses the rights that controlling shareholders should have. We demonstrate that controllers’ rights may produce legal outcomes that run against traditional notions of shareholder value maximization. Section C analyzes the main elements of minority protections. Here, we explain why Delaware’s approach to identifying self-dealing transactions should be modified to take into account the need to protect the minority against mid-stream changes to the firm’s governance structure. Lastly, section D uses our framework to reevaluate several difficult corporate law cases.

A. The Tradeoff between Minority Protection and Controller Rights.

Our analysis thus far can be summarized as follows. Corporate law should recognize the controller’s right to pursue the idiosyncratic value that she attaches to the business while protecting investors from expropriation through self-dealing and other methods of value diversion. Ideally, corporate law doctrine would be designed in a manner to achieve both of these goals. For several reasons, however, there is an inevitable conflict

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between minority protection and controller rights. First, drawing a line between decisions that concern idiosyncratic value and those that could lead to unequal distributions may be difficult. Second, measures to protect the minority from value diversion could produce costly errors. Third, enforcing the prohibition against non-pro-rata distributions might require interventionist measures that could undermine the controller’s right to execute the business idea.

To see the interplay between minority protection and controller rights, assume the entrepreneur owns 60% of a firm. The entrepreneur genuinely believes that a specific component produced only by one company is necessary for the development of a new product. It so happens, however, that the company producing the component is 100% owned by the entrepreneur. Accordingly, the entrepreneur wishes for her 60%-owned firm to buy the components from her wholly-owned company. If the entrepreneur were the sole owner of both firms, she could simply buy the component under whatever terms she desired. But, with investors owning 40% of the firm’s shares, there is an understandable suspicion that the entrepreneur is abusing this transaction to divert value from minority shareholders to her wholly-owned corporation.

This illustration underscores the at-times opaque line between unfair self-dealing and decisions that affect idiosyncratic value. As a result, protecting the minority against inappropriate value diversion requires some constraints on the entrepreneur’s ability to exercise control. These constraints can take the form of ex post review by courts as to the fairness of the transaction, or a requirement to get an ex ante approval by a majority of minority shareholders.\textsuperscript{146} The need to provide the minority with protection against agency costs will necessarily require inhibiting some of the freedom to pursue idiosyncratic value that the entrepreneur enjoyed as a single owner.\textsuperscript{147}

One might argue that constraining self-dealing need not necessarily interfere with the controller’s ability to pursue idiosyncratic value. After all, the argument goes, if the controller does not intend to expropriate the minority, why would she care about the extra supervision? If the transaction is on arm’s-length terms, the court will find it to be fair,\textsuperscript{148} or minority shareholders will grant their approval. This argument would be correct in a world without transaction costs. In the real world, however, plaintiffs sometimes bring suits without merit,\textsuperscript{149} and courts make

\textsuperscript{146} Goshen, \textit{Controlling Self-Dealing}, supra note 11.
\textsuperscript{147} The single-owner standard is useful not only as a benchmark for the protection of investors, but also as a benchmark for the controller’s right to secure idiosyncratic value. See, e.g., Lucian A. Bebchuk, \textit{The Sole Owner Standard for Takeover Policy}, 17 J. LEGAL STUD. 197 (1988).
\textsuperscript{148} For a case in which the court concluded that a controlling shareholders had a high idiosyncratic value (without using this term, of course) and therefore approved a series of long term self-dealing transactions as fair, see \textit{Cookies Food v. Lakes Warehouse}, 430 N.W. 2d 447 (Sup, Iowa 1988).
mistakes.\textsuperscript{150} Likewise, under a rule that requires a majority-of-minority vote, minority shareholders might strategically attempt to hold-out or simply err in evaluating the proposed transactions.\textsuperscript{151} This conclusion applies to other prophylactic measures required for creating an effective minority-protection regime.\textsuperscript{152} Accordingly, protecting minority shareholders against agency costs inevitably interferes with the controller’s right to pursue idiosyncratic value.

The inevitable tradeoff between minority protection and controller rights has obvious implications for the design of corporate law. Lawmakers and courts should seek an optimal balance between minority protection and providing controlling shareholders with the freedom to make managerial decisions. More practically, the nature of minority protection should depend on enforcement considerations. Enforcing a given protection may be too costly not only because of the direct compliance costs incurred by corporations or courts, but also due to the expected cost of detracting from idiosyncratic value.

\textbf{B. Controller Rights.}

Our analysis of the controlling shareholder’s side of the contract focuses on the scope of the controller’s rights and the type of protection that should accompany these rights.

1. Management Rights: Business Judgment Rule and Board Composition. – The entrepreneur-controller is willing to make a significant equity investment in exchange for the right to secure the idiosyncratic value that she attaches to her business idea. The allocation of control matters in light of the asymmetric information between the entrepreneur and the investors/market. Some of the “crazy” or “visionary” entrepreneurs are responsible for some of the greatest breakthroughs in business ideas, ideas that would have never come to pass in the absence of control. What then should be the nature of idiosyncratic value protection?

Corporate law should recognize the entrepreneur’s right to exercise control over any issue that could affect the firm’s value. Controlling shareholders should be free to set the firm’s direction and make all management decisions. This includes the right to assume a managerial role (if the controller is an individual) as well as the right to appoint and fire managers. This has two implications for corporate law. First, courts should

\textsuperscript{150} See Goshen, \textit{Controlling Self-Dealing}, supra note 11 (explaining the inefficiencies associated with a fairness test).

\textsuperscript{151} See Id. (reviewing opportunism and inefficiencies associated with majority-of-minority voting).

\textsuperscript{152} Modern corporate governance relies on a variety of gatekeepers and enforcement measures to constrain agency costs. These include, for example, financial reporting and other disclosure duties, requiring outside auditors and setting standards for their work, and requirements for outside independent directors. These measures could interfere with the controller’s ability to manage the firm in a way that limits her ability to capture idiosyncratic value.
not interfere with business decisions that controllers or their representatives make. In other words, our analysis explains why courts should follow the business judgment rule. The controller-entrepreneur retains control because of her concern that asymmetric information would induce investors to make decisions that would destroy the firm’s idiosyncratic value. Asymmetric information, however, also cautions against allowing courts to exercise control over business decisions. Like investors, courts could make decisions that, from the entrepreneur’s perspective, would destroy idiosyncratic value.

This rationale differs from the conventional justification for not interfering with controlling shareholders’ business decisions. The legal literature assumes that judicial review of non-conflicted-transactions is simply unnecessary in a concentrated ownership environment, as the controller’s significant equity stake provides her with incentives to maximize value for all investors. Our explanation, in contrast, focuses on the need to allow the controller the freedom to implement her business plan even when investors (and courts) believe that such a plan would not enhance share value.

Second, controllers’ management rights shed a new light on corporate-governance reforms designed to enhance board independence at firms with controlling shareholders. Controllers’ voting power enables them to appoint any candidate they wish to the board. Recent corporate-governance reforms, however, constrain the controller’s power to appoint directors. Listing requirements, for example, require boards or board committees to have a certain percentage of their directors who are independent, not only from the company but also from the controller. Some legal systems go further and empower minority shareholders to influence board composition by, for example, appointing their representatives to the board.

These measures may be necessary to enforce the rule against self-dealing. Our analysis, however, explains why lawmakers should proceed

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153 For the rationale underlying the business judgment rule, see In re Walt Disney Co. Derivative Litigation, 907 A.2d 693, 698 (Del Ch. 2005) (“[R]edress for [directors’] failures ... must come ... through the actions of shareholders ... and not from this Court”); Aronson v. Lewis, 473 A.2d 805 (Del. 1984) (“[D]irectors are better equipped than the courts to make business judgments ...”).

154 See, for example, Bebchuk & Hamdani, supra note 14, at 1310.

155 See the stock exchange rules Nasdaq Rule 4350(c)(1) and Section 303(a) of the NYSE’s Listing Company Manual.


cautiously when constraining controllers’ power to fill board or management positions. Board reforms aim at making the board more effective in monitoring those with power—the CEO or the controlling shareholder. But asymmetric information could prevent the controller-entrepreneur from credibly communicating her beliefs concerning idiosyncratic value not only to investors but also to skeptical, independent board members. Thus, the need to balance controller rights and minority protection should also shape board reforms at firms with controlling shareholders. It should be acknowledged that the presence of such representatives could interfere with the controller ability to manage. At a minimum, the controller should have the power to appoint a majority of the board (which in turn should have the power to appoint the CEO and other members of management).

2. Property Rule Protection: Preserving Control. – To preserve the entrepreneur’s uncontestable control, her right to make management decisions should be afforded a property-rule protection. In other words, the market (minority shareholders) or courts should not be able to unilaterally take control rights away from the controller in exchange for objectively-determined compensation; the controller should be able to prevent a non-consensual change of control from ever taking place. The property-rule protection of controller rights has some straightforward implications that are no different than the standard protection of private property. Controllers cannot be forced to sell their control block even when doing so would clearly benefit the corporation or its minority shareholders. The controller is generally free to exit her

21 J. APPLIED CORP. FIN. 67 (2009) (finding corporate value is consistently higher in controlled firms with independent directors).

158 Indeed, under NASDAQ Rule 4350(c)(5) a controlled company is exempt from the requirement of Rule 4350(c) of the NASDAQ Marketplace Rule requiring a majority of independent directors on the board. A similar exemption exists under Section 303A of the NYSE’s Listed Company Manual.


160 The need for property-rule protection arises from the fundamental justification for allocating control and management rights to the entrepreneur. The controller-entrepreneur is the one who has the unique vision or subjective assessment concerning the project’s value (idiosyncratic value). Any objectively determined compensation for a nonconsensual taking will rarely be fair to the entrepreneur. The extensive academic literature on property and liability rules suggests that a property-rule protection is appropriate when idiosyncratic value is present. See Henry E. Smith, Property and Property Rules, 79 N.Y.U. L. REV. 1719, 1722–31, 1755–56 (2004).

investment by selling her control block whenever she wants and for whatever price she sees fit. 162

Nonetheless, the controller’s property-right protection extends to a broader range of corporate actions. Controllers can lose control not only when they sell their shares, but also when the company takes action—like issuing shares—that dilutes their holdings. Under our framework, companies with controlling shareholders need not take actions that would make the controller lose its control even when doing so would benefit the corporation or minority investors.

Consider the following hypothetical. A bank must increase its capital to meet new capital adequacy requirements. The bank has two options: issuing new shares or selling one of its subsidiaries. The bank’s controlling shareholder, who owns 51% of the shares, has her own liquidity problems that prevent her from buying additional shares of the bank. Issuing new shares would therefore dilute the controller and may cause her to lose her control position. How should the board decide between the two options? At first sight, directors’ fiduciary duties require them to choose the option that best serves the company interests while disregarding the controller’s interest in preserving control. Under Delaware case law, however, the board might be prohibited from taking steps that would force the controller to lose control “in the absence of a threatened serious breach of fiduciary duty by the controlling stockholder.” 163 The board could thus decide to sell a subsidiary merely because issuing new shares would force the controller to lose control. 164

This outcome runs against traditional notions of shareholder value maximization, as the need to preserve control might drive firms with controlling shareholders to take value-reducing actions. Yet, a regime

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162 Some limits are imposed, however, on the identity of the buyer. See Harris v. Carter, 582 A.2d 222 (Del. Ch. 1990) (prohibiting sale of control to a known looter and imposing limited duties of investigation on controlling shareholders). In the Hollinger case, Delaware’s Chancery Court allowed the board to use a poison pill to prevent a controlling shareholder from selling his control block. We believe, however, that this holding applies only when the sale of the block is in clear violation of the controller’s fiduciary duties. See Hollinger International, Inc., v. Black, 844 A.2d 1022, 1085-86 (Del. Ch. 2004) (allowing the board to deploy a poison pill when the sale of control was the culmination of an improper course of conduct by the controller and in violation of his contractual obligations).


164 Note that this treatment of the controller differs from that of minority shareholders (or investors at widely-held firms). We normally allow management to use rights offerings even when that might coerce investors into a choice between dilution and increasing their investment. For evidence that controllers’ need to preserve their control affects firm decisions concerning capital structure, see, e.g., Thomas S. Schmid, Control Considerations, Creditor Monitoring, and the Capital Structure of Family Firms, 37 J. BANKING & FIN. 257 (2013) (finding evidence consistent with the hypothesis that family firms in Germany use firms’ capital structure to optimize control over the firm).
under which minority shareholders, the board, or courts, could compel the controller to lose control—whether by a forced sale, dilution, or any other action—is inconsistent with the need to provide controllers with a property-rule protection for their right to make management decisions and preserve idiosyncratic value. Moreover, this outcome is not justified by the need to provide controllers with private benefits to reward them for their willingness to monitor management. Rather, it is based on the parties’ mutual consent *ex ante* on an arrangement that would enable entrepreneurs to pursue idiosyncratic value to the benefit of both investors and the entrepreneur.

3. Right to Sell Control for a Premium. – Whether controlling shareholders can sell their shares for a premium is one of the most important and controversial questions for firms with controlling shareholders. Delaware recognizes the right of controlling shareholders to sell at a premium, subject to the restriction on selling control to a looter (the “market rule”). As we explained earlier, the controller’s right to sell at any time is the essence of her property right. But what about the right to sell for a premium not shared by minority shareholders?

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165 The common law norm to sell control for a premium is explained clearly in *Zeitlin v. Hanson Holdings, Inc.*, 397 N.E.2d 387, 388-89 (N.Y. 1979) (“It has long been settled law that, absent looting of corporate assets, conversion of a corporate opportunity, fraud or other acts of bad faith, a controlling stockholder is free to sell, and a purchaser is free to buy, that controlling interest at a premium price.”) But see William D. Andrews, *The Stockholder's Right to Equal Opportunity in the Sale of Shares*, 78 HARV. L. REV. 505 (1965) (arguing for a sharing of control premium with minority shareholders).


167 Many countries follow the so-called equal-opportunity rule by requiring a buyer of more than a certain percentage of a firm’s shares (usually around 30%) to make a tender offer that would take the shareholder to at least 50% share ownership. See, e.g. U.K. City Code on Takeovers and Mergers, Rule 36 (stating a purchaser crossing 30% triggers a mandatory offer for over 50% of the company); EU Takeover Directive (Directive 2004/25/EC [adoption: codecision COD/2002/0240]) (mandating that “Member States must ensure that [a controller] is required to make a bid as a means of protecting the minority shareholders of that company. Such a bid must be addressed at the earliest opportunity to all the holders of those securities for all their holdings at the equitable price”). To be sure, the equal-opportunity rule could protect the minority against a sale to a looter. (After all, we do not rule out the possibility that a control premium would reflect private benefits of control.) Moreover, it does not prevent the controller from selling her shares for a premium. Rather, it requires the buyer to offer the same premium to all shareholders. Yet, forcing the buyer to pay a premium to all shareholders raises the acquisition's total costs, thereby effectively barring a range of control transactions in which the buyer’s expected increase in corporate value is insufficient to justify paying the premium demanded by the current controller to all shareholders. Thus, to the extent that a control premium is a proxy for idiosyncratic value (and not private benefits), the costs of the equal opportunity rule—in terms of discouraging efficient transactions—are expected to be higher. See Lucian A. Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 1994 Q. J. ECON. 957.
Our framework offers several justifications for allowing controllers to sell their stake for a premium without sharing it with the minority. A key premise underlying the objection to controllers’ right to sell for a premium is that a control premium is a proxy for private benefits and thus for minority expropriation. Under this view, imposing constraints on controllers’ ability to sell for a premium would decrease the risk of inefficient sales motivated by the prospect of consuming private benefits at the expense of minority shareholders.168

As the previous Part has explained, however, a control premium is not necessarily a proxy for private benefits of control or the magnitude of minority expropriation. It could also reflect the idiosyncratic value from either the buyer’s or the seller’s perspective. A seller who believes that she could earn above-market return on her shares would insist on a premium for selling her stake even if, had she stayed in control, she would have shared the idiosyncratic value, when realized, on a pro-rata basis with minority shareholders. In this sense, the seller is only taking a premium reflecting her pro-rata share of what she expected to receive. Consequently, a buyer that believes she could make an even greater above-market return on the new investment would be willing to pay such a premium. Under the assumption that the buyer envisions a higher idiosyncratic value regarding the firm, she is allowed to substitute for the seller as the counterparty to the contract with the minority wherein the idiosyncratic value will also be shared pro-rata with the minority shareholders.169

C. Minority Rights.

Our analysis of the minority shareholder’s side of the contract focuses on the threats facing minority shareholders in a controlling shareholder structure and the type of protection that should be provided to enforce minority rights.

1. Pro-Rata Share: Identifying Self-Dealing. – Minority shareholders’ main concern is that the entrepreneur-controller will engage in self-dealing, tunneling, or other methods of capturing more than her pro-rata share of cash-flow rights. The principal form of minority protection is the strong regulation of non-pro-rata distributions of the firm’s assets. In exchange for her freedom to execute the business idea in the manner she wishes, the controller commits to share equally with the minority any cash-flows that the project will produce. If she seeks any preference over the minority, she

168 See Bebchuk, supra note 167.
169 At the same time, our framework could lend support to the equal-opportunity rule. After all, investors in our framework allow the controller to preserve control in order to enable the controller to pursue idiosyncratic value that would then be shared with investors. When the controller exits the joint investment she takes her pro-rata part of her idiosyncratic value from the buyer, leaving minority shareholders to wait until the new buyer will realize his idiosyncratic value. The claim could thus be that the seller must first perform her contractual commitment to the minority (pay the promised share of idiosyncratic value) before she can ask the minority to enter a new contract with the buyer.
should negotiate with investors and obtain their approval—either before entering the joint investment or before getting the preference. Otherwise, any non-pro-rata distribution will be subject to strict judicial scrutiny.\(^{170}\)

A legal regime governing companies with controlling shareholders thus should accomplish two important tasks: first, create a workable distinction between business decisions and self-dealing; and second, implement adequate mechanisms to govern self-dealing transactions. We discuss below the choice between different mechanisms to govern self-dealing. In this section, we shall focus on the first element—the test for identifying transactions that deserve closer scrutiny.

The distinction between self-dealing and other transactions has considerable consequences. Under Delaware law, for example, this distinction determines whether a lawsuit challenging a transaction would be carefully reviewed under the plaintiff-friendly entire fairness standard or quickly dismissed under the business judgment rule.\(^{171}\) But, drawing the line between cases that deserve close scrutiny and those that do not is often difficult. Some cases are straightforward, for example, when the controller sells her privately-owned asset to the publicly-traded firm that she controls. In other cases, however, it is unclear whether the fact that the controller’s interests with respect to certain corporate actions are not fully aligned with those of the minority justifies close scrutiny.\(^{172}\) We have no intention of resolving this issue here. Rather, we would like to use one famous example to argue that the test for identifying self-dealing should take into account the need to balance minority protection and controller rights.

Consider the \textit{dividend distribution} question underlying the \textit{Sinclair} case.\(^{173}\) Should courts protect the minority against the risk that a controlling shareholder would use a pro-rata dividend distribution to advance its own interests? The \textit{Sinclair} court answered this question with a clear: “No.” It held that pro-rata dividend distributions do not amount to self-dealing and should thus be reviewed under the business judgment rule.\(^{174}\) But, is this outcome the desirable one?

For purposes of our discussion, assume that a pro-rata distribution could be used to satisfy the controller’s own liquidity needs while denying the corporation highly profitable growth opportunities. In other words, assume that a pro-rata dividend distribution could be harmful to minority


\(^{172}\) See Jens Dammann, \textit{Corporate Ostracism: Freezing Out Controlling Shareholders}, 33 J. CORP. L. 681, 694 (2007) (noting that the Delaware test makes it difficult for plaintiffs to establish self-dealing because “while it may be possible to show that the course of action taken by the corporation benefited the controlling shareholder, it is extremely difficult to prove that this advantage came at the expense of other shareholders.”).

\(^{173}\) See \textit{Sinclair Oil Corp. v. Levien}, 280 A.2d 717 (Del. 1971).

\(^{174}\) \textit{Id.}
shareholders. Nevertheless, a legal rule that would aspire to supervise the controller and prevent such “abusive” distributions would be too costly.

Any rule that would try to scrutinize pro-rata dividend distributions would necessarily interfere with the controller’s management rights. First, control over the firm’s capital structure—the amount of capital that is required and how to finance the firm’s operations—might be an integral part of implementing an entrepreneur’s vision. Outside intervention would therefore significantly interfere with the controllers’ ability to make management decisions concerning idiosyncratic value. Second, distinguishing “legitimate” dividend distributions from non-legitimate ones is prone to errors given asymmetric information. Third, even if courts were to accurately determine that a certain dividend is illegal, effective enforcement would itself require excessive intervention. A disgruntled controller prohibited from paying a dividend may decide, for example, to avoid investments and deposit the dividend amount in the firm’s bank account in order to distribute the same amount in the near future. Clearly, courts would not assume responsibility for management decisions by forcing the controller to put the money to other, more profitable uses. In other words, effectively enforcing the non-distribution of dividends would ultimately require courts to abandon the business judgment rule.

Our discussion of Sinclair thus shows that the omnipresent tension between controller management rights and minority protection should shape the legal distinction between self-dealing and other transactions. The interests of controlling shareholders are not always fully aligned with those

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175 In a world with no transaction costs the firm’s capital structure (i.e., its debt to equity ratio) can be determined using any combination of dividends, leverage, and issuing new shares, with the same effect on corporate value. Similarly, buying a risky investment with no leverage is the same as buying a solid investment with leverage. See Merton Miller, The Modigliani-Miller Propositions after Thirty Years, 2 J. ECON. PERS. 99 (1988) (discussing Modigliani and Miller’s theorems about the irrelevance of capital structure and dividend policy for corporate value). But, in a world with transaction costs, idiosyncratic value as to a business idea is no different than idiosyncratic value as to capital structure. A controlling shareholder decision to issue new shares and invest in a project should be treated in the same manner as her decision to avoid a project and distribute the money.

176 Any investment offers a combination of risk and expected returns that are calculated based on estimates of future events or consequences. An investment with an expected return that equals the market pricing of a similar risk offers a zero net present value (NPV). In efficient markets all investments are zero NPV, but to make our point it is sufficient to assume that most of them are. If the expected return on the investment is lower (higher) than the market pricing of the risk that it carries, then it offers a negative (positive) NPV and should be avoided (is a bargain). A controller decision to forego an investment in order to distribute dividends will harm minority shareholders only if the avoided investment was positive NPV (negative NPV should be avoided, and zero NPV leaves shareholders with many alternatives for reinvesting the dividend). Deciding about an investment’s NPV would require courts to decide whether the investment is good or bad. Courts cannot make such a decision. Indeed, avoiding such decisions is a major justification for the Business Judgment Rule.
of minority investors. Yet, not every conflict of interest justifies legal intervention to protect the minority.

2. Mid-stream Changes. – The preceding analysis provides support for Delaware’s approach to identifying self-dealing transactions. In this section, however, we explain that the same approach fails to protect minority shareholders against unilateral changes to the firm’s governance mid-stream. Controlling shareholders can enjoy more than their pro-rata share of the project by using their control to change the firm’s governance arrangements mid-stream either directly—through changes in the charter/bylaws—or indirectly through some business combination, such as a merger. These changes could be inconsistent with the initial contract between the entrepreneur and investors.¹⁷⁷

Consider, for example, the link between control and cash-flow rights. Under one-share-one-vote, the controller’s willingness to make a significant equity investment in order to secure his control position alleviates management agency costs and asymmetric information concerns. Once he raises funds from investors, however, the controller might be tempted to unravel this arrangement and find ways to preserve uncontestable control without having to incur the costs associated with holding a large equity block.¹⁷⁸ A necessary element in any minority-protection scheme is, therefore, a protection against unilateral, mid-stream changes to the firm’s governance arrangement.

Indeed, on several occasions minority shareholders did attempt to challenge such changes in Delaware courts, but without success. Courts refused to review these changes under the entire fairness standard, holding that the disparate economic impact of such changes on the controller did not amount to self-dealing as long as the legal effect was equal.¹⁷⁹

In our opinion, this approach is inconsistent with the need to protect the minority against agency costs. Part of the problem may be that Delaware courts use a single test for two distinct tasks—identifying self-dealing and coping with mid-stream changes. The problem of mid-stream governance changes by controlling shareholders requires its own legal framework. Like self-dealing cases, this framework should consist of two elements: first, identifying cases of mid-stream changes that deserve some level of scrutiny; and second, making a decision on the nature of protection that minority shareholders should enjoy.

¹⁷⁸ See, for example, Black et al., Law and Tunneling, 37 J. CORP. L. 1 (2011).
¹⁷⁹ See Williams v. Geier, 671 A.2d 1368, 1378 (Del. 1996) (“[T]here was on this record: … no non-pro-rata or disproportionate benefit which accrued to the Family Group on the face of the Recapitalization, although the dynamics of how the Plan would work in practice had the effect of strengthening the Family Group’s control.”); see also eBay Domestic Holdings v. Newmark, 16 A.3d 1 (Del. Ch. 2010).
3. Type of Protection. – Minority rights, like controller rights, could be protected by a liability or property-rule.\(^\text{180}\) Under a liability-rule, the controller can engage in self-dealing transactions without minority shareholders’ consent, subject to her duty to pay an objectively fair price (a commitment supervised by courts). Under a property-rule, the controller cannot engage in self-dealing without securing the minority’s consent (typically by a majority-of-the-minority vote).

The need to balance controller and minority rights affects the desirable form of minority protection. A property-rule provides the minority with consent-based protection that is vulnerable to hold-out, thereby creating a risk of interfering with the controller’s management right. In contrast, a liability-rule provides the minority with fair-compensation-based protection vulnerable to judicial mistakes, while being less likely to interfere with the controller’s management rights.\(^\text{181}\) As a result, other things being equal,\(^\text{182}\) the tradeoff between minority protection and controller rights supports a liability-rule protection for minority shareholders to better balance between protecting minority against agency costs and preserve idiosyncratic value.\(^\text{183}\)

D. “Difficult Cases."

In this section, we consider two examples of transactions that have occupied courts and scholars alike, and are not easily classified as dealing with either minority protection or controller rights. We first address freezeout transactions. As we explain, transactions of this type raise an inevitable and difficult tension between minority protection and controller rights. We then address Delaware’s indeterminate approach concerning

\(^{180}\) See Goshen, Controlling Self-Dealing, supra note 11, at 408.

\(^{181}\) To be sure, as Delaware’s case law demonstrates, majority-of-the-minority votes may play an important role in scrutinizing self-dealing transactions even under a liability rule. Yet, it authorizes courts to approve self-dealing transactions notwithstanding the minority objection, thereby reducing the risk of errors resulting from hold-outs or differences of opinion between the controller and investors.

\(^{182}\) Although, in theory, our framework would consider a liability-rule protection more appropriate, once reality is introduced, our framework does not identify any form of protection—liability or property—as superior because the actual effect of each protection depends on the judicial system and institutional investors of a given jurisdiction. A liability-rule may not work in certain markets or legal systems without an effective regime of shareholder lawsuits or where courts lack the necessary expertise to adjudicate fairness disputes. See Goshen, Controlling Self-Dealing, supra note 11, at 409.

\(^{183}\) Note that specialized courts would not only enhance minority protection, but also reduce the risk of excessive interference with controlling shareholders’ rights. Specialized courts are less likely to err. This in turn would decrease the cost—in terms of undermining controller rights—of rules designed to protect minority shareholders. See, e.g., Luca Enriques, Off the Books, But on the Record: Evidence from Italy on the Relevance of Judges to the Quality of Corporate Law, in GLOBAL MARKETS AND DOMESTIC INSTITUTIONS: CORPORATE LAW IN A NEW ERA OF CROSS BORDER DEALS (Curtis Milhaupt ed., 2003).
transactions in which both the controller and the minority sell, for equal consideration, 100% of the firm to a third party. In this case, the need for minority protection is substantially weaker than in a freezeout transaction. At the same time, however, subjecting these transactions to closer scrutiny is unlikely to interfere with the controller’s right to secure idiosyncratic value.

1. Freezeout Transactions. – In a freezeout transaction the controlling shareholder of a publicly-traded company buys out minority shareholders in order to take the company private. Although freezeouts have been the subject of extensive analysis by legal scholars, courts continue to struggle with the proper approach for regulating these transactions. Our analysis offers a new perspective on the difficulty of crafting an optimal freezeout regime.

Let us start with controller rights. In our view, the inevitable conflict between minority protection and controller rights calls for providing controllers with an option to discontinue their partnership with the minority by taking the firm private. Buying out the minority may be required when keeping the firm public interferes with the realization of idiosyncratic value, or when an imprecise minority-protection regime proves too costly. Additionally, bolstering minority protection increases the likelihood that such protections would interfere with the realization of idiosyncratic value, thereby creating an increased need to make it possible for controllers to take the corporation private. Furthermore, there is an obvious

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185 See, for example, In re CNX Gas Corp., 4. A.3d 397 (Del. Ch. 2010) (developing the unified standard for reviewing controlling shareholder freezeout transactions); In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013) (holding that freezeout mergers could be subject to the business judgment rule if the controller allows the firm to adopt certain procedural safeguards).

186 For example, an entrepreneur may believe it is no longer possible to implement her vision while complying with the extensive disclosure duties imposed on public companies. In this case, the only way for the entrepreneur-controller to implement her plan and capture the value she attaches to the project is by taking the firm private. See Harry DeAngelo, Linda DeAngelo & Edward M. Rice, Going Private: Minority Freezeouts and Shareholder Wealth, 27 J. LAW & ECON 367 (1984) (finding the source of efficiency to be the elimination of the costs attendant to the regulation of public ownership).

187 Assume a liability-rule protection against self-dealing under which courts makes errors in 20% of the cases: in half of them they approve unfair transactions and in the other half they block fair transactions. When the court approves an unfair transaction, the direct damage is the given transfer of wealth from the minority to the controller (i.e., zero sum transfer), while the indirect damage of under-deterrence is limited due to the small percentage of such mistakes. However, when the court erroneously blocks a fair transaction the damage is not limited to
difficulty in forcing an entrepreneur to “work” for others—minority investors—for as long as they wish.\textsuperscript{188} As a matter of legal doctrine, the need to provide the controller with an option to buy out the minority explains why Delaware courts have abandoned the requirement that freezeout transactions satisfy a business purpose test.\textsuperscript{189}

For minority shareholders, however, freezeout transactions present a substantial risk of expropriation on a large-scale. Controlling shareholders might opportunistically use the option to buy out the minority at unfair prices while taking advantage of their superior access to information concerning the firm’s value.\textsuperscript{188} The risk of expropriation calls for effective measures to protect minority shareholders in freezeout transactions.

But a property-rule protection—that is, making a freezeout conditional on a majority-of-minority vote—might undermine the controller’s option to take the firm private in order to preserve idiosyncratic value.\textsuperscript{191} Providing minority shareholders with the power to veto a freezeout may be contrary to the goal of preserving idiosyncratic value in two respects. Firstly, asymmetric information or strategic voting considerations might lead minority shareholders to vote down going-private proposals that are fair to the minority, thereby preventing the controller from an exit that could secure its idiosyncratic value. Secondly, forcing the controller to stay has the same consequence as preventing dividend distribution. The court will have to interfere with management decisions, normally protected by the business judgment rule, to make sure the controller continues to work efficiently for the minority. Therefore, despite the high risk of expropriation, minority shareholders’ protection should tilt towards a liability-rule protection.\textsuperscript{192}

Our analysis thus calls for a narrow reading of the Delaware Chancery Court’s decisions in \textit{CNX Gas}. One could read the decision as requiring over-deterrence and zero sum transfer, as it also includes the frustration of idiosyncratic value. The last damage might in some cases be too high to tolerate. Thus, due to the potential incidence of such cases the legal system should contain a safety valve when minority shareholder protections are involved—the ability to take the company private.

\textsuperscript{188} See Uniform Partnership Act (1997) § 601 (explaining partnership is at will).
\textsuperscript{189} See \textit{Weinberger v. UOP, Inc.}, 457 A.2d 701 (Del. 1983) (explaining that allowing controllers to buy out the minority only if they present convincing business reasons for taking the firm private would overly burden controllers, especially given the role played by asymmetric information). \textit{See also Jones v. H. F. Ahmanson & Co.}, 460 P.2d 464, 469 (Cal. 1969).
\textsuperscript{191} \textit{See also} Benjamin HermaLin \& Alan Schwartz, \textit{Buyouts in Large Companies}, 25 J. LEG. STUD. 351 (1996) (calling for protecting the minority with a liability-rule to provide the controller with optimal incentives to encourage her entrepreneurial effort).
\textsuperscript{192} To be sure, a legal regime could adopt a variety of measures to protect the minority, such as approval by special committees of the board and shifting the burden of proof to controllers. Yet, some form of an exit option should be left open even when the minority objects.
controlling shareholders to allow the board to use a poison pill to prevent a freezeout.\textsuperscript{193} But in a subsequent decision, the court seems to suggest that a poison pill is required only if the controller would like to avoid judicial review of the transaction under the entire fairness standard.\textsuperscript{194} In other words, the court allowed controllers to choose between a liability rule (judicial review) and a property rule (majority-of-minority vote and board veto). Allowing controllers to choose the regime that would apply to their going-private transaction seems consistent with the pursuit of idiosyncratic value.\textsuperscript{195} However, a regime that would compel controllers to subject their going-private transaction to the substantial delays associated with a board’s deployment of a poison pill would unnecessarily delay the freezeout by forcing the controller to replace the directors and only then merge.

2. Sale to Third Party. – The last example that we would like to consider is a transaction in which a third party, who is unrelated to the controller, buys all the company’s shares from both the controller and the minority shareholders. In a transaction of this type, the controller—with a majority of the votes—can effectively force the minority to sell their shares (an implied drag-along option). Delaware courts have reviewed such transactions under different forms of scrutiny, depending on whether the controller and the minority received equal consideration. A sale to a third party raises genuine minority protection concerns when the consideration for the controller differs from that payable to the minority. Cases of this type create a conflict between the controller and the minority over the allocation of the sale proceeds. The controller might abuse her control over the target to divert value from the minority by bargaining with the third-party buyer for a transaction that would benefit the controller at the expense of the minority. Not surprisingly, courts have subjected these transactions to the entire fairness test.\textsuperscript{196}

In contrast, when a third-party buyer offers equal consideration to all shareholders, minority shareholders apparently need no protection. After

\textsuperscript{193} See In re CNX Gas Corp., 4. A.3d 397, 415 (Del. Ch. 2010) (“[A] controller making a tender offer does not have an inalienable right to usurp or restrict the authority of the subsidiary board of directors. A subsidiary board, acting directly or through a special committee, can deploy a rights plan legitimately against a controller’s tender offer...to provide the subsidiary with time to respond, negotiate, and develop alternatives.”).

\textsuperscript{194} See id.

\textsuperscript{195} For this reason, we also support the recent decision in In re MFW Shareholders Litigation, 67 A.3d 496 (Del. Ch. 2013) (holding that a freezeout merger could be subject to the business judgment standard of review if the controller both (i) allowed a special committee of independent directors to veto the transaction; and (ii) conditioned the transaction on a majority-of-minority shareholder vote.

\textsuperscript{196} See In re John Q. Hammons Hotels Inc. S’holder Litig., Civil Action No. 758-CC, 2009 WL 3165613 (Del. Ch. 2009) (requiring procedural protections in order to apply the business judgment rule); Ryan v. Tad’s Enters., Inc., 709 A.2d 682, 689 & n. 9 (Del. Ch. 1996), aff’d, 693 A.2d 1082 (Del. 1997) (applying entire fairness when the controlling stockholder received a benefit that was not shared with the minority shareholders in an asset sale).
all, with the largest equity stake and no apparent conflict, the controller could be relied upon to work hard to achieve the best feasible bargain. Yet, Delaware case law on this issue is in remarkable disarray. While some decisions hold that these transactions do not require close scrutiny, others have allowed minority shareholders to proceed with claims that the controller’s need for cash—liquidity—created a conflict that justified the court’s review of the transaction. Delaware courts’ willingness to treat the controller’s liquidity needs as creating a conflict that justifies judicial review is especially puzzling given their reluctance to treat the controller’s liquidity needs as justifying judicial review in other contexts, such as pro-rata dividends. Our framework sheds a new light on this inconsistent approach. We believe that the answer lies not in the nature of the conflict, but, rather, in the absence of idiosyncratic value concerns.

To begin, the controller can sell her block at a premium, thereby taking her share of the idiosyncratic value, while enabling the minority to stay and share in the buyer’s idiosyncratic value. Alternatively, the controller can freeze the minority out to pursue her idiosyncratic value in a wholly-owned corporation, subject to minority shareholders receiving an appraisal right and entire fairness protection. But, contrary to these situations, the right to drag-along the minority does not protect the controller’s idiosyncratic value: The controller sells the corporation and ends her pursuit of idiosyncratic value. Why, then, does the controller receive the right to force the minority to sell their shares together with him?

The answer is to allow the buyer to pursue her idiosyncratic value in a wholly-owned corporation. Instead of buying just the control block and then freezing out the minority, subject to appraisal rights and entire fairness review, the buyer is willing to pay an equal premium to the minority to avoid the cost of a freezeout (time, effort, uncertainty, and litigation). In this scenario the seller who forces the minority to sell together with him assumes the role of an auctioneer. However, the controller has substantial

197 See Trenwick Am. Litig. Trust v. Ernst & Young, L.L.P., 906 A.2d 168, 202 n. 95 (Del. Ch. 2006) (“[T]ransactions where the minority receive the same consideration as the majority, particularly a majority entitled to sell its own position for a premium, had long been thought to fall within the ambit of non-conflict transactions subject to business judgment rule protection.”).

198 See N.J. Carpenters Pension Fund v. Infogroup, Inc., 2011 WL 4825888, at *4, *9–10 (Del. Ch. 2011) (denying motion to dismiss when the director, who was also a large stockholder, was in desperate need of liquidity to satisfy personal judgments, repay loans, and fund a new venture); McMullin v. Beran, 765 A.2d 910 (Del. 2000) (stating duty-of-loyalty claim could be filed against the parent for negotiating an all-cash transaction to satisfy a liquidity need). See also In re Synthes, Inc. Shareholder Litigation, 2012 WL 3594293, at *10 (Del. Ch. 2012) (NO. CIV.A. 6452) (“[I]t may be that there are very narrow circumstances in which a controlling stockholder's immediate need for liquidity could constitute a disabling conflict of interest irrespective of pro rata treatment.”).

199 See Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (explaining pro-rata dividend payments are subject to business judgment rule, even if paid for clear benefit of controlling shareholder/parent).

holdings that normally induce him to maximize sale price. Thus, unlike the board of directors of a widely-held firm who assume the role of an auctioneer subject to a heightened duty of care (i.e., Revlon duties), the controller is only subject to the duty of loyalty.

Of course, the controller can avoid the role of an auctioneer by selling only his block. Obviously, he will do just that unless selling with the minority will result in a higher price. Put differently, in this case the seller needs the minority to sell with him not to allow him to get the right price for his idiosyncratic value, but to allow him to extract a higher share of the buyer’s idiosyncratic value. Accordingly, a controller cannot, for example, decide, due to his liquidity needs, to take a cash offer over a higher valued bid when dragging along the minority, as this would be a breach of his duties as an auctioneer.

Therefore, the different treatment of the controller’s liquidity needs is apparent. A regime that would impose scrutiny on dividend distributions would inevitably interfere with controllers’ management rights and might undermine their ability to preserve their idiosyncratic value. These concerns cease to apply when the controller decides to sell the whole corporation to a third party. By putting her management rights up for sale, and also forcing the minority to sell, the controller signals that she is no longer concerned with her idiosyncratic value. Moreover, a sale to the highest bidder also means that asymmetric information is no longer an issue. In other words, employing judicial review is less likely to be costly here. Thus, even a relatively small risk of a conflict of interest might call for judicial review.

**Conclusion**

In this Article, we have demonstrated that ownership structures represent a spectrum of contracts dividing control and cash-flow rights between entrepreneurs and investors. Our theory identifies the tension between the entrepreneur’s need to pursue idiosyncratic value and investors’ quest for protection against agency costs as the main explanation for the variety of ownership patterns. Concentrated ownership is one such structure on this spectrum, bundling control and cash-flow to foster the controller’s idiosyncratic value and reduce minority shareholders’ exposure to agency costs.

From this framework, we have questioned the views that private benefits of control are vital for controlling shareholders, that improved monitoring explains the controlling-shareholder structure, and that the size of control premiums is a good proxy for the quality of investor protections. In addition to challenging existing theories regarding concentrated ownership, we further explained how the tension between idiosyncratic value and agency costs is informing, and should inform, the shape of corporate law doctrines concerning corporations with controlling shareholders.

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