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Superstar CEOs and Corporate Law

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# Corporate Law Implications

Superstar CEOs raise two normative questions for corporate law. In this part, we examine these questions and then offer new insights into several fundamental doctrines that have long occupied courts and corporate law scholars.

First, what should be the role of corporate law in policing superstar CEOs? Undoubtedly, there is a danger that these powerful CEOs could use their power to the detriment of investors (and other stakeholders). However, given that their power is the result of the market’s appreciation of their unique contribution to the company’s value, the conventional remedy of empowering shareholders is less likely to be an effective constraint. Nonetheless, superstar CEOs are able to act opportunistically only as long as their contribution remains unique and evident. Once their star quality fades, they are likely to face a real risk of removal.

Second, assuming a CEO’s contribution to company value is indeed unique, should corporate law allocate the extra value created by that CEO to shareholders or to the CEO?

In this part, we show how these two questions inform three recent developments: the expansion of the definition of controlling shareholders; courts’ treatment of management buyouts and other corporate control transactions; and the role of corporate law in protecting constituencies other than shareholders. The analysis we provide in this part is a first important step in addressing the complex issues these three recent developments raise.

## Definition of Control

### Tesla: A New Definition of “Control”

Under Delaware law, the legal treatment of related-party transactions critically depends on the company’s ownership structure and whether or not there is a controlling shareholder.[[1]](#footnote-2) Consider, for example, a public company that acquires a business owned by that company’s CEO. If a majority of the public company’s directors are disinterested and independent, and if the company has no controlling shareholder, courts will generally apply the *business judgment rule* (MFW) and defer to the board’s decision to approve the transaction.[[2]](#footnote-3) However, if the CEO is the company’s controlling shareholder, the courts will generally scrutinize the transaction under the more demanding *entire fairness* standard.[[3]](#footnote-4) To avoid a *fairness* review, the transaction must be approved by a special committee of independent directors and a majority of disinterested shareholders.[[4]](#footnote-5)

Shareholders holding 50 percent or more of the voting rights or able to nominate 50 percent of the board are clearly controlling shareholders.[[5]](#footnote-6) However, parties bringing legal challenges to challenge related-party transactions often seek review under the entire fairness standard (or MFW conditions) by arguing that the courts should treat minority blockholders (those with less than 50 percent of the votes) as controlling shareholders.[[6]](#footnote-7)

The distinction between controlling and other significant shareholders has traditionally focused on shareholders’ voting power (or contractual rights to appoint directors). While in some borderline cases courts have relied on the shareholders’ influence as managers to classify them as controllers,[[7]](#footnote-8) shareholders with significantly less than 50% of the votes have not been treated as controllers.[[8]](#footnote-9)

The *Tesla* decision marked a substantial departure from this prior case law.[[9]](#footnote-10) The plaintiffs challenged Tesla's acquisition of SolarCity, another company founded by Musk.[[10]](#footnote-11) Although Musk held only 20 percent of Tesla’s voting rights, the Delaware court found him to be Tesla’s controlling shareholder with respect to the acquisition[[11]](#footnote-12) and, accordingly, applied the entire fairness standard to the transaction.[[12]](#footnote-13) Notably, one of the reasons the court concluded that Musk controlled Tesla was his unique contribution as the company’s visionary. The court explained, “the Board was well aware of Musk’s singularly important role in sustaining Tesla in hard times and providing the vision for the Company’s success.”[[13]](#footnote-14)

This departure from prior case law has triggered some criticism. In a recent article, for example, two former Justices from Delaware’s Supreme Court, together with a leading expert on Delaware corporate law, argue, “that Musk was so talented and visionary that the company could not succeed without him—does not rationally imply that someone is a controlling stockholder.”[[14]](#footnote-15) Still, it appears that Delaware courts are continuing to take this factor of unique contribution, along with other factors, into account in deciding whether blockholders should be treated as controlling shareholders,[[15]](#footnote-16)an approach supported by recent academic research.[[16]](#footnote-17)

Our framework explains this development in Delaware law. While superstar CEOs do share some features with controlling shareholders, treating them as such overlooks the real question underlying related-party transactions involving them.

The main justification for subjecting transactions with controlling shareholders to judicial review is the power that controlling shareholders have over directors.[[17]](#footnote-18) Disinterested, independent directors presumably have not only the power to prevent value-reducing transactions with CEOs, in today’s era of powerful shareholders[[18]](#footnote-19) they also have the motivation, as directors who approve a related-party transaction that harms the company might not get reelected.[[19]](#footnote-20) However, when controlling shareholders have the power to elect directors to the board, even truly independent directors might fail to prevent opportunistic self-dealing by these shareholders.[[20]](#footnote-21)

In part II we identified two distinct sources of CEO power: superstar status and equity ownership. Beginning with superstar qualities, our analysis ostensibly supports the treatment in *Tesla* of superstar CEOs as controlling shareholders. As explained, regardless of superstar CEOs’ voting power, the mere perception that they are uniquely valuable to the company provides them with power over directors. As a result, their boards might become a less reliable mechanism for preventing opportunistic self-dealing.[[21]](#footnote-22)

The power of such CEOs is bolstered when they own an equity stake large enough to give them with significant voting power. Even blockholders, whether CEOs or founders, who do not have control can influence (albeit not dictate) the outcome of shareholder votes. For example, a shareholder with 20 percent of the votes (similarly to Musk) can be the decision-maker in contested director elections, even without a lock on control.[[22]](#footnote-23) Directors therefore have an incentive to cater to the interests of blockholders.

It is therefore tempting to treat superstar CEOs as controlling shareholders. If directors are unable to oppose them, why not use judicial review to protect public investors from opportunistic related-party transactions? Our analysis, however, indicates a difference between the case of majority shareholders and that of superstar CEOs.

Under Delaware’s long-standing approach, the courts did not equate *influence* with *control*. They did not treat blockholders as controlling shareholders if the other shareholders had a realistic ability to outvote the blockholders.[[23]](#footnote-24) Essentially, the courts focused on the question of whether control is *contestable*;*[[24]](#footnote-25)*meaning whether public investors have the collective power to outvote the blockholder.

Should this outcome change when the blockholder happens to be a superstar CEO? Visionary CEOs are powerful only to the extent that investors believe in their ability to produce above-market returns. The power of superstar CEOs is therefore limited in two important ways. First, boards are more likely to challenge such CEOs if the expected harm from self-dealing exceeds the value of the CEO’s unique contribution to company value. Second, superstar CEOs lose their power once their ability to produce superior returns is doubted by the markets. These constraints also apply to CEOs who hold a significant percentage of company shares. As shown in part II above, powerful CEOs with significant holdings (such as Papa John’s CEO) do get fired when they are no longer perceived to contribute to company value.[[25]](#footnote-26)

These constraints, however, do not apply to majority controlling shareholders, and do not protect minority shareholders from expropriation. Controlling shareholders’ power is based not on their contribution to company value, but on their control over director appointments, appointing whomever they want to the board regardless of other shareholders’ views.[[26]](#footnote-27) Whereas both majority shareholders and superstar CEOs can use related-party transactions to divert value from the company, only superstar CEOs are constrained by the fact that they cannot extract more than what their unique contribution is deemed to be worth.

This situation highlights the difficult normative question underlying the *Tesla* approach. In this type of case, investors have sufficient disciplinary voting power to protect a company from a CEO who reduces its value through mismanagement or self-dealing, thus attaining “downside protection.” Thus, the real issue is the distribution between the visionary CEO and the investors of the “upside” generated by the CEO (“upside protection”). Should corporate law allow superstar CEOs to capture some of their unique contribution to company value through related-party transactions? If not, treating them as controlling shareholders can be justified under the view that courts should prevent independent directors from supporting mechanisms that award these CEOs.

Until the *Tesla* case, the Delaware courts generally avoided treating powerful CEOs as controlling shareholders. There are several institutional factors that in our view explain the courts’ reluctance to expand the definition of controlling shareholder.

First, as we have just shown with respect to powerful CEOs and related-party transactions, investors have two safety valves for limiting any harm public investors may suffer from less strict judicial review: they can remove a CEO who loses that magic touch, or they can outvote other directors, thereby signaling their dissatisfaction with certain actions of the CEO. Such safety valves may reduce courts’ willingness to intervene.

Second, a test based on “contestability” increases certainty by limiting the broad scope of the Delaware courts’ open-ended definition of “control” to some extent. While there may be some disagreement over the exact percentage at which control becomes contestable, such a test would provide a relatively clear metric to market players and enable them to anticipate the level of judicial review to which a related-party transaction will be subject.

In contrast, a test based on broad notions such as “power” and “influence” constitutes a vague standard that can create ambiguity and uncertainty. As we have shown, some powerful CEOs can hold as little as 2 percent of the voting rights and still significantly influence decision-making. Should their related-party transactions be subject to the entire fairness review? If any powerful CEO can has the potentially to significantly influence the firm’s decision-making even with a tiny equity stake, where should courts draw the line? Will they be able to distinguish between superstar CEOs and “ordinary” ones? And should they also treat other influential blockholders, such as activist hedge funds, as controlling shareholders? As can be seen, once the courts broaden the definition of “control” to include powerful CEOs (or other minority holders), a myriad of complicated questions arise.

Third, subjecting transactions with superstar CEOs to substantive fairness review could also pose significant institutional challenges because such review often requires the court to assess the CEO’s contribution to the firm. In the case of Elon Musk’s compensation,[[27]](#footnote-28) for example, what would be an “unfair” pay package that requires court intervention? Are the courts in a position to estimate the value to shareholders of Musk’s vision and unique skills? If so, what metrics should they use?[[28]](#footnote-29) If the shareholders are willing to pay Musk an unprecedented amount once he meets certain extremely ambitious thresholds, thereby making Tesla the largest automaker in the United States and delivering incomparable returns, should the courts intervene?

If one assumes that the CEO’s unique contribution and the terms of specific transactions should be assessed together, there remains the difficult question of whether the courts should be tasked with determining the value of superstar CEOs. This might require them to assess the value of a CEO’s unique vision.[[29]](#footnote-30) From an institutional perspective, treating superstar CEOs as controlling shareholders therefore makes sense only under the view that courts should perform this task and are capable of doing so.

In the case of true controlling (i.e., majority) shareholders, courts rarely engage in a substantive fairness analysis due to the adoption of the MFW standard, which encourages controlling shareholders to submit related-party transactions for a majority-of-the-minority vote. In the event of a challenge, the court will then apply the deferential business judgment rule.[[30]](#footnote-31) But such dual approval has its own costs. And while it may be necessary to protect minority shareholders from expropriation by a majority shareholder, where the shareholders are able to replace a powerful CEO if something goes wrong, such enhanced protection plays a more limited role.

Last, the rationale underlying the MFW approach is that shareholders are better positioned than courts to determine whether a proposed transaction is desirable. In Part II we explained that it is the market’s belief in superstar CEOs unique contribution to company value, rather than directors’ lack of accountability to the shareholders, that gives superstar CEOs power over boards. Like the board of directors, shareholders might support a suboptimal related-party transaction if they believe that its harm does not exceed the expected value of the CEO’s unique contribution. In *Tesla*, for example, both the SolarCity transaction and Musk’s executive compensation package were approved by the overwhelming majority of disinterested shareholders.[[31]](#footnote-32) Tesla shareholders also approved the appointment of Musk’s brother as a company director, even though appointing relatives to the board is rare in public companies without a controlling shareholder.

Despite the limited effectiveness of having a special shareholder vote on a related-party transaction, it is not meaningless. Superstar CEOs might be less confident about their ability to win such a vote if the transaction is subject to scrutiny, or might fear the reputational cost of publicly losing such a vote. Moreover, where there is no separate voting on related-party transactions, as long as a powerful CEO continues to outperform, shareholders are likely to agree to “pay the price” of a suboptimal related-party transaction. At most, they would express their frustration by voting not to renew the directors who approved the opportunistic transaction with the CEO. Thus, as a matter of institutional design, shareholders enjoy a larger share of the upside generated by a powerful CEO when there are two separate votes (one on director election and one on the related-party transaction) than when they are able to express their view on a related-party transaction only indirectly, in the annual election of directors.

Delaware law, however, does not require a vote on related-party transactions with CEOs (powerful or not). Under the current rules, a court can decide that the CEO does not exercise control, in which case the transaction can proceed upon approval by the board, or that the CEO does exercise control, in which case it will review the transaction according to the entire fairness or the MFW standard. There is no intermediate solution of requiring separate shareholder approval of related-party transactions involving powerful CEOs, and the courts have tended to prefer the more lenient option of not finding that powerful CEOs exercise control. The analysis set forth in this section clarifies the institutional reasons for that preference, as well as its distributive implications.

## Control Transactions

Our analysis also sheds new light on one of the most litigated areas of corporate law: mergers and[[32]](#footnote-33) acquisitions. The law governing corporate acquisitions aims to ensure that managers’ potential conflicts of interest do not undermine investors’ rights to receive the fair value of their shares. This desirable goal, however, becomes more difficult to meet when management is uniquely valuable, that is, when the value of the company depends on the identity of its CEO. We first consider management buyouts and then examine other sales.

### 1. Management Buyouts

In a management buyout (MBO) the CEO, usually in cooperation with a private equity fund or another financial sponsor, takes a public company private by acquiring it from its public investors. In 2013, for example, Michael Dell, who owned approximately 16 percent of Dell, Inc. and served as its CEO and chair, partnered with Silver Lake Partners to acquire Dell from its public investors and take the company private.[[33]](#footnote-34)

MBOs inevitably create conflicts of interest between shareholders and management, who want to buy the company from its shareholders at the lowest price possible. The conventional view identifies two primary concerns associated with such conflicts. First, CEOs know the company better than the shareholders and independent directors do[[34]](#footnote-35) and can use their informational advantage to buy the company at an unfairly low price. Second, CEOs might use their power to sway the decision to sell in their favor, undermining the bidding process by reducing the likelihood that competing bids will be made or accepted.[[35]](#footnote-36)

These concerns have led commentators to call for more extensive judicial review of MBOs.[[36]](#footnote-37) More recently, the question of an improved legal approach to MBOs has focused on appraisal as a remedy. In appraisal cases, shareholders who object to the terms of an MBO ask the court to determine the fair value of their shares[[37]](#footnote-38) (the courts rely on experts, who usually use the discounted cash flow (DCF) method to the company’s fair value[[38]](#footnote-39)). The issue that has preoccupied courts and scholars is whether there is an optimal sale process that adequately ensures that shareholders receive the fair value of their shares. Under one approach, a court may forgo the complicated task of determining a company’s fair value if the share purchase price results from an auction or other competitive bidding process.[[39]](#footnote-40) Another approach would require courts to independently value companies regardless of the process leading to the MBO.[[40]](#footnote-41)

The *Dell* case is notable for involving both the superstar CEO phenomenon and the appraisal debate. Following the Dell MBO, shareholders filed an appraisal action in the Delaware Court of Chancery. The defendants argued that since the sale process provided other potential buyers with a meaningful opportunity to submit competing bids, the purchase price was the best evidence of the company’s fair value.[[41]](#footnote-42) Finding, however, that the process had several flaws and did not accurately represent the company’s fair value, the Court used the DCF method to value the company.[[42]](#footnote-43) The Delaware Supreme Court subsequently overruled the Court of Chancery decision to reject the validity of the transaction price,[[43]](#footnote-44) relying heavily on the fact that other prospective buyers had been able to submit higher bids to acquire the company.[[44]](#footnote-45)

Interestingly, the *Dell* case was the first in which the Delaware Court of Chancery expressly addressed the issue of “valuable CEOs,” indicating that: “[a] competing bidder that did not have Mr. Dell as part of its buyout group would be bidding for a company without that asset and would end up with a less valuable” and that “Mr. Dell's unique value and his affiliation with the Buyout Group were negative factors that inhibited the effectiveness of the go-shop process.”[[45]](#footnote-46) The Delaware Supreme Court found there was no factual basis for that finding, however, determining that the Court of Chancery “did not identify any possible bidders that were actually deterred because of Mr. Dell's status.”[[46]](#footnote-47)

In an insightful article, Guhan Subramanian offers further insights into the factors that weaken the effectiveness of a market-check process prior to an MBO. In particular, he explains that canvassing the market is not a useful price discovery mechanism when management provides unique personal value and chooses not to work with third-party bidders.[[47]](#footnote-48) In response, Subramanian outlines proposals for boards and their advisors to follow to level the playing field and increase the role of auctions in price discovery.[[48]](#footnote-49)

Our analysis offers a new explanation for the tension underlying MBOs, at least for companies with superstar CEOs. The law of corporate acquisitions ultimately seeks to ensure that the target’s shareholders receive the fair value of their shares, that is, their pro rata share of the value of the company as a going concern, without the gains that the acquisition will produce (synergies).[[49]](#footnote-50) Achieving this objective relies on the premise that a company’s value does not depend on the identity of its CEO. That premise does not hold when the CEO is uniquely valuable, however. We therefore argue that the choice between appraisal and deal price as a measure of firm value raises a normative question: who is entitled to the value created by the CEO’s unique contribution to it?

Assume that a CEO acquires the company from its public investors. Assume further that the value of that company under the leadership of the current CEO exceeds its value under any other CEO. What is the fair value of the company under these assumptions? In other words, from a normative standpoint, what value should shareholders be entitled to? The (lower) value of the company without the CEO or the (higher) value with the CEO?

This is not an easy question to answer. Until the CEO decided to take the company private, there was no doubt that the extra value the CEO produced belonged to the shareholders: the CEO was entitled to a compensation package (that may include company shares or other forms of equity-based compensation) and the shareholders were entitled to all the company’s residual cash flows. However, the shareholders depend on the CEO to enable the company to produce this extra value. Investors cannot then force the CEO to continue providing services to the company.[[50]](#footnote-51)

We do not intend to take a stand. Rather, we make two points. First, asymmetric information and the threat of opportunistic behavior by CEOs are not the only reasons it is difficult to regulate MBOs. They can be difficult to regulate even when boards are powerful, independent, and genuinely accountable to the shareholders. This explains why the rise of shareholder power does not necessarily imply “the death of corporate law” for judicial review of mergers and acquisitions (M&A). Greater shareholder power somewhat mitigates the concerns about opportunistic MBOs. Directors who are more accountable to shareholders and less dependent on CEOs can be expected to oversee the sale, for example by forming a special committee.[[51]](#footnote-52) But this cannot solve the problem of diverting value to a powerful CEO through M&A transactions.

Second, different answers to the normative question lead to different legal treatment of MBOs. Reliance on the deal price as a measure of fair value is supported by the view that public investors are entitled only to the value of the company without the CEO. The appraisal remedy, in contrast, is consistent with the opposite view. To see why, consider the DCF method, which is the prevailing method for valuing companies but is notorious for its reliance on hired-gun experts who produce divergent valuations and is known for its reliance on assessments of future cash flows. Our analysis, in contrast, identifies a feature that would exist even if expert opinions were not biased. Taking into account not only past cash flows but also management projections for future cash flows, it captures the unique value a superstar CEO would produce were the superstar to stay with the company.

Now consider an MBO conducted by a board-led auction. The CEO announces that she will join only one of the bidders. Even when the process is “clean” and all parties are fully informed, if the CEO is uniquely valuable, the other bidders will offer a lower price than the CEO is offering simply because the company is worth less without its CEO. If the CEO is not uniquely valuable however, a robust market check will produce higher bids.[[52]](#footnote-53)

Note that in our superstar CEO example, the more valuable the CEO, the higher the appraised “fair value” of the company’s shares will be because the appraisal method takes into account the CEO’s past contribution to firm value (although it does not formally incorporate the CEO’s identity into the model). Other bidders, in contrast, will try to assess the expected value of the company without its superstar CEO.

Thus, if shareholders are deemed not to be entitled to the extra value the CEO produces, relying on the deal price is preferable to judicial valuation[[53]](#footnote-54) because the appraisal remedy tends to provide public investors with a share of the extra value attributable to the CEO’s leadership.

Moreover, unlike in the case of self-dealing, reliance on the deal price does not require courts to determine whether a CEO is uniquely valuable. If the CEO is not, other bidders will bid higher and there will be little difference between the value determined using the appraisal and deal price methods.

Our analysis does not mean that there are no other concerns with MBOs. Asymmetric information is a problem and management may take steps to deter other bidders.[[54]](#footnote-55) These concerns, however, should be incorporated into the deal process inquiry.

Note that our analysis differs from Subramanian’s. While he also recognizes the problem of “valuable CEOs” (to the best of our knowledge he was the first and remains the only one to do so), he focuses on the obstacle superstar CEOs might create for bidders: they cannot benefit from insiders’ bids because those bids may reflect the value with the CEO.[[55]](#footnote-56) In his view, that means auctions are less likely to work.[[56]](#footnote-57) His analysis led him to make several proposals to improve the dealmaking process, the most important one being ensuring that “valuable” managers work with other bidders.[[57]](#footnote-58) But the ability of valuable CEOs to offer higher prices is not necessarily a negative outcome. Rather, it reflects the normative question of whether superstar CEOs alone—and not shareholders—are entitled to the extra value they produce.

### Acquisitions by Third Parties

Our analysis thus far in this section has focused on the measure of fair value in MBOs. But the superstar CEO phenomenon can provide insights on other aspects of M&A litigation.

M&A deals are a source of considerable litigation. Until *Corwin*, they were subject to enhanced scrutiny under *Revlon.* The concern justifying enhanced scrutiny was CEO conflicts of interest, usually in the form of preferential treatment of bidders more favorable to the CEO and offers of future employment or bonuses, for example. Subramanian even argues that the distinction between an MBO and a freezeout by a controlling shareholder is not so clear in private equity deals.

In our framework, we distinguish between two types of payments. One is typically intended to induce the CEO to agree to a sale of the company[[58]](#footnote-59) and includes non-compete arrangements or closing bonuses for departing CEOs.[[59]](#footnote-60) The other includes retention agreements or other arrangements under which the buyer agrees to employ current management.

If a CEO is valuable, the buyer will want to retain her. And since a valuable CEO makes the target more attractive, the likelihood of an acquisition that also benefits the target’s shareholders is greater. However, retaining the CEO could simply be a way to divert value from the shareholders to the CEO. Assume that the company is sold to a third party who believes the CEO is valuable and would like to retain her or pay her consulting fees. The concerns here are the same as in the previous case; the payment the CEO receives may reflect her unique contribution to value, or it may be a form of bribery to induce her to favor one bidder over another.

Forming a special committee to run the process can ensure that CEO conflicts do not affect the sale, and most importantly, can provide potential buyers with a meaningful opportunity to make competitive bids.[[60]](#footnote-62) But even a perfect process cannot address the issue of valuable CEOs.

Under *Corwin*, a shareholder vote that is informed and not coerced will entitle the transaction to business judgment review. The major criticism here is that bundling all the transaction-related decisions into a single vote cannot ensure that public shareholders receive their fair share. Even holding separate votes, one for the transaction and one for the payment to the CEO, would not help if the acquirer conditions their purchase on retaining the powerful CEO and paying her a side benefit. Why would shareholders agree to such a payment, which would reduce their share of the pie? As in the previous Section, the real issue is who should be entitled to the extra value generated by a powerful CEO. Our framework shows that the *Corwin* doctrine lets powerful CEOs capture a larger share, and that even competitive bids cannot alter that outcome.

## ESG and Oversight

In recent years there has been growing interest in the role corporate law and governance play in protecting the interests of stakeholders other than shareholders.[[61]](#footnote-63) Our framework sheds new light on the extent to which companies can protect those interests under existing governance arrangements and on the failure of boards to prevent managerial misconduct.

*1. Superstar CEOs and Stakeholder Protection*

We begin with the implications of our analysis for the broader issues of ESG and the protection of stakeholders. There seems to be growing optimism that increasingly powerful shareholders can play an important role in convincing companies to incorporate ESG considerations into their policies.[[62]](#footnote-64) In recent years, shareholders have brought more and more ESG-related proposals[[63]](#footnote-65) and prominent scholars have argued that shareholders should have a greater say on these topics.[[64]](#footnote-66) Institutional investors are taking part in high-profile initiatives to protect stakeholder interests, and even activist hedge funds have started to include ESG issues on their agenda.[[65]](#footnote-67)

However, our analysis shows that there are limits to how much one can rely on shareholders to cause firms to take stakeholder interests into consideration. The presence of a superstar CEO in the boardroom may change the dynamic between shareholders and management. The hope that shareholders will drive corporations to change implicitly relies on the substantial increase in power shareholders have recently gained. But even powerful shareholders may be too deferential to iconic CEOs. In such situations, a company’s protection of stakeholder interests depends on the good will of its superstar CEO, who may or may not support a stakeholder approach.[[66]](#footnote-68) Either way, shareholders would tend to say little about such matters, having no incentive to replace a successful CEO or act against her will.[[67]](#footnote-69)

Our analysis is also supported by recent empirical evidence showing that companies that outperform or that have superstar CEOs are less likely to be subject to ESG activism. For example, a recent study finds that shareholder proposals are significantly more likely to fail when the CEO is a superstar.[[68]](#footnote-70) Amazon, for instance, has faced mounting scrutiny over labor and workplace safety issues. We found that between 2015 and 2020, the company was subject to 26 shareholder proposals on environmental and social issues, including those related to human rights and labor issues, but none of them passed (or even received more than 35 percent support).[[69]](#footnote-71)

Another study, analyzing a large international, socially responsible activist fund’s proprietary data set, shows that targets of ESG activism have lower potential growth opportunities and high entrenchment scores.[[70]](#footnote-72) A third study, examining a large data set of firm-level ESG news and their effect on stock prices, finds that “investors differentiate in their reactions based on whether the news is likely to affect a company’s fundamentals, and therefore their reactions are motivated by a financial rather than a nonpecuniary motive.”[[71]](#footnote-73) Commenters also note that even the poster child of climate activism, the campaign launched by Engine No. 1 against Exxon Mobil, was mostly motivated by Exxon’s severe underperformance.[[72]](#footnote-74)

Arguably, however, the shareholders in the above-mentioned examples were reluctant to advance stakeholder interests not because they were overly deferential to a superstar CEO, but because their preferences were perfectly aligned with the CEOs’: they both preferred to maximize company profits at the expense of stakeholder interests. To disentangle these alternative explanations, we turn now to the example of managerial misconduct. Some types of managerial misconduct clearly will not maximize shareholder value, so shareholders have no reason to support it.

*2. Superstar CEOs and Managerial Misconduct*

One of the timely questions in corporate governance is the role of director oversight in preventing managerial misconduct. It is worth emphasizing at the outset that our discussion of misconduct does not include cases where the board knowingly decides to violate the law.[[73]](#footnote-75) Instead, we focus on so-called oversight failures.

The first type of managerial misconduct is directly related to the company’s business, and might even increase profits if undetected. However, such misconduct might also result in corporate liability and penalties if noncompliance with government regulations is detected. When managerial misconduct leads to penalties, plaintiffs often file *Caremark-*type derivative lawsuits alleging that the board in question failed to fulfill its oversight duties.[[74]](#footnote-76) The Delaware courts seem to have become more receptive to such lawsuits in recent years.[[75]](#footnote-77)

The second type of managerial misconduct is *not* directly related to company business and therefore might be costly for the company and shareholders. Examples include the allegations that the founder of WeWork used drugs in the workplace and engaged in self-dealing, sexual harassment claims against corporate executives,[[76]](#footnote-78) and Elon Musk’s use of Twitter.

Both types of cases raise the following question: why do boards fail to prevent CEOs from engaging in misconduct? Current views focus on CEO power and board agency costs. For example, it has been argued that board members are rewarded with equity-based compensation, which leads them to prefer short-term profits over long-term performance.[[77]](#footnote-79) Under this view, making boards more independent would make them better suited to prevent CEO misconduct.

But this view fails to explain managerial misconduct that is not directly related to company business. Why would directors turn a blind eye to a CEO’s unlawful conduct, such as discrimination, that is not likely to benefit the corporation?

Agency cost theories are also unable to explain why misconduct is tolerated at startups such as Uber and WeWork, which have powerful, sophisticated investors that can closely monitor management.[[78]](#footnote-80) Governance scholars have offered an explanation that relies on the complex capital structure of late-stage startups and the conflicts of interests of directors representing VC firms. For example, Elizabeth Polman argues that given the need to bring in new investors, directors appointed by VC funds lack the incentive to uncover problems.[[79]](#footnote-81) Donald Langevoort and Hilary Sale argue that public markets and their governance structure are better at overseeing CEOs.[[80]](#footnote-82)

We offer another explanation: directors hesitate to closely monitor superstar CEOs because they fear the consequences losing such a CEO (including by uncovering information about misconduct) will have on the company. Consider, for example, a CEO who is believed to be critical for the company’s success, but who engages in unlawful conduct that might be harmful to the company, such using Twitter irresponsibly, using drugs, or even engaging in sexual misconduct.[[81]](#footnote-83) In such a case, the board may be reluctant to dismiss the superstar CEO or, more realistically, might find it preferable to remain ignorant of the CEO’s misconduct. In addition, since boards with superstar CEOs are likely to defer to the CEO when it comes to business strategy, including management of business risks, they may also defer with respect to legal risks and compliance strategy.[[82]](#footnote-84)

Our explanation has two implications. First, it shows why making directors more independent or more accountable to shareholders will not make them exercise closer oversight to prevent a powerful CEO’s misconduct and that legal intervention is required to prevent such third-party externalities.

Second, it clarifies the undertheorized *Caremark* doctrine. Why is a special doctrine needed to force boards to monitor compliance? Our analysis shows that without the motivation such a doctrine provides, boards might opt to remain ignorant of misconduct, not because they are afraid of personal liability (which is rare anyway),[[83]](#footnote-85) but because they would rather not confront a superstar CEO, or are simply too deferential.

Our analysis thus provides additional support for the view that the *Caremark* doctrine is not really about protecting shareholder interests, but about advancing the interests of stakeholders. In particular, we show that shareholders may benefit from the continued leadership of a powerful CEO and are likely to tolerate misbehavior despite its effects on third parties, provided it does not significantly diminish company value.[[84]](#footnote-86)

1. Ann Lipton, *The Three Faces of Control*, The Business Lawyer (forthcoming, 2022), at 3 (“[U]nder Delaware doctrine, a single label – controlling shareholder – carries an enormous amount of legal weight”) (hereinafter: Lipton, *Three Faces of Control*). [↑](#footnote-ref-2)
2. *Id.*, at 9-10. Voigt v. Metcalf, No. 2018-0828-JTL, 2020 Del. Ch. LEXIS 55, at \*28-9 (Ch. Feb. 10, 2020). [↑](#footnote-ref-3)
3. Lipton, *Three Faces of Control*, *supra* note 244, at 11 (“Unlike other interested transactions, when the transaction concerns a controlling shareholder, business judgment review cannot be restored by the approval of the disinterested and independent directors or the disinterested (minority) shareholders”). The law on the application of the entire fairness standard to transaction other than freezout mergers is somewhat unclear. For the view that virtually all self-dealing transactions with a controlling shareholder are subject to the entire fairness standard, *see* Vice Chancellor Laster’s opinion in *In re* EZCORP Inc. Consulting Agreement Derivative Litig., 2016 WL 301245, at \*12-15 (Del. Ch. Jan. 25, 2016) (**describe type of transactions).** See also Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1239 (Del. 2012). For recent cases supporting this approach, see Berteau v. Glazek, C.A. No. 2020-873-PAF, 2021 Del. Ch. LEXIS 141 (Del. Ch. June 30, 2021 (**same)**); In re Tilray, Inc. Reorganization. Litig., C.A. No. 2020-0137-KSM, 2021 Del. Ch. LEXIS 111, at \*31 (Del. Ch. June 1, 2021). For criticism, *see* Lawrence A. Hammermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World’s Leading Corporate Law: A 20-Year Retrospective and Look Ahead* 27-28, 34-37 (U. Penn. Working Paper, 2021) (hereinafter: Hammermesh, Jacobs & Strine) ("we never understood that entire fairness review would be universally required in these common situations, or that the potential for controller self-dealing makes it impossible for the company’s directors to avoid a judicial fairness inquiry. Rather, if one of the traditional cleansing techniques is used… the business judgement rule would apply"). [↑](#footnote-ref-4)
4. In re MFW S’holders Litig., 67 A.3d 496, 499 (Del. Ch. 2013), aff’d sub nom. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014). See also Lipton, *Three Faces of Control*, *supra* note 244, at 11-12 (noting that so far the Delaware Supreme Court has only approved the use of MFW procedures for cleansing transformative transactions, such as freezeouts, but Chancery Courts have used it to cleanse additional types of conflicted transactions, involving a controlling shareholder). [↑](#footnote-ref-5)
5. *See*, *e.g.*, In re PNB Holding Co. S'holders Litig., 2006 Del. Ch. LEXIS 158, 2006 WL 2403999, at \*9 (Del. Ch. Aug. 18, 2006) ("Under our law, a controlling stockholder exists when a stockholder… owns more than 50% of the voting power of a corporation"); Williamson v. Cox Communs., Inc., 2006 Del. Ch. LEXIS 111, 2006 WL 1586375, at \*4 (Del. Ch. June 5, 2006) ("A shareholder is a 'controlling' one if she owns more than 50% of the voting power in a corporation"). [↑](#footnote-ref-6)
6. Hammermesh, Jacobs & Strine, *supra* note 246, at 40. [↑](#footnote-ref-7)
7. Most notably, one decision found a 35% shareholder (close to 40% taking into account stock options and shares held by family members) qualified as the controlling shareholder. *See Cysive* [\_\_] at 552) (“The conclusion that Carbonell possesses the attributes that the Lynch doctrine is designed to address is reinforced when one takes into account the fact that Carbonell is Chairman and CEO of Cysive, and a hands-on one, to boot. He is, by admission, involved in all aspects of the company's business, was the company's creator, and has been its inspirational force.”). But see Hammermesh, Jacobs & Strine, *supra* note 246, at 35-36 (explaining that he controlled approximately 40% of the votes, and that the court’s reasoning remained deeply tied to voting, not just managerial power). [↑](#footnote-ref-8)
8. *Id*, at 35-36 (explaining that "[u]nder Delaware law, it was historically difficult to establish that a stockholder having less than majority ownership was a controlling stockholder" and that "courts have focused on voting rather than managerial power"). [↑](#footnote-ref-9)
9. *Id.* at 35-37 (explaining that court rulings after Cysive "have been cautious in determining that a minority holder with a significant role in the company was a controller" and providing examples of several rulings between 2000 and 2015, which demonstrate this point. The authors also note that "[a]lthough that finding [in the Tesla case] may have been appropriate, we are concerned that the court’s reasoning in applying controlling stockholder doctrine sweeps too broadly"). For a different view and comprehensive analysis and review of cases concerning the definition of control Ann M. Lipton, *After Corwin: Down the Controlling Shareholder Rabbit Hole*, 72 Vand. L. Rev. 1977, 1987-2005 (2019). [↑](#footnote-ref-10)
10. *In re* Tesla Motors, Inc., 2020 Del. Ch. LEXIS 51, 2020 WL 553902 (Del. Ch. Feb. 4, 2020). At the time of the acquisition, Musk held about 22% of SolarCity voting power. [↑](#footnote-ref-11)
11. *Id.*, at 57-8 ("the Complaint pleads sufficient facts to support a reasonable inference that Musk exercised his influence as a controlling stockholder with respect to the Acquisition"). [↑](#footnote-ref-12)
12. *Id.*, at 37 ("[b]ecause I agree the Complaint pleads facts that allow reasonable inferences that Musk was a controlling stockholder and that Plaintiffs’ claims against all Defendants are subject to entire fairness review"). [↑](#footnote-ref-13)
13. *Id.*, at 48-9. [↑](#footnote-ref-14)
14. Hammermesh, Jacobs & Strine, *supra* note 246, at 37. [↑](#footnote-ref-15)
15. *See*, for example, Basho Techs. Holdco B, LLC v. Georgetown Basho Invs., LLC, No. CV 11802-VCL, 2018 WL 3326693, at \*27 (Del. Ch. July 6, 2018), aff'd sub nom. Davenport v. Basho Techs. Holdco B, LLC, 221 A.3d 100 (Del. 2019) (noting that “the ability to exercise outsized influence in the board room, such as through high-status roles like CEO, Chairman, or founder” is one of the indicia of control); FrontFour Cap. Grp. LLC v. Taube, No. CV 2019-0100-KSJM, 2019 WL 1313408, at \*24 (Del. Ch. Mar. 11, 2019) (status as founder listed among indicia of control). In a recent ruling Vice Chancellor Laster provides a comprehensive analysis of the various factors that could *collectively* support a reasonable pleading-stage inference of control: the ability to designate directors; block size; voting rights and restrictions in stockholders agreements; *the roles that an alleged controller or its representatives play in the boardroom*; the existence of relationships between the alleged controller and the key managers or advisors who play a critical role in providing directors with information with repsect to the transaction at stake). *See* Voigt v. Metcalf, No. 2018-0828-JTL, 2020 Del. Ch. LEXIS 55, at \*32-33 (Del. Ch. Feb. 10, 2020). In that case though the shareholder held 35% of the votes. For an earlier case *see*, *In re* Zhongpin Inc. S'holders Litig, 2014 WL 6735457, at \*7 (Del. Ch. Nov. 26, 2014) (viewing a CEO with 17.3% as exercising significant influence that amounts into actual control. In that case though the CEO and the buyout group owned together approximately 26% of the votes). [↑](#footnote-ref-16)
16. *See* Lipton, *Three Faces of Control*, *supra* note 244, at 13-17. [↑](#footnote-ref-17)
17. Another explanation focuses on the threat of retribution by controlling shareholders against minority shareholders. *See*, *Id*, at 12. For a review and criticism of this rationale *see* Hammermesh, Jacobs & Strine, *supra* note 246, at 15-22. [↑](#footnote-ref-18)
18. *See* *supra* Part I. [↑](#footnote-ref-19)
19. Kobi Kastiel & Yaron Nili, *Competing for Votes*, 10 Harv. Bus. L. Rev. 287, 312-314, 319-312 (2020) (providing evidence to the willingness of shareholders to vote against directors and reviewing related literature). [↑](#footnote-ref-20)
20. *See* Bebchuk & Hamdani, *Independent Directors*, *supra* note 2, at *(XX)*; J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 Wm. Mitchell L. Rev. 1443, 1460 (2014) (“The controller’s influence also undercuts the independence of otherwise independent and disinterested directors, because the controller has the power to determine whether those individuals will remain directors”). [↑](#footnote-ref-21)
21. Lipton, *The Three Faces of Control*, at 13 (“[C]ourts might also consider whether certain founders or CEOs are so closely identified with the company that it would be nearly unthinkable to oust them”). [↑](#footnote-ref-22)
22. See *supra* Section [\_]. [↑](#footnote-ref-23)
23. *See*, *e.g.*, *In re* Loral Space and Commc'ns Inc., 2008 WL 4293781, at \*73 (Del. Ch. Sep. 19, 2008) ([w]ith 36% of the votes, MHR hardly feared a proxy fight, and although it did not have the power to unilaterally vote in charter changes or effect a merger, it had substantial blocking power"). *See* also Hammermesh, Jacobs & Strine, *supra* note 246, at 35-36. [↑](#footnote-ref-24)
24. *See, for example,* the analysis in OTK Associates, LLC v. Friedman (Delaware Chancery Court, C.A. No. 8447-VCL) (February 5, 2014). [↑](#footnote-ref-25)
25. See *supra* Section [\_]. [↑](#footnote-ref-26)
26. For the general concern about independent directors' dependence on the controller for continued service at the company, *see, e.g.,* Bebchuk & Hamdani, *Independent Directors*, *supra* note 2, at 1274. Hammermesh, Jacobs & Strine, however, argue that directors at controlled companies may be motivated to constrain controlling shareholders by their desire to maintain their reputation and get shareholder support in their nomination in other companies, *see* Hammermesh, Jacobs & Strine, *supra* note 246, at 34. [↑](#footnote-ref-27)
27. *See* *supra* Section [\_]. [↑](#footnote-ref-28)
28. *See also* Hammermesh, Jacobs & Strine, *supra* note 246, at 32 ("[a]ppraising a company sold in a conflicted merger with no market test is difficult enough; judicial pricing of compensation packages plans is unmoored in standards that would make any exercise of discretion reviewable in any coherent and consistent way"). [↑](#footnote-ref-29)
29. *See* Goshen & Hamdani, *The Limits of Judicial Review*, *supra* note 4, at 961-74. [↑](#footnote-ref-30)
30. *Id*, at 978-980. *See also* Itai Fiegenbaum, *The Controlling Shareholder Enforcement Gap*, 56 AM. BUS. L.J. 583, 589-92 (2019); Edward B. Rock, *Majority of the Minority Approval in a World of Active Shareholders*, *in* The Law and Finance of Related Party Transactions 105, 115 (Luca Enriques & Tobias Tröger eds., 2019). For an extension of the MFW protections to non-freezeouts transactions, *see* IRA Tr. Bobbie Ahmed v. Crane (NRG Yield), C.A. No. 12742-CB, 2017 WL 6335912 (Del. Ch. Dec. 11, 2017); *In re* Tesla Motors, Inc. Stockholder Litig., C.A. No.12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018). [↑](#footnote-ref-31)
31. For example, Musk's compensation package was approved by 73% of shareholders of Tesla, who were unaffiliated with the company management (see *supra* notes **שגיאה! הסימניה אינה מוגדרת.**, and accompanying text), and about 60% of the holders of Tesla outstanding shares voted in favor of the SolarCity acquisition. *See* *Tesla Motors*, 2018 WL 1560293, at \*26 (Del. Ch. Mar. 28, 2018). Plaintiffs contended that the company made misleading disclosure in connection with the acquisition and that certain mutual funds who held equity positions in both Tesla and SolarCity should have been excluded from the vote tally, as they are allegedly not "disinterested" in the vote due to this cross-ownership. *Id.* We do not address the merit of these arguments, but for noting that "Delaware law does not generally inquire into the motivations of non-controlling shareholders when they are exercising their voting rights." *See* Jill Fisch, Assaf Hamdani & Steven Davidoff Solomon, *The New Titans of Wall Street: A Theoretical Framework for Passive Investors*, 168 U. Pa. L. Rev. 17, 68-69 (2019). [↑](#footnote-ref-32)
32. [↑](#footnote-ref-33)
33. *See* Dell Inc., Definitive Proxy Statement (Schedule 14A), at XX (May 31, 2013). [↑](#footnote-ref-34)
34. Matthew D. Cain and Steven M. Davidoff, *Form Over Substance? The Value of Corporate Process and Management Buy-Outs*, 36 Del. J. Corp. L. 849 (2011) (hereinafter: Cain & Davidoff); [\_\_] Predatory MBOs, at 1305 (“In contrast to their inside counterparts, outside directors are not full-time employees of the target and thus must rely primarily on management for information”). [↑](#footnote-ref-35)
35. Predatory MBOs, page 1301. [↑](#footnote-ref-36)
36. Cite Cain & Davidoff, *supra* note 276, at [\_\_] (\_\_\_\_). [↑](#footnote-ref-37)
37. Cite Delaware General Corporation Law, Section 262. [↑](#footnote-ref-38)
38. Cite [one of the papers on the appraisal debate] [↑](#footnote-ref-39)
39. *See* Union Ill. 1995 Inv. Ltd. P'shipv. UnionFin. Grp., Ltd., 847 A.2d 340, 358 (Del. Ch. 2004) (merger price is indicative of fair value when it “resulted from a competitive and fair auction, which followed a more-than adequate sales process and involved the broad dissemination of confidential information to a large number of prospective buyers.") [↑](#footnote-ref-40)
40. *Id.* [↑](#footnote-ref-41)
41. *In re* Appraisal of Dell Inc., No. 9322-VCL, 2016 WL 3186538, at \*22 (Del. Ch. May 31, 2016). [↑](#footnote-ref-42)
42. *Id*.,at 1. [↑](#footnote-ref-43)
43. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1, 6 (Del. 2017); *See* Charles Korsmo & Minor Myers*, The Flawed Corporate Finance of Dell and DFC Global,* 68 Emory L. J. 221, 251 (2018) (“[A]t the end of the day, the Supreme Court simply saw nothing wrong with the sales process"). [↑](#footnote-ref-44)
44. The Supreme Court remanded the case, and the parties settled thereafter. *In re* Appraisal of Dell Inc., No. 9322-VCL, 2018 WL 2939448 at \*1 (Del.Ch. June 11, 2018). [↑](#footnote-ref-45)
45. *In re* Appraisal of Dell Inc., No. 9322-VCL, 2016 WL 3186538, at \*44 (Del. Ch. May 31, 2016). [↑](#footnote-ref-46)
46. Dell, Inc. v. Magnetar Global Event Driven Master Fund Ltd., 177 A.3d 1, 34 (Del. 2017). [↑](#footnote-ref-47)
47. Subramanian, *Deal Process Design*, *supra* note 130, at 621. [↑](#footnote-ref-48)
48. *Id.*, at 631-47. [↑](#footnote-ref-49)
49. Cite DFC DE case; Lawrence A. Hamermesh & Michael L. Wachter, *Finding the Right Balance in Appraisal Litigation: Deal Price*, *Deal* Process, and Synergies, 73 Bus. L. 961 (2018) (**find page)** [↑](#footnote-ref-50)
50. Another complicating factor is related to whether CEO's threat to leave the company is a credible one and whether it can produce this value at another venture. CEO who founded a company may be reluctant to leave it just before an exit, and if she does so and the value of the company would go down, this does not mean that the CEO would enjoy this lost value elsewhere. [literature on asset-specific investments]. Hart & Moore, Property Rights and Theory of the Firm [↑](#footnote-ref-51)
51. Note: cases where the court adopted a deferential approach when special committees were empowered to control CEO conflicts. For example, *In re* Plains Exploration & Production Company Stockholder Litig., 2013 WL 1909124 (Del. Ch. May 9, 2013); Teamsters Local 237 Welfare Fund. v. AstraZenca Pharmaceuticals LP, 136 A.3d 688 (Del. 2016); Additional Sec. Benefit Fund v. Caruso [↑](#footnote-ref-52)
52. Subramanian, *Deal Process Design*, *supra* note 130, at 622-23. [↑](#footnote-ref-53)
53. Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J. L. Econ. & Org. 543 (2018); Jonathan Macay & Joshua Mitts, Asking the Right Question: The Statutory Right of Appraisal and Efficient Markets (Eur. Corp. Gov. Inst. Working Paper, Law Working Paper No. 428/2018, 2018). [↑](#footnote-ref-54)
54. Predatory MBOs at 1320 (“The presence of management as a potential acquiror of the target may chill third-party bidding if external bidders perceive a heightened risk of being unable to consummate a transaction that does not involve management participation”). [↑](#footnote-ref-55)
55. Subramanian, *Deal Process Design*, *supra* note 130, at 620. And at 621 (“Management does not have an obligation to work with third-party bidders, but when management chooses not to do so (either implicitly or explicitly), and when management is valuable, a market canvass process is no longer a useful mechanism for price discovery.”) [↑](#footnote-ref-56)
56. We note that this claim assumes that potential bidders include only private equity funds that critically depend on incumbent managers to run the target. Strategic buyers (other companies) and private equity funds that have their own vision about the target’s strategy might value the company regardless of its existing leadership. Kobi's verson: In some situations, however, strategic buyers—and perhaps even private equity buyers—may have different plans for the company as well. In those cases, existence of powerful controller might have little impact, if at all, on the pricing as well as on the effectiveness of the auction. [↑](#footnote-ref-57)
57. Subramanian, *Deal Process Design*, *supra* note 130, at 639 (“In order to mitigate the information-asymmetry problem and the valuable-management problem, boards should insist on cooperation agreements from management as a condition for considering an MBO.”) Yet, the board cannot force managers to cooperate with all potential buyers. *See* Guhan Subramanian & Annie Zhao, *Go-Shops Revisited*, 133 Harv. L. Rev. 1215, 1242 (2020)(hereinafter: Subramanian & Zhao) (“if the CEO is important to the ongoing value of the enterprise, no go-shop bidder would want to partner with a reluctant CEO”). [↑](#footnote-ref-58)
58. *Id* at 82 (“[S]ide payments arise more often in settings where the CEO's loss of private benefits creates heightened incentives to otherwise block the merger”). [↑](#footnote-ref-59)
59. See Brian J. Broughman, *CEO Side Payments in Mergers and Acquisitions*, at 76 (2017). [↑](#footnote-ref-60)
60. Subramanian & Zhao, *supra* note 299, at 1274 (2020) (“Forming a special committee, and making sure that it functions well, would be an important inoculation against defective sell-side processes.”) [↑](#footnote-ref-62)
61. For a review, *see* https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3544978. [↑](#footnote-ref-63)
62. Cite Ringe, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3958960

    See, e.g., https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3798101; <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3630480>). [↑](#footnote-ref-64)
63. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3798101; https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3630480) [↑](#footnote-ref-65)
64. Oliver Hart & Luigi Zingales, *Companies Should Maximize Shareholder Welfare Not Market Value*, J.L. Fin. & Acct. 247 (2017). [↑](#footnote-ref-66)
65. See, e.g., Michal Barzuza, Quinn Curtis, & David H. Webber, *The Millennial corporation* (Working Paper, 2021); Kai; https://corpgov.law.harvard.edu/2021/05/29/shareholder-activism-and-esg-what-comes-next-and-how-to-prepare/]. [↑](#footnote-ref-67)
66. Compare Roe's view [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3817788] to Barzuza et al., *id.* [↑](#footnote-ref-68)
67. This analysis is consistent with Lund and Polman view, which explains that "while some … institutional investors have begun to highlight the importance of stakeholder interests, there is no sign that they have abandoned the pursuit of long-term shareholder value." ESSAY: THE CORPORATE GOVERNANCE MACHINE, 121 Colum. L. Rev. 2563, 2591. [↑](#footnote-ref-69)
68. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3551223 [↑](#footnote-ref-70)
69. Reference to the dataset. [↑](#footnote-ref-71)
70. https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2977219 [↑](#footnote-ref-72)
71. [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3832698]. [↑](#footnote-ref-73)
72. Https://finance.yahoo.com/news/forget-activism-chronic-underperformance-big-000000083.html [↑](#footnote-ref-74)
73. *See* Genworth Financial, Inc. Consolidated Derivative Litigation (explaining the distinction between failure of oversight and causing the company to violate the law),. *See* DE new case. [↑](#footnote-ref-75)
74. In re Caremark Int’l Derivative Litig., 698 A.2d 959, 967 (Del. Ch. 1996). [↑](#footnote-ref-76)
75. See, e.g., Bainbridge (https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3899528); Shapira (https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3732838). [↑](#footnote-ref-77)
76. See Lund, https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3147130 [↑](#footnote-ref-78)
77. John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 Yale J. Reg. 1, XX (2020) )XX( [↑](#footnote-ref-79)
78. See *supra* notes [\_\_], and accompanying text. [↑](#footnote-ref-80)
79. *See* Polman, *Startup Governance*, *supra* note [\_\_], at 203-206. [↑](#footnote-ref-81)
80. Langevoort & Sale, *supra* note 228 at [\_\_[]e [↑](#footnote-ref-82)
81. See Lund, supra note [\_\_] at <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3147130> [↑](#footnote-ref-83)
82. There is some evidence at the shareholder level—successful CEOs are more likely to get support by institutional investors on ESG-related shareholder proposals. See *supra* note \_\_, and accompanying text. [https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=3551223] [↑](#footnote-ref-84)
83. See, e.g., https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=894921. [↑](#footnote-ref-85)
84. *See* Pollman XX. See also Lund, supra note [\_\_] at 1662 (explaining that when the damage to a firm's value from losing an iconic CEO may be far less than the reputational consequences of a high-profile sexual harassment scandal, members of the board should terminate the CEO). [↑](#footnote-ref-86)