The End of the Beginning in Corporate Law

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Roy Shapira
Reichman University (IDC) and ECGI

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I thank Afra Afsharipur, Jim An, Lucian Bebchuk, Itai Fiegenbaum, Aneil Kovvali, Amir Licht, Ann Lipton, Elise Maizel, Geeyoung Min, William Moon, Brian Quinn, and participants in Harvard Law's Corporate Law Lunch Group, the Corporate Compliance Roundtable, and the National Business Law Scholars Conference for helpful comments and discussions. Alma Katsri, Yarin Koichman, Or Morag, Shany Sabinik, Omar Shalabbi, and Noa Shemesh Friedlander provided excellent research assistance.

Abstract

In 2025, Delaware's legislature enacted the most significant corporate law overhaul in decades, making it easier for controlling shareholders to cleanse conflicted transactions. The reform—Senate Bill 21 (SB 21)—sparked a fierce public debate. Critics framed the legislation as a concession to powerful controllers, while proponents defended it as a necessary response to judicial overreach. Most of the debate focused on the high-profile provisions concerning who counts as a controller and which transactions trigger heightened scrutiny. But a more revealing change largely escaped attention: SB 21 also eliminated corporate law's timing requirement.

Before SB 21, controllers seeking to cleanse conflicted transactions had to adopt procedural safeguards from the outset ("ab initio"), before deal negotiations began. Over the preceding decade, that requirement became one of the most consequential prerequisites in conflicted-transaction litigation. Yet the legislature omitted the requirement without explanation. And neither practitioner nor academic commentary has supplied a theory of why timing matters.

This Article provides that theory and makes three contributions. Descriptively, it offers the first systematic account of the rise and fall of the ab initio requirement, situating it within corporate law's broader shift from substantive fairness review to process-based protections. Normatively, the Article evaluates the desirability of eliminating the requirement and concludes that the legislature erred. Timing matters. Negotiation research demonstrates that early communications anchor expectations, and early commitments are hard to unwind. More fundamentally, the timing requirement is a potent tool for protecting the integrity of internal corporate procedures and distinguishing meaningful oversight from cosmetic compliance. Prescriptively, the Article identifies steps courts can take to preserve investor protection in a post-SB 21 world, such as interpreting shareholders' inspection rights liberally. More broadly, the ab initio saga reveals that the effectiveness of procedural safe harbors depends not only on statutory design or judicial specialization, but also on doctrinal and evidentiary tools needed to detect and deter opportunistic compliance with the process. The saga thus surfaces lessons about state competition, specialized business courts, and the systemic value of litigation.

Keywords: Corporate Law, Controlling Shareholders, Fiduciary Duties, Related-Party Transactions, Cleansing Mechanisms, MFW, SB 21, Specialized Courts, Ab Initio, Anchoring Effects, Shareholder Inspection Rights, Corporate Governance, Freezeouts, Going-Private Transactions

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THE END OF THE BEGINNING IN CORPORATE LAW

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Abstract. In 2025, Delaware's legislature enacted the most significant corporate law overhaul in decades, making it easier for controlling shareholders to cleanse conflicted transactions. The reform—Senate Bill 21 (SB 21)—sparked a fierce public debate. Critics framed the legislation as a concession to powerful controllers, while proponents defended it as a necessary response to judicial overreach. Most of the debate focused on the high-profile provisions concerning who counts as a controller and which transactions trigger heightened scrutiny. But a more revealing change largely escaped attention: SB 21 also eliminated corporate law's timing requirement.

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INTRODUCTION

Corporate law balances deference to the business judgment of corporate insiders and protection of outside shareholders. This balance is implemented through varying judicial standards of review.[1] When a corporation transacts with third parties, courts largely insulate insiders' decisions from scrutiny (even when these decisions prove disastrous) by applying the business judgment rule.[2] By contrast, when the corporation

[1] *See* William T. Allen, Jack B. Jacobs & Leo E. Strine Jr., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 26 DEL. J. CORP. L. 859, 867 (2001).

[2] The business judgment rule is a difficult-to-rebut presumption that the corporate decision-makers were informed and believed in good faith that their decision furthers the company's best interests. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83 (2004) (explaining how the business judgment rule effectively immunizes directors from liability for negligence).

transacts with its controlling shareholder, courts treat insiders' decisions with suspicion and typically apply the entire fairness standard.[3] A paradigmatic example is the freezeout, in which a controller buys out the minority shareholders.[4] Concerned that controllers may exploit their influence to extract value unfairly from the minority, courts have traditionally placed on defendants the burden of demonstrating that the transaction was entirely fair.[5]

The 2014 *MFW* decision recalibrated this balance and allowed defendants to enjoy the deferential business judgment review even in controller freezeouts, provided they adopted dual procedural safeguards: (1) negotiation and approval by a special committee of independent directors, and (2) approval by a majority of the minority shareholders.[6] When these safeguards are in place, courts will not second-guess the transaction, and will dismiss lawsuits challenging it at the pleading stage.[7] The reasoning was that approval by disinterested directors and shareholders can effectively mimic arm's-length bargaining. The independent directors will negotiate aggressively with the controller, and the minority shareholders will reject any deal that does not serve their interests.[8] *MFW*'s impact was immediate: within a few years, over 90% of freezeouts adopted both procedural safeguards.[9] And courts began extending the *MFW* framework beyond freezeouts to other conflicted transactions.[10]

Scholars and practitioners viewed this development as a fundamental shift in investor protection: from ex post judicial review to ex ante design of market procedures.[11] Some even proclaimed it "the death of corporate law," suggesting that judicial oversight was "no longer vital to the regulation of U.S. corporations."[12] Yet the rumors turned out to be greatly

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[3] Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1239 (Del. 2012); Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983). *See also* Claire Hill & Brett McDonnell, *Sanitizing Interested Transactions*, 36 DEL. J. CORP. L. 903, 908 (2011).

[4] When a controller purchases the remaining publicly traded shares of its company, that target company either continues to exist as a privately held entity owned by the controller, or is merged into another business entity owned by the controller. *See* Fernán Restrepo & Guhan Subramanian, *The Effect of Delaware Doctrine on Freezeout Structure and Outcomes: Evidence on the Unified Approach*, 5 HARV. BUS. L. REV. 205, 208 (2015) (explaining the near-synonyms of freezeouts, such as squeeze-outs and going-private transactions).

[5] Kahn v. Lynch Commc'ns Sys. 638 A.2d 1110, 1115 (Del. 1994).

[6] Kahn v. M & F Worldwide Corp., 88 A.3d 635, 642 (Del. 2014) (affirming *In re MFW S'holders Litig.*, 67 A.3d 496 (Del. Ch. 2013)). While both decisions are typically referred to collectively as *MFW*, I will refer to the Delaware Supreme Court decision as *M&F Worldwide* and to the Court of Chancery decision as *MFW*.

[7] *See* James D. Cox & Randall S. Thomas, *Delaware's Retreat: Exploring Developing Fissures and Tectonic Shifts in Delaware Corporate Law*, 42 DEL. J. CORP. L. 323, 348 (2018). Formally, plaintiffs can still survive a motion to dismiss by pleading facts supporting a waste claim, but such claims were always extremely unlikely to succeed and were effectively eliminated by Delaware's 2025 Senate Bill 21. See *infra* note 24 and the accompanying text.

[8] *See* Leo E. Strine, *The Delaware Way: How We Do Corporate Law and Some of the New Challenges We (and Europe) Face*, 30 DEL. J. CORP. L. 673, 678 (2005); *In re* Cox Commc'ns, Inc. S'holder Litig., 879 A.2d 604, 647 (Del. Ch. 2005).

[9] Fernán Restrepo, *Judicial Deference, Procedural Protections, and Deal Outcomes in Freezeout Transactions: Evidence from the Effect of* MFW, 6 J. L. FIN. ACCT. 353 (2021) (finding that the percentage of freezeouts adopting both procedural safeguards increased from 37% before *MFW* to over 90% after *MFW*).

[10] *See, e.g.*, *In re* Match Group, Inc. Deriv. Litig., 315 A.3d 446, 462–63 (Del. 2024); *In re* EZCORP Inc. Consulting Agreement Deriv. Litig., No. 9962-VCL, 2016 WL 301245 (Del. Ch. Jan. 25, 2016).

[11] *See, e.g.*, Cox & Thomas, *supra* note 7 (detailing the development).

[12] Zohar Goshen & Sharon Hannes, *The Death of Corporate Law*, 94 N.Y.U. L. REV. 263, 265 (2019). The idea was that today's sophisticated institutional investors can fend for themselves, and so the courts can step back and let the market police conflicted transactions.

exaggerated.[13] Over the next decade (2015–2025), plaintiffs continued to challenge conflicted controller transactions successfully—just with different legal tools. Rather than waiting for defendants to prove that the transaction was entirely fair (as in the pre-*MFW* world), plaintiffs began searching for evidence that the procedures that defendants implemented did not meet the requirements for securing *MFW* protection.

One recurring and particularly successful path to defeating *MFW* protection was the *ab initio* (Latin for "from the beginning") requirement.[14] That is, *MFW* imposed a timing condition: it was not enough that the dual procedural safeguards appeared eventually; instead, they had to be in place from the outset, before negotiations began. If a controller initially approached the CEO or board to discuss deal terms, and only later started negotiating with an independent committee and committed to a shareholder vote, the transaction remained subject to entire fairness review. In *Zhongpin*, for example, plaintiffs prevailed by showing that the controller committed to submitting the deal to a vote only after negotiating price with the board.[15] In *Olenik*, the controller and the board sat together to evaluate the price range before empowering an independent committee to negotiate with the controller.[16] Other examples abound.[17]

In practice, then, the ab initio requirement became the linchpin for whether *MFW* applied.[18] And just as courts expanded *MFW* beyond freezeouts, they extended ab initio scrutiny to other conflicted transactions,[19] including transactions that did not involve controlling shareholders at all.[20] The rationale was straightforward: if the law credits internal corporate procedures as mimicking market dynamics and cleansing conflicts of interest, ensuring that these procedural safeguards are in place from the outset becomes key. Put differently, *ab initio* became an administrable indicator of whether the cleansing procedure had integrity.

The surge in litigation over ab initio turned the question of *where* "the beginning" is into one of corporate law's most consequential uncertainties. Do preliminary overtures close the ab initio window, or only substantive economic negotiations?[21] How does one distinguish exploratory talks from substantive negotiations?[22] If negotiations pause and a few months later resume, does the ab initio window reset?[23]

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[13] *See also* Matteo Gatti & Martin Gelter, Barking without Biting: How *Corwin* Did Not Change M&A (ECGI Law Working Paper No. 808, 2024), https://ssrn.com/abstract=4988673 (providing evidence on analogous dynamics in third-party M&A deals).

[14] *See* Nathaniel J. Stuhlmiller & Brian T.M. Mammarella, *'MFW' Just Turned 10, But is It Worth the Candle?*, DEL. BUS. COURT INSIDER (Jul. 3, 2024), https://www.rlf.com/wp-content/uploads/2024/07/MFW-Just-Turned-10.pdf (analyzing all published opinions and transcript opinions addressing *MFW* defense and finding ab initio to be the leading cause of the defense's failure).

[15] *In re* Zhongpin, Inc. S'holders Litig., No. 7393-VCN, 2014 WL 6735457, at *10 (Del. Ch. Nov. 26, 2014).

[16] Olenik v. Lodzinski, 208 A.3d 704, 715 (Del. 2019).

[17] *Infra* Section I.B.

[18] Stuhlmiller & Mammarella, *supra* note 14.

[19] *In re* Martha Stewart Living Omnimedia, Inc. S'holder Litig., No. 11202-VCS, 2017 WL 3568089, at *16–18 (Del. Ch. Aug. 18, 2017).

[20] Salladay v. Lev, 2020 WL 954032, at *9–12 (Del. Ch. Feb. 27, 2020).

[21] *See, e.g.*, Flood v. Synutra Int'l, Inc., 195 A.3d 754, 760 (Del. 2018).

[22] *See, e.g.*, Olenik, 208 A.3d at 716.

[23] *See, e.g.*, *In re* HomeFed Corp. No. 2019-0592-AGB, 2020 WL 3960335 (Del. Ch. July 13, 2020).

In March 2025, Delaware's legislature reversed course and appeared to render all these questions moot: Senate Bill 21 (SB 21) eliminated the ab initio requirement as a formal precondition to insulating conflicted transactions from judicial review.[24] Under SB 21, corporate insiders can seemingly engage in meaningful negotiations over the deal's structure and price long before they appoint a special committee and submit the deal to a vote, and still obtain statutory safe-harbor protection. This pivot away from the ab initio requirement was lost amid the fierce public debate over SB 21. In corporate circles and the general media, opponents framed the legislative overhaul as a concession to powerful controllers (following Elon Musk's publicized exit from Delaware), while proponents argued it was needed to curb judicial overreach.[25] Most of the debate focused on salient and easier-to-understand provisions such as who is considered a controller or what transactions are subject to heightened scrutiny. The quiet removal of ab initio received little sustained attention.

But does timing really matter to process integrity? Should procedural safeguards be in place from the beginning of negotiations? If so, why? And how should the law define "the beginning"? Surprisingly, the legislative history of SB 21 and the debate following its enactment have not answered these foundational questions.[26] Nor have corporate legal scholars. Corporate law has been lacking a coherent theory of why timing matters. This Article offers that theory and makes three contributions: descriptive, normative, and prescriptive.

Descriptively, the Article offers the first systematic account of the rise and fall of the ab initio requirement in corporate law. By examining all judicial opinions that applied the requirement and materials surrounding its legislative repeal,[27] the Article situates the requirement's emergence as part of a broader shift in corporate law from substance to process.[28] The Article then highlights the striking mismatch between the requirement's practical significance and the lack of theoretical or empirical clarity regarding why timing matters or how the law should define when a negotiation has truly begun.

Normatively, the Article evaluates the desirability of eliminating the ab initio requirement and concludes that the legislature erred. Timing matters. A well-developed body of negotiation research demonstrates that early communications anchor expectations, and early commitments are hard

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[24] S.B. 21, 153rd Gen. Assemb. (Del. 2025).

[25] *See, e.g.*, Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525, 533–37 (2025); Jill E. Fisch & Steven Davidoff Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641, 644–46 (2025). *But see* J. Travis Laster, *Not New: A Response to Claims About "New Control" in Control and Its Discontents*, VA. J. L & BUS. 2–7 (forthcoming), https://ssrn.com/abstract=6604058.

[26] I use "legislative history" here in a broad sense to refer to the materials surrounding SB 21's enactment, including the bill synopsis and committee hearings in the House and Senate.

[27] To supplement searches in traditional legal databases, I reviewed the archives of The Chancery Daily, which capture not only published opinions but also "transcript opinions" (meaning, rulings delivered orally from the bench). On this common practice in Delaware see Roy Shapira, *Conceptualizing* Caremark, 100 IND. L.J. 467, 480 (2025).

[28] *See* William W. Bratton & Simone M. Sepe, *Substance and Process in Corporate Law: Theory and History*, 50 J. CORP. L. 893, 894 (2025) (describing the broader shift).

to unwind.[29] The early phases of negotiations are therefore not merely exploratory; they are formative in shaping final outcomes. Removing the ab initio requirement also departs from a core tenet of corporate law, namely, ensuring the integrity of internal corporate procedures. Examining *when* procedural safeguards are put in place is often a useful tool for distinguishing meaningful oversight from cosmetic compliance.

To complete the normative assessment, the Article reconstructs three potential justifications for eliminating the ab initio requirement. The first is the "tender-bypass argument," which maintains that ab initio was designed to prevent controllers from exploiting a loophole in the differing legal treatment of merger freezeouts and tender-offer freezeouts. By equalizing the legal treatment of mergers and tender offers, SB 21 rendered the ab initio requirement superfluous, or so the argument goes. The second is the "foot-fault litigation argument," which frames the ab initio requirement as a magnet for costly litigation over formal missteps, rather than substantive investor protection. The third is the "substitute forces argument," which contends that even without a rigid timing requirement, directors' reputational concerns and institutional investors' voting pressures will keep corporate insiders in check. The Article critically evaluates each potential justification and finds them all wanting.

Prescriptively, the Article proposes concrete steps courts can take to return to first principles of corporate law and preserve meaningful investor protection in a post-SB 21 world. In theory, courts could continue to scrutinize *when* procedural safeguards were implemented—consistent with the revised statute, even without a formal ab initio requirement—by grounding their review in general fiduciary principles. The inquiry would be looser than the old ab initio rule: not whether safeguards were in place at the first possible moment, but whether they were implemented early enough to serve their cleansing function.

In practice, however, courts will likely have fewer opportunities to engage in such scrutiny, if only because SB 21 also curtailed shareholder inspection rights.[30] Past successful challenges often hinged on minority shareholders using inspection powers to uncover internal communications revealing that controllers made backchannel overtures before formally committing to procedural safeguards. Going forward, courts may need to interpret the revised inspection rights provision more liberally in the freezeout context by recognizing a "compelling need" to access informal communications relevant to process integrity.

The Article contributes to an emerging literature on Delaware's 2025 overhaul of corporate law, and the broader challenge of holding powerful controlling shareholders accountable. Much of that literature debates *what* procedural protections should apply—such as whether controller freezeouts should be subject to the same treatment as non-freezeout transactions, or how to define "controller" for purposes of determining the level of

[29] Section II.A *infra*.
[30] Section III.A.4 *infra*.

procedural protections.[31] The discussion here, by contrast, focuses on *how* courts assess the validity of given procedural protections. This shift in focus exposes a gap in the public debate over SB 21. Supporters justified the reform as a response to two forms of perceived judicial overreach: (1) so-called "*MFW* creep," in which courts extended the requirement of dual procedural safeguards beyond freezeouts to other conflicted controller transactions; and (2) so-called "controller creep," in which courts broadened the definition of who qualifies as a controller.[32] They described SB 21's guiding principle as simply to "bring Delaware corporate law back to where it was [in 2015]."[33] But even when taken at face value, that account does not explain why SB 21 removed an integral feature of the original *MFW* framework, which preceded 2015: the ab initio requirement. SB 21 itself keeps controller freezeouts subject to dual procedural protections. It therefore leaves open the central question this Article addresses: when must those protections be implemented to be meaningful?

By shifting focus to the mechanics of enforcing process compliance, this Article also surfaces broader lessons about the role of specialized business courts and the systemic value of litigation. One advantage of a relatively small court specializing in corporate law disputes is that the judges develop an ability to benchmark. Judges who have evaluated many iterations of similar transactions can more easily detect when the process in a pending transaction deviates from settled norms. This expertise in pattern recognition allows courts to enforce process integrity without second-guessing substantive business judgment. The capacity to benchmark similar cases also allows specialized business courts to influence corporate behavior not only through formal legal interventions, but also through clarifying what is expected of corporate insiders (shaping norms) and flushing out information on who behaved below expectations (shaping reputations). This is an easy-to-overlook and hard-to-quantify benefit that gets lost when corporate law shifts toward administrative-style safe harbors.

The corporate law question of how to ensure the integrity of internal procedures has become a first-order societal issue. In today's economy, a significant share of economic power is concentrated in companies with controlling shareholders:[34] Google, Meta, Oracle, Nike, Walmart, Coinbase, and Comcast are just a few prominent examples.[35] Without effective tools to discipline controllers and protect minority investors, capital markets and

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[31] *See, e.g.*, Fisch & Solomon, *supra* note 25; Bainbridge, *supra* note 25.

[32] *See* Gregory V. Varallo et al., *A Critical Analysis of 'Fair Price' in Entire Fairness Law in Delaware*, 49 DEL. J. CORP. L. 603, 608 (2025) (using the term). For overviews of the debate, *see, e.g.*, J. Travis Laster, *How to Evaluate Non-Majority Control: What History and Statutes Tell Us—Part One: The Historical Dominance of Functionalism*, 31 FORDHAM J. CORP. & FIN. L. 1 (2025); Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, 50 J. CORP. L. 1095 (2025); Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977 (2019).

[33] *Hearing on S.B. 21 Before the House Judiciary Comm.*, 153rd Gen. Assemb. (Del. Mar. 12, 2025) (testimony of Lawrence Hamermesh), between 2:20:15-2:20:25, https://shorturl.at/4XX4C; *Hearing on S.B. 21 Before the S. Judiciary Comm.*, 153rd Gen. Assemb. (Del. Mar. 19, 2025), https://shorturl.at/QCv4t (testimony of Lawrence Hamermesh).

[34] *See* Lucian A. Bebchuk & Kobi Kastiel, *Controllers Unbound*, TEX. L. REV. (forthcoming), https://ssrn.com/abstract=6111106, manuscript at 9 (explaining why controlled companies are likely to become more prevalent).

[35] *Id.* at 6, tbl. 1 (compiling examples).

the broader economy risk erosion of trust and efficiency.[36] Among conflicted transactions, freezeouts expose these stakes most clearly: each dollar paid less to the minority is a dollar retained by the controller.[37]

Getting freezeout regulation right can therefore offer broader lessons for governing conflicted transactions across corporate law.[38] These lessons also travel beyond Delaware. For example, the European Union is now considering its own corporate-law recalibration through the EU Inc. initiative.[39] This initiative encourages Member States to consider setting up specialized business courts.[40] European scholars have likewise urged EU reformers to draw lessons from Delaware's SB 21 about how corporate law can combine bright-line statutory rules with judicial scrutiny of opportunistic compliance.[41] But that comparative argument only sharpens the puzzle presented here: specialized courts are not enough. To distinguish meaningful compliance from cosmetic compliance, such courts need doctrinal and evidentiary tools. In Delaware, two important tools have traditionally been broad inspection rights and the timing requirement. SB 21 chips away at both.

The Article proceeds in three parts. Part I details the historical evolution of the ab initio requirement. It begins with the background principles of how corporate law addresses the risk of controlling shareholders expropriating minority investors, explains the development and expansion of the *MFW* framework, and concludes with the dismantling of key features in that framework in 2025. Part II critically assesses the legislature's decision to eliminate the ab initio requirement and argues that this move will likely reduce courts' capacity to police conflicted transactions. Part III offers concrete policy proposals to improve the quality of investor protection in a post-SB 21 world. A brief Conclusion clarifies the Article's original contributions by juxtaposing them with the existing literature and highlights promising directions for future research.

I. THE BEGINNING AND THE END OF AB INITIO

The ab initio requirement emerged as part of a broader move toward "proceduralism" in corporate law. Courts have started allowing corporate insiders to avoid judicial scrutiny of conflicted transactions ex post, as long as insiders adopted certain procedural safeguards ex ante. Section A shows

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[36] *See* Lucian A. Bebchuk & Kobi Kastiel, *How to Control Controller Conflicts,* 54 J. CORP. L. 1001, 1004 (2025). For classic works showing the link between the quality of investor protection and the development of stock markets (and, in turn, economic growth), *see* Ross Levine, *Law, Finance, and Economic Growth*, 8 J. FIN. INTERMEDIATION 36 (1999); Rafael La Porta et al., *Investor Protection and Corporate Valuation*, 57 J. FIN. 1147 (2002).

[37] *See* Fernán Restrepo & Guhan Subramanian, *Declining MOM Conditions in Freezeout Transactions and the MOOM Alternative* (working paper, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4965438.

[38] *Id*.

[39] Proposal for a Regulation of the European Parliament and of the Council on the 28th Regime Corporate Legal Framework "EU Inc.," COM (2026) 321 final (Mar. 18, 2026).

[40] *Id*. at Recital 81.

[41] *See* Alessio M. Pacces, What Europe Can Learn from the Law & Economics of Delaware SB 21 (ECGI L. Working P. 933/2026 (2026)), https://ssrn.com/abstract=6803480.

how under this proceduralist approach, courts shift their focus from scrutinizing the substance of the transaction to assessing "process compliance:" namely, whether the prerequisites for a credible process were satisfied. Among these prerequisites, the requirement that safeguards be put in place before negotiations begin proved to be the most consequential in litigation. Section B examines the courts' effort to define when "the beginning" occurs: does the ab initio window close once a controller makes an overture to corporate insiders, or can it remain open until more substantive negotiations commence? Section C turns to the sudden change in 2025, when Delaware's legislature eliminated the ab initio requirement altogether, without explaining why.

A. The Beginning of the Beginning

Whenever a controller stands on both sides of a transaction, there exists a risk of expropriating minority shareholders.[42] Suppose John owns 60% of company A's shares, and company A is considering paying John for consulting services. John is the seller in this transaction, but he also exerts influence over the buyer, namely, the officers and directors negotiating on behalf of company A.[43] Because controllers often dictate who sits on the board, directors may reasonably fear that crossing John could jeopardize their directorship positions.[44] As a result, there is a risk that the board will approve terms that exceed the market value of John's services.[45]

This risk becomes especially acute in the context of controller freezeouts, because of the combination of three compounding factors: (1) higher stakes, (2) "zero-sum" dynamics, and (3) "endgame" incentives.[46] To recast our example, suppose John proposes that company A merge with company B, which he wholly owns. Under the proposal, the remaining 40% of A's shareholders would receive $50 per share and be cashed out. If A's board approves the deal, the minority shareholders will have to surrender their shares for the cash payment, leaving John as the 100% owner of a now-private entity. Unlike the consulting-fee example, which was a going-concern transaction (where both sides remained invested in the firm's future), this is a going-private transaction that eliminates the minority's stake.

The stakes in such a transaction are higher than in routine related-party transactions such as a consulting contract. Going-private transactions also present a particularly stark zero-sum dynamic: any value the controller gains through a lower price comes directly at the expense of the minority

[42] *See, e.g.*, Strine, *supra* note 8, at 678; María Gutiérrez Urtiaga & Maria Isabel Sáez Lacave, *Deconstructing Independent Directors*, 13 J. CORP. L. STUD. 63 (2013) (providing a comparative perspective).
[43] For evidence on the many levers that controllers hold over ostensibly independent directors, *see* Da Lin, *Beyond Beholden*, 44 J. CORP. L. 516 (2019); Faith Stevelman, *Going Private at the Intersection of the Market and the Law*, 62 BUS. LAW. 775, 779 (2007).
[44] Lucian A. Bebchuk & Assaf Hamdani, *Independent Directors and Controlling Shareholders*, 165 U. PA. L. REV. 1271, 1287 (2017).
[45] Match, 315 A.3d at 473.
[46] *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *Controlling Controlling Shareholders,* 152 U. PA. L. REV. 785, 804 (2003).

shareholders who are being cashed out.[47] By contrast, going-concern transactions, such as consulting contracts, may involve zero-sum bargaining over price, but they can create value for the firm as a whole; and because minority shareholders remain invested, they can share in the firm's future gains. Moreover, in going-concern transactions, the controller remains in an ongoing relationship with minority shareholders and may wish to preserve goodwill with them. In going-private transactions, by contrast, the controller wipes out the remaining shareholders and has fewer reasons to appease anyone. This endgame dynamic dilutes the reputational concerns that could otherwise discipline controllers from expropriating the minority.[48]

Corporate law's traditional response to the risk posed by conflicted controller transactions in general and freezeouts in particular has been to subject such transactions to *entire fairness* review.[49] Under this standard, defendants bear the burden to prove that the transaction was fair in both process and price.[50] The prospect of such exacting judicial scrutiny after the fact is meant to deter opportunistic behavior to begin with. In other words, the idea is that heightened judicial scrutiny will protect minority investors in a context where classic market forces are less effective.

Over time, it became clear that this heightened judicial scrutiny regime invites meritless litigation.[51] The unique procedural stance, whereby defendants are the ones having to prove entire fairness, made it easier for plaintiff attorneys to survive the motion to dismiss even when bringing weak cases.[52] As a result, attorneys started hastily filing lawsuits immediately after a company announced a transaction, only to use the filing as a bargaining chip to extract quick settlements from defendants.[53] Defendants, eager to avoid the cost and disruption of discovery during a time-sensitive transaction, often paid these "go-away" settlements.[54] Plaintiffs' attorneys, in turn, collected fees despite having little role in shaping or improving the deal.[55] This ritual created a "deal tax," which benefited only the lawyers without delivering meaningful benefits to shareholders or improving corporate governance.[56]

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[47] The "zero-sum" descriptor thus applies to the allocation of the surplus between controller and minority. It does not necessarily apply to the transaction overall, because a freezeout may reduce costs or create synergies.
[48] *But see* Bebchuk & Kastiel, *supra* note 36 (noting that freezeouts are more salient than routine related-party transactions, and therefore more likely to draw scrutiny from institutional investors, which in turn enhances the discipline of directors).
[49] Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).
[50] *Id.*
[51] *See, e.g.*, Matthew D. Cain & Steven Davidoff Solomon, *A Great Game: The Dynamics of State Competition and Litigation*, 100 IOWA L. REV. 465 (2014) (providing evidence on both third-party and controller mergers); Cox Commc'ns, 879 A.2d at 608–12 (decrying the situation); Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133, 135 (2004) (showing that acquisition-oriented lawsuits have become the dominant form of corporate litigation).
[52] *In re* Cornerstone Therapeutics, 115 A.3d 1173, 1180–81 (Del. 2015). That dynamic was compounded by the courts' willingness to entertain challenges filed immediately after announcements of potential freezeouts, rather than treating such suits as premature.
[53] *See* Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321, 334 (2022).
[54] Cox Commc'ns, 879 A.2d at 608.
[55] *Id.*
[56] Hamermesh et al., *supra* note 53, at 334 n.56.

MFW aimed to disrupt this litigation equilibrium[57] by offering controllers a path to early dismissals.[58] If a controller conditioned a freezeout on *both* (1) approval by an independent, empowered special committee, and (2) an uncoerced, informed vote of a majority of the minority shareholders, they could insulate themselves from entire fairness review.[59] Prior to *MFW*, even disinterested and informed consents by directors and minority shareholders could, at best, shift the burden of proof, but did not lower the standard of review.[60] This was largely due to the notion of "inherent coercion:" the idea that a controlling shareholder wishing to exercise a freezeout is like an 800-pound gorilla with such retributive powers that even ostensibly disinterested directors and shareholders will not be able to resist.[61]

MFW's explanation for departing from the "inherent coercion" tradition was twofold: correcting the perverse incentives that prior precedent created and acknowledging the rise of market forces that can countercheck controllers. First, *MFW* sought to incentivize controllers to subject the deal to a majority-of-minority vote.[62] Under prior precedent, controllers could obtain burden-shifting simply by appointing a special committee, so they had little incentive to submit to a majority-of-the-minority vote.[63] As a result, while almost all freezeouts used a special committee, far fewer included a shareholder vote.[64] By promising controllers a liability shield for adopting *both* procedures, *MFW* managed to change this reality: within just a few years, the overwhelming majority of controller freezeouts became subject to a minority vote.[65]

Second, *MFW* reasoned that the market forces traditionally viewed as too weak to counterbalance controller influence had evolved.[66] For example, the increased prominence of institutional investors and the rise of

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[57] *MFW* was part of a series of decisions issued in the mid-2010s that effectively allowed defendants to avoid exacting judicial scrutiny and discovery as long as they satisfied certain procedural safeguards. *See* Roy Shapira, *Corporate Law, Retooled: How Books and Records Revamped Judicial Oversight*, 42 CARDOZO L. REV. 1949, 1960–61 (2021).

[58] The facts of the case have been widely discussed. In brief (see *MFW*, 67 A.3d 496, 499): MacAndrews & Forbes, which controlled 43% of M&F Worldwide, proposed to acquire the remaining 57% for $24 per share (a premium of over $7 relative to the trading price at the time). Pertinently, its initial letter conditioned the deal on approval by both a special committee of independent directors and a majority of the minority shareholders. Plaintiffs argued that defendants bore the burden of proving the deal was entirely fair. The Court of Chancery rejected that argument, holding that "when a controlling stockholder merger has, from the time of the controller's first overture, been subject to (i) negotiation and approval by a special committee of independent directors fully empowered to say no, and (ii) approval by an uncoerced, fully informed vote of a majority of the minority investors, the business judgment standard of review applies." *Id*. at 500. The Delaware Supreme Court affirmed. M&F Worldwide, 88 A.3d at 642.

[59] M&F Worldwide, *id*.

[60] Lynch, 638 A.2d at 1120–21; Stevelman, *supra* note 43, at 797–99 (compiling references).

[61] *In re* Pure Res. Inc. S'holders Litig. 808 A.2d 421, 436 (Del. Ch. 2002) (using the gorilla analogy); Leo E. Strine, Jr., *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 509 (2002) (elaborating on that analogy); Kahn v. Tremont Corp., 694 A.2d 422, 428 (Del. 1997) (describing controllers' retributive powers); Iman Anabtawi, *The Limits of Shareholder Ratification*, 50 J. CORP. L. 450, 484 (2025) (same).

[62] *MFW*, 67 A.3d at 502.

[63] *Id*.

[64] *See* Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 12 (2005) (providing evidence on pre-*MFW* practice); Restrepo, *supra* note 9 (finding that pre-*MFW*, 94% of deals included a special committee, but only 37% included majority-of-minority vote).

[65] Restrepo, *supra* note 9.

[66] *MFW*, 67 A.3d at 530–31.

proxy advisory firms had created a robust market for shareholder votes, which could and would vote against the controller if the proposed deal is unfair.[67] Further, even if each procedural mechanism suffers from its own limitations, the combination of both provides a mutually reinforcing safeguard.[68] Minority shareholders may be too dispersed or uninformed to negotiate effectively, but a special committee of independent directors is better positioned to act as a bargaining agent.[69] Conversely, while a special committee may be prone to capture (or subtle influence) by the controller, the broad base of minority shareholders is less susceptible to such pressures.[70] Together, the two checks function as complementary tools to ensure fairness.[71]

Following the *MFW* decision, Delaware courts extended the framework to a variety of non-freezeout settings: from consulting agreements to charter amendments that favor the controller, to decisions to lend money to the controller.[72]

This so-called "*MFW* creep" made it increasingly important to determine what qualifies as proper execution of the *MFW* framework (that is, the conditions under which insiders could earn a liability shield). Minority shareholders and their attorneys continued to challenge conflicted transactions, often arguing that the deal process failed to meet *MFW* prerequisites. Courts were receptive to these challenges on various grounds, such as controllers withholding material information from shareholders or the special committee lacking true independence.

The most consequential ground for challenge in the post-*MFW* world was the "ab initio" requirement—that is, the claim that the controller adopted procedural safeguards only after negotiations had already begun.[73] The *MFW* decision expressly held that for the dual procedural safeguards to credibly replicate arm's-length bargaining, they must be in place from the outset.[74] The court explained that real bargaining with third parties often becomes a bare-knuckle contest over price: buyers looking to close a deal must typically make a price move to meet sellers halfway.[75] Requiring controllers to commit to procedural safeguards from the beginning ensures that controllers cannot treat these safeguards as bargaining chips in later stages.[76] In other words, the *MFW* court sought to preclude scenarios where controllers, rather than raising their offer, dangle in front of the board the opportunity to put the deal to a majority-of-minority vote.[77]

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[67] *Id.*
[68] *See* Subramanian, *supra* note 64, at 53–54; Gilson & Gordon, *supra* note 46, at 839-40.
[69] *See* Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 44 DEL. J. CORP. L. 1, 28–30 (2020).
[70] *Id.*
[71] *Id*; J. Travis Laster, *The Effect of Stockholder Approval on Enhanced Scrutiny*, 40 WM. MITCHELL L. REV. 1443, 1461–63 (2014).
[72] Match, 315 A.3d at 462–63; Bebchuk & Kastiel, *supra* note 36, at 1006.
[73] *See, e.g.*, Brian Quinn, *What Does Ab Initio Mean Anyway?*, M&A LAW PROF BLOG (Oct. 10, 2018), https://lawprofessors.typepad.com/mergers/2018/10/what-does-ab-inito-mean-anyway.htm (noting that "the crux of challenges" to conflicted controller transactions was the ab initio requirement).
[74] M&F Worldwide, 88 A.3d at 644.
[75] *Id*; Synutra, 195 A.3d at 762–63.
[76] Synutra, *id*.
[77] M&F Worldwide, 88 A.3d at 644.

Within weeks of the *MFW* decisions, challenges invoking the "ab initio" requirement began to mount.[78] And just as the *MFW* framework radiated beyond freezeouts, ab initio scrutiny began to migrate to other contexts: first to non-freezeout controller transactions, and then even to conflicted deals that do not involve controllers.[79]

In *Salladay*, for example, a third-party investor group proposed to acquire an identity-protection company called Intersections through a merger.[80] As part of the deal, certain directors at Intersections would be permitted to roll over their ownership interests in the company to the merged entity (while the remaining shareholders would be cashed out).[81] One such "rollover director" met with the investor group and conveyed that Intersections' board would be receptive to an offer in the range of $3.5–4 per share.[82] After that meeting, Intersections formed a special committee to carry out negotiations.[83] When shareholders later challenged the transaction in court, defendants moved to dismiss, arguing that negotiation by a special committee warranted a business judgment review dismissal.[84] The court rejected that argument, holding that the conflicted rollover directors were required to self-disable by empowering an independent committee at the outset.[85] Whether the committee was properly empowered, the court explained, turns inter alia on timing: if negotiations begin before the committee is formed (as they did here), defendants cannot invoke the protection of business judgment review.[86]

This migration of ab initio scrutiny turned the question of what counts as "the beginning" into one of the most significant in corporate law. Plaintiffs were using their inspection rights to obtain internal company communications, showing that controllers had made overtures about the deal to officers and directors well before committing to any procedural safeguards.[87] In response, defendants were arguing that in real life controllers inevitably communicate with company insiders about potential transactions, and that accepting such challenges would undercut the holding and rationale of *MFW*.[88] These debates quickly reached Delaware's Supreme Court, which was called on to clarify the timing requirement.

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[78] Section I.B *infra*.
[79] Salladay, 2020 WL 954032, at *9–12. While *Salladay* did not generate a robust line of subsequent cases citing it for the proposition that ab initio scrutiny applies outside the controller context, it did lead to a change in legal advice on how to design deals. Notable law firms circulated memos to their corporate clients, citing *Salladay* for the proposition that timing-based scrutiny could apply to conflicted transactions beyond controller deals. *See, e.g.*, Taylor Bartholomew et al., *Ab Initio 2.0: Even Without a Controller, Special Committees Must Be Formed Before Economic Negotiations Begin*, TROUTMAN PEPPER LOCKE (Mar. 10, 2020), https://www.jdsupra.com/legalnews/ab-initio-2-0-even-without-a-controller-57596/; *Delaware Court of Chancery Holds That a Special Committee Must Be Constituted Ab Initio in Order to Cleanse a Transaction Involving a Conflicted Board Majority*, A&O SHEARMAN (Mar. 17, 2020), https://www.lit-ma.aoshearman.com/delaware-court-of-chancery-holds-that-a-special-committee.
[80] *Id.* at *7–8.
[81] *Id.*
[82] *Id.*
[83] *Id.* at *9–10.
[84] When some of the directors of a widely held company are self-interested, only one procedural safeguard suffices to cleanse the transaction. *Id.*
[85] *Id.* at *22–23.
[86] *Id.* at *21.
[87] *Id.*
[88] *Id.*

B. Where is the Beginning?

As the ab initio requirement gained prominence, courts and practitioners struggled with how to interpret it. The concept of "from the beginning" may sound straightforward, but in the context of transactions between a corporation and its controller, it is anything but.[89] Controllers often maintain informal channels of communication with officers and directors, and major transactions typically unfold in multiple stages. As a result, it can be difficult for courts to determine when day-to-day backchannel communications evolve into concrete negotiations.

The matter reached Delaware's Supreme Court in *Synutra*.[90] There, the controller sent the board an initial letter of interest, proposing to acquire the remaining shares at $5.91 per share.[91] That initial communication did not reference the *MFW* procedural safeguards.[92] One week later, the board formed a special committee.[93] A week after that, the controller sent a second letter, offering the same price but this time conditioning the deal on *MFW* safeguards.[94] Seven months passed before the sides purportedly began price negotiations, ultimately agreeing to $6.05 per share.[95] Minority shareholders challenged the deal, and the defendants moved to dismiss, arguing that the *MFW* framework applies.[96]

The key question was whether the controller's second letter—sent two weeks after the initial expression of interest—satisfied the ab initio requirement, or whether the first letter irrevocably closed the window.[97]

Synutra adopted a liberal interpretation, holding that the window does *not* close after the first expression of interest.[98] Instead, the window closes only when the interest materializes into substantive economic negotiations. The court reasoned that a rigid interpretation of "the beginning" contradicts what the term means in everyday language.[99] To illustrate, the court used a soccer metaphor: "a goal scored in the fifth minute of a 90-minute match would be referred to as a goal at the beginning of the match."[100] In other words, an ordinary person considers the first few minutes of the match (rather than the first seconds) or the first few chapters of a novel (rather than the first words) to be a part of the beginning.[101] If the

[89] The difficulty of defining "the beginning" was compounded as ab initio scrutiny migrated across transactional settings. Once courts applied the timing requirement outside the freezeout context, they had to adapt different definitions of "the beginning." *See, e.g.*, Martha Stewart 2017 WL 3568089, at *18 n.76.
[90] Flood v. Synutra, 195 A.3d 754 (Del. 2018).
[91] *Id.* at 757.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 758.
[95] *Id.* at 759.
[96] *Id.* at 760.
[97] *Id.*
[98] *Id.*
[99] *Id.* at 761. We revisit the soccer game analogy in Part III *infra*. The court also noted that a rigid interpretation contradicts the way that a previous Court of Chancery decision had interpreted "from the beginning." *See* Swomley v. Schlecht, No. 9355-VCL, 2014 WL 4470947 (Del. Ch. Aug. 27, 2014), aff'd, 128 A.3d 992 (Del. 2015).
[100] *Id.*
[101] *Id.* at 762.

freezeout process takes many months, conditioning on *MFW* safeguards two weeks after the initial show of interest still counts as a part of the early period of the deal, or so the court reasoned.

The court also rejected the rigid approach on policy grounds: if a controller loses its chances of escaping entire fairness the minute it discusses the acquisition (without conditioning on *MFW*), the controller has no incentives to add procedural safeguards later.[102] A rigid approach thus creates incentives that undermine *MFW*'s intent of incentivizing controllers to design deals in ways that protect the interests of outside investors.[103]

Notably, *Synutra* contained a dissenting opinion by Justice Valihura, favoring a clear-line approach.[104] According to the dissent, "ab initio" should mean from the first written proposal.[105] Applied to *Synutra*, this means that the ab initio window was shut: the events that transpired in the two weeks between when the controller first sent a letter and the special committee was empowered were enough to potentially impact the ability of the committee to effectively negotiate on behalf of shareholders.[106] The dissenting opinion further maintained that such a bright-line reading of "ab initio" would promote certainty and help the court avoid fact-intensive inquiries.[107] We will return to this reasoning when discussing policy implications (how to reconstruct the freezeout process in a post-SB 21 world) in Part III below.

Following *Synutra*, the key question became how to draw the line between preliminary discussions (which do not close the ab initio window) and substantive negotiations (which do). *Olenik* provided important guidance on this question.[108] There, two companies with the same controller entered a stock-for-stock merger.[109] Minority shareholders challenged the deal, arguing that the controller used the merger to bail out its investment in the acquired company. Defendants moved to dismiss, invoking the *MFW* framework. Plaintiffs claimed that the controller did not commit to *MFW* safeguards until ten months after premerger discussions had begun.[110] While the court agreed that many early discussions were exploratory, it found that the parties had at some point engaged in a joint valuation exercise (to delineate the high and low values for the company).[111] The court viewed such an evaluation exercise as crossing the line into substantive economic negotiations.[112]

In other words, *Olenik* clarified that once the parties begin discussing price, such discussions typically close the ab initio window.[113]

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[102] *Id.*
[103] *Id.*
[104] *Id.* at 768.
[105] *Id.* at 773.
[106] *Id.* at 776.
[107] *Id.* at 779.
[108] Olenik v. Lodzinski, 208 A.3d 704, 717 (Del. 2019).
[109] *Id.* at 709–10.
[110] *Id.* at 706.
[111] *Id.* at 716–17.
[112] *Id.*
[113] For applications of this principle, *see, e.g.*, Ark. Teacher Ret. Sys. v. Alon USA Energy, Inc., 2019 Del. Ch. LEXIS 245, *44-46.

As the court explained, identifying a valuation range "set the field of play for the economic negotiations to come by fixing the range in which offers and counteroffers might be made."[114] Indeed, that turned out to be the case in *Olenik*: the controller's initial offer landed just below the floor of the pre-discussed valuation range, and the final price landed just under the ceiling.[115]

Attention next turned to whether a pause in negotiations resets the ab initio window. In *HomeFed*, the company's board formed a special committee to evaluate a potential going-private transaction with the controller.[116] Shortly thereafter, the controller notified the committee that it was no longer interested in pursuing the deal, which prompted the committee to pause its work.[117] While the committee was on pause, the controller engaged in extensive discussions with the second largest shareholder, BMO (which owned 36% of the shares unaffiliated with the controller), regarding the contours of a potential freezeout.[118] After nearly a year of dialogue, BMO encouraged the controller to return to the same deal that was initially proposed and assured the controller that other minority shareholders would support such a deal.[119] The controller then formally announced its intentions to propose a freezeout and expressly conditioned the transaction on *MFW* safeguards.[120] The board resuscitated the special committee and authorized it to negotiate with the controller.[121] The committee approved the transaction, and the minority shareholders voted in its favor. In subsequent litigation, however, the court rejected defendants' *MFW* defense, concluding that the discussions with BMO had addressed "the key economic term of the transaction" (namely, the price).[122]

The upshot of *HomeFed* is that a pause in formal negotiations does not reset the ab initio window if the controller continues to discuss price in back channels. The decision also clarified *with whom* a controller must avoid discussing price in order to preserve *MFW* protection. The defendants contended that discussions with BMO should not trigger the *ab initio* cutoff, since BMO was merely a minority shareholder without authority to bind the company.[123] The court rejected that argument, holding that discussions with large unaffiliated shareholders can impair the special committee's negotiation position.[124] As the court noted, the final deal price (reached after the committee was reactivated) closely tracked the initial offer made before the pause, suggesting that the economic terms had already been locked in before the formal process started.[125]

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[114] *Id.* at 717.
[115] *Id.*
[116] *In re* HomeFed Corp, No. 2019-0592-AGB, 2020 Lexis 235, at *2 (Del. Ch. Jul. 13, 2020).
[117] *Id.*
[118] *Id.* at *9–11.
[119] *Id.* at *2–3.
[120] *Id.* at *12–13.
[121] *Id.*
[122] *Id.* at *30.
[123] *Id.* at *28.
[124] *Id.* at *31.
[125] *Id.*

Even after a decade of intensive litigation (2015–2025), uncertainty persisted over where exactly the beginning lies. *Olenik* held that price discussions trigger the ab initio cutoff, yet in *Synutra*, the controller received *MFW* protection despite including a price in the initial proposal. *HomeFed* concluded that a pause in formal negotiations does not reset the ab initio window, yet in *Books-a-Million*, the controller regained business judgment protection after restarting the process several years later.[126] The emerging pattern was that courts increasingly looked beyond the passage of time and focused instead on structural indicators of process integrity, such as when the committee had retained independent legal and financial advisors.[127]

This trend reflected the typical evolution of Delaware corporate law: incremental refinement through litigation, gradually producing a body of guidance that shapes best practices on the ground. But in March 2025, this gradual evolution was abruptly cut short with the enactment of SB 21.

C. *The End of the Beginning*

SB 21 arguably represents the most sweeping legislative overhaul of corporate law in decades.[128] Motivated by concerns over perceived judicial overreach and threats by several prominent controlled companies to reincorporate elsewhere, the Delaware legislature amended the law in ways that reduce the likelihood of challenging conflicted transactions.[129]

For non-freezeout controller transactions, SB 21 lowered the level of procedural safeguards necessary to obtain business judgment deference. Going forward, the approval of *either* a special committee *or* the majority of minority shareholders will suffice.[130] For freezeouts, by contrast, the legislation retained the dual protection requirement, such that approval by *both* committee *and* minority shareholders is necessary.[131] This bifurcated approach reflects the legislature's judgment that freezeouts pose a uniquely high risk of minority expropriation.

Even in the freezeout context, however, SB 21 made it easier for controllers to secure a liability shield. It relaxed the definition of director independence, specified that the special committee no longer needs to be exclusively composed of independent directors, and removed the requirement that the committee retain its own legal and financial advisors.[132] As for the shareholder vote, SB 21 changed the standard from a

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[126] *In re* Books-A-Million, Inc. S'holders Litig., 2016 Lexis 154 (Del. Ch. Oct. 10, 2016).
[127] Synutra, 195 A.3d at 763; *Note,* Flood v. Synutra International Inc., 132 HARV L. REV. 2386 (2019) [hereinafter: HLR Note].
[128] *See* Eric Talley, Sarath Sanga & Gabriel V. Rauterberg, *Delaware Law's Biggest Overhaul in Half a Century: A Bold Reform—or the Beginning of an Unraveling?*, CLS BLUE SKY BLOG (Feb. 18, 2025), https://clsbluesky.law.columbia.edu/2025/02/18/delaware-laws-biggest-overhaul-in-half-a-century-a-bold-reform-or-the-beginning-of-an-unraveling/.
[129] *See, e.g.*, Lora Kolodny, *Meta's Potential Exit from Delaware Had Governor Worried Enough to Call Special Weekend Meetings*, CNBC (Mar. 19, 2025), https://www.cnbc.com/2025/03/19/meta-billions-of-dollars-at-stake-in-overhaul-delaware-corporate-law.html (discussing the motivations of the legislature).
[130] *Compare* Del. S.B. 21, 153rd Gen. Assemb. § 144(b) *with* § 144(c). Non-controller conflicted transactions are governed by § 144(a).
[131] *Id*. § 144(c)(1).
[132] *See* Paul S. Bird et al., *Delaware Enacts Sweeping Changes to Treatment of Conflicted Transactions*, DEBEVOISE & PLIMPTON LLP (Mar. 28, 2025),

majority of the minority shares outstanding to a majority of the minority shares voted.[133] It also limited shareholders' inspection rights, thereby reducing the ability of minority investors to uncover flaws in the cleansing process.[134]

While these changes sparked extensive commentary by corporate legal academics and practitioners, one critical change received much less attention:[135] SB 21 also omitted the ab initio requirement as a prerequisite for cleansing.[136] Under SB 21, a controller seemingly need not commit to procedural safeguards at the outset.[137] It is now sufficient to condition the transaction on procedural safeguards at the time the deal is submitted to a shareholder vote.[138] This shift effectively eliminates meaningful temporal restrictions on freezeout negotiations: a controller may agree on the key economic terms of the deal with beholden directors or officers, and only thereafter convene a special committee of independent directors and seek minority approval.

This development raises a fundamental question. If the legislature had determined that freezeouts warrant maximum procedural protection, why dispense with the very requirement designed to safeguard the integrity of that process? Resolving this puzzle requires a deeper theory of why timing matters. This is the question we turn to next.

II. Why Eliminating the Ab Initio Requirement is Bad Policy

If Delaware courts consistently treated the ab initio requirement as essential, why did the legislature eliminate it altogether? Does the timing of procedural safeguards matter? If so, how?

This Part answers these questions and concludes that the legislature erred. Timing matters. Section A draws on a rich literature in negotiation theory to show how the early stages of bargaining often dictate the final outcomes. Section B explains how eliminating the ab initio requirement undermines a key tenet of Delaware's corporate law, namely, ensuring the integrity of internal corporate processes. Examining *when* procedural safeguards are put in place is often useful to distinguish meaningful oversight from cosmetic compliance. Indeed, Section B details how other legal fields employ a similar timing requirement to ensure that consent is

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https://www.debevoise.com/insights/publications/2025/03/delaware-enacts-sweeping-changes-to-treatment-of (summarizing the changes).

[133] *Id.*

[134] *See* Roy Shapira, *An Overlooked Cost of Delaware's Corporate Law Overhaul*, CLS Blue Sky Blog (Feb. 26, 2025), https://clsbluesky.law.columbia.edu/2025/02/26/an-overlooked-cost-of-delawares-corporate-law-overhaul/.

[135] Before SB 21, some commentators had called for bifurcating the procedural safeguards and cabining the definition of controller; very few, if at all, called for eliminating the ab initio requirement. *See, e.g.*, Hamermesh et al., *supra* note 53, at 325.

[136] More precisely, SB 21 removed the ab initio requirement *as an express prerequisite for cleansing*. As Part III *infra* argues, courts may still consider timing evidence under general fiduciary principles.

[137] Bird et al., *supra* note 132.

[138] *Id.*

meaningful. Section C considers three potential justifications for eliminating the ab initio requirement and finds each unconvincing.

A. Eliminating Ab Initio is Inconsistent with the Negotiation Literature

A rich body of scholarship on negotiations shows that the early stages of bargaining often shape the final outcome. Early communications anchor expectations, and early commitments are difficult to unwind.[139]

Indeed, one of the most robust findings in that literature is the "anchoring effect," which refers to the human tendency to adjust insufficiently away from an initial reference point.[140] Imagine a customer entering a jewelry store and seeing a ring marked at a "sale" price of $2,000 next to a crossed-out "original" price of $5,000. In that example, the jeweler may have anchored the customer's perception of the value of that ring. Even if the ring's true market value is $1,000, the $5,000 label may anchor the customer's perception, making $2,000 feel like a bargain rather than an overpayment. Pertinently here, the anchoring effect has been observed not only in controlled lab experiments or in negotiations between gullible consumers and sophisticated sellers, but also in high-stakes negotiations between sophisticated parties.[141]

Reflecting these dynamics, empirical studies confirm that the initial stages of M&A dealmaking often serve as a primary determinant of the final price.[142] These findings are consistent with anchoring theory, which suggests that the more complex a negotiation is, the more participants gravitate toward salient reference points.[143] In mergers, where the long-term value of the target company is inherently uncertain, early pricing signals—such as an initial offer or valuation range—tend to cabin subsequent bargaining (an "initial offer ± x%" mindset).[144] And once expectations are anchored, path dependence and escalation of commitment dynamics make it difficult for parties to deviate meaningfully from those early figures.[145]

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[139] *See, e.g.*, GUHAN SUBRAMANIAN, DEALMAKING: THE NEW STRATEGY OF NEGOTIAUCTIONS 16 (2d ed., 2020).

[140] *See* Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974) (introducing the phenomenon).

[141] *See* Mikko Hukkanen & Matti Keloharju, *Initial Offer Precision and M&A Outcomes*, 48 FIN. MGMT. 291 (2019) (synthesizing relevant studies).

[142] *See, e.g.*, Ronald W. Masulis & Serif Aziz Simsir, *Deal Initiation in Mergers and Acquisitions*, 53 J. FIN. QUANT. ANAL. 2389 (2018) (showing that who initiates the deal affects premiums and returns).

[143] On the importance of reference points in M&A negotiations, see Malcolm Baker, Xin Pan & Jeffrey Wurgler, *The Effect of Reference Point Prices on Mergers and Acquisitions*, 106 J. FIN. ECON. 49 (2012).

[144] *See* SUBRAMANIAN, *supra* note 139, at 16 (noting that the first offer influences negotiators' perception of where the "zone of possible agreement" lies). The point here is not that making the first offer is always beneficial; under certain conditions, it may be better to move second. Yossi Maaravi & Tamar Gur, *How Practitioners Decide When to Move First in Negotiations* 13 HUMAN & SOC. SCI. COMMC'NS 1 (2025). The point here is more modest: whatever the first move is and whoever makes it, early moves in negotiations often significantly shape the final outcome.

[145] "Escalation of commitment" refers to the tendency to stick with a chosen path even when later information suggests that switching paths would be preferable. On the phenomenon generally, *see* Amir N. Licht, *My Creditor's Keeper: Escalation of Commitment and Custodial Fiduciary Duties in the Vicinity of Insolvency*, 98 WASH. U. L. REV. 1731, 1737–44 (2021). On escalation dynamics in negotiations, see the practitioner's viewpoint at Bill Haneman, *Human Psychology Influences Negotiation Outcomes*, ZACHARY SCOTT, https://zacharyscott.com/human-psychology-influences-negotiation-outcomes/.

When the merger is negotiated with the company's own controller, anchoring effects can become even more pronounced due to information and power imbalances. A controller typically possesses superior information about the company's value relative to the outside directors with whom the controller negotiates.[146] These directors often find themselves in a reactive stance, responding to the controller's proposal rather than initiating their own. In third-party mergers, directors can debias anchoring effects by soliciting competing bids.[147] In controller going-private mergers, by contrast, the controller may indicate that they are not open to alternative bids, thereby effectively preventing directors from introducing meaningful outside benchmarks.[148]

The implication for corporate law is clear: procedural safeguards introduced midstream may be ineffective at dislodging anchoring and path-dependence dynamics in controller freezeouts.[149] To illustrate, consider two scenarios. In scenario A, a special committee hires financial advisors who provide valuations and set internal walkaway points before the controller presents a price. In scenario B, the committee starts operating only after the controller signals her desired price. All else equal, committee A is more likely to be insulated from anchoring effects, while committee B is likely to conduct its negotiations within a narrow band of "the controller's offer ± x%."

From a policy standpoint, then, it is both rational and necessary for corporate law to insist that controllers self-disable *before* they begin exerting influence. A law that takes seriously the internal ratification processes should be attentive not only to the formal mechanisms of disclosure and voting, but also to the integrity of the process that shapes those disclosures and votes. And the research on anchoring and path dependence suggests that controllers can critically influence committee deliberation and minority shareholder expectations already at the first stages of the process. As a result, caring about the integrity of the process means caring about *when* the controller self-disables.

A potential rebuttal is that appointing a special committee, even later in the process, can reset and debias the anchoring and path dependence effects. Sure, initial backchannel discussions between the controller and directors may have anchored certain directors' expectations. But at some stage, the company (seeking to secure SB 21's safe harbor) will formulate a committee of disinterested directors to lead negotiations. And that newly constituted committee will be mindful of the anchoring and discount the controller's initial overtures, or so the argument goes. But such an argument clashes with the clear findings in the psychology literature, which show that

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[146] Although outside directors may not be *financially* beholden to the controller, they may be disadvantaged in access to the information and expertise needed to evaluate the company's prospects. *See* Stevelman, *supra* note 43, at 874–75.
[147] Subramanian, *supra* note 68, at 54.
[148] *Id*; Restrepo & Subramanian, *supra* note 37 ("the vast majority of controlling shareholders indicate in their initial approach to the target that they are not interested in selling to a competing bidder").
[149] *Cf.* Donald C. Langevoort, *The Behavioral Economics of Mergers and Acquisitions*, 12 TRANSACTIONS: TENN. J. BUS. L. 65 (2011) (explaining more generally how behavioral biases affect mergers-and-acquisitions activity).

anchoring and path-dependence biases affect even savvy professional decisionmakers, and that being aware of these biases (or being warned to ignore them) is not enough to debias decision-making.[150] In other words, the literature suggests that the effective way to preserve the integrity of the process is to impose procedural conditions that establish the rules of the game ex ante (here, the ab initio mandate), before certain outcome-specific anchors (here, the proposed price range or structure of the deal) take hold.

B. Eliminating Ab Initio is Inconsistent with Corporate Law's Focus on Process Integrity

1. <u>Corporate Law Has Always Focused on Ensuring Process Integrity</u>

At its core, corporate law is about respecting internal corporate procedures.[151] Courts cannot—and should not—second guess the substance of business decisions.[152] And so even when a transaction is conflicted, courts often defer to the internal processes by which those decisions are made, on the theory that well-structured procedures can screen out value expropriation, approximate arm's-length outcomes, and enable valid corporate consent to a transaction involving one of the corporation's fiduciaries. If management is conflicted, let the board review the deal; if some directors are conflicted, delegate the review to a committee of disinterested directors; if a controller is conflicted, require a vote of disinterested shareholders; and so on.[153]

Under this proceduralist framework, the court's primary role is to ensure the integrity of whatever internal mechanism is meant to cleanse the conflict.[154] If the required mechanism is a special committee, courts examine whether the committee's members are truly independent and empowered.[155] If the mechanism is a shareholder vote, courts assess whether the vote was fully informed and uncoerced.[156] In each setting, the question is not merely whether the corporation followed the formal steps, but whether those steps generated the kind of disinterested, informed consent that can justify judicial deference.

Focusing on process integrity is both necessary and rational. It is necessary because, without scrutiny, corporate procedures tend to devolve

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[150] *See, e.g.*, Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 LAW & HUM. BEHAV. 89, 101–02 (1995) (discussing the failure of debiasing techniques in the context of judicial warnings to jurors); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 799–803 (2001) (discussing similar failures in the context of professional judges).

[151] *See* Dalia T. Mitchell, *Proceduralism: Delaware's Legacy*, 2 U. CHI. BUS. L. REV. 333, 337 (2023); James An, *Substance and Process in Corporate Law*, 20 N.Y.U. J.L. & BUS. 187, 189–90 (2024) ("the push toward process is evident in nearly every aspect of Delaware corporate law"); Bratton & Sepe, *supra* note 28, at 896.

[152] On the advantages of procedural review over substantive review in our context see Alessio M. Pacces, *Procedural and Substantive Review of Related Party Transactions*, *in* THE LAW AND FINANCE OF RELATED PARTY TRANSACTIONS 181 (Luca Enriques & Tobias H. Tröger eds., 2019); Bratton & Sepe, *id.*

[153] *See, e.g.*, Hill & McDonnell, *supra* note 3, at 910.

[154] Bratton & Sepe, *supra* note 28, at 919.

[155] Hill & McDonnell, *supra* note 3, at 910.

[156] *Id.*

into "cosmetic compliance."[157] The term refers to internal structures that appear to check the right boxes on paper but in practice merely rubber-stamp a predetermined outcome.[158] A wide body of scholarship across regulatory contexts has shown that self-regulation typically fails to achieve its intended goals unless it is backstopped by a credible background threat of external enforcement.[159] In corporate law, such external enforcement typically comes from private litigation probing issues such as whether the vote was informed and whether the committee was empowered.

It is also rational for courts to focus on the integrity of the process, because this is where their comparative advantage lies.[160] Courts are not well-positioned to assess whether a deal is fair in economic terms, but they are well-equipped to assess whether decision-making structures meet basic standards of procedural integrity.[161] Consider, for example, a shareholder vote, whereby shareholders consent to a conflicted transaction. Courts understand that for such consent to be valid, it must rest on all the material information and be free from coercion.[162] And they can relatively easily assess these conditions (such as verifying whether shareholders received adequate disclosures before voting).[163] Such an inquiry falls squarely within the judicial toolkit.[164]

Indeed, focusing on process integrity is not only the necessary and rational approach in theory, but also the approach that Delaware courts have consistently taken in practice. Former Chancellor Allen captured this point succinctly: "what the chancery judges are driven to do is to try and look to the integrity of the procedures."[165] In case after case, Delaware courts have seen through efforts to obscure conflicts or manipulate formal structures.[166]

This understanding of the judicial role is also shared by the target audience, namely, legal advisors to corporate decisionmakers. For instance, one leading law firm explains to its clients that the caselaw on special committees "show[s] that the courts are effective in discerning sham processes."[167] Another law firm reminds clients that *MFW* protection will only be granted where the special committee "follows proper procedures."[168] In both cases, the message is clear: corporate

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[157] On the evolution of the term and its meaning, *see* Veronica Root Martinez, *Complex Compliance Investigations*, 120 COLUM. L. REV. 249, 299 (2020).
[158] *See* Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 491 (2003).
[159] *See, e.g.*, Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More Than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. Q. 361 (2010) (providing empirical evidence from the environmental context).
[160] Bratton & Sepe, *supra* note 28.
[161] *Id.*
[162] *Id.* at 911.
[163] *Id.*
[164] *Id.*
[165] Mitchell, *supra* note 151, at 368 n.181 (quoting former Chancellor Allen's observation that "what the chancery judges are driven to do is to try and look to the integrity of the procedures").
[166] *See, e.g.*, Gatz v. Ponsoldt, 925 A.2d 1265, 1279 (Del. 2007).
[167] Stephen Fraidin & Stefanie M. Wool, *Special Committees: Process Makes Perfect*, 243 N.Y. L.J. (Apr. 8, 2010), https://www.kirkland.com/siteFiles/Publications/9A4F2C30E41E45C58AFDC93A2BAAC9EF.pdf.
[168] Andrew R. Brownstein et al., *Use of Special Committees in Conflicted Transactions*, HARV. L. SCH. F. CORP. GOVERNANCE (Sep. 23, 2019), https://corpgov.law.harvard.edu/2019/09/23/use-of-special-committees-in-conflict-transactions/.

decisionmakers must take procedural integrity seriously, or risk judicial intervention.

The emphasis on process integrity extends beyond our context of cleansing conflicted transactions. Consider for example the doctrine of oversight duties (often dubbed *Caremark*, after Delaware's leading precedent).[169] This doctrine requires directors to be proactive about compliance: they must install reporting systems to monitor compliance and must respond to "red flags" that these systems reveal.[170] But despite this affirmative duty, the substantive standard for liability remains extremely deferential: courts will intervene only if directors *knowingly* breached their obligations.[171] That standard creates an obvious risk of cosmetic compliance: virtually every large company has a compliance system, and formal board minutes (carefully crafted after the fact by lawyers) will rarely document deliberate inaction.[172]

Over time, Delaware's courts have developed meaningful proxies to decipher whether directors were merely "going through the motions" or genuinely attempting to address noncompliance.[173] The opioid crisis oversight cases provide vivid examples. In *AmerisourceBergen*, director defendants showed evidence that they responded to warnings, but the court found that these responses were superficial, and that directors had delayed more potent recovery measures in hopes of using them as a bargaining chip in a future settlement with regulators.[174] In *Walmart*, the court criticized directors for adopting nice-sounding policies while not allocating enough resources for successful implementation of said policies.[175] In both cases, the court thus focused on assessing whether internal procedures had real substance or were simply window dressing.

Nowhere in corporate law has this emphasis on process integrity been more explicit than in *MFW* and its progeny. The *MFW* opinion itself stressed that the dual procedural safeguards must be of sufficient integrity.[176] And as two corporate law luminaries summarized *MFW*'s progeny, it "became clear that courts would not tolerate a rote, hollow application of the rule announced in *MFW*: where it appeared that the two-part approval structure was abused through manipulative and incomplete disclosures by the controlling stockholder, the protection otherwise available through use of that structure disappeared."[177] The heightened scrutiny of the process makes sense: recall that *MFW* asked courts to trust internal procedures in the one setting (controller freezeouts) where

[169] *In re* Caremark Int'l Inc. Deriv. Litig., 698 A.2d 959, 967 (Del. Ch. 1996).
[170] *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[171] *Id.*
[172] Shapira, *supra* note 27, at 484.
[173] *Id*. at 472.
[174] *In re* AmerisourceBergen Corp. S'holder Litig., No. 2021-1118-JTL, 2022 WL 17841215, at *16 (Del. Ch. Dec. 22, 2022).
[175] *In re* Walmart Inc. S'holder Litig., No. 2021-0827-JTL, 2023 WL 3093500, at *35 (Del. Ch. Apr. 26, 2023).
[176] *MFW*, 67 A.3d at 517.
[177] Lawrence A. Hamermesh & Leo E. Strine, *Fiduciary Principles and Delaware Corporation Law: Searching for the Optimal Balance by Understanding That the World Is Not*, *in* OXFORD HANDBOOK OF FIDUCIARY LAW 871 (Evan J. Criddle et al. eds., 2019).

Delaware law had long refused to trust them. For courts to defer, these procedures must be implemented with high fidelity.[178]

The key question, then, is *how* to ensure that the dual procedural safeguards are of high integrity. A large part of the answer, as the next Section explains, has been the ab initio requirement.

2. Ab Initio is an Effective Tool for Ensuring Process Integrity

Between 2015–2025, the ab initio requirement emerged as the single most effective tool for minority shareholders to challenge the integrity of procedural safeguards in conflicted controller transactions.[179]

The reason is twofold: the ab initio requirement is harder for corporate insiders to falsify, and easier for judges to administer, relative to other integrity-forcing mechanisms.

Ab initio is harder to fabricate after the fact because it turns on a fixed and observable moment: when the controller formally conditions the deal on procedural safeguards. Contrast this binary, documentable event with more fluid or subjective indicators of process integrity, such as whether a special committee was "effective." It is easier for insiders to reconstruct a paper trail showing that the committee independently reached a price that conveniently results in a modest price increase. It is more difficult for insiders to backdate the formation of a special committee or its retention of advisors.

For similar reasons, the ab initio requirement is relatively easier for judges to administer. The requirement hinges on a clear, time-stamped event, rather than asking courts to conduct a subjective inquiry into the quality of negotiations. This matters when evaluating the concern (raised by SB 21 proponents) that litigation under the pre-SB 21 regime was too costly.[180] Sure, the ab initio requirement invites litigation. Sure, it calls on plaintiff attorneys to dig through internal corporate communications. But the same is true for every process-integrity requirement. The relevant question is which integrity-forcing mechanism allows more effective screening of lawsuits. A timing-based rule allows for early-stage dismissal if the condition is met, thereby reducing the need for prolonged discovery or trials over process quality.

In short, ab initio is a relatively efficient mechanism to deter cosmetic compliance in conflicted transactions. Eliminating it invites gamesmanship. By allowing corporate insiders to introduce procedural safeguards later in the process, SB 21 makes it easier for insiders to produce a paper trail mimicking arm's-length bargaining. For example, insiders may frame the controller's initial offer as lower than what the committee "negotiated," even if the committee had no meaningful role in shaping the outcome. That kind of narrative is much harder to fabricate when an

[178] Hamermesh et al., *supra* note 53, at 339.
[179] *Supra* note 14.
[180] *Infra* Section II.C.2.

independent committee is formed, hires its own advisors, and develops a valuation framework before ever hearing the controller's proposal.

Beyond inviting gamesmanship by controllers, eliminating *ab initio* also weakens the reputational incentives of independent directors to stand up to controllers. Committing to a majority-of-minority vote at the outset affects the special committee: When directors know from the beginning that if they do not negotiate diligently with the controller they may "suffer the reputational embarrassment of repudiation at the ballot box," they have stronger incentives to bargain aggressively before the deal reaches shareholders.[181] By contrast, if the shareholder vote condition is added only after the controller has shaped the deal's price and structure, the vote may discipline directors less effectively because by then the committee's bargaining posture has already been set.

3. <u>Other Legal Fields Employ Their Version of Ab Initio for Similar Functions</u>

Corporate law is hardly the only field that has adopted and refined an ab initio requirement. While the term most commonly appears in the context of voidness (as in a contract deemed void *ab initio*),[182] it also frequently arises in determining when legal rights and obligations commence. Examining how other areas of law apply a timing requirement can shed light on the function and interpretation of ab initio in the corporate law setting. Consider three illustrative examples.

First, the most natural source of comparison is *fiduciary law*, and particularly the common-law tradition of determining *when* fiduciary obligations begin. Across legal domains, fiduciary duties attach not at a formal milestone, but at a moment when A de facto undertakes to act for B with discretionary power over B's interests.[183] For instance, in the context of corporate formation, a promoter typically becomes a fiduciary not upon the company's incorporation, but earlier, when they begin organizing the company.[184] The logic is that the promoter wields discretionary control over critical terms that shape the future structure and governance of the company long before formal incorporation occurs.[185]

Applying this logic to conflicted controller transactions is straightforward.[186] If corporate law sets out conditions under which certain conflicted transactions are insulated from judicial review, then the timing requirement should attach when the controller first uses their fiduciary position to promote a self-interested deal. The first "promotion" typically

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[181] *See* Martha Stewart 2017 WL 3568089, at *16-18.
[182] *See* RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (AM. L. INST. 1981).
[183] *See* Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 969, 1012 (2013).
[184] *See, e.g.*, Roni LLC v. Arfa, 18 N.Y.3d 846, 848 (2011).
[185] *See* PAUL L. DAVIES, SARAH WORTHINGTON & EVA MICHELER, GOWER AND DAVIES' PRINCIPLES OF MODERN COMPANY LAW 108–09, 112 (8th ed. 2008); Erlanger v. New Sombrero Phosphate Co. (1878) 3 App. Cas. 1218, 1236 (HL).
[186] The question here is not whether controllers are considered fiduciaries under corporate law (they are. Pepper v. Litton, 308 U.S. 295, 306 (1939)). The question is what general fiduciary law can teach us about scrutinizing internal corporate processes.

occurs when the controller conveys a concrete transactional direction, such as a proposed price, to officers or directors. This moment precedes the formal announcement of the proposed transactions to shareholders (ahead of their votes), which is the point at which SB 21 permits procedural safeguards to be imposed.

A second example comes from the related field of *securities regulation*—particularly the treatment of "soft information."[187] The term refers to forward-looking statements or subjective projections that are not objectively verifiable and may be less reliable than hard, factual data.[188] Under securities law, soft information typically need not be disclosed unless it becomes "material."[189] The central question is therefore one of timing: when does soft information become sufficiently concrete and important so that it must be disclosed?

Interestingly, that timing question arises frequently in our context of mergers and acquisitions. Courts have long recognized that even early-stage deal negotiations may become material before the parties reach agreement, for example when the deal is of high magnitude (based on the "probability × magnitude" framework for assessing materiality).[190] From a securities-law perspective, then, substantive negotiations over a freezeout merger can cross a legal threshold well before the parties have reached an agreement or submitted the deal to a shareholder vote. The theoretical underpinnings of this approach echo the behavioral dynamics discussed in Section A above: early communications can serve to signal intentions, anchor expectations, and shape the contours of the deal to come.

Our third and final example comes from the remote legal field of international law and development—specifically, the principle of "Free, Prior, and Informed Consent" (FPIC).[191] FPIC governs the rights of indigenous peoples in the context of large-scale infrastructure projects.[192] The core idea is that developers must secure the consent of indigenous communities *prior to* commencing any project that affects indigenous land or resources.[193] To reiterate, this consent must be prior and not merely a retrospective ratification.[194] The emphasis on "prior" is meant to ensure that affected communities retain meaningful leverage to negotiate on equal footing with developers.[195] A community that negotiates when the project is

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[187] *See, e.g.*, Susanna Kim Ripken, *Predictions, Projections, and Precautions: Conveying Cautionary Warnings in Corporate Forward-Looking Statements*, 2005 U. ILL. L. REV. 929, 937.

[188] *See* Marc Steinberg & Robin Goldman, *Issuer Affirmative Disclosure Obligations—An Analytical Framework for Merger Negotiations, Soft Information, and Bad News*, 46 MD. L. REV. 923, 934–35 (1987).

[189] *Id.*

[190] Basic Inc. v. Levinson, 485 U.S. 224, 238 (1988). To be sure, "materiality" does not always create an affirmative duty to disclose. But once a company chooses to speak (or is otherwise obligated to speak), it may not mislead investors by omitting or obscuring details about early-stage negotiations in such circumstances.

[191] For an overview, *see* Mauro Barelli, *Free, Prior, and Informed Consent in the UNDRIP*, *in* THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY 247 (Jessie Hohmann & Marc Weller eds., 2018).

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.*

already underway or finished loses much of its leverage.[196] When a project is submitted to retrospective approval, the developers have already sunk substantial resources into the project, and the project momentum effectively marginalizes the voices of those who might object.[197] The rationale is not limited to power imbalances. Timing also affects how information is processed. When communities are asked to approve a project retrospectively, developers can more easily put a spin on scenarios of success and make the costs of undoing the project look more salient.

The corporate-law analogue is straightforward: just as "prior" consent helps ensure that affected communities can influence a project before its trajectory is fixed, an ab initio requirement helps ensure that minority shareholders' consent is meaningful by requiring the controller to cede potent bargaining power before the deal process is shaped.

C. Potential Rebuttals: Why Eliminating Ab Initio Could Make Sense

Proponents of SB 21 have extolled several virtues of overhauling the law on conflicted transactions—such as increasing certainty and limiting judicial overreach—but they have not clearly explained why SB 21 eliminated the ab initio requirement.[198] This Section surveys academic and practitioner commentary around the legislative overhaul, to reconstruct three potential justifications.

The first is the "tender-bypass argument," which maintains that ab initio arose as a patch to address disparities between merger freezeouts and tender-offer freezeouts. By equalizing the legal treatment of mergers and tender offers, SB 21 rendered the ab initio requirement superfluous, or so the argument goes. The second is the "foot-fault litigation argument," which sees ab initio as a magnet for costly litigation over formal missteps, rather than substantive investor protection. Finally, the "substitute forces argument" suggests that even without a rigid timing requirement, directors' reputational concerns and institutional investors' voting power will discipline corporate insiders. The Section evaluates these rationales and ultimately finds each one unpersuasive.

1. The Tender-Bypass Argument

One potential justification for eliminating the ab initio requirement rests on viewing SB 21 as a holistic reform of freezeout law. SB 21 did more than just remove the timing requirement: it also harmonized the legal treatment of merger- and tender-offer freezeouts. This harmonization eliminates the underlying asymmetry that originally led the *MFW* court to insist on a timing requirement.

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196 For an overview of the various considerations *see* EMIL SALIM, STRIKING A BETTER BALANCE: THE FINAL REPORT OF THE EXTRACTIVE INDUSTRIES REVIEW (2003).
197 *Id.*
198 *See, e.g.*, Jonathan R. Macey, *Delaware Law Mid-Century: Far from Perfect but Probably Not Leaving for Las Vegas*, 50 J. CORP. L. 1111 (2025).

To appreciate this logic, it is useful to take a step back and explain the pre-*MFW* (pre-ab initio) doctrinal landscape.[199] Although both freezeout structures aim at achieving the same outcome of privatizing a public company, they were subject to different legal regimes.[200] A freezeout via merger required both board and shareholder approval and was reviewed for entire fairness.[201] A tender-offer freezeout, by contrast, did not require board approval and was arguably not subject to entire fairness review.[202]

This divergence created a loophole that controllers wishing to expropriate minority investors could exploit.[203] If a special committee negotiated a merger too diligently for the controller's liking, the controller could threaten to abandon negotiations and proceed with a tender offer instead (bypassing the committee and going straight to shareholders).[204] To illustrate, consider *Lynch*,[205] where the controlling shareholder (Alcatel) sought to freeze out the minority shareholders, proposing $14 per share in cash.[206] Lynch's special committee countered with $17.[207] Alcatel was willing to go to $15.5 as its final offer.[208] When the committee did not agree, Alcatel threatened to go directly to shareholders with a tender at a price lower than $15.5.[209] Faced with this tender-bypass threat, the committee caved and recommended Alcatel's desired price of $15.5.[210]

MFW introduced the ab initio requirement to neutralize such threats, or so the potential argument goes. By requiring the controller to commit at the outset to let the special committee block the transaction, the ab initio requirement disabled the controller from using the threat of a tender offer to pressure the board midstream.

SB 21 arguably renders this timing requirement redundant. By subjecting merger- and tender-offer freezeouts to the same legal treatment, the statute eliminates the legal arbitrage that once made tender-bypass threats effective.[211] A controller's threat to shift from a merger to a tender offer is not credible when both parties understand that such a shift will not improve the legal position of the controller.[212]

The tender-bypass argument mischaracterizes the ab initio requirement too narrowly, in ways that conflict with the evolution of Delaware corporate law and underlying policy considerations.

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[199] Hamermesh et al., *supra* note 53, at 334.
[200] Restrepo & Subramanian, *supra* note 4, at 208–9.
[201] *Id*. at 209.
[202] *Id*; Glassman v. Unocal Exploration Corp., 777 A.2d 242 (Del. 2001).
[203] Subramanian, *supra* note 68, at 7.
[204] Hamermesh et al., *supra* note 53, at 339.
[205] Lynch, 638 A.2d at 1113.
[206] *Id*.
[207] *Id*.
[208] *Id*.
[209] *Id*.
[210] *Id*.
[211] S.B. 21 § 144(e)(6) (grouping tender offers together with other going-private transactions for purposes of the cleansing mechanism).
[212] *Cf*. Hamermesh et al., *supra* note 53, at 343 (noting, before SB 21's enactment, that "if the Delaware Supreme Court were to make clear that a going private tender offer by a controller would be subject to the same level of judicial review as a going private merger… the condition in *MFW* that the controller cannot bypass the special committee or the minority stockholders would be rendered superfluous.").

In the freezeout context, Delaware's Supreme Court explicitly referenced the "anchoring" literature when interpreting the ab initio requirement.[213] And since anchoring effects are not dependent on the credibility of a tender-bypass threat, it is clear that the Supreme Court did not view the tender-bypass threat as the sole reason for insisting on an ab initio requirement.

Outside the freezeout context, Delaware courts have repeatedly applied the ab initio requirement as an administrable indicator of process integrity across a range of conflicted transactions—not just in controlled companies[214] but also in widely held companies.[215] Such applications reflect, again, the courts' view that *ab initio* serves purposes that go beyond merely preventing controllers' shifts from mergers to tender offers.[216]

The lessons from the negotiation literature similarly suggest that the purported elimination of a tender-bypass threat does not obviate the need for an ab initio requirement.[217] A process that begins under a controlled mindset (beholden directors communicating with their controller) may not genuinely transform into arm's-length bargaining later on, simply because the early (beholden) stages continue to shape the trajectory of negotiations in later (supposedly independent) stages.[218]

2. The Foot-Fault Litigation Argument

Another potential justification views the elimination of *ab initio* as a necessary step to curb the costs of excessive litigation. Indeed, this rationale appears in a footnote to a memo circulated by the law firm that played a central role in drafting SB 21.[219] The footnote contends that while the ab initio requirement sounded good in theory, it "proved in practice to introduce an unacceptable level of 'foot-fault' risk and perversely provided a disincentive to the deployment of sound procedural protective devices."[220]

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[213] Olenik, 208 A.3d at 717 n.65.

[214] *See, e.g.*, *In re* Martha Stewart Living Omnimedia, Inc. S'holder Litig., No. 11202-VCS, 2017 WL 3568089, at *1–2, *15–25 (Del. Ch. Aug. 18, 2017) (holding, in a going-concern conflicted-controller transaction, that the ab initio requirement was necessary to ensure that the process is free from tainted influence).

[215] *See, e.g.*, Salladay, 2020 WL 954032, at *9 ("Even in a non-control setting, commencing negotiations prior to the special committee's constitution may begin to shape the transaction in a way that even a fully empowered committee will later struggle to overcome… [In that scenario,] a bare-knuckle contest over price is unlikely, and the existence of the committee is insufficient to replicate an arm's-length transaction. Consequently, it is also insufficient to revive business judgment review").

[216] To be sure, some have criticized these cases for extending *MFW* beyond its original freezeout contexts. Yet the relevant point here is not *which* procedural safeguards should apply, but how courts should assess the integrity of whichever safeguards do apply. Even if one accepts SB 21's distinction between freezeouts (which require dual safeguards) and non-freezeouts (which require only one safeguard), the timing question remains: when must these safeguards be implemented to be meaningful?

[217] Freezing out minority shareholders through a tender offer does not eliminate anchoring concerns. After all, when a controller's first price is made public at launch, it immediately becomes a salient reference point for both minority shareholders and directors.

[218] *See* Section II.A *supra*; Salladay, 2020 WL 954032, at *23.

[219] Richards, Layton & Finger, P.A., *Overview of the DGCL's Newly-Enacted Safe Harbor Procedures and Books and Records Regime* (Apr. 2, 2025), https://www.rlf.com/overview-of-the-dgcls-newly-enacted-safe-harbor-procedures-and-books-and-records-regime/.

[220] *Id.* at 1 n.1.

The real question is not whether the ab initio requirement leads to litigation (it does), but whether the costs of such litigation outweigh its benefits. The "foot-fault litigation" argument overstates the costs and understates the benefits.

To illustrate why the costs are exaggerated, one need only review the actual cases that dealt with ab initio between 2015–2025. As Section I.B demonstrated, Delaware courts have already eschewed a rigid approach: when the problems with the procedural safeguards amounted to foot faults or honest mistakes, courts summarily dismissed the lawsuits.[221] This reflects Delaware's courts' broader tradition of valuing consistency, stability, and deference to the business judgment of corporate boards.[222]

The foot-fault litigation argument also underplays the benefits of litigation. Ex post scrutiny of procedural safeguards is not a bug but rather a feature, serving as a backstop against cosmetic compliance. Earlier we mentioned the rich body of interdisciplinary research, which shows that self-regulatory mechanisms often fail to deter misconduct unless accompanied by a credible threat of external enforcement.[223] A statutory safe harbor not backed by a real threat of litigation is likely to incentivize corporate insiders to adopt cosmetic rather than meaningful procedural safeguards.

In fact, litigation over the integrity of procedural safeguards yields benefits that often extend beyond the immediate dispute in question. There is a broader point in play here, about how corporate law guides behavior.[224] Corporate law affects behavior less through sanctions imposed after a full trial, and more through the signals embedded in the early stages of the process. Importantly, the earlier stages of the process provide courts with opportunities to comment on what is expected of corporate insiders (thereby shaping norms), and produce information about whether the insiders in a given case behaved according to or below the norm (thereby shaping reputations).[225] Indeed, many of today's widely accepted practices for designing special committees emerged from past Delaware cases.[226] In evaluating the value of process-integrity litigation, one should therefore recognize its role in helping the market develop and enforce best practices.

3. The Substitute Forces Argument

A final potential justification holds that the ab initio requirement is redundant given the presence of other forces that can ensure process integrity. Even under SB 21's revised framework, freezeouts must still

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[221] *See, e.g.*, Synutra, 195 A.3d 754; Swomley, 2014 WL 4470947.
[222] HLR Note, *supra* note 127, at 2390 & n.45.
[223] Short & Toffel, *supra* note 159.
[224] *See* Luca Enriques, Matteo Gatti & Roy Shapira, *How the EU Sustainability Directive Could Reshape Corporate America*, 78 STAN. L. REV. 241, 278 (2026).
[225] On these indirect effects of Delaware corporate litigation, *see generally* Edward Rock, *Saints and Sinners: How Does Delaware Corporate Law Work?*, 44 UCLA L. REV. 1009, 1017 (1997) (discussing litigation's impact on norms); Roy Shapira, *A Reputational Theory of Corporate Law* 26 STAN. L. POL'Y REV. 1, 15 (2015) (discussing litigation's impact on reputations).
[226] Bratton & Sepe, *supra* note 28, at 926 ("Delaware caselaw became a focal point in self-regulatory corporate governance discussions").

receive approval from disinterested directors and disinterested shareholders. The reputational concerns of independent directors will deter them from appearing as "a stooge for controllers."[227] And the influence of institutional investors will check any deal that is unfair to shareholders, or so the argument goes.[228]

This "substitute forces" theory sits uneasily with the logic of SB 21 itself. The statute preserved both procedural safeguards in the context of freezeouts, precisely because neither mechanism alone can be trusted to provide sufficient protection.[229] If directors' reputational concerns are effective enough, why require a majority-of-minority vote? If institutional investors can easily rein in controllers, why demand approval by a committee of independent directors?[230]

More importantly, the substitute-forces argument clashes with the theory and evidence of how directors' reputational concerns and shareholder voting actually operate. Consider first the argument about independent directors: directors who care about their labor-market reputation will not relent to controllers, for fear of facing "adverse electoral consequences (withhold votes) from institutional investors and proxy advisors" when they are up for reelection.[231] Such an argument rests on an overly optimistic assumption of reputation markets. Several conditions have to hold for reputational discipline to work effectively: from consistent revelation of information to certification of said information, to its wide diffusion, and so on.[232] These conditions typically hold when litigation feeds the market quality information on how directors behaved.[233] By significantly reducing the probability of information production through litigation, SB 21 also reduced the likelihood that reputational discipline will work effectively.

The reputational-forces-will-take-care-of-things argument also ignores the dynamic equilibrium element here. If SB 21 makes it easier for controllers to extract private benefits,[234] and if, as a result, more companies over the long run will be controlled (rather than widely-held),[235] then a reputation for saying no to controllers will become less desirable.[236] In a state of the world where controllers are more prevalent and more unbound,

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[227] Hamermesh et al., *supra* note 53, at 341 n.95.
[228] *Id.* at 341 (noting that institutional investors "had shown themselves willing to criticize" and "dissent at the ballot box" even in companies with controlling shareholders).
[229] M&F Worldwide, 88 A.3d at 643 (holding that the special committee and shareholder vote each "serve independent integrity-enforcing functions" and that their combination is necessary when there is a compelling need to ensure process integrity); *MFW*, 67 A.3d at 526 (emphasizing that only a "potent combination" of procedural safeguards can achieve investor protection).
[230] *Cf.* Zohar Goshen, Assaf Hamdani & Dorothy Lund, *Fixing* MFW*: Fairness and Vision in Controller Self-Dealing*, 15 HARV. BUS. L. REV. 577, 588 (2025) (suggesting that an informed vote by disinterested shareholders matters more for investor protection than special-committee bargaining, even when the latter is conducted with integrity).
[231] Hamermesh et al., *supra* note 53, at 341 n.95 (contending that "other boards seeking new directors will also likely shy away from the negative attention they can draw to themselves by nominating a director now regarded by institutional investors and their proxy advisors as a stooge").
[232] *See* ROY SHAPIRA, LAW AND REPUTATION: HOW THE LEGAL SYSTEM SHAPES BEHAVIOR BY PRODUCING INFORMATION 11–35 (2020).
[233] *Id.* at 36–74.
[234] Bebchuk & Kastiel, *supra* note 34.
[235] *Id.*
[236] *See generally* Doron Levit & Nadya Malenko, *The Labor Market for Directors and Externalities in Corporate Governance*, 71 J. FIN. 775 (2016) (formally theorizing such dynamics).

a reputation for being a stooge of controllers may actually be more desirable for a director seeking positions.[237]

Similarly, theoretical and empirical studies suggest that one should be skeptical about treating a minority-shareholder vote as a substitute for early process integrity in M&A deals.[238] Without insistence on the timing of procedural safeguards, shareholder consent is less likely to be fully informed and reliable.

III. IMPLICATIONS: HOW TO REDISCOVER CORPORATE LAW'S BEGINNINGS

Our story thus far has been straightforward: the legislative overhaul risks undermining corporate law's ability to ensure the integrity of processes meant to protect investors. This Part examines what, if anything, can be done to preserve effective investor protection in a post-SB 21 world.

Section A outlines four practical implications for how courts can respond. First, courts can and should still scrutinize procedural safeguards using general principles of fiduciary law. Second, courts should distinguish between types of conflicted transactions in that respect: scrutinizing the timing is more appropriate in freezeouts than in non-freezeout transactions. Third, when scrutinizing the timing, courts should adopt a more functional test for defining when negotiations fully begin (and forgo the "soccer game" analogy). Finally, the Section highlights how the overhaul of DGCL §144 (relaxing requirements for cleansing conflicted transactions) intersects with the overhaul of DGCL §220 (narrowing shareholder inspection rights). Due to the latter, even if courts are willing to continue to scrutinize the timing of procedural safeguards, plaintiffs may lack the information needed to bring these cases to court to begin with. To mitigate the negative effects of such a development, courts should liberally interpret the carveout in Section 220, in ways that allow outside shareholders to probe the internal processes in freezeouts.

Section B steps back to extract broader lessons from our deep dive into the ab initio saga, revisiting timely debates over state competition in corporate law (is it a race to the bottom?), the role of specialized business courts, and the interdependencies between securities regulation and corporate law.

A. Practical Guidance on Enforcing Process Integrity

1. Whether to Scrutinize Timing

Can courts continue to scrutinize the timing of procedural safeguards after SB 21? The statute's ab-initio reform was notably subtler

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[237] *Id.*

[238] *See* James D. Cox, Thomas J. Mondino & Randall S. Thomas, *Understanding the (Ir)Relevance of Shareholder Votes on M&A Deals*, 69 DUKE L.J. 503 (2019) (synthesizing the theory and presenting new evidence).

than its other provisions: the legislature did not explicitly state "the ab initio requirement is repealed." Instead, it simply omitted any reference to the caselaw terminology of "from the outset" when prescribing the cleansing mechanisms. One could therefore argue that courts may still read an ab initio requirement back into the statute as an implied prerequisite for cleansing conflicted transactions. I do not subscribe to this view.

SB 21 *does* reference timing (albeit subtly) when requiring controllers to condition the transaction on shareholder approval at the time the transaction is submitted to a vote. The legislation also stipulates that courts may not impose additional formal requirements beyond those specified in the statute. Moreover, the statute's animating purpose was to streamline doctrine and reduce judicial second-guessing. In light of both text and legislative intent, my view is that SB 21 eliminated *ab initio* as a formal statutory cleansing requirement.

But while courts are unlikely to engage in full-blown ab initio analysis, that does not mean that they will avoid scrutinizing the timing altogether. Nor should they. Even under SB 21, courts retain discretion to determine whether procedural safeguards were meaningfully implemented or manipulated.[239] Suppose a special committee is formed only after price negotiations are substantially complete. In that case, a court could reasonably conclude that the committee was effectively neutered, such that the safe harbor does not apply.

Continuing to insist on process integrity (and within it, on timing) is both necessary and feasible. It is necessary in the sense that without a judicial backstop, the market is unlikely to effectively police such transactions. Indeed, *MFW* and its precursors and progeny, as well as SB 21 itself, are all based on suspicion that the market, when left to its own devices, has a hard time policing controller freezeouts.[240]

Scrutinizing the timing is also feasible, in the sense that the costs of such judicial scrutiny are limited, for three reasons. First and most basically, courts are far better equipped for this type of scrutiny (evaluating the timing of procedural safeguards) than they are at assessing the substance of business decisions. Second, SB 21 itself reduces the risk of judicial errors by limiting the scrutiny to specific types of transactions (controller freezeouts) and to specific types of controllers (those with clearly defined voting power). Finally, even if courts occasionally err in evaluating timing, the costs of such errors are limited given the procedural stance. Say that a court errs by suspecting the integrity of a process that did in fact mimic arm's-length bargaining. Such an error does not terminate the case; it merely prevents early dismissal at the pleading stage.[241] Even if a case survives the pleading stage, defendants still have ample opportunity to demonstrate that

[239] Delaware's Supreme Court has made that point clear when rejecting constitutional challenges to SB 21. *See* Rutledge v. Clearway Energy Grp. LLC, 2026 WL 548504, at *11 (Del. Feb. 27, 2026).
[240] Section I.A *supra*.
[241] Indeed, courts emphasized "strict compliance" with the *MFW* framework precisely because satisfaction of that framework justifies dismissal at the pleading stage. *See* Martha Stewart 2017 WL 3568089, at *18-19.

the transaction was fair. And showing entire fairness is hardly an insurmountable hurdle.[242]

In other words, courts should not treat SB 21 as forbidding all timing scrutiny. The statute removes ab initio as a formal safe-harbor prerequisite, but timing can still matter as evidence of whether fiduciaries satisfied their duties and whether the cleansing process was genuine. Whatever costs remain for judicial scrutiny of the timing of procedural safeguards, these costs can be further curbed with simple design choices regarding how to scrutinize the beginning and in what transactions to do so. This is what Section 2 and Section 3 below elaborate on.

2. How to Scrutinize Timing

Assuming courts will continue to scrutinize the timing of procedural safeguards, the next question becomes how to define when "the beginning" occurs. Here, the analysis suggests a slight modification of the approach that *Synutra* adopted. *Synutra* was right in holding that not all exploratory discussions contaminate the integrity of the process. Purely generic expressions of interest—along the lines of "we're not sure about the future of this subsidiary, and so we might at some point be open to merging it into our operations"—should not count toward an ab-initio-like scrutiny. If a special committee selects its advisors, establishes its method of proceeding, and begins its due diligence without the shadow of a preset price, the fact that there has been a previous generic expression of interest does not taint the integrity of the process.

However, *Synutra* left a bit too much leeway for defendants to exploit. To illustrate, consider the soccer analogy that it invoked: a goal scored in the fifth minute is still considered in everyday language as a goal scored in the beginning of the game (even if it was not the first minute). Such an analogy ignores the *distinction between fixed and manipulable timelines*. In a soccer match, the duration of the process is externally fixed at ninety minutes. A goal scored in the fifth minute will therefore always be early, no matter what. In a freezeout negotiation, by contrast, the duration is determined by the parties themselves. A controller can shape the timeline by delaying negotiations after the proposal, prolonging committee discussions, and so on. The power to stretch the timeline allows controllers to make any early conduct appear, in hindsight, to be part of the "beginning." Relying on a soccer analogy may therefore legitimize procedural window dressing.

A potential alternative analogy is the "sterile field" in surgery. If a surgeon begins an operation before scrubbing in, they cannot retroactively "sterilize" the procedure by washing their hands five minutes after making an incision. That analogy reflects the idea that some thresholds, once crossed, cannot be undone. Yet while it is tempting for jurists to adopt such a bright-line, easy-to-implement approach, I do not believe that it is fit for our purposes. In the corporate context there will always be exploratory talks

[242] Laster, *supra* note 71, at 1448. A transaction need not be entirely fair in each facet; it simply needs to be fair in its entirety. Kahn v. Lynch Commc'n Sys., 669 A.2d 79, 90 (Del. 1995).

that may materialize into a transaction with the controller, and relying on such a rigid analogy will prove counterproductive.

What courts need instead is a middle-ground analogy that preserves judicial flexibility while offering a clearer normative trigger. An example of such an analogy comes from nondisclosure agreements (NDAs) in high-stakes negotiations. NDA protections kick in only if the agreement is signed before a trade secret is revealed. After all, once a party shares confidential information, no subsequent contract can fully reverse that disclosure. Unlike a fixed-time soccer match, in the NDA analogy the informational point of no return is defined by the exchange of value (there, the trade secret; in our case, the controller's preferred price) rather than the passage of time. Such an analogy leaves leeway for courts while preventing controllers from manipulating the calendar to sanitize an early breach of the process.

To operationalize the analogy: courts should consider "the beginning" for our purposes as the first point in time when a controller communicated a concrete transactional direction, such as a price range. Procedural safeguards should be in place no later than the controller's first concrete proposal to enjoy the legal safe harbor.

This proposed interpretation is consistent with new Section 144. The statute still requires that the committee have authority to negotiate or oversee the negotiation of the transaction. That authority can be meaningful only if the committee enters the process before the key economic terms have been effectively fixed. The post-SB 21 inquiry is therefore better understood as a looser timing standard: instead of examining whether the safeguards were in place at the first possible moment, courts should examine whether safeguards were implemented early enough to serve their cleansing function.

3. When to Scrutinize Timing

The analysis here also informs when timing scrutiny is most appropriate. In other words, some types of conflicted transactions warrant greater judicial attention to the timing of procedural safeguards than others.

Insisting on ab initio makes more sense in freezeouts than in ordinary conflicted transactions. Establishing the start of negotiations in freezeouts is relatively straightforward: a decision to cash out all the remaining shareholders and go private is hardly an everyday occurrence.[243] By contrast, locating the beginning of more mundane business transactions, like a long-term supply agreement between a corporation and its controller's affiliate, can be harder.[244] In such non-freezeout transactions, negotiations often emerge from months of informal, back-and-forth operational adjustments, and it can be unclear at the outset whether a relationship will culminate in the controller receiving a non-ratable benefit.[245]

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243 Fisch & Solomon, *supra* note 25, at 687.
244 *Id.* at 687–88.
245 *Id.*

To clarify, I do not argue that courts should *never* scrutinize the timing of safeguards in non-freezeout contexts. There will be non-freezeout transactions where it is easy and necessary to scrutinize the timing of procedural safeguards. And there will be freezeouts where delineating the beginning will be hard. My claim here is therefore relative rather than categorical: scrutinizing the timing of safeguards should generally be more prevalent in freezeouts than in non-freezeouts.

4. How to Interpret Shareholder Inspection Rights

SB 21 amended two statutory provisions: thus far we have focused on §144, which governs conflicted transactions, but equally important are changes to §220, which governs shareholders' qualified right to inspect their company's books and records. SB 21 largely limited the scope of permissible books and records to formal board-level documents (excluding emails or other informal communications unless narrow exceptions apply).

This narrowing of shareholder inspection rights may very well become the biggest impediment to scrutinizing process integrity going forward. Indeed, many of the successful challenges to the *MFW* defense prior to SB 21 (between 2015–2025) rested on prefiling discovery via Section 220.[246] One could argue that in a post-SB 21 world entrepreneurial plaintiff attorneys will avoid taking such cases in the first place: the attorneys may reason that without access to informal communications, the expected value of challenging *MFW* processes is too low to justify sinking resources into. These dynamics are especially pronounced for ab initio challenges, whose premise is that controllers made backchannel overtures before they established formal safeguards.[247] If shareholders cannot access those informal communications, they will struggle to test whether the safeguards were truly in place from the beginning.

To maintain effective process scrutiny under these constraints, courts have two primary tools at their disposal: (1) adopting a more bright-line approach to what counts as the beginning, and/or (2) interpreting the statutory carveout in Section 220 liberally.[248]

The current approach for determining the beginning (as set in *Synutra*) is fact-intensive, calling on courts to distinguish exploratory talks from substantive negotiations on a case-by-case basis.[249] Such an approach can work effectively when combined with broad inspection rights, because the latter allow outside shareholders to probe (prior to filing lawsuits) the nature of exploratory talks.[250] In a post-SB 21 world, when shareholders' inspection rights are presumably narrower, it may be preferable to shift to a bright-line approach for scrutinizing timing. One option is Justice

[246] Shapira, *supra* note 57, at 1979.
[247] *See* James D. Cox, Kenneth J. Martin & Randall S. Thomas, *The Paradox of Delaware's 'Tools at Hand' Doctrine: An Empirical Investigation*, 75 BUS. LAW. 2123, 2139 (2020).
[248] For a theoretical account of Section 220 that accords with the recommendations here, see Roberto Tallarita, Setting the Standard for Board Transparency (working paper, 2026) (on file with author).
[249] Section I.B *supra*.
[250] Cox et al., *supra* note 247 (arguing that *Synutra* increased "the importance of pre-filing discovery as a means of uncovering when the key events occurred").

Valihura's dissent in *Synutra*, which defines the beginning as the first written proposal by the controller.[251]

Under such a bright-line rule, shareholders may be able to challenge suspicious processes even without broad inspection rights. After all, freezeouts are subject to a vote by the shareholders of a publicly traded company, and so securities regulations require insiders to disclose details about the transaction.[252] Granted, relying on such public information may not be enough to reveal who said what to whom behind closed doors and when they said it (that is, not enough to reveal the nature and timing of exploratory talks). But shareholders could arguably rely on these securities market disclosures to ascertain in broad strokes when the board first received an official letter proposing the potential transaction, when the board empowered a special committee, and so on.[253]

To be sure, relying on securities market disclosures will not be enough to produce accountability when insiders are not fully forthright. Indeed, past cases suggest that maintaining a realistic background threat of shareholder inspection is necessary to ensure the integrity of public disclosures. To illustrate, in *Hightower* outside shareholders relied on documents they received through a Section 220 demand to show mismatches in the description of key events related to a conflicted merger: the internal board materials told a different story than what the company disclosed to the public in its proxy filings.[254] Chancellor McCormick concluded that one way to resolve such inconsistencies is granting shareholders limited access to the *emails* of directors and officers.[255]

This is where the second route for ensuring process integrity in a post-SB 21 world comes in: Courts should consider using SB 21's statutory carveout to order inspection of informal communications (and not just formal board materials). The revised Section 220 grants such discretion, in circumstances where shareholders demonstrate a "compelling need" to inspect these documents and "clear and convincing evidence" that such inspection is essential and necessary. In the context of controller freezeouts, the need to order such access is more compelling (relative to other transactions), because without access to informal communications, shareholders cannot effectively evaluate whether procedural safeguards were genuine or merely performative.[256]

[251] Synutra, 195 A.3d at 773.
[252] SEC Rule 13e-3 details the materials that insiders need to divulge. 17 C.F.R. § 240.13e-3 (2025).
[253] *See* Hamermesh et al., *supra* note 53, at 326; Itai Fiegenbaum, *The Controlling Shareholder Enforcement Gap*, 56 AM. BUS. L.J. 583, 612 (2019).
[254] Hightower v. SharpSpring, Inc., No. 2021-0720-KSJM, 2022 Del. Ch. LEXIS 214 (Del. Ch. Aug. 31, 2022).
[255] *Id.* at *21–22; *see also* The Chancery Daily (Feb. 16, 2026), https://archive.chancerydaily.com/edition/2026-02-16 (reporting on a motion to compel production of emails that pertain to ab initio scrutiny).
[256] A potential counterargument is that SB 21's legislative history reflects a narrower conception of what counts as "fully informed" consent. The final version omitted language from previous drafts that would have specifically required that shareholders be informed about flaws in the negotiation process; the enacted version requires only that shareholders be informed generally. Ann Lipton, *SB 21 Just Keeps Unfolding Like a Flower*, BUS. L. PROF BLOG (Mar. 15, 2025), https://www.businesslawprofessors.com/2025/03/sb-21-just-keeps-unfolding-like-a-flower. Corporate defense attorneys could argue that the shareholder vote is legally "informed" so long as investors know the material economic terms of the deal, regardless of how the

B. Big Picture Lessons on How Corporate Law Works

The lively debate around SB 21 was framed in public discourse as one between those who think that the legislature distorted corporate law to placate powerful corporate insiders, and those who claim that the legislative intervention was needed to curb judicial overreach and enhance predictability for transaction planners.[257]

By drilling into the narrower question of the ab initio requirement, this Article generates a different lens through which to evaluate the legislative overhaul: whether it refocuses or undermines corporate law's capacity to ensure the integrity of internal corporate processes. This angle cuts across partisan lines in the broader debate. Even those who believe that "*MFW* creep" and "controller creep" warranted correction should ask: does the revised regime preserve meaningful checks on insider opportunism? After all, no one (that I am aware of) claims that corporate law should always trust the integrity of corporate processes and never verify them.

The question, then, is how to preserve that verification function. Should it be implemented through statutory safe harbors, or left to case-by-case judgment by specialized business courts? And what role does securities regulation play in maintaining the integrity of market processes? These are the broader institutional questions this Section takes up.

1. State Competition in Corporate Law and the Role of Specialized Business Courts

The 2025 legislative overhaul raises important questions about the role of specialized business courts. Many corporate law commentators view Delaware's Court of Chancery as the State's biggest comparative advantage in the competition for corporate charters.[258] To the extent that SB 21 codifies in statute a key part of what courts have specialized in (supervising conflicted transactions), does the legislative overhaul erode that advantage?[259] More broadly, why does a state need a specialized court if its corporate law relies on administrative-style safe harbors?

negotiation process transpired (including, in our context, whether backchannel controller overtures were concealed from investors). *Id.* Such a reading of SB 21 is inconsistent with how its proponents have portrayed the legislative intervention. Completely divorcing the "informed consent" from the negotiation process would not "simply return corporate law to where it was ten years ago;" it would return the law to where it stood more than forty years ago, prior to *Weinberger*. And if that is the statute's meaning, then SB 21 is not merely a recalibration meant to screen out meritless cases more effectively; it is a de facto bulwark against transactional litigation, including meritorious challenges.

[257] *See, e.g.*, Robert E. Bishop, Tyler Grace & Yaron Nili, *Influence Without Control: Private Funds, Shareholder Engagement, and the New Law of Control*, J. CORP. L. (forthcoming), https://ssrn.com/abstract=6578858 (recounting the debate and arguing that SB 21 provides clarity for private funds such as venture capital investors and private equity sponsors).

[258] *See, e.g.*, Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1086 (2000).

[259] A recent study finds that Delaware firms experienced significant negative cumulative abnormal returns upon the announcement of SB 21, suggesting that public investors viewed the potential dismantling of procedural protections as value destructive. *See* Kenneth Khoo & Roberto Tallarita, The Price of Delaware Corporate Law Reform (working paper, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5318203.

A 2025 study by Goshen and Stein suggests that the main value of specialized business courts lies in their "claim-dismissal specialization," and that SB 21 is compatible with that role.[260] The institutional strength of a court that specializes in business disputes is that such a court knows when *not* to interfere, or so their argument goes. Specialist business courts accumulate deep understanding of the types of problems that are more effectively resolved by market forces and can therefore dismiss cases early. From this perspective, the 2025 legislative overhaul is a feature rather than a bug: it restores the equilibrium of early dismissals and refocuses judicial attention toward truly harmful self-dealing.[261]

Our analysis of the ab initio requirement, however, points to a different role for specialized business courts: *ensuring process integrity*. The main advantage of having a relatively small court that focuses on corporate law disputes is that over time each judge develops an ability to benchmark. Judges who have evaluated many iterations of similar transactions (in our case, freezeouts) can more easily detect when the process of a pending transaction deviates from settled norms. This expertise in pattern recognition allows courts to enforce process integrity without second-guessing substantive business judgment. In other words, it allows courts to maintain the balance that lies at the heart of corporate law, between managerial discretion and minority shareholder protection.

At first glance, the two approaches may appear functionally similar: a court that develops expertise in assessing processes can more effectively screen cases early. But a closer look reveals an important difference in emphasis. An approach that emphasizes claim dismissal is not truly reliant on judicial expertise. Statutory safe harbors can produce early dismissal outcomes even when courts lack deep familiarity with the relevant transactional context. By contrast, an approach that centers on ensuring process integrity is inherently dependent on the court's ability to distinguish genuine compliance from cosmetic compliance. In that respect, the "ensuring process integrity" approach better reflects the history of Delaware corporate law than the "claim-dismissal" approach.

This capacity to benchmark similar cases highlights a broader institutional advantage of the Court of Chancery that models focused primarily on "claim dismissals" tend to overlook. The value of specialization is not merely that expert judges can identify weak claims earlier and more accurately. It is also that repeated exposure to similar transactional settings allows judges to articulate what credible process looks like in practice. That articulation matters even when a case does not proceed to trial. Pleading-stage opinions and books-and-records decisions can generate "morality tales" that lawyers, directors, controllers, and investors use to understand the boundaries between genuine procedural protection

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[260] *See* Zohar Goshen & Tomer S. Stein, *Leaving Delaware? The Essential Role of Specialized Corporate Courts*, 125 COLUM. L. REV. 2077, 2086 (2025).

[261] *Id.* at 2128. Judge-made law evolves slowly, and so legislative interventions may be needed to deal with quick and hard-to-reverse changes (such as a purported exodus of companies out of Delaware). *See* Pacces, *supra* note 41.

and cosmetic compliance.[262] This model of "indirect deterrence" is only effective when the adjudicators are experts who are well respected in the legal and business communities. After all, no one is going to heed "morality tales" coming from generalist judges who are unfamiliar with a particular transaction terrain. By commenting on the integrity of corporate processes, the Court of Chancery helps the market develop and enforce best practices.[263] This is an easy-to-overlook and hard-to-quantify benefit that gets lost when corporate law shifts toward administrative-style safe harbors.[264]

The same institutional lens also clarifies this Article's level of analysis: much of the debate surrounding SB 21 has centered on whether Delaware will retain its dominance in the market for corporate charters or cede market share to states like Texas and Nevada.[265] The analysis here deliberately sets aside this angle and focuses on the broader welfare implications of corporate law.[266] If SB 21 helps Delaware retain the corporate franchise but does so at the cost of eroding investor protection, the result may serve the State's parochial interests but undermine the societal value of corporate law.[267]

2. Interdependencies Between Corporate Law and Securities Markets

By exploring the conditions needed to trust internal corporate processes, the analysis here reveals a broader point about the interdependencies between corporate law and securities regulation.

To illustrate, let us return to the reasoning behind *MFW*. The decision veered away from prior precedent by maintaining that internal processes can be trusted even in the most suspicious type of conflicted

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[262] *Supra* note 225.
[263] *See* Stevelman, *supra* note 43, at 883–84 (noting that judicial opinions in such settings provide "a valuable contribution to the transactional choreography").
[264] *But see* Assaf Hamdani & Kobi Kastiel, Courts, Legislation and Delaware Corporate Law (ECGI Law Working Paper 869/2025, 2025), https://ssrn.com/abstract=5391963 (detailing the advantages of legislative interventions in Delaware corporate law); Roberta Romano, *Market for Corporate Law Redux, in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS 358 (Francesco Parisi ed., 2017) (emphasizing the responsiveness of Delaware's legislature).
[265] *See, e.g.*, Michal Barzuza, Nevada vs. Delaware pt. II.B (ECGI Law Working Paper 761/2024, 2024), https://ssrn.com/abstract=4746878, at Part II.B; Marcel Kahan & Edward B. Rock, *The New Political Economy of Delaware Corporate Lawmaking,* J. CORP. L. (forthcoming), https://ssrn.com/abstract=5489066; Dorothy Lund & Eric Talley, *Should Corporate Law Go Private?*, J. CORP. L. (forthcoming), https://ssrn.com/abstract=5534959; Christine Hurt, *Texas, Delaware, and the New Controller Primacy*, 67 ARIZ. L. REV. 693 (2025).
[266] Barzuza, *id*. at pt. IV.C.
[267] This point is not merely distributional. One might argue that if a freezeout generates synergies and leaves minority shareholders better off than the pre-transaction market price (say, offers them $23 per share when the stock price sits at $21), corporate law should not police how the resulting surplus is divided between the controller and the minority. *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 705–06 (1981). But permitting controllers systematically to capture transactional surplus through weak procedures may affect investors' ex ante pricing of minority shares and thereby raise the cost of capital. *See* Lucian A. Bebchuk & Marcel Kahan, *Adverse Selection and Gains to Controllers in Corporate Freezeouts*, *in* CONCENTRATED CORPORATE OWNERSHIP 247 (Randall K. Morck ed., 2000); Zohar Goshen, *The Efficiency of Controlling Corporate Self-Dealing: Theory Meets Reality*, 91 CAL. L. REV. 393, 411–14 (2003) (analyzing the various factors).

transaction (controller freezeouts).[268] *MFW* justified this innovation by noting that securities markets are more active and confrontational toward corporate insiders relative to what they were at the time of prior precedent such as *Lynch*.[269] Given the rise of a robust market for shareholder votes, the majority-of-minority vote and reputational concerns have become a more trustworthy check on insider opportunism, or so *MFW*'s reasoning went.[270]

But such a holistic approach cannot be frozen in time. If later developments have since reduced the likelihood of a confrontational shareholder vote, courts should reevaluate their willingness to trust market processes. To illustrate, consider changes to the role of proxy advisors. Writing in 2013, *MFW* specifically invoked proxy advisors as an institution that "scrutinize deals and help institutional investors decide how to vote."[271] Yet in 2026, "proxy advisory firms… have been under considerable legislative and regulatory pressure."[272] These pressures arguably reduce the likelihood that proxy advisors will recommend against management.[273] For instance, Texas passed a law requiring proxy advisors to detail their justifications when recommending against management (no such detail is required when the advisors recommend in favor of management).[274] Indeed, prominent law firms advise their corporate clients that the "recent backlash targeting proxy advisory firms and large institutional investors… may result in a shift in how voting decisions may be made going forward."[275]

It is too early to tell how these upcoming shifts in voting patterns will change the effectiveness of market discipline. But the broader point stands: changes to regulatory and market practices in securities markets should make corporate law courts reassess their approach for scrutinizing conflicted transactions.

This is yet another questionable aspect of SB 21: by codifying *MFW* into statute, SB 21 risks ossifying a doctrine that was deliberately context-specific, crafted as a common-law response to prevailing market conditions. The balance between deference to corporate insiders and protection of outside investors is dynamic and is therefore better recalibrated as those conditions evolve.

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[268] *In re* EZCORP Inc. Deriv. Litig., 2016 WL 301245, at *11 (Del. Ch. Jan. 25, 2016).
[269] MFW, 67 A.3d at 530–31.
[270] *Id.*
[271] *See also* Hamermesh et al., *supra* note 53, at 342.
[272] *See* Martin Lipton et al., *Thoughts for Boards: Key Issues for 2026* (2026), https://www.wlrk.com/webdocs/wlrknew/ClientMemos/WLRK/WLRK.29917.26.pdf.
[273] *See, e.g.*, Ann Lipton, *Texas's Anti-Woke Corporate Governance*, BUS. LAW PROF BLOG (Sept. 18, 2025), https://www.businesslawprofessors.com/2025/09/its-tough-to-make-predictions-especially-about-the-future-but/.
[274] *Id.*
[275] *See* Lillian Tsu & Shuangjun Wang, *Shareholder Engagement: Is the Power of Proxy Advisors and Institutional Investors Shifting?*, HARV. L. SCH. F. CORP. GOVERNANCE (Feb. 6, 2026), https://corpgov.law.harvard.edu/2026/02/06/shareholder-engagement-is-the-power-of-proxy-advisors-and-institutional-investors-shifting/.

CONCLUSION

Procedural safeguards are only as effective as the tools available to verify them. For years, the ab initio requirement was an important tool that corporate law employed to distinguish cosmetic procedures from genuine ones. The 2025 legislative overhaul took that tool away.[276] And it did so without any proper explanation. On paper, the logic of this statutory omission seems misguided: by allowing controllers to set procedural safeguards only *after* price discussions occurred, the legislature reduced the likelihood that future deal processes will replicate arm's-length bargaining. Combined with the narrowing of shareholder inspection rights, that change leaves courts and investors with fewer tools to verify that director and shareholder consent was fully informed and reliable.

To be sure, there are strong arguments favoring the SB 21 reform, like the need to increase predictability for transaction planners.[277] But these arguments largely apply to the other changes in SB 21, namely, the cabining of the types of transactions subject to dual procedural safeguards (limiting the so-called "*MFW* creep" and "controller creep"). These arguments do *not* apply to SB 21's removal of the ab initio requirement. After all, that timing requirement affects precisely the types of transactions that even SB 21's proponents agreed should be subject to dual procedural safeguards. In other words, while the existing debate focused on what *level* of procedural safeguards should apply, this Article focused on the more fundamental question of how to ensure the integrity of given safeguards.

From that angle, one could claim that SB 21's elimination of the ab initio requirement was a calculated tradeoff: corporate law lost some capacity to ensure process integrity but reduced the costs of litigation going forward. But if this is the argument, it must rest on a theory of timing capable of assessing how much process integrity (and investor protection) is lost in the tradeoff.

Ultimately, the extent of lost investor protection is an empirical question. SB 21 is a recent reform, and post-enactment deal data will take time to accumulate before empirical research is possible. By isolating the behavioral and epistemic functions of *ab initio*, this Article provides the necessary theoretical framework and testable hypotheses for such future studies. Prior empirical work examined the effects of *MFW* on the gains of target shareholders and found that the decision proved beneficial to these public investors who were being squeezed out.[278] Yet these studies were conducted when deals happened under the shadow of ab initio scrutiny (and liberal inspection rights). It is time to reexamine how the *MFW* framework fares, now that the threat of ex post verification of the procedural safeguards is attenuated.

[276] More precisely, SB 21 removed *ab initio* as a formal condition for obtaining safe-harbor protection; it does not necessarily foreclose courts from considering timing evidence under general fiduciary principles.
[277] *See, e.g.*, Bishop et al., *supra* note 257.
[278] *See, e.g.*, Restrepo, *supra* note 9.

These doctrinal, theoretical, and empirical reexaminations are crucial to revealing the deeper systemic stakes of today's corporate law landscape. Predictive certainty for corporate insiders is important. But corporate law can be effective only if it balances that certainty against ensuring the integrity of processes meant to protect outside investors. This Article offers a first step toward understanding how corporate law reimagines—or ought to reimagine—that balance in a post-SB 21 world.

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