A debate exists in the close corporate literature and caselaw regarding who in a close corporation owes fiduciary duties, to whom those duties are owed, whether that duty is the traditional corporate duty or a "heightened" partnership duty, and whether corporations with a small number of shareholders can merit recognition as a close corporation without a statutory election of that status. The different points of view are represented by the caselaw in Massachusetts and Delaware, with the Massachusetts rule being crowned as the majority rule. This article delineates with great specificity that characterizing the Massachusetts rule as the majority rule is a highly suspect classification because the caselaw support for this rule has been greatly exaggerated and misunderstood. Moreover, this article exposes the issues underlying the competing viewpoints so that courts can make a more educated choice among these issues. Finally, since recent developments in business law are consistent with the philosophy underlying the minority rule, this article reasons that the current Delaware minority rule will eventually become the dominant view in close corporate law.

I. INTRODUCTION

"To say that man is a fiduciary only begins the analysis; it gives direction to further inquiry." Justice Frankfurter's oft-quoted statement hints at the complexities inherent in fiduciary law, and correctly suggests that the starting point is labeling an actor as a fiduciary. It is, therefore, odd how relatively little attention has been paid to the fundamental controversy.
over who is a fiduciary in a close corporation and the extent of that duty. At the outset, any important issue in close corporation law should be of central concern given that close corporations constitute the vast majority of American businesses. The scant attention these fiduciary-related questions have generated is even more peculiar given that Delaware, the pre-eminent jurisdiction in corporate law, is viewed as representing the minority position. While there are many differences between what purports to be the majority and the minority rules, the most obvious difference is the majority's position that officers, directors, and all shareholders in close corporations are fiduciaries and, in that capacity, owe each other a heightened, fiduciary duty, akin to the heightened duty owed within partnerships. In contrast, the minority rule is that officers, directors, and only controlling shareholders acting in their corporate capacities owe corporate-based fiduciary duties, which are owed primarily to the corporation.

2Close corporations are corporations that have a small number of shareholders that qualify under their respective statutes for special treatment. See, e.g., DEL. CODE ANN. tit. 8, §§ 341-342 (2000). Closely-held corporations, however, also have a small number of shareholders, but the corporation either has not elected special status under its respective statute's close corporation provisions, does not qualify under its respective statute, or its statute does not provide for this separate category of corporations. Unless otherwise noted, the article groups all of these corporations together and calls them "close corporations." When necessary to distinguish these types of corporations, they will be described as "closely-held corporations" versus "statutory close corporations."


5See Ragazzo, supra note 4, at 1100 (analyzing Delaware's minority position on fiduciary duties of shareholders in close corporations in light of its status as the leading corporate jurisdiction); Robert Drumm, Note, Shareholder Duties in Closely Held Kansas Corporations After Hunt v. Data Management Resources, 49 U. KAN. L. REV. 1159, 1168-69 (2001) (stating that even though Delaware is the leading jurisdiction in corporate law, Delaware courts do not follow the majority rule on fiduciary duties in close corporations).

6See discussion infra Part I.E (describing the many differences between the majority and the minority rules).

7See discussion infra Parts I.C.-D. (delineating the majority and minority rules, respectively).
These differences between the majority and minority rules largely apply to the dilemma minority shareholders face when they are "frozen out" of receiving any financial benefits from the corporation, while simultaneously "frozen in" because they are unable to sell their stock. Given that there is no market for close corporate stock, these shareholders are trapped in their respective corporations, armed with whatever statutory

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8For example, a minority shareholder's employment may be terminated and the board may refuse to declare dividends, thereby leaving the minority with only a paper interest in the enterprise and no concrete financial benefits. Some courts consider this behavior to be a de facto squeeze-out or freeze-out, designed to induce the minority to sell their shares at a low price. See discussion infra Part II. See also James M. Van Vliet, Jr. & Mark D. Snider, The Evolving Fiduciary Duty Solution for Shareholders Caught in a Closely Held Corporation Trap, 18 N. ILL. U. L. REV. 239, 258 (1998) (defining "freeze-out/squeeze-out" as oppressive conduct by a particular shareholder designed force other shareholders to sell their stock by diminishing the value of the stock while excluding those shareholders from employment in the corporation); Douglas K. Moll, Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective, 53 VAND. L. REV. 749, 757-58 (2000) (discussing "freeze-out" tactics by majority shareholders designed to limit or eliminate minority shareholder participation in the management of the corporation and any return on investment leading to a sale of the minority's stock at low price). Other frequent fact patterns depict a corporation furnishing an exit strategy only for select shareholders by repurchasing their stock. See, e.g., Nixon v. Blackwell, 626 A.2d 1366, 1379 (Del. 1993) (finding that closely-held corporation repurchased stock only from shareholders who were also employees); Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 520 (Mass. 1975) (finding that the closely-held corporation repurchased stock only from majority shareholder). Still other common scenarios involve a corporation that has elected Subchapter S tax status, a federal tax election whereby a corporation does not pay taxes on its income. I.R.C. § 1366 (2003). Instead, shareholders are directly taxed on their respective share of the corporation's income. If the corporation fails to distribute any cash to the shareholders, they suffer twice: not only are they not benefiting from the corporation's income, but they also suffer a detriment because they must personally pay taxes on their respective share of the corporation's income. An effective freeze-out technique, therefore, involves excluding some shareholders from employment and then increasing the salaries of the employee-shareholders to cover their respective corporate tax obligations while simultaneously not declaring dividends. See Bauer v. Bauer, 54 Cal. Rptr. 2d 377, 383 n.6 (Cal. Ct. App. 1996).

9Scholars, however debate whether shareholders in a close corporation are particularly vulnerable. Compare J.A.C. Hetherington & Michael P. Dooley, Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem, 63 VA. L. REV. 1, 6 (1977) ("The position of the minority in a close corporation is as unique as it is precarious: no other form of business organization subjects an owner to the dual hazards of a complete loss of liquidity and an indefinite exclusion from sharing in the profitability of the firm.") with FRANK H. EASTERTROOK & DANIEL R. FISCHER, THE ECONOMIC STRUCTURE OF CORPORATE LAW 231 (Harvard U. Press 1991) (hereinafter The Economic Structure of Corporate Law):

Still, it is a mistake to conclude that shareholders in closely held corporations face unique risks of oppression, just as it is wrong to argue that shareholders in publicly held corporations face unique risks of exploitation because of the separation of ownership and control. Each organizational form presents its own problems, for which people have designed different mechanisms of control. At the margin the problems must be equally severe, the mechanisms equally effective—were it otherwise, investors would transfer their money from one form to the other until the marginal equality condition was satisfied.
or contractual remedies that may exist. Since there are a wide variety of reasons why statutory or contractual remedies may be ineffective, the extent and availability of fiduciary obligations provide another source of protection. The majority view, by granting broader and deeper fiduciary duties than does the minority view, clearly arms minority shareholders with an added weapon.12

The few articles that have thus far analyzed this topic share two common philosophies. First, they uniformly depict the majority rule as articulated by Massachusetts courts as the superior rule,13 and characterize the Delaware minority view as an unfortunate aberration from the national norm.14 Some articles exhort Delaware courts to join the rest of the nation

Things may go awry in closely held firms, as in other firms. Promises may be disavowed and expectations dashed. But the anticipated return, taking into account the prospect of such ill events, must be equal at the margin for all kinds of firms. As a result, there is no reason to believe that shareholders of either closely or publicly held corporations will be more or less "exploited." No a priori case can be made for greater legal intervention in closely or publicly held corporations.

For example, since some statutes require that those in control of the corporation commit some extreme wrong, the defendant's conduct may fall outside the conduct that will trip the statute. See Stuparich v. Harbor Furniture Mfg., Inc., 100 Cal. Rptr. 2d 313, 319-20 (Cal. Ct. App. 2000) (finding that extreme family hostility and disagreement over a business strategy are insufficient grounds for statutory dissolution).

For example, some courts require a corporation to elect close corporate status in order to change the norms of corporate governance by charter provision or contract. Nixon, 626 A.2d at 1380-81. See also infra notes 39-40 and accompanying text (discussing Delaware's close corporate statute). Furthermore, many shareholders either do not have private contractual agreements or discover that their agreements do not give them the protection that they desire. See Mary Siegel, Back to the Future: Appraisal Rights in the Twenty-First Century, 32 HARV. J. ON LEGIS. 79, 114-15 (1995) (noting that shareholders in close corporations are often unable to anticipate future events or changes in their relationship that could prompt a desire to leave the corporation, and, as a result, do not adequately protect themselves by contract).

Van Vliet, Jr. & Snider, supra note 8, at 242.

See, e.g., George W. Dent, Jr., Gap Fillers and Fiduciary Duties in Strategic Alliances, 57 BUS. LAW. 55, 86 (2001) (explaining that the emerging view is that fiduciary duties should be higher in smaller entities like partnerships and close corporations, than in larger entities, like public corporations); J. Mark Meinhardt, Note, Investor Beware: Protection of Minority Shareholder Interests in Closely Held Limited Liability Organizations: Delaware Law and its Adherents, 40 WASHBURN L. J. 288, 289 (2001) (describing the majority rule as "judicially advanced"); Van Vliet & Snider, supra note 8, at 241-42 (touting Massachusetts position as the most widely accepted position and most beneficial position for close corporation fiduciary duties).

See Meinhardt, supra note 13, at 289-90 (describing Delaware's position is in direct opposition to many states, and is detrimental to minority shareholders); Ragazzo, supra note 4, at 1101 (claiming that conduct in close corporations that is illegal in most states is permitted under Delaware law and claiming that "Delaware corporate law is starkly at odds with the rest of the nation" on this issue); Van Vliet & Snider, supra note 8, at 242 (noting that the Delaware view falls in the minority position among state laws regarding close corporation fiduciary duties); Shannon Wells Stevenson, The Venture Capital Solution to the Problem of Close Corporations Shareholder Duties, 51 DUKE L.J. 1139, 1148 (2001) (noting that only a few states follow the position developed by Delaware courts regarding the extent of fiduciary duties in close
in offering protection to close corporate shareholders.\textsuperscript{15}

Second, the existing commentary has created and perpetuated the assumption that this aspect of the Massachusetts caselaw represents the majority view in close corporate law. For example, one recent article dismissed the issue and Delaware's minority position when it asserted that all shareholders in close corporations must owe each other fiduciary duties.\textsuperscript{16} Similarly, one corporate casebook declares that twenty-five states either follow or are sympathetic to the majority rule,\textsuperscript{17} while other authors have remarked that the Massachusetts rule has come to be widely accepted.\textsuperscript{18} These authors have bestowed the moniker "majority rule" on this aspect of the Massachusetts caselaw, and that stature has garnered a life of its own. That stature, however, is entirely unsupported by the caselaw.

In reality, many states have yet either to consider or rule squarely on
corporations).

\textsuperscript{15}See David C. Crago, \textit{Fiduciary Duties and Reasonable Expectations: Cash-Out Mergers in Close Corporations}, 49 \textit{Okla. L. Rev.} \textbf{1}, 1-2, 9 (1996) (describing the Massachusetts position that shareholders in close corporations owe each other fiduciary duties similar to partnership fiduciary duties as a widely accepted position among states); Meinhardt, \textit{supra} note 13, at 295 (encouraging Delaware to reverse its current position and find that fiduciary duties exist for shareholders in closely-held corporations); Ragazzo, \textit{supra} note 4, at 1134 (suggesting there is "some hope" that the Delaware Supreme Court may "reconsider its views in \textit{Nixon}"); Stevenson, \textit{supra} note 14, at 1147-48 (stating that the vast majority of states follow the Massachusetts rule applying heightened fiduciary duties to all shareholders in a close corporation); Van Vliet & Snider, \textit{supra} note 8, at 240 (stating that the mainstream development of shareholder fiduciary duty follows the Massachusetts rule that shareholders in a closely-held corporation owe partnership fiduciary duties). \textit{Cf.} Drumm, \textit{supra} note 5, at 1191 (speculating that unless Kansas retreats from blindly following the Delaware rule, all shareholders in close corporations will be left with little protection of their interests).

\textsuperscript{16}See Van Vliet & Snider, \textit{supra} note 8 (stating that the very nature of the close corporation requires that all shareholders owe each other partnership fiduciary duties).

\textsuperscript{17}See ROBERT HAMILTON, CASES AND MATERIALS ON CORPORATIONS 482 (8th ed. 2003) ("The basic holding of \textit{Donahue} that fiduciary relationships exist within closely held corporations has been widely cited and accepted. Courts in more than 25 states have either cited \textit{Donahue} approvingly or have cited cases that relied upon \textit{Donahue} for this proposition.").

\textsuperscript{18}See Crago, \textit{supra} note 15, at 9 (explaining that the \textit{Rodd/Wilkes} formulation of duty in close corporations is widely accepted by many states, including Ohio); Robert B. Thompson, \textit{The Shareholder's Cause of Action for Oppression}, 48 BUS. LAW. 699, 729 (1993) (clarifying that differences among states regarding their interpretation of \textit{Rodd} do not diminish the widespread judicial acceptance of the philosophy that applying an enhanced fiduciary duty in close corporations is beneficial). \textit{See also} Jeremy Nolan Hendon, Comment, \textit{Combating Legal Theft: Arguments for Shareholder/Employees Terminated from Close Corporations}, \textit{77 OR. L. REV.} \textbf{735}, 743 (1998) (noting that while some states, including Oregon, disagree with the \textit{Rodd} standard, the majority of states accept the standard and recognize that it provides "fairness to all shareholders in close corporations").
this issue. Of those that have made a firm commitment, only five states may be characterized as being true majority-rule states in that they adopt the position that all shareholders in close corporations owe enhanced, partnership fiduciary duties to each other. Furthermore, one of those states has made clear that application of the majority rule is merely a rebuttable presumption. A more generous interpretation could include other states that have followed some of the majority-rule principles, adopted some aspects of both the majority and minority rules, or have at least nodded sympathetically at the majority rule. Even the most generous interpretation, however, cannot transform the Massachusetts rule into anything resembling a true majority rule.

Characterizing the Massachusetts rule as the majority rule is a highly suspect classification because the caselaw support for this rule has been greatly exaggerated. Moreover, this article will demonstrate that far from being isolated on this issue, Delaware's minority rule has garnered support from an ever-increasing number of states. Given that many state courts have either yet to consider or decide their position on this topic, there is an opportunity to expose the issues underlying the competing viewpoints so that courts can make a more educated choice.

After laying out the majority and minority rules and the statutory framework in which they operate, Part I considers whether these rules are substantively or merely semantically different. The article contends that these monitors are quite different, thereby disabusing any notion that the

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19Twelve states have not yet considered this topic. See cases cited in chart col. 11, app. A. Five states have ruled primarily under their dissolution statutes. See cases cited in chart cols. 9-10, app. A. Additionally, another six states and the District of Columbia have not yet expressed a clear adoption or rejection of majority-rule principles. See cases cited in chart col. 8, app. A.

20Massachusetts, the source of the majority rule, is in this category, along with Montana, Nebraska, New Mexico, and Rhode Island. See cases cited in chart cols. 1-2, app. A.

21See, e.g., A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997) (explaining that the presumption is that all close corporate shareholders have fiduciary duties similar to partnership duties but the existence of this fiduciary duty is fact-specific and evidence may be presented that rebuts this presumption).

22California and Indiana are in this category. See cases cited in chart col. 3, app. A; see also infra text accompanying notes 254-58.

23See cases cited in chart col. 4, app. A (identifying five states that adopt some aspect of both principles). Four of these states—Colorado, Illinois, North Carolina, and Ohio—appear to adopt the majority's "heightened" fiduciary duty, but only impose that duty on the traditional corporate actors, similar to the minority rule, while in the fifth state, Tennessee, all shareholders owe each other fiduciary duties as the majority rule requires—but the duties are corporate duties, as the minority rule requires. See cases cited in chart col. 4, app. A; see also infra text accompanying notes 259-61.

24See cases cited in chart col. 8, app. A; see also infra text accompanying notes 262-63.

25See infra text accompanying notes 279-84.
majority and minority rules are coalescing. Part II explores the caselaw in detail in order to demonstrate why labeling the Massachusetts cases and their progeny as the majority rule is seriously misleading. Part III critiques these two rules and explains the ramifications of each under both state and federal law. Part IV recounts recent developments in the law of business associations and their implications for close corporate law. Because these developments are consistent with the philosophy underlying the minority rule, this article concludes that the minority rule will eventually become the dominant view in close corporate law.

II. THE MAJORITY AND MINORITY VIEWS

A. More Opportunity for Abuse in Close Corporations

While controlling shareholders in public companies may attempt to appropriate a disproportionate share of corporate financial benefits or otherwise act opportunistically, the issues surrounding such predatory behavior are compounded in a close corporation. One reason is that while

\footnote{Much of the extant literature incorrectly rationalizes that the Massachusetts and Delaware views are coalescing. See, e.g., Ragazzo, supra note 4, at 1142-51 (explaining that the divergent views represented by the Massachusetts and Delaware courts have actually converged, in that the Massachusetts formulation requiring controlling shareholders to demonstrate that there is no legitimate corporate purpose that could have been achieved in a manner less harmful to the minority produces the same holding as an application of the Delaware formulation of entire fairness); Michael P. Dooley, Fundamentals of Corporation Law 1057 (Foundation Press 1995) (proposing that the apparent disagreements among states over fiduciary duties in the close corporation context is exaggerated). Some articles try to rationalize Delaware's position by viewing the Delaware position as adherent to the majority rule in spirit, although not in name. See Ragazzo, supra note 4, at 1142-51 (arguing that Delaware's refusal to recognize special duties for shareholders in close corporation is misunderstood and that the entire fairness test employed by Delaware courts is a reflection of the same principles applied by majority-rule states).}

\footnote{See, e.g., In re Maxxam, Inc., 659 A.2d 760 (Del. Ch. 1995) (finding that the majority shareholder caused the corporation to loan it money and then to forgive the loan); Summa Corp. v. Trans World Airlines, Inc., 540 A.2d 403 (Del. 1988) (finding that a seventy-eight percent shareholder interfered with the corporation's business to the detriment of the company but received considerable benefit for itself); Pierce v. Wahl, 86 A.2d 757 (Del. 1952) (holding that a director and owner of 40% of the stock used the corporation's assets for his own benefit).}

\footnote{See Robert B. Thompson, The Law's Limits on Contracts in a Corporation, 15 J. Corp. L. 377, 393 (1990) (contrasting that increased risks for shareholders in close corporations with risks for shareholders in public corporations and specifically delineating the inability of shareholders to diversify portfolios, which leads to an increased risk of loss in their portfolios); see also Edward B. Rock & Michael L. Wachter, Waiting for the Omelet to Set: Match-Specific Assets and Minority Oppression in Close Corporations, 24 J. Corp. L. 913, 916 (1999) (stating that minority shareholders in close corporations are particularly vulnerable to actions by majority shareholders due to the lack of a public market locking the parties into their investments combined with majority shareholder's control over directors and management). Cf. Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations, 138 U. Pa. L. Rev. 1675, 1690 (1990) (explaining that potential conflicts of interest in public corporations become realities in close
most public corporations do not have a controlling shareholder,29 close corporations often either have a controlling shareholder or, given the small number of shareholders, can more easily form a control group. Such control creates the power to dictate transactions, thereby increasing the potential for exploitive behavior. A second reason is that opportunistic behavior in public corporations may be constrained by the market;30 by definition, close corporations lack a market, and therefore lack this monitor. Finally, the impact of ordinary business decisions is felt more directly and disproportionately in a close corporation than in a public corporation. Routine events in a corporation, such as not declaring dividends and not employing a shareholder, may, in a close corporation, be involuntary, disguised wealth transfers to the controlling shareholder as the financially-starved minority shareholders may feel pressure to sell their stock for a low value.31 Such financial deprivation is particularly untenable given that close-corporate shareholders often have invested a disproportionately high percentage of their wealth in their corporation.32

B. The Statutory Framework

Every corporate statute embraces two core principles of corporate governance: a board of directors that oversees the management of the corporation, and shareholder decisions decided by majority rule.33 Over time, some legislatures responded to the demand by close-corporate shareholders for flexibility to alter these core principles. These legislatures
amended corporate statutes to enable shareholders to contract among themselves to dispense with corporate formalities to provide for dividend, employment and dissolution options that deviate from these core principles. Some corporate statutes group all such provisions in a separate subchapter, while others scatter these accommodation provisions throughout the statute.

The selection of the statutory scheme is quite significant. For example, the Revised Model Business Corporation Act (RMBCA) has certain provisions scattered throughout its statute, each with its own set of qualifications, and any qualified corporation can avail itself of any/all applicable statutory provisions. In contrast, the Delaware statute has a separate close-corporation subchapter, which, among other criteria, requires a qualified corporation to specify in its charter its election of close-corporate status. The Delaware Supreme Court stated unequivocally that without such an election, none of the accommodations in the close-corporation subchapter are available.

While a few close-corporate statutes provide specialized governance provisions, most of these statutes simply enable the parties to create contracts or to specify in the corporate charter a panoply of options that deviate from the standard format of corporate governance. Phrased differently, these are "self help" provisions which, by themselves, neither create nor alter any rights or obligations among the corporate actors. For example, these enabling provisions allow shareholders, by contract, to provide for their employment as officers and directors and to set dividend

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34See e.g., DEL. CODE ANN. tit. 8, §§ 350, 351, 354-355 (2000); REVISED MODEL BUS. CORP. ACT § 7.32 (2000).
35See e.g., DEL. CODE ANN. tit. 8, §§ 341-342 (2000).
36See e.g., REVISED MODEL BUS. CORP. ACT § 7.32 (2000).
38See DEL. CODE ANN. tit. 8, § 342 (2000).
39See Nixon, 626 A.2d at 1380 (stating that court will not treat a corporation as a statutory close corporation if the entity did not elect that status). See infra Part I.E.1 (discussing whether closely-held corporations should be treated as equivalent to statutory close corporations).
40See MD. CODE ANN., CORPS. & ASSN'S §§ 4-402, 4-403 (1993) (showing that Maryland maintains unique provisions that do not require annual meetings for close corporations unless the shareholder requests a meeting and that provide more relaxed inspections rights for close corporation shareholders). A few states permit any shareholder of a close corporation, regardless of the percentage of stock owned, to petition for dissolution. See, e.g., CAL. CORP. CODE § 1800(a) (West 1990); MD. CODE ANN., CORPS. & ASS'NS § 4-602(a) (1993).
41For example, in Delaware, certain deviations from the corporate norm, such as dissolution at will or upon occurrence of a contract-for, specified event, or direct shareholder running of the corporation are permitted but must be so specified in the certificate of incorporation of any close corporation. See, e.g., DEL. CODE ANN. tit. 8, §§ 351, 355 (2000) (identifying dissolution and shareholder management options specifically). Other deviations from the corporate norm can be done by shareholder contract. Id. §§ 351-352, 354.
policy. These provisions are irrelevant, however, if the shareholders do not execute such a contract and the close corporation ceases to pay dividends or fires the minority from her officer/director position. Similarly, these statutes do not create exit rights by themselves but allow the shareholders to deviate from the statutory norm and provide in the charter for dissolution at will or by the vote of the minority.

The other, less obvious, statutory provision that impacts shareholders in close corporations is the standard for dissolution. While most corporate statutes used to require extreme conduct, such as illegality or fraud, to dissolve a solvent corporation involuntarily, currently, thirty-seven states provide for involuntary dissolution or other remedies if the defendant acts "oppressively." As most of these statutes do not define "oppression,"

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43 Id. § 355(a).
44 See F. Hodge O'Neal & Robert B. Thompson, O'Neal's Close Corporations § 9.27 (Supp. 2001) (explaining that in order to dissolve a solvent corporation involuntarily, most states formerly required a showing of misconduct, which encompassed illegality, fraud, misapplication of assets, or waste).

45 A few statutes specifically authorize the court to order remedies in addition to dissolution. For example, New Jersey's statute provides that a court may not only dissolve the corporation, but also may choose to appoint a custodian, appoint a provisional director, or order a sale of one shareholder's stock to the other shareholder(s) where those in control of the corporation have acted oppressively or unfairly. See N.J. Stat. Ann. § 14A:12-7 (West Supp. 1992) (making the remedy for oppression available to corporations with twenty-five or fewer shareholders). In addition to specifying the possible array of remedies, some states authorize courts to provide whatever relief is appropriate. See, e.g., 805 Ill. Comp. Stat. Ann. § 5/12.56(b)-(c) (West 1983) (amended 1994) (authorizing "other legal and equitable remedies" for non-public corporations). Some states have also enacted buyout provisions that allow some shareholders to buy the stock of other shareholders in lieu of dissolution. See, e.g. N.Y. Bus. Corp. Law § 1-118 (McKinney Supp. 1993) (providing shareholders in both public and close corporations the irrevocable right to buy out other shareholders unless court determines such election should be revocable); Utah Code Ann. § 16-10a-1434 (Supp. 1992) (applying this provision to non-public corporations only). See also Revised Model Bus. Corp. Act § 14.34 (2000) (permitting the defendant to buy out petitioner's shares in lieu of dissolution if the petitioner demonstrates that the majority shareholders acted in a manner that is illegal, oppressive or fraudulent, but limiting this provision to non-public corporations). Even if the statute authorizes only the remedies of dissolution or a buyout, some courts reason that they should be free to award less dramatic relief. See, e.g., Alaska Plastics, Inc. v. Coppock, 621 P.2d 270, 275 (Alaska 1980) (finding that the court retains the power to utilize a less drastic remedy appropriate to the factual situation when defendant commits oppression); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395-96 (Or. 1973) (noting that while a showing of oppressive conduct under the dissolution statute was sufficient to bring the claim under the jurisdiction of the court, such showing did not oblige the court to impose dissolution as the sole remedy).

courts have supplied a continuum of definitions that includes abusive conduct, recurring breaches of fiduciary duty, or simply a frustration of a shareholder's reasonable expectations.\textsuperscript{47} Clearly, the impact of the oppression doctrine is particularly significant when courts interpret the oppression standard to include conduct inconsistent with the shareholders' reasonable expectations because this interpretation provides minority shareholders with a substantially broader and more subjective base upon which to challenge conduct.\textsuperscript{48}


\textsuperscript{47}For a discussion of what constitutes "oppression," see Moll, \textit{supra} note 8, at 761-62 (describing different approaches taken by courts to defining oppression based on a variety of perspectives); Thompson, \textit{supra} note 18, at 711-12 (1993) (noting that because oppression is usually not defined by corporate law statutes, courts have supplied a variety of definitions). Only a few statutes specifically define oppression. \textit{See, e.g., MICH. COMP. LAWS. ANN. § 450.1489(3) (West 1990) ("[W]illfully unfair and oppressive conduct" is defined as "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement . . . .")}.

\textsuperscript{48}See, e.g., Polk v. Hergert Land & Cattle Co., 5 P.3d 402, 404-05 (Colo. Ct. App. 2000) (finding that oppressive conduct is "closely related to breach of the fiduciary duty owed to minority," and may include reasonable expectations "when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the [plaintiff's] decision to join the venture"); Pedro v. Pedro, 463 N.W.2d 285, 287 (Minn. Ct. App. 1990) (awarding plaintiff compensation for lost wages he reasonably expected to earn as an employee and stockholder of the company); Muellenberg v. Bikon Corp., 669 A.2d 1382, 1388-90 (N.J. 1996) (applying the reasonable expectation test to relationships among the close corporation shareholders and ordering the majority to sell his stock to the minority shareholder); Bonavita v. Corbo, 692 A.2d 119, 128 (N.J. Super. Ct. Ch. Div. 1996) (indicating that decedent's widow had reasonable expectations of obtaining some form of financial benefit or compensation and ordering the majority to purchase the widow's stock); \textit{In re Kemp & Beatley, Inc.}, 473 N.E.2d 1173, 1179 (N.Y. 1984) (finding that "[g]iven the nature of close corporations and the remedial purpose of the statute, . . . utilizing a complaining shareholder's 'reasonable expectations' as a means of identifying and measuring conduct alleged to be oppressive is
The dissolution statutes that include the oppression standard do not, however, serve as the panacea for concerns that plague close corporate shareholders. Some courts have refused to apply these statutes if the plaintiff is seeking a remedy other than dissolution,49 or have held, in some cases, that the defendant's conduct does not meet the statutory standard for dissolution.50 Other courts interpret the term "oppression" more narrowly, excluding the expectations of the complaining shareholder, either finding the reasonable expectation doctrine to be outside the statute's scope51 or concluding that the doctrine itself is unsound.52

49See, e.g., Gruenberg v. Goldmine Plantation, Inc., 360 So.2d 884, 889 (La. Ct. App. 1978) (finding that while the substantive law provides for involuntary dissolution under the oppression statute, this does not apply to shareholders in a close corporation seeking redress for violations of fiduciary duties by the majority). Daniels v. Thomas, Dean & Hoskins, Inc., 804 P.2d 359, 368-69 (Mont. 1990) (refusing to find oppression under the dissolution statute because the plaintiffs failed to allege a dissolution claim); Dilacioni v. New Cal. Corp., 643 P.2d 1234 (N.M. App. 1982) (refusing to find a dissolution claim where the plaintiffs merely alleged a breach of fiduciary duty by the majority).

50See, e.g., Woodward v. Anderson, 627 N.W.2d 742, 752 (Neb. 2001) (holding that plaintiff did not show that defendant's failure to appoint a second director and to hold shareholders' meetings rose to the level of oppression as required under the Nebraska dissolution statute).

51The typical oppression statute focuses on the controlling shareholder's conduct, rather than the expectations of the minority shareholder. See, e.g., S.C. CODE ANN. § 33-14-300 (Law. Co-op. 1990) (focusing on the controlling shareholders that "have acted, are acting, or will act in a manner that is illegal, fraudulent, oppressive, or unfairly prejudicial either to the corporation or to any shareholder"); Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 264-65 (S.C. 2001) (noting that the legislature did not intend for a court to order dissolution based on the parties reasonable expectations because it was not specifically delineated in the statute); see also Moll, supra note 8, at 826 (describing the majority view of shareholder oppression which focuses primarily on the conduct of the majority shareholder, and the minority view of shareholder oppression, which looks to reasonable expectations, focusing primarily on the effect of that conduct on the minority shareholder).

52See generally J.C. Bruno, Reasonable Expectations: A Primer on an Oppressive Standard, 71 Mich. B.J. 434 (May 1992) (theorizing that the reasonable expectations doctrine will create instability and uncertainty in the field of corporate law and increase litigation as all minority shareholders will assert that their reasonable expectations were frustrated). Criticisms of the reasonable expectations doctrine are numerous. For example, the doctrine is very fact specific, requiring courts to perform an extensive case-by-case examination of the history of the complaining shareholder's relationship with the corporation to determine whether these expectations were reasonable, the measure of "reasonableness," from whose perspective it will be viewed, as well as whether the expectation was shared by the other parties. See, e.g., Kiriakides, 541 S.E.2d at 264 (refusing to adopt the reasonable expectations doctrine because the determination of reasonable expectations of a minority shareholder is too fact specific to provide a uniform rule).

More broadly, the reasonable expectations doctrine clashes with two well-accepted doctrines: the business judgment rule and the employment-at-will doctrine. See Bruno, supra, at
Regardless of whether and how courts apply these oppression statutes, cases decided under these statutes should not be included under either the majority or minority rules, which apply to non-statutory fiduciary claims. While oppression statutes may reflect some of the same concerns that have generated the fiduciary-based rules, and may sometimes offer a parallel track for protecting minority shareholders, grouping decisions

437 (noting concerns about the propriety of ignoring traditional norms of corporate governance, and allowing shareholders to impose "undocumented 'understandings' under the guise of reasonable expectations"); Douglas K. Moll, Majority Rule Isn't What It Used To Be: Shareholder Oppression in Texas Close Corporations, 63 TEX. BAR J. 434, 438 (2000) (explaining that in close corporation context, the reasonable expectations doctrine requires courts to delve more deeply into decisions regarding employment, management, and dividends—contrary to the business judgment rule); Ralph A. Peeples, The Use and Misuse of the Business Judgment Rule in the Close Corporation, 60 NOTRE DAME L. REV. 456, 506 (1985) (discussing the conflict between the reasonable expectations focus on managerial decisions and the fact that decisions are not reviewable under the business judgment rule). The reasonable expectations doctrine also conflicts with the employment-at-will doctrine, a doctrine that states that an employer may fire at any time an employee who either does not have an employment contract or who has such a contract but its terms do not specify a specific term of employment and financial consequences to the termination. There is obvious tension between the employment-at-will doctrine, which allows those in control to fire an employee even though that employee is also a minority shareholder, and that employee/shareholder's reasonable expectation of employment. For example, in Ingle v. Glamore Motor Sales, 535 N.E.2d 1311 (N.Y. Ct. App. 1989), all shareholders signed a contract stating that if any shareholder ceased to be an employee for any reason, the corporation would have thirty days to purchase that shareholder's stock at a fixed price. When the corporation fired the minority shareholder, he argued that the employment-at-will doctrine was inapplicable to minority shareholders in close corporations. Id. at 1312-13. In a 5-2 opinion, the court in Ingle, siding with the corporation, reasoned: "A minority shareholder in a close corporation, by that status alone, who contractually agrees to the repurchase of his shares upon termination of his employment for any reason, acquires no right from the corporation or majority shareholders against at-will discharge." Id. at 1313. In contrast, the dissent viewed the majority shareholders as oppressing the minority shareholder because they were frustrating his reasonable expectation that he would be employed as long as he wanted to work for the corporation. Id. at 1317. Accord Merola v. Exergen, 668 N.E.2d 351, 354-55 (Mass. 1996) (noting that not all close corporate employees who are also shareholders have a reasonable expectation of employment because controlling shareholders in close corporations must have some ability to make business decisions in the corporation's best interest); Gallagher v. Lambert, 549 N.E.2d 136 (N.Y. 1989) (finding that the minority shareholders were not protected from being fired as an employee simply because the corporation was a close corporation). See Douglas K. Moll, Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution, U. ILL. L. REV. 517, 531 n.65, 559 (1999) (arguing that termination of shareholder employment constitutes oppressive conduct in close corporations where the expectation of employment by the shareholder is reasonable).

53See infra text accompanying notes 287-302 (explaining why cases decided under the oppression statutes should not be considered majority-rule cases).

54See Moll, supra note 8, at 761 (explaining that the parallel development of the statutory cause of action under oppression and the enhanced fiduciary duty action both seek to protect the minority shareholders in closed corporations); Thompson, supra note 18, at 738-39 (noting that the increasing recognition of the statutory cause of action for oppression, the enhanced fiduciary duty created by Rodd, and greater acceptance of alternative remedies for dissolution indicate courts' growing concern for minority shareholders in close corporations).
under oppression statutes along with common-law fiduciary-based decisions intermingles the separate judicial and legislative resolutions of these issues. Such intermingling ignores the guiding philosophy of the minority rule: its abhorrence of courts that arrogate the legislative function. For example, while the Delaware Supreme Court's interpretation of its current statute has defined the minority rule, it is indisputable that the Delaware Supreme Court would follow a different approach to analyzing close corporate issues if the Delaware legislature so dictated. Therefore, while cases decided under oppression statutes can be compared and contrasted with other jurisdictions, only cases analyzed under the fiduciary rubric can be counted as supporting the majority or minority rules. Who owes these fiduciary duties and how that duty is defined and measured is what differentiates the majority and the minority rules in close corporate law.

C. The Majority Rule

A series of decisions from the Massachusetts courts represent the statement and refinement of the majority rule, a rule that in essence holds that all shareholders in a close corporation owe enhanced fiduciary duties to each other. The first of these cases, Donahue v. Rodd Electrotype Co., involved the corporation's repurchase of some of the shares of its majority shareholder, Harry Rodd. The minority shareholder, Euphemia Donahue, challenged the repurchase because the corporation would not repurchase her shares on the same terms. She argued that the directors, a majority of whom included Rodd's children and Rodd himself, caused the corporation to repurchase only Rodd's shares in violation of their fiduciary duty to her as a minority shareholder. Instead of analyzing the transaction under corporate law, as the lower court had done, the Massachusetts Supreme Court analyzed the transaction under partnership law:

55See Nixon, 626 A.2d at 1380-81 (expressing court's concern that adopting the majority rule would do "violence" to its corporate statute by involving the court in judicial legislation). See infra notes 152-54 and accompanying text.
56In Nixon, the Delaware Supreme Court made clear that it was up to the legislature, not the courts, to create special rules for close corporations. See Nixon, 626 A.2d at 1380 ("It would run counter to the spirit of the doctrine of independent legal significance, and would be inappropriate judicial legislation for this Court to fashion a special judicially-created rule for minority investors . . . .").
57See chart col. 1, 6-7, & 9-10, app. A (differentiating decisions under oppression statutes from decisions based on common law fiduciary duties).
59Id. at 514-15.
60See id. at 508 (stating that the lower court had used corporate standards to find "that the purchase was without prejudice to the plaintiff and implicitly found that the transaction had been carried out in good faith and with inherent fairness").
Because of the fundamental resemblance of the close corporation to the partnership, the trust and confidence which are essential to this scale and manner of enterprise, and the inherent danger to minority interests in the close corporation, we hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another . . . we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. . . . We contrast this strict good faith standard with the somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities. Corporate directors are held to a good faith and inherent fairness standard of conduct. . . . "Their paramount duty is to the corporation . . ." The more rigorous duty of partners . . . [is] here extended to stockholders in a close corporation . . . .61

The breadth of the opinion is quite remarkable. The court not only equated closely-held corporations with close corporations,62 but also equated close corporations with partnerships.63 As a result of the "fundamental resemblance of the close corporation to the partnership,"64 the court found it appropriate to apply its view of partnership fiduciary duty to these corporate actors.65 In so doing, the court made two additional important conclusions. First, because all partners owe fiduciary duties to each other as well as to the partnership, the Rodd court stated, in dictum, that all shareholders in a close corporation similarly owe fiduciary duties to each other as well as to the corporation.66 Second, the court contrasted the


62See Rodd, 328 N.E.2d at 511 (listing characteristics of a close corporation as "(1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation").

63See id. at 512 (analogizing partnerships to close corporations by stating like a partnership, trust and confidence is essential to protecting a minority shareholder's interest).

64Id. at 515.

65Id.

66See Rodd, 328 N.E.2d at 515 n.17 ("We do not limit our holding to majority stockholders. In the close corporation, the minority may do equal damage through unscrupulous and improper 'sharp dealings' with an unsuspecting majority.").
partnership and the corporate standards of fiduciary duty and concluded that the partnership fiduciary duty is "higher." They used a definition of partnership fiduciary duty of "utmost good faith and loyalty," the court reasoned that partnership fiduciary duty requires the corporation to offer each stockholder an "equal opportunity" to sell to the corporation a ratably number of shares at an identical price as was provided to the controlling shareholder. In a footnote, the court in Rodd provided an exception to the equal opportunity rule if the shareholders have so contracted.

A mere fifteen months later, in Wilkes v. Springside Nursing Home, Inc., the Massachusetts Supreme Court both reinforced and rejected aspects of its holding in Rodd. Wilkes was one of four equal shareholders in Springside Nursing Home. All four shareholders served as directors and officers of the corporation and received equal salaries. After a dispute, the shareholders did not reelect Wilkes as a director, and the directors did not reappoint him as an officer. As a result, Wilkes no longer drew any salary, which was his sole source of cash from the corporation. The court reaffirmed its holding in Rodd that all stockholders in a close corporation owe each other the fiduciary duties that partners owe each other, and reaffirmed that this duty was the duty of "utmost good faith and loyalty."

The court in Wilkes, however, abandoned Rodd's equal opportunity rule out of concern that the rule hinders legitimate activity by the controlling shareholder acting in the best interest of the corporation.

67Id. at 515-16.
68Id. at 515.
69See id. at 518 (reasoning that when controlling shareholders cause the corporation to buy only their shares, they are receiving benefits that are not available to the minority shareholder).
70See Rodd, 328 N.E.2d at 518 n.24 (stating that the equal opportunity rule would be inapplicable in situations where parties have so agreed in the corporate articles or bylaws). See generally Blank v. Chelmsford Ob/Gyn, P.C., 649 N.E.2d 1102, 1106 (Mass.1995) (finding minority shareholder received what he bargained for and no duty was owed where the employment agreement and stock purchase agreement allowed for termination without cause and a repurchase of his stock at book value); Evangelista v. Holland, 537 N.E.2d 589, 593 (Mass. App. Ct. 1989) (forcing estate of deceased shareholder to abide by repurchase terms set in stockholders' agreement does not violate duty of good faith and loyalty even though actual value of the stock was far higher than the price set in the agreement); Case v. New York Cent. R. Co., 204 N.E.2d 643, 647 (N.Y. 1965) (honoring agreement to file consolidated tax returns, even though the agreement benefitted only the majority). See also COX ET AL., supra note 48, at 257 (recognizing that conduct is allowed that is harmful to the non-controlling shareholder if it is consistent with the parties' agreement).
72Id. at 661.
73See id. at 663 (allowing discretion in decisions withholding or declaring a dividend, deciding to merge or consolidate, deciding salaries of officers, dismissing directors without cause, and hiring and firing corporate employees). For criticism of the equal opportunity rule, see EASTERBROOK & FISCHER, supra note 9, at 246 (arguing that if parties contracted on this issue, they would not adopt the equal opportunity rule).
Instead, the court in Wilkes conceded that the majority has some "selfish ownership" rights in the corporation that need to be tempered against its fiduciary obligation. As a result, the court's interpretation of the "utmost good faith" standard was that a controlling shareholder must demonstrate a legitimate business purpose for its action, but the minority shareholder can attempt to demonstrate that the "same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." This change appeared to move Massachusetts law closer to a corporate standard, which requires fiduciaries to consider what is in the corporation's best interest.

Despite the difference between Wilkes's rebuttable "legitimate business purpose" test and Rodd's "equal opportunity" test, the Wilkes court held for the plaintiff. The court rejected the notion that the majority's dislike for Wilkes constituted a legitimate business purpose for excluding him from his employment with the corporation. Furthermore, contrary to this shift, the court found that Wilkes had a reasonable expectation of employment:

Wilkes was one of the four originators of the nursing home venture; and that Wilkes, like the others, had invested his capital and time for more than fifteen years with the expectation that he would continue to participate in corporate decisions. Most important is the plain fact that the cutting off of Wilkes's salary, together with the fact that the corporation never declared a dividend, assured that Wilkes would receive no return at all from the corporation.

74Wilkes, 353 N.E.2d at 663.
75See id. The court reasoned:
It must be asked whether the controlling group can demonstrate a legitimate business purpose for its action . . . we acknowledge the fact that the controlling group in a close corporation must have some room to maneuver in establishing the business policy of the corporation. It must have a large measure of discretion, for example, in declaring or withholding dividends, deciding whether to merge or consolidate, establishing the salaries of corporate officers, dismissing directors with or without cause, and hiring and firing corporate employees.

76Id.
77See infra text and notes 234-39 (describing the similarities between Wilkes and the corporate standard).
78Wilkes, 353 N.E.2d at 664 (finding there was no showing of misconduct to support majority's assertion of Wilkes being disruptive or any evidence of him incompetently performing his duties).
79Id. at 664 (citation omitted). Decisions subsequent to Wilkes, however, make clear that not all employees of a close corporation have a reasonable expectation of employment. See infra notes 89-97 and accompanying text. For criticisms of the doctrine, see supra note 52.
In adopting the doctrine of reasonable expectations, which focuses on the perspective of the minority shareholder, the court in Wilkes undercut the corporate standard it appeared to adopt in the legitimate business purpose test. Thus, although both Rodd and Wilkes held for the minority shareholder, and both cases affirmed that all shareholders in a close corporation owe partnership fiduciary duties to each other, Wilkes’s rebuttable legitimate business purpose test not only replaced Rodd’s equal opportunity rule in Massachusetts, but the court also adopted the reasonable expectations test.  

While the court in Wilkes supported the minority shareholder’s reasonable expectation that the corporation employ him, rulings in Massachusetts subsequent to Wilkes make clear that not all close corporate employees who are also shareholders have a reasonable expectation of employment.  

Reiterating the legitimate business purpose standard from Wilkes, the Massachusetts Supreme Court in Merola v. Exergen held that the majority shareholder did not violate his fiduciary duties to the minority by causing the corporation to fire the minority, even without a legitimate business purpose. The court in Merola noted that controlling shareholders in close corporations must have "some room to maneuver" with respect to business decisions and reasoned that even where a shareholder has an expectation of employment, the expectation will not be reasonable absent (i) a general policy regarding ownership and employment, (ii) a requirement that employees buy stock as a condition of employment, or (iii) a history of distributing profits to employees in the form of salaries, as was present in Wilkes. The court was careful, however, to distinguish the facts of Merola from those in Wilkes, rather than overruling it.

But see Mitchell, supra note 28, at 1708 (arguing Wilkes’s balancing of interests is wholly inconsistent with Rodd’s view of fiduciary duties because balancing does not analyze whether the fiduciary acted in the beneficiary’s best interest).


Id. at 354-55.

Id. See also Vakil v. Anesthesiology Assocs. of Tauton, Inc., 744 N.E.2d 651, 655 (Mass. App. Ct. 2001) (holding no breach of the majority’s fiduciary duty by causing the corporation to fire plaintiff as there was no evidence that employment was tied to stock ownership); Olsen v. Seifert, No. 97-6456, 1009 Mass. Super. LEXIS 592, at *11, *15 (Mass. Super. Aug. 28, 1998) (applying Delaware law but noting that even the Massachusetts rule does not destroy the employment-at-will doctrine); Gallagher v. Lambert, 549 N.E.2d 136, 138 (N.Y. 1989) (finding minority shareholder not protected from being fired as an employee simply because the corporation was a close corporation).

See Merola, 668 N.E.2d at 354-55 (introducing the comparison to Wilkes by stating that "the termination of a minority shareholder’s employment may present a situation where the majority interest has breached its fiduciary duty to the minority interest," thereby leaving the door open to future rulings that shareholder expectations may trump the employment-at-will doctrine).

In non-employment contexts, shareholder expectations will tip the balance of interests only under narrow circumstances, having the most sway with Massachusetts courts in the context of expectations of ownership of stock or control of the corporation. For example, in Bodio v. Ellis, the court found that two minority shareholders had a reasonable expectation that they would continue in the equal status they had historically held until the death or retirement of either one. The court found that a transfer of two shares from the majority shareholder to an attorney for the corporation and subsequently to one of the minority shareholders was technically not a violation of transfer restrictions or other agreements between the parties, but was a violation of the fiduciary duties between these shareholders. The court held that the transfer was a violation of the reasonable expectations of the minority shareholders because it "upset the contemplated balance of power" between the two, who had received equal salaries and bonuses and contracted for the reciprocal right to buy sufficient shares to attain majority shareholder status on the retirement of the other.

Contrary to the pro-plaintiff tilt of Rodd, Massachusetts cases subsequent to Wilkes also refused to interpret the "higher" fiduciary obligation to help a minority shareholder who was treated differently from the majority in a merger, or a shareholder who tried to argue that shareholder feared a retaliatory termination after filing a lawsuit against the majority shareholder). Citing Wilkes, the appellate court upheld the superior court's injunction and approving its reasoning that the termination of the minority shareholder's employment "could be tantamount to a freeze-out." Id. at 614.

Id. at 668-88.
Id.
Id.

See Bodio, 513 N.E.2d at 689 (stating that assignment of shares to the defendant "was a clear contravention of [plaintiff's] rightful expectation that he would have equal control with [the defendant], and constituted a violation of the loyalty and fiduciary duty owed between the shareholders"). See also Battaglia v. Battaglia, 596 N.E.2d 712, 719 (Ill. App. Ct. 1992) (requiring constructive trust to maintain equal stock ownership); Cressy v. Shannon Continental Corp., 378 N.E.2d 941, 945 (Ind. Ct. App. 1978) (stating shareholders must vote their shares, or sell them to realign ownership, in order to preserve the equal sharing of control they expected); Hallahan v. Haltom Corp., 385 N.E.2d 1033, 1035 (Mass. App. Ct. 1979) (granting relief to effectuate plaintiff's reasonable expectation of balance of control which "the parties had envisioned and which they had a fiduciary duty to each other to maintain"). Cf. A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 7 (1st Cir. 1997) (finding the defendant breached his duty by acting contrary to the reasonable expectations of the other shareholders by engaging in a sham sale of his stock in order to leverage the company into purchasing his stock). Accord Schwartz v. Marien, 335 N.E.2d 334, 337 (N.Y. 1975) (conceding pre-emptive rights do not attach to treasury stock without specific provisions in certificate of incorporation but members of corporate board of directors owe fiduciary duty to treat shareholders fairly and equally).

See, e.g., Horizon House-Microwave, Inc. v. Bazzy, 486 N.E.2d 70, 77 (Mass. App. Ct. 1985) (finding merger that cashed out minority shareholder while giving majority shareholder stock in another corporation was lawful, despite the different consideration, because the merger
partnership fiduciary duties required the majority shareholders or the corporation to repurchase the shares owned by the minority shareholder. In addition, a series of Massachusetts cases required minority shareholders to bring cases for excessive compensation derivatively, not directly, because these cases rejected plaintiffs’ claims that such payments alone constituted freeze-outs.

After Wilkes, Massachusetts courts limited relief largely to shareholders whom the court believed were frozen out without a valid corporate purpose. For example, in Sugarman v. Sugarman, the First Circuit affirmed a judgment granting recovery to the minority shareholder in a close corporation because the majority shareholders not only paid themselves excessive salaries, but also denied the minority any financial benefits and then offered to purchase the minority’s shares at a low price. The court carefully delineated the cause of action for a successful freeze-out claim, and differentiated a freeze-out claim from an excessive compensation claim:

First, it is not sufficient for a minority shareholder to prove that the majority shareholder has taken excessive compensation or other payments from the corporation.

Second, it is not sufficient to allege that the majority shareholder has offered to buy the stock of a minority shareholder at an inadequate price.

[In order to establish the cause of action,] the minority shareholder must first establish that the majority shareholder employed various devices to ensure that the minority shareholder is frozen out of any financial benefits from the corporation through such means as the receipt of dividends or

had a legitimate business purpose).

See Goode v. Ryan, 489 N.E.2d 1001, 1005 (Mass. 1986) (finding no general duty to repurchase minority shareholder’s stock at death, absent an agreement or other provision requiring a repurchase, adding that the administrator received the same price per share as other shareholders on liquidation).

See, e.g., Symmons v. O’Keeffe, 644 N.E.2d 631, 638 (Mass. 1995) (stating claims of excessive compensation should be brought derivatively); Bessette v. Bessette, 434 N.E.2d 206, 207-08 (Mass. 1982) (denying the minority shareholder any relief simply because the defendants were getting allegedly excessive salaries, holding that the plaintiff should be bringing claim derivatively); Crowley v. Communications For Hosps., Inc., 573 N.E.2d 996, 1004 (Mass. App. Ct. 1991) ("[W]here corporate recovery for misdeeds by a corporate fiduciary is available under traditional corporate law, and such recovery provides a just measure of relief to the complaining stockholder, resort to a direct, personal action against miscreant fiduciaries may not be available . . ."). Cf. Donahue v. Draper, 491 N.E.2d 260, 263 (Mass. App. Ct. 1986) (allowing direct action for claim involving salary inequalities).

797 F.2d 3 (1st Cir. 1986).

Id. at 9.
employment, and that the offer to buy stock at a low price is the "capstone of the majority plan" to freeze-out the minority. 96

All freeze-outs, however, will not violate fiduciary duties. In Leader v. Hycor, 97 the court found that the defendants, who were majority shareholders in a public company, had met the Wilkes standard for freezing out the minority shareholders because the recapitalization had a legitimate business purpose and plaintiffs had not shown a less drastic alternative. 98 Interestingly, the court in Leader applied the Rodd fiduciary analysis even though Hycor was a public corporation, rather than a close corporation. 99

Although Wilkes and subsequent rulings have narrowed Rodd's applicability regarding what conduct will be actionable, the Massachusetts courts have repeatedly affirmed Rodd's dictum that in a close corporation, all shareholders owe fiduciary duties. 100 For example, in Smith v. Atlantic Properties, Inc., the corporate charter gave each shareholder veto power over the distribution of dividends. 101 The Massachusetts Court of Appeals reasoned that the minority shareholder owed fiduciary duties and was required to exercise his veto power consistently with these duties. 102 The court weighed the business reasons proffered by both parties and held that the defendant minority shareholder who exercised his veto power so that the corporation could never pay dividends, which ultimately resulted in the

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96Id. at 7-8. See generally Mitchell, supra note 28, at 1720 (citations omitted) (explaining that the tortious nature of a freeze-out is different from the fiduciary duty to act in the beneficiary's best interests and to avoid self-dealing). See also Bodio v. Ellis, 513 N.E.2d 684, 689 (Mass. 1987) (applying Rodd to undo a transfer of stock which thereby made the plaintiff the minority shareholder, causing him to be frozen out); Hallahan v. Haltom Corp., 385 N.E.2d 1033, 1035 (Mass. App. Ct. 1979) (affirming lower court order that shareholders in close corporation breached a fiduciary duty by disturbing the equal division of voting power between two shareholder groups, causing the discharge from employment without a legitimate purpose of one group, as part of a freeze-out scheme).


98Id. at 178.

99Id. at 174.


101See id. at 799 (stating that each of the four equal shareholders had a veto power because all significant corporate actions required eighty percent approval).

102See id. at 803 n.9 (supporting view that minority shareholders who are in position to control corporation have same fiduciary duties as majority shareholder). Smith is an appellate court decision and therefore of less precedential value than are Rodd and Wilkes. The Massachusetts Supreme Court in Zimmerman, however, affirmed Smith without critical comment, which suggests that the Supreme Court agreed with Smith. See Zimmerman v. Bogoff, 524 N.E.2d 849, 853-54 (Mass. 1988) (following Smith's holding and finding fifty percent shareholder 'controlled the purse strings' and therefore owed fiduciary duty to fellow owner of close corporation).
corporation incurring penalty taxes,\textsuperscript{103} did not have sufficient reasons for his veto when balanced against the desire of the other shareholders to receive dividends.\textsuperscript{104} Similarly, in \textit{A.W. Chesterton Co. v. Chesterton},\textsuperscript{105} the First Circuit, applying Massachusetts law, issued an injunction preventing the minority shareholder from selling his shares. The court held that under the factual circumstances of the case,\textsuperscript{106} the minority’s sale would breach the fiduciary duty he owed under \textit{Rodd}.\textsuperscript{107} Moreover, neither case found it significant that the defendant/shareholder was acting in a personal capacity, rather than in an official one.

Three principles emerge from these Massachusetts cases, which represent what has come to be known as the majority view in close corporation law. The first principle is that closely-held corporations should be treated as the equivalent of statutory close corporations.\textsuperscript{108} Courts in two other states agree with this first principle.\textsuperscript{109} In contrast, some courts that

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\item See Smith, 422 N.E.2d at 803 (requiring shareholders who vetoed the dividend to reimburse the majority shareholders for the accumulated earnings tax assessed by the IRS). See generally I.R.C. § 531 (2000) (imposing an accumulated earnings tax to pressure corporations to distribute excess profits so that individual shareholders will pay the taxes on the distributions).
\item See Smith, 422 N.E.2d at 800 (refusing to vote for dividends because minority shareholder thought the money should be spent on repairs and improvements on the buildings). See Mitchell, supra note 28, at 1714 (reasoning that the court’s conclusion in Smith, although couched in fiduciary language, was really decided on which party had the better business purpose).
\item 128 F.3d 1 (1st Cir. 1997).
\item The minority shareholder was using the sale as leverage to force the corporation to repurchase his shares because his sale of stock would cause the corporation to lose its Subchapter S tax status. See I.R.C. § 1366 (West 2003) (delineating requirements of Subchapter S corporations). See generally supra note 8 (discussing tax consequences to shareholders of Subchapter S corporations).
\item Chesterton, 128 F.3d at 6. See also Medical Air Tech. Corp. v. Marwan Inv., Inc., 303 F.3d 11, 20-21 (1st Cir. 2002) (noting finding minority shareholders in Massachusetts close corporations owe fiduciary duties but finding minority in this case did not breach because they had legitimate business purpose in voting against a merger).
\item See generally Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511-12 (Mass. 1975) ("For our purposes, a close corporation is one in which the stock is held in a few hands, or in a few families, and wherein it is not at all, or only rarely, dealt in by buying or selling."); Hallahan v. Haltom Corp., 385 N.E.2d 1033, 1034 (Mass. App. Ct. 1979) ("The findings we have summarized describe a close corporation as defined in [Rodd]. Haltom has a small number of stockholders, no ready market for its corporate stock, and substantial majority stockholder participation in the management, direction, and operations of the corporation.") (citations omitted); Scanolon v. W.C. Canniff & Sons, No. 94-6722-C, 1996 Mass. Super. LEXIS 172, at *10 (Mass. Dist. Ct. Aug. 9, 1996) (ruling that the corporation was a close corporation because it "has few shareholders [and] ... is a private, family-run corporation without a ready market for its shares").
\item See, e.g., Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 127 n.1 (7th Cir. 1995) (holding that although the corporation at issue was not organized under the Illinois Close Corporation Act, it would qualify "under common law principles" as a close corporation because "it is a family-run business with only three shareholders"); J. Bar H, Inc. v. Johnson, 822 P.2d 849, 859-60 (Idaho 1991) (treatig a corporation as a close corporation even though it did not elect close corporate status).
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are willing to accept other aspects of the majority rule reject this aspect of the rule and demand that the corporation formally elect close corporate status in order to qualify for the unique treatment that their respective corporate statutes accord solely to these corporations.\textsuperscript{110} Second, all shareholders in a close corporation owe each other fiduciary duties, regardless of the percentage of stock owned.\textsuperscript{111} Courts in three other states agree,\textsuperscript{112} while courts in four other states that have not embraced all aspects of the majority rule have nevertheless adopted this principle.\textsuperscript{113} Furthermore, another state has conflicting cases on this point.\textsuperscript{114} Third, this

\textsuperscript{110}See Sundberg v. Lampert Lumber Co., 390 N.W.2d 352, 357 (Minn. Ct. App. 1986) (reversing holding for plaintiff on three bases, one of which was that the requested remedy was available for statutory close corporations but the corporation had not elected close corporate status); Daniels v. Thomas, Dean & Hoskins, Inc., 804 P.2d 359, 364 (Mont. 1990) (ruling under the state's former oppression statute, the court reasoned that since the closely held corporation had not elected statutory close corporate status, the corporation's actions would be governed by the general corporation statute, rather than the close corporation statute).

\textsuperscript{111}See, e.g., Chesterton, 128 F.3d at 6 (reasoning that all shareholders owe fiduciary duties); Merola v. Exergen Corp, 668 N.E.2d 351, 353-55 (Mass. 1996) (agreeing that shareholders in a close corporation owe each other fiduciary duties of good faith and loyalty under Rodd, but supporting Wilkes's requirement that the majority must have some discretion in taking corporate actions); Zimmerman v. Bogoff, 524 N.E.2d 849, 853-54 (Mass. 1988) (applying Rodd fiduciary principles to all shareholders, regardless of the percentage of stock owned); Rodd, 328 N.E.2d at 515 n.7 (reasoning that because shareholders in a close corporation are like partners and because both majority and minority shareholders are capable of inflicting harm on each other, they all owe each other fiduciary duties); Smith v. Atlantic Properties, Inc., 422 N.E.2d 798, 802 (Mass. App. Ct. 1981) (reasoning that even minority shareholders in close corporations owe fiduciary duties).

\textsuperscript{112}See, e.g., Lawton v. Nyman, 327 F.3d 30, 38 (1st Cir. 2003) (applying Rhode Island law and recognizing that a fiduciary duty may apply among shareholders in closely-held family corporations); Slettland v. Roberts, 16 P.3d 1062, 1067 (Mont. 2000) (holding that fiduciary duty also applies to situations where a minority shareholder can adversely affect the corporation); Russell v. First York Sav. Co., 352 N.W.2d 871, 874 (Neb. 1984), rev'd on other grounds, 364 N.W.2d 14 (Neb. 1985) (stating that shareholders in close corporation owe one another the same fiduciary duty as that owed by partners in partnership); Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 457 (N.M. Ct. App. 2001) (citing partnership language from Rodd and progeny, court states that "we agree with the reasoning and approach of these cases). Cf. A. Teixeira & Co. v. Teixeira, 699 A.2d 1383, 1387 (R.I. 1997) (while all shareholders in a close corporation do not necessarily owe each other fiduciary duties, they may owe each other such duties if they treat each other like partners).

\textsuperscript{113}See Hubbard v. Tomlinson, 747 N.E.2d 69, 71 (Ind. Ct. App. 2001) (all shareholders in close corporations owe each other fiduciary duties); McRedmond v. Estate of Marianelli, 46 S.W.3d 730, 738-39 (Tenn. Ct. App. 2000) (finding all close corporation shareholders owe fiduciary duties); P.F. Jurgs & Co. v. O'Brien, 629 A.2d 325, 331 (Vt. 1993) (holding that all shareholders in a close corporations owe one another fiduciary duty of good faith and loyalty); cf. Helms v. Duckworth, 249 F.2d 482, 487 (D.C. 1957) (holders of closely-held stock owe each other a fiduciary duty to deal fairly and make full disclosure when negotiating between each other regarding the price of the company's stock).

fiduciary duty is the duty of utmost good faith and loyalty owed by partners.\textsuperscript{115} Courts in three states have also embraced the partnership standard for fiduciary duty,\textsuperscript{116} and courts in two other states have stated they will impose partnership fiduciary duties on shareholders if that is what the parties intended.\textsuperscript{117} In four other states, courts purport to adopt the majority's heightened duty, but then impose such duty only on those in control of the corporation,\textsuperscript{118} instead of on all shareholders. Demonstrating compliance with this partnership fiduciary duty in Rodd required offering an equal opportunity for all stockholders; however, Wilkes overruled the

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\textsuperscript{115}See, e.g., Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) (stating in close corporation stockholders must discharge their management and stockholder responsibilities in conformity with the strict good faith standard of duty owed by partners); Rodd, 328 N.E.2d at 515 (holding that "stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another"); Cain v. Cain, 334 N.E.2d 650, 654-55 (Mass. App. Ct. 1975) (reasoning that partnership fiduciary principles apply to fifty percent shareholder). But see Charles W. Murdock, The Evolution of Effective Remedies for Minority Shareholders and its Impact Upon Valuation of Minority Shares, 65 NOTRE DAME L. REV. 425, 436 (1990) (arguing Rodd is limited to shareholders who view each other as partners).

\textsuperscript{116}See, e.g., I.P. Homeowners, Inc. v. Radlue, 558 N.W.2d 582, 589 (Neb. Ct. App. 1997) (holding that shareholders in a close corporation owe each other partnership fiduciary duties); Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 458-59 (N.M. App. 2001) (holding that shareholders in a close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another, and in the context of a close corporation, this duty is higher than the duty of good faith and fair dealing imposed on all contractual relationships); cf. Sleteland v. Roberts, 16 P.3d 1062, 1067 (Mont. 2000) (applying the partnership duty of "utmost good faith and loyalty" and stating the fiduciary duty cannot be limited where a minority shareholder can damage a corporation).

\textsuperscript{117}See Cressy v. Shannon Cont'l Corp., 378 N.E.2d 941, 944-45 n.6 (Ind. Ct. App. 1978) (enforcing partnership-like treatment only if this is what the parties intended because not all shareholders in close corporations intend to treat each other as partners); A. Teixera & Co. v. Teixera, 699 A.2d 1383, 1387 (R.I. 1997) (finding that all shareholders in a close corporation do not necessarily owe each other fiduciary duties, but they may owe each other such duties if they act towards each other like partners).

\textsuperscript{118}See Wisheart v. Zion's Bancorporation, 49 P.3d 1200, 1204 (Colo. Ct. App. 2002) (quoting Van Schaack Holdings, Ltd. v. Van Schaack, 867 P.2d 892, 8897-98 (Colo.1994)) (noting fiduciary duty in close corporations is enhanced and requires corporate directors to "fully disclose all material facts and circumstances surrounding or affecting a proposed [stock] transaction with a shareholder"); Hagshenas v. Gaylord, 557 N.E.2d 316, 323-24 (Ill. App. Ct. 1990) (applying partnership heightened fiduciary duties only after determining the fifty percent shareholder retained significant control even after he resigned as an officer in the close corporation); Norman v. Nash Johnson & Sons' Farms, Inc., 537 S.E.2d 248, 260 (N.C. Ct. App. 2000) (holding "special duty" of good faith, care and diligence, was owed to minority shareholders after finding defendants owned a majority of shares, were officers, and controlled the company's board of directors); Koos v. Cent. Ohio Cellular, Inc., 641 N.E.2d 265, 271 (Ohio Ct. App. 1994) (holding that majority shareholders and corporate officers and directors in a closely held corporation owe heightened fiduciary duties).
equal opportunity rule for Massachusetts. The equal opportunity rule has similarly been rejected in some majority-rule states but continues to be good law in other states. Finally, while Massachusetts recognizes the doctrine of reasonable expectations under some circumstances, no other state wholeheartedly endorses the doctrine solely as a component of enhanced fiduciary duty.

In sum, courts following the majority rule have imposed on some or all shareholders in close corporations an enhanced, partnership-like fiduciary duty. Although several majority-rule courts have applied such fiduciary duty. Although several majority-rule courts have applied such a duty to all shareholders, the context of most cases required courts to impose an enhanced fiduciary duty on the controlling shareholder. This enhanced duty has created significant changes in both the rights and obligations of close corporate shareholders. For example, courts in majority-rule

119 See supra note 73 and accompanying text. See also Goode v. Ryan, 489 N.E.2d 1001, 1005 (Mass. 1986) (finding that close corporation did not attempt to freeze-out or otherwise oppress the shareholder and administrator who received same price per share as other shareholders on liquidation, corporation was under no fiduciary obligation to repurchase shares of deceased stockholder at death).

120 See Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 457-58 (N.M. App. 2001) (following Massachusetts lead and stating that since Rodd, Massachusetts courts refined their notion of fiduciary duty to allow controlling groups to show a legitimate business purpose for their actions); Daniels v. Thomas, Dean & Hoskins, Inc., 804 P.2d 359, 366 (Mont. 1990) (adopting Wilkes's legitimate business purpose after noting Rodd had been amended).

121 See Jones v. H. F. Ahmanson & Co., 460 P.2d 464, 478 (Cal. 1969) (holding even before Rodd was decided, and continuing to be good law in California, that equal opportunity rule requires shareholders to have opportunity to have their stock repurchased on same terms that majority's shares were repurchased); Morrison v. Gugle, 755 N.E.2d 404, 412 (Ohio Ct. App. 2001) (emphasizing that majority or controlling shareholders breach their fiduciary duty to minority shareholders when control of close corporation is used to prevent minority from having an equal opportunity); Jorgenson v. Water Works, Inc., 630 N.W.2d 230, 235 (Wisc. Ct. App. 2001) (noting all shareholders in close corporations, particularly in a Subchapter S corporation, must be treated equally). Although Georgia has a case adopting the equal opportunity rule, subsequent cases seem to follow more traditional corporate principles. Compare Comolli v. Comolli, 246 S.E.2d 278, 281 (Ga. 1978) (holding that corporation must authorize a corporate purchase of all shareholder's stock at the same price and terms as offered to another shareholder) with Matthews v. Tele-Systems, Inc., 525 S.E.2d 413, 415-16 (Ga. Ct. App. 1999) (apparently not requiring "partnership" level of duty of disclosure or honesty in finding that shareholders/directors who lied to other shareholder/director to get him to resign from the board did not breach a duty). Furthermore, one court interprets its dissolution statute as adopting the equal opportunity rule. See, e.g., Powell v. MVW Holdings, Inc., 626 N.W.2d 451, 463 (Minn. Ct. App. 2001) (stating that the equal opportunity rule is generally available under the dissolution statute and is designed to protect minority shareholders from being frozen out).

122 See supra notes 92-97 and accompanying text.

123 See infra notes 299-301 and accompanying text. While other majority-rule states do not adopt the doctrine of reasonable expectations as a component of fiduciary law, two oppression statutes explicitly include the doctrine, see infra note 296, and some courts have defined "oppression" under their dissolution statutes as including the reasonable expectations doctrine, see infra note 292.
jurisdictions have ordered stock buyouts where neither the statute nor a private agreement required a buyout, and ordered corporations to employ a minority shareholder even though the shareholder had no employment agreement. Other majority-rule courts have prevented shareholders from selling their shares or forced controlling shareholders to share a control premium with the minority. While seeming to provide innumerable benefits to minority shareholders, imposing this heightened duty on all shareholders may instead be a double-edged sword.

D. The Minority Rule

Delaware caselaw involving fiduciary duties in either closely-held or statutory close corporations is scant. The first case to discuss this issue was *Ueltzhoffer v. Fox Fire Development Co.* where the minority shareholder in a closely-held corporation was successful in only one of her three claims. In holding for the plaintiff on this one claim, the Delaware Court of Chancery reasoned that the majority shareholder had "breached her fiduciary duty by using her control . . . to cause payments to be made to

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124 See Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 518-19 (Mass. 1975) (using equal opportunity rule to require a buyout of minority shares if corporation buys majority's shares). Cf. Comolli v. Comolli, 246 S.E.2d 278, 281 (Ga. 1978) (finding good faith requires directors to repurchase shares from all shareholders on same terms so as to avoid a preferential distribution of assets); Bodio v. Ellis, 513 N.E.2d 684, 688-89 (Mass 1987) (applying Rodd to undo a transfer of stock which thereby made the plaintiff the minority shareholder, causing him to be frozen out); Hallahan v. Haltom Corp., 385 N.E.2d 1033, 1035 (Mass. App. Ct. 1979) (ordering the return of five shares of stock to the corporation so as to reinstate balance of control which "the parties had envisioned and which they had a fiduciary duty to each other to maintain").

125 See, e.g., Gigax v. Repka, 615 N.E.2d 644, 649-50 (Ohio Ct. App. 1992) (disagreeing with the defendants that employees/shareholders/directors in close corporation are at-will terminable employees terminable at any time by the majority/controlling shareholder, and stating, "the fiduciary duty which the partners owe each other requires that the removal of a partner be based on legitimate business reasons."). See also Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663-65 (Mass. 1976) (finding that close corporation wrongly squeezed-out shareholder from employment and salary benefits based on an understanding among the shareholders that each would be employed by the corporation, and holding that Wilkes "shall be allowed to recover . . . the salary he would have received had he remained an officer and director").

126 See, e.g., A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 8-9 (1st Cir. 1997) (granting injunctive relief to prevent minority shareholder from selling shares because sale would have caused closely-held corporation to lose its Subchapter S tax status); see also supra note 123.

127 See, e.g., Jones v. H. F. Ahmanson & Co., 460 P.2d 464, 471 (Cal. 1969) (finding any time majority shareholders use their controlling power, it must benefit the minority shareholder proportionately).

128 See infra Part IV.D-E (discussing whether shareholders are better off in a majority-rule jurisdiction).

herself while excluding the Ueltzhoffers." Although the court addressed fiduciary duties, the basis for requiring equal payments was a contract theory, as there was ample testimony indicating that the shareholders had negotiated for an equal share of the profits. It is noteworthy that the court denied plaintiffs' demands to be bought out of the company and to be reinstated to the position from which one of them had been fired. The court reasoned that minority shareholders do not have the right to be bought out and that the majority had the right to fire the minority for a legitimate reason. Furthermore, because the firing was based on the majority shareholder's belief that the minority shareholder was an incompetent employee, the firing was not a disguised freeze-out. In \textit{dictum}, the chancery court posited that there was no Delaware authority following Wilkes or applying Wilkes, especially in a corporation that was not a statutory close corporation. The court's analysis, therefore, rejected arguments that there were any special duties among shareholders in Delaware close corporations.

Two months after \textit{Ueltzhoffer}, the Delaware Court of Chancery decided \textit{Litle v. Waters}. In \textit{Litle}, even though the plaintiff-minority shareholder was discharged from his employment, he did not challenge his discharge or ask for any protection under majority-rule principles. Instead, his lawsuit claimed that the corporation, in an attempt to freeze him out of the corporation, refused to pay dividends to his Subchapter S corporation; therefore, he had to pay taxes on his \textit{pro rata} share of the corporation's profits without receiving cash to pay these taxes. The majority moved to

\footnotesize{\begin{itemize}
\item[130]Id. at *23.
\item[131]See id. at *22-*23 (holding that the minority shareholders were entitled to an equal share of the profits from the corporation based on testimony that the minority and majority shareholders had agreed to share profits equally despite unequal ownership of shares).
\item[132]Id. at *22.
\item[133]\textit{Ueltzhoffer}, 1991 Del. Ch. LEXIS 204, at *24.
\item[134]Id. at *22. This aspect of the Delaware Court of Chancery's reasoning is similar to the Massachusetts rule under Wilkes, which allows the majority shareholder to act in the best interest of the corporation if there is no less harmful alternative.
\item[135]Id.
\item[136]See Nixon, 626 A.2d at 1379 (affirming the reasoning in \textit{Ueltzhoffer} without identifying the \textit{Ueltzhoffer} case by name). In Nixon, the Delaware explicitly stated that there are no special duties owed to minority shareholders in close corporations both because the statute allows these shareholders to contract for their own protection and because the statute fails to identify any special duties owed to minority shareholders. \textit{Id.} See also Ragazzo, supra note 4, at 1122-24 (critiquing the reasoning and analysis of \textit{Ueltzhoffer} by questioning the validity of the court's decision to disregard any special duties owed to minority shareholders).
\item[138]Id. at *3-*5, reprinted in 18 DEL. J. CORP. L. at 319-20. See also supra note 8 (discussing tax effect on shareholders in Subchapter S corporations).
\end{itemize}}
dismiss the complaint on the ground that the business judgment rule governs a board's decision to declare or withhold dividends. The court, agreeing that corporate principles govern, nevertheless denied the majority's motion to dismiss, reasoning that the entire fairness test should be used to evaluate whether the withholding of dividends was proper.

The surprising aspect of the *Litle* opinion was that the court reasoned that the majority breaches its fiduciary duty whenever the majority acts oppressively by violating the reasonable expectations of the minority shareholder—reasoning that one would typically find in a majority-rule case. In *Garza v. TV Answer, Inc.*, however, the Delaware Court of Chancery stated:

I do not read *Litle* as establishing an independent cause of action for "oppressive abuse of discretion" distinct from a cause of action based on a breach of fiduciary duty. *Litle* appears merely to reiterate the well-established principle of law that, under Delaware law, the declaration of a dividend, like any action of the directors, rests in the discretion of the directors, but that the business judgment rule does not protect the directors if they grossly or fraudulently abuse the discretion entrusted to them by the shareholders.

Subsequently, the Delaware Supreme Court in *Nixon* confirmed Garza's reading of *Litle* that there is no separate cause of action for oppression or for frustration of reasonable expectations.

In *Nixon*, the Delaware Court of Chancery considered a selective stock repurchase plan that, as in *Rodd*, excluded the minority shareholder.

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139 Id. at *8-*9, reprinted in 18 Del. J. Corp. L. at 321.
140 Id. at *25, reprinted in 18 Del. J. Corp. L. at 329.
141 See *Litle*, 1992 Del. Ch. LEXIS 25, at *23-*24, reprinted in 18 Del. J. Corp. L. at 328 (stating that reasonable expectations of both parties were that "neither expected that the other would use [their] power so as to make the stock a liability when the company was making money in order to effectuate a squeeze out").
143 See id. at *19, reprinted in 19 Del. J. Corp. L. at 304. But see Minor v. Albright, No. 01 C 4493, 2001 U.S. Dist. LEXIS 19436, at *8 (N.D. Ill. Nov. 28, 2001) (applying Delaware law, the district court in Illinois cited *Litle v. Waters* for the proposition that Delaware not only recognizes a cause of action for oppressive conduct by majority shareholders but may also include conduct that is contrary to the "spoken or unspoken understandings on which the founders of a venture rely when commencing a venture").
144 *Nixon*, 626 A.2d at 1366. While the Delaware Supreme Court in *Nixon* did not mention *Litle*, the court confirmed the assertion in *Garza* that there are no special duties owed to shareholders of close corporations. Id. at 1379-80.
145 See id. at 1371.
In holding that the directors in a closely-held corporation\textsuperscript{146} breached their fiduciary duties by providing liquidity for employee stockholders but not for non-employee stockholders, the Delaware Court of Chancery appeared to adopt Rodd's equal opportunity rule by specifically noting: "I find it inherently unfair for defendants to . . . provide liquidity for themselves while providing no method by which plaintiffs may liquidate their stock at fair value . . . the needs of all stockholders must be considered and addressed when decisions are made to provide some form of liquidity."\textsuperscript{147}

Matching the bold language of Rodd, the Delaware Supreme Court in Nixon not only reversed the chancery court, but also repudiated virtually all of Rodd's tenets.\textsuperscript{148} First, the Delaware Supreme Court viewed the choice of form as dispositive; since the case involved a corporation, the court used corporate monitors, debating between the business judgment rule and the entire fairness standard, and ultimately settling on the latter.\textsuperscript{149} By utilizing only corporate monitors, the court implicitly rejected the Massachusetts view that partnership fiduciary law should be applied in close corporations.\textsuperscript{150}

Having selected the entire fairness monitor, the Delaware Supreme Court then decided whether the selective repurchase was entirely fair. The Delaware Supreme Court could have found that the relevant group to whom this duty of fairness was owed was only employee-shareholders, all of whom had been given an equal opportunity to exit. Instead, the Supreme Court accepted the chancery court's identification of the relevant group as all shareholders. While the chancery court in Nixon found the inequality created by the repurchase of only employees' stock "inherently unfair,"\textsuperscript{151} the Supreme Court reasoned that the dissimilar treatment of the stockholders was entirely fair because the directors owed their duty to the

\textsuperscript{146}While the Delaware Court of Chancery did not find it significant that the corporation was not a statutory close corporation, the supreme court did. See infra notes 154-56 and accompanying text.


\textsuperscript{148}Nixon, 626 A.2d at 1366.

\textsuperscript{149}The court reasoned that if, as in the case at hand, a controlling shareholder transaction presented a conflict of interest, the defendant shareholder is required to prove the entire fairness of the transaction. See id. at 1381 (stating that the entire fairness test is the most appropriate judicial standard in analyzing shareholder transactions that involve conflicts of interest). See generally Mary Siegel, The Erosion of the Law of Controlling Shareholders, 24 DEL. J. OF CORP. LAW 27 (1999) (providing an extensive discussion of judicial monitors of controlling shareholders transactions). For a discussion of the appropriate monitor for the Nixon fact pattern, see id. at 67-69.

\textsuperscript{150}See Nixon, 626 A.2d at 1380-81.

\textsuperscript{151}Id. at 1373.
corporation and had acted in its best interest.\textsuperscript{152} In so reasoning, the Delaware Supreme Court explicitly rejected the chancery court's view that fairness requires equality.\textsuperscript{153} Finally, in \textit{dictum}, the Delaware Supreme Court repudiated the suggestion that closely-held corporations and statutory close corporations should be deemed legal equivalents.\textsuperscript{154} The court found such equivalence to be "inappropriate judicial legislation"\textsuperscript{155} and a violation of the doctrine of independent legal significance.\textsuperscript{156} In order to disabuse any suggestion that close-corporate shareholders are entitled to special fiduciary treatment, the Delaware Supreme Court further opined that "we do not intend to imply that, if the Corporation had been a close corporation under Subchapter XIV, the result in this case would have been different."\textsuperscript{157}

While not unsympathetic to the risks of minority stock ownership in a close corporation, the Delaware Supreme Court explained its ruling in \textit{Nixon}:

The case at bar points up the basic dilemma of minority stockholders in receiving fair value for their stock as to which there is no market and no market valuation. It is not difficult to be sympathetic, in the abstract, to a stockholder who finds

\textsuperscript{152}Id. at 1377-78. See R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, THE DELAWARE LAW OF CORPORATIONS AND BUSINESS ORGANIZATIONS § 4.9 (Supp. 1996) (articulating that fiduciary duties of directors, officers and controlling shareholders are owed directly to the corporation and indirectly to the shareholders); DAVID A. DREXLER ET AL., DELAWARE LAW AND PRACTICE § 15.13, at 15-105 (1998).

\textsuperscript{153}Nixon, 626 A.2d at 1376-77. The court was quite critical of the chancery court's entire fairness analysis and rebuked the court for failing to "crisply and clearly set forth findings of fact in a form which we believe is entitled to such deference." The court acknowledged that it generally gives deference to trial courts when the opinions are a product of "orderly and logical deductive reasoning process," but emphasized that the trial court in the case at hand failed to demonstrate such coherent reasoning. \textit{Id.} at 1378.

\textsuperscript{154}Id. at 1380.

\textsuperscript{155}Id. at 1380-81.

\textsuperscript{156}Id. The Delaware Supreme Court has used the doctrine of independent legal significance in other contexts. See Rothschild Int'l Corp. v. Liggett Group, Inc., 474 A.2d 133 (Del. 1984) (applying the doctrine of independent legal significance to find that because the transaction was structured as a merger, preferred shareholders had a right to receive only the payment due in the merger agreement rather than the higher liquidation price, even though the merger would liquidate their corporation); Haritan v. Arco Elecs, Inc. 188 A.2d 123 (Del. 1963) (rejecting the \textit{de facto} merger doctrine on grounds that it would violate the doctrine of independent legal significance).

\textsuperscript{157}Nixon, 626 A.2d at 1380.
him or herself in that position. A stockholder who bargains for stock in a closely-held corporation and who pays for those shares (unlike the plaintiffs in this case who acquired their stock through gift) can make a business judgment whether to buy into such a minority position, and if so on what terms. One could bargain for definitive provisions of self-ordering permitted to a Delaware corporation through the certificate of incorporation or by-laws by reason of the provisions in [the Delaware Code]. Moreover, in addition to such mechanisms, a stockholder intending to buy into a minority position in a Delaware corporation may enter into definitive stockholder agreements, and such agreements may provide for elaborate earnings tests, buy-out provisions, voting trusts, or other voting agreements. The tools for good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.\^158

It is important to note that the Delaware Court of Chancery and the Supreme Court in Nixon did not simply disagree about whether the transaction was fair; their differences were clearly on principle. The chancery court, viewing fairness through a Rodd lens and requiring all shareholders to be treated the same, found the repurchase plan a violation of the majority's fiduciary duty because their plan did not treat employee and non-employee shareholders equally.\^159 The Delaware Supreme Court accepted the chancery court's identification of the relevant group as all shareholders, but reasoned that it was entirely fair to discriminate among them because the selective repurchase was a benefit to the corporation.\^160 Moreover, the Delaware Supreme Court chastised the chancery court for adopting "the novel legal principle"\^161 that plaintiffs have a right to the same liquidity that the corporation offered to defendants. The supreme court argued that it was "well established in our jurisprudence that stockholders

\^158 Id. at 1379-80.
\^160 Nixon, 626 A.2d at 1379.
\^161 Id. at 1376. See also Ragazzo, supra note 4, at 1101 (discussing Nixon and arguing that the holding of Nixon is not controversial but the implications are).
need not always be treated equally for all purposes," and explicitly rejected *Rodd*'s equal opportunity rule. Since the court also did not permit the minority to show a less harmful alternative, the court implicitly rejected the *Wilkes* standard, a point the court made explicit in a later case. Lastly, *Nixon* makes clear that electing close corporate status would give shareholders only the opportunity to contract around the corporate norm but would not alter corporate fiduciary law.

Finally, in *Riblet Products Corp. v. Nagy*, a minority shareholder sued in federal district court in Indiana after being fired from his position as the corporation's president and chief executive officer. The Seventh Circuit certified to the Delaware Supreme Court the question of "whether majority stockholders of a Delaware corporation may be held liable for violation of a fiduciary duty to a minority stockholder who is an employee of the corporation under an employment contract with respect to issues involving that employment." The Delaware Supreme Court viewed the employment contract as dispositive; therefore, the court held that there was no claim for breach of fiduciary duties by the controlling shareholder.

The Delaware Supreme Court's holding in *Nagy* was narrow. The court merely held that when parties create an employment contract, that contract governs employment, even if the plaintiff/employee is also a shareholder. The case did not involve the situation where the employee/shareholder did not have an employment contract, as in *Ueltzhoffer*. Nor did the case involve an employee/shareholder alleging that his termination was an attempt to freeze him out of the corporation. Finally, the plaintiff did not contend that the majority breached duties owed to him as a shareholder. Given how this plaintiff framed his complaint, the court in *Nagy* did not consider the broader ramifications of the fiduciary duties owed

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162 See *Nixon*, 626 A.2d at 1376-77 (citing Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985)).
163 See *Riblet Products Corp. v. Nagy*, 683 A.2d 37 (Del. 1996) (noting explicitly that *Wilkes* was not the law in Delaware).
164 *Id.*
165 *Id.* at 39.
166 See *id.* at 40 (stating the case is governed by an employment contract and that contract rights differ from stockholder rights). *Cf.* *Berman v. Physical Med. Assocs., Ltd.*, 225 F.3d 429, 433-34 (4th Cir. 2000) (rejecting plaintiff's claims that the directors breached their fiduciary duty by terminating him and reasoning that any injury caused by the termination impacted his interests as an employee rather than as a stockholder).
167 *Nagy*, 683 A.2d at 40.
168 *Id.* at 39.
169 *Id.* at 40.
170 *Id.*
indirectly to minority shareholders.\(^{171}\)

Despite its narrow holding, *Nagy* is significant. In *Nagy*, the Delaware Supreme Court disagreed with the reasoning in *Wilkes* and its grant of special rights to minority shareholders.\(^{172}\) By holding that employment contracts supersede claims for breaches of fiduciary duties in both close and public corporations, *Nagy* reaffirmed the principle that Delaware will apply only general corporate principles to all corporations, whether they are public, closely-held, or statutory close corporations.\(^{173}\)

In sum, several principles emerge from this Delaware caselaw that represents the minority view. First, the Delaware Supreme Court requires corporations to elect close corporate status in order to obtain the benefits of that subchapter.\(^{174}\) At least three other states agree with this,\(^{175}\) and in so

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\(^{172}\)(*Nagy*, 683 A.2d at 39-40 (holding that majority stockholders have not breached a fiduciary duty to minority stockholder if the minority holder is terminated from the company and not reelected as a director and specifically rejecting the principles applied in *Wilkes*).)

\(^{173}\)See id.

\(^{174}\)See also *Chapin* v. Benwood Found., Inc. 402 A.2d 1205 (Del. Ch. 1979), aff'd sub nom on other grounds, *Harrison* v. *Chapin*, 415 A.2d 1068 (Del. 1980) (holding that provisions of close corporate subchapter are unavailable to noncomplying corporations).

\(^{175}\)See, e.g., Jamal v. Pirani, 490 S.E.2d 140, 141 (Ga. 1997) (rejecting the plaintiff's claim for breach of fiduciary duty because the corporation was not formed under the statutory provisions regulating close corporations); Hunt v. Data Mgmt. Res., Inc., 985 P.2d 731 (Kan. App. 1999) (finding that since the legislature has statutorily defined close corporations, a court should not accord special treatment to closely-held corporations under Kansas law); Toner v. Baltimore Envelope Co., 498 A.2d 642 (Md. 1985) (finding that closely-held corporations are not statutory close corporations and that corporate principles must be applied to determined whether the majority breached any fiduciary duty). Oklahoma may similarly reject the principle that closely-held corporations receive the same treatment as statutory close corporations because its caselaw and corporation statute are interpreted to follow Delaware law. See, e.g., Woolf v. Universal Fidelity Life Ins. Co., 849 P.2d 1093, 1095 (Okla. App. 1992) (stating that since the Oklahoma General Corporation Act is based on the Delaware General Corporation Act, cases arising under the Oklahoma Act should be interpreted in accordance with Delaware decisions). Cf. Sundberg v. Lampert Lumber Co., 390 N.W.2d 352, 356 (Minn. Ct. App. 1986) (ruling under its dissolution statute and reversing the holding for the plaintiff on three bases, one of which was that the requested remedy was available in close corporations but the corporation was not a statutory close corporation). Illinois has cases going both ways. Compare *Sims* v. *Tezak*, 694 N.E.2d 1015, 1017 n.1 (III. 1998) (holding that minority shareholders in a corporation that has not elected close corporate status do not receive the benefits granted to minority shareholders in statutory close corporations) with *Rexford Rand Corp.* v. *Ancel*, 58 F.3d 1215, 1217 n.1 (7th Cir. 1995) (holding that although the corporation at issue was not organized under the Illinois Close Corporation Act, it would qualify "under common law principles" as a close corporation because "it is a family-run business with only three shareholders"). But see *Davis* v. *Rondina*, 741 F. Supp. 1115, 1122-1123 (S.D.N.Y. 1990) (upholding the shareholders' right to use a provision of the Delaware close
doing, reject the majority view that equates closely-held corporations with statutory close corporations. Second, the only shareholders who owe fiduciary duties are controlling shareholders, and this duty arises only when acting in a corporate, rather than in a personal, capacity. Identifying controlling shareholders in their corporate capacity as the only shareholders who owe fiduciary duties is a principle that has garnered support from both minority and some majority-rule jurisdictions. Third, Delaware's position is that all corporations are to be governed by corporate, not partnership, principles. Delaware's adherence to corporate principles applies whether the corporation is publicly-held, closely-held or corporate subchapter even when corporation had not elected close corporation status if it was ineligible for that status and there were no intervening rights of third parties. See also Drumm, supra note 5, at 1168-71 (discussing Delaware's unwillingness to impose special duties for minority shareholders in corporations that have not elected statutory close corporation status and noting that several states, including Minnesota and Kansas, follow this approach).

For a discussion of what is control, see infra notes 197-99 and accompanying text. See also Siegel, supra note 149, at 36 n.31 (describing the process of defining control in a corporation and specifically stating that a minority shareholder will be a controlling shareholder only if there is actual control of corporate conduct).

See, e.g., Thorpe v. CERBCO, Inc., 676 A.2d 436, 441 (Del. 1996) (reasoning that although controlling shareholders will breach a fiduciary duty if they abuse their control position with respect to the corporation, controlling shareholders are not required to act altruistically toward minority shareholders in their personal capacity); Odyssey Partners v. Fleming, 735 A.2d 386 (Del. Ch. 1999) (rejecting the argument that a controlling shareholder's refusal to assume further financial obligations was a breach of his fiduciary duty and reasoning that Delaware law does not recognize fiduciary obligations when a controlling shareholder is acting in its personal capacity); Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986) (acknowledging that majority shareholders' fiduciary duty applies only to their corporate capacity and not to their personal capacity by finding that Delaware law does not require controlling shareholders to sacrifice their own financial interest in order to benefit the minority shareholders).

See Hines v. Hines, 934 P.2d. 20, 23-4 (Idaho 1997) (holding that while there is no general fiduciary duty among shareholders, majority shareholders negotiating purchase of minority shareholder's stock owes fiduciary duty to minority); Hunt, 985 P.2d at 731 (finding that minority shareholders may act in their own self interest and do not necessarily owe any fiduciary duties toward the close corporation); Hogge v. Brown, 971 S.W.2d 472, 488 (Tex. App. 1997) (finding no general fiduciary duty among shareholders in closely-held corporations, but controlling shareholders who dominate the corporation may, under limited circumstances owe fiduciary duties to minority shareholder); Sensormatic Sec. Corp. v. Bogansky, No. 119,641, 1992 Va. Cir. LEXIS 249, at *3 (Va. Cir. Ct. Mar. 27, 1992) (refusing to hold that a minority shareholder owed a continuing fiduciary duty to the majority shareholder and the corporation). Cf. Frieler v. Reuping, Inc., No. 84-602, 1985 Wis. App. LEXIS 3633, at *5 (Wis. Ct. App. Aug. 21, 1985) (finding a breach of fiduciary duty only if a shareholder, while acting in the role of corporate management, disregards the best interests of the corporation and its shareholders).

a statutory close corporation. In this context, the corporate monitors of fiduciary duties are the business judgment rule or the entire fairness test and they require fiduciaries to act in the corporation's best interests, rather than in the interest of any particular shareholder. At least six states similarly reject applying partnership principles in the corporate context. Moreover, although not explicitly addressing the doctrines of "oppression" or "reasonable expectations," Nixon's admonition that only the legislature, and not courts, can create different standards for close corporations is an implicit rejection of those doctrines because the Delaware corporate statute does not address either of them.

E. How Different Are the Majority and Minority Rules?

As noted above, some scholars minimize the differences between the majority and minority rules. Clearly, the same set of facts analyzed by

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181 See, e.g., id.

182 Delaware also has intermediate standards of review for contexts inapplicable here. See, e.g., Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985) (adopting rule in certain contexts, known as the "Revlon mode," whereby the directors' sole obligation is to maximize profits for their shareholders); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 946 (Del. 1985) (adopting enhanced business judgment rule when a corporation is defending against a hostile tender offer).

183 See 1 Rodman Ward, Jr. et al., Folk on the Delaware General Corporation Law 151.6, at GCL-V-38 (4th ed. 1999) ("Entire fairness standard of review is appropriate where the controlling shareholder has actually used its power over the corporation to 'impair the normal and primary protection the law affords the corporation and its shareholders.'").

184 See supra note 152 (discussing that fiduciaries in Delaware corporations owe their duties primarily to the corporation).

185 See, e.g., Berman v. Physical Medicine Assocs., Ltd., 225 F.3d 429, 434 (4th Cir. 2000) (finding that partnership law, including the requirement of a fiduciary duty among all shareholders, is normally not imputed to close corporations); Clagett v. Hutchinson, 583 F.2d 1259, 1264 (Md. 1978) (holding that the ruling in Rodd does not apply in Maryland and rejecting application of special duties to close corporation shareholders); Hunt, 985 P.2d at 732 (acknowledging that minority shareholders may act in their own self-interest and that Kansas does not impose partnership fiduciary duties on all shareholders in close corporations); Foster v. Blackwell, 747 So.2d 1203, 1216 (La. Ct. app. 1999) (stating that partnership legal obligations and corporate legal obligations are distinct and duties under one structure are not necessarily required under the other); Rosenthal v. Rosenthal, 543 A.2d 348, 352-53 (Me. 1988) (recognizing that a closely held corporation may operate like a partnership but stating that when determining whether a majority shareholder violates its fiduciary duties, a court must apply corporate principles); Toner, 948 A.2d at 642 (refusing to apply partnership principles to close corporations); Hoggett, 971 S.W.2d at 488 n.13 (finding no general partnership fiduciary duty among shareholders in closely-held corporations and rejecting application of partnership fiduciary duties to close corporation). Cf. Advanced Communication Design v. Follet, 615 N.W.2d 285, 293-94 (Minn. 2000) (ruling under its dissolution statute and holding that partnership duties are not applicable in close corporation context).

186 See supra note 26 (noting that recent literature frequently asserts that the differences between majority and minority rule jurisdictions are minimal).
both the *Nixon* and *Rodd* monitors, or analyzed by the *Nixon* and *Wilkes* monitors, can produce identical holdings. Surely, using *Nixon's* entire fairness methodology, Delaware courts might have sided with the plaintiff in the *Rodd* fact pattern, reasoning that the selective repurchase lacked a valid corporate purpose or was simply a disguised dividend. Similarly, the *Wilkes* court might have sided with the defendant in *Nixon* because that selective repurchase had a legitimate corporate purpose. Even assuming, *arguendo*, that majority and minority-rule courts could rule the same way on a given fact pattern, however, does not prove that the majority and minority rules have coalesced.187

There are at least three fundamental differences between the majority and minority rules. Additionally, some differences exist even among those states purporting to follow one rule or the other,188 and some courts have yet to consider all aspects of either rule.189

1. Will Closely-held Corporations and Statutory Close Corporations Be Treated Alike?

There is no one, generally-accepted, definition of a close corporation. In *Rodd*, the Massachusetts Supreme Court created its own common-law definition: "We deem a close corporation to be typified by: (1) a small number of stockholders; (2) no ready market for the corporate stock; and (3) substantial majority stockholder participation in the management, direction and operations of the corporation."190 In contrast, Delaware's statutory definition explicitly requires no more than thirty shareholders, at least one restriction on the transferability of stock, and precludes a public offering of the stock.191 Obviously, while the Delaware and Massachusetts definitions share some common ground, their criteria do not completely overlap.192

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187 *Accord* Harrison v. Netcentric Corp., 744 N.E.2d 622, 628-29 (Mass. 2001) (applying Delaware law to a Delaware closely-held corporation whose principal headquarters were in Massachusetts, and contrasting Massachusetts law, which imposes a heightened fiduciary duty on shareholders in a close corporation, with Delaware law, which does not).

188 See cases cited in chart col. 4, app. A (listing four states that apply the heightened duty of the majority rule but apply that duty only to corporate actors, which is a minority-rule principle, as well as one state that applies the corporate fiduciary standard of the minority rule to all shareholders, which is a majority-rule principle).

189 See cases cited in chart col. 11, app. A (listing states that either have not considered or have not reached a conclusion on this debate).


192 Compare id. (specifying the maximum number of shareholders for a close corporation and specifically not requiring shareholder participation in management by the majority shareholder) with *Rodd*, 328 N.E.2d at 511 (requiring an unspecified but "small" number of shareholders and also requiring substantial participation by the majority in the management of the corporation).
The greater disagreement between the majority and minority rules lies not in the differing criteria for qualifying as a close corporation but in whether their respective courts will equate closely-held corporations with statutory close corporations. Although Massachusetts does not have a separate close corporate chapter, some courts in states whose corporate statute has a close corporate subchapter have permitted this equivalence. In clear contrast, Delaware’s assertion that such equivalence is "inappropriate judicial legislation" has garnered support not only from fellow minority-rule states, but also from a majority-rule state and even one state interpreting its dissolution statute.

This difference between the majority and minority rules has further implications. The majority’s flexible attitude toward the corporate statute, demonstrated by its willingness to equate closely-held corporations with statutory close corporations, is consistent with its further willingness to treat closely-held corporations as incorporated partnerships. Conversely, the minority’s demand that a close corporation conform to the corporate statute by specifically electing close corporate status is similarly consistent with its view that when a business association has incorporated, it will be governed by a package of purely corporate rights and responsibilities.

2. Who has Fiduciary Duties?

Probably the most significant difference between the majority and the minority rules is who is under the fiduciary-duty rubric. Majority-rule courts, having analogized close corporations to partnerships, impose fiduciary responsibilities on all shareholders because all partners owe fiduciary duties to each other. In contrast, courts following the minority rule adhere to the corporate norm, which is that the only shareholders that owe fiduciary duties are those that control the corporation, and then only when acting in their corporate capacity. Shareholders are in control not

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193 See supra note 108.
194 Nixon, 626 A.2d at 1380-81.
195 See supra note 175 (citing Maryland and Kansas cases for the proposition that equating closely-held corporations with statutory close corporations undermines legislative intent of the corporate statutes).
196 See supra note 110 (noting that Montana follows Delaware’s lead and refuses to equate closely-held corporations with statutory close corporations).
197 See Sundberg v. Lampert Lumber Co., 390 N.W.2d 352, 355-56 (Minn. Ct. App. 1986) (ruling under its dissolution statute and reversing holding for plaintiff on three bases, one of which was that the requested remedy was available in statutory close corporations but the corporation had not so elected under the corporate statute). See also supra note 175 (discussing from the "Too Close to Call" column one Georgia case that refused to equate the two types of corporations).
198 See supra notes 116-18.
199 See supra notes 176-77.
only if they own a majority of shares, but also if they have the ability to dictate the terms of a transaction:

[A] shareholder who owns less than 50% of a corporation's outstanding stock does not, without more, become a controlling shareholder of that corporation, with a concomitant fiduciary status. For a dominating relationship to exist in the absence of controlling stock ownership, a plaintiff must allege domination by a minority shareholder through actual control of corporate conduct.

Thus, one point of distinction between the majority and minority views is who owes fiduciary duties. Cases with similar facts, one litigated in a majority-rule jurisdiction and one in a minority-rule jurisdiction, illustrate this difference. In both A.W. Chesterton Co. and Hunt v. Data Management Resources, Inc., minority shareholders took actions that would destroy their respective corporation's ability to continue its Subchapter S tax election. The court in Chesterton, following the majority rule, concluded that the minority shareholder owed and breached a fiduciary duty when he sold his stock, given that the sale would destroy the chosen tax status. On the other hand, the court in Hunt, following the minority rule, reasoned that because the minority shareholder owed no such duty, he could do as he wished.

Other contrasting holdings further demarcate the two rules. In

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200 The Delaware Supreme Court assumes that majority shareholders are in control of the corporation, and, as such, owe fiduciary duties. See Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) (citing Unocal, 493 A.2d at 958 for the proposition that only shareholders exercising control in a corporation owe fiduciary duties). There are a few Delaware cases, however, where the majority shareholder was held not to be in control. See Siegel, supra note 149, at 36-37 n.38.

201 Citron v. Fairchild Camera & Instrument Corp., 569 A.2d 53, 70 (Del. 1989); see also Cafcas v. DeHaan & Richter, P.C., 699 F. Supp. 679, 683-84 (N.D. Ill. 1988) (finding that fiduciary duties extend beyond individual controlling shareholders and may be imposed on a control group within the corporation); In re Tri-Star Pictures, Inc. Litig., 634 A.2d 319, 328 (Del. 1993) (holding that while Coca-Cola was not a majority shareholder, it attempted to "dictate the destiny of Tri-Star" and therefore owed a fiduciary duty to Tri-Star's shareholders). As the presumption is that a minority shareholder is not a fiduciary, the plaintiff bears the burden of proving the required domination of the corporation. See Siegel, supra note 149, at 36 n.30.

202 128 F.3d 1 (1st Cir. 1997).


204 As the tax election requires unanimous shareholder consent, any sale can threaten this election. See I.R.C. § 1366 (West 2003); see also supra note 8.

205 "Chesterton," 128 F.3d at 6.

Rexford Rand Corp. v. Ancel,\textsuperscript{207} the Seventh Circuit followed the majority rule and held that the defendant minority shareholder, Gregory Ancel, continued to owe a duty of loyalty to his co-shareholders even after being fired from his job.\textsuperscript{208} Similarly, in Hagshenas v. Gaylord,\textsuperscript{209} an Illinois appellate court held that even though a fifty percent shareholder in a closely-held Illinois corporation had resigned from all employment positions in his corporation, he continued to owe a partnership-like fiduciary duty to the corporation and its shareholders and therefore could not compete with the corporation as long as he owned its stock.\textsuperscript{210} In contrast, in Sensormatic Security Corp. v. Bogasky,\textsuperscript{211} a Virginia Circuit Court held that a former officer and director who continued to own a

\textsuperscript{207}58 F.3d 1215 (7th Cir. 1995).

\textsuperscript{208}See id. at 1220. The corporate name became available when the corporation was administratively dissolved because it neglected to file its annual report with the state. When the defendant/minority shareholder, who had not received either a salary or dividends from the corporation for several years, reserved the corporate name and incorporated under it, the original corporation sued, claiming the defendant breached his fiduciary duty as a shareholder in a close corporation. At the outset, the Seventh Circuit affirmed that minority shareholders in close corporations owe a duty of loyalty not to damage the corporate interests. \textit{id} at 1219. The Seventh Circuit then reasoned that although the minority shareholder was financially frozen out of the corporation, he was not deprived of his stock; therefore, he continued to owe the corporation a fiduciary duty. The court found that since the minority shareholder’s conduct was harmful to the corporation, it was a breach of his fiduciary duty. \textit{id} at 1220. \textit{See also} Cain v. Cain, 334 N.E.2d 650, 656 (Mass. App. Ct. 1975) (finding that a fifty percent shareholder violated its fiduciary duty owed to the corporation when he attempted to compete with the corporation by starting a second company in the same industry).


\textsuperscript{210}Id. at 323. Although the Illinois state Bar Association thought the \textit{Hagshenas} decision was outrageous and recommended legislation to amend the Illinois corporate statute so as to overrule the decision, the proposed legislation failed to pass. This proposed legislation became House Bill 700 in the 88th General Assembly of the State of Illinois, which proposed to amend § 6.4 of the Illinois Corporation Act of 1983 to add a provision to the effect that a noncontrolling shareholder has no fiduciary duty to a corporation or its shareholders. \textit{See} Van Vliet & Snider, \textit{supra} note 8, at 240-41. Subsequent cases in Illinois continue to follow \textit{Hagshenas}. \textit{See}, \textit{e.g.}, Rexford Rand Corp., 58 F.3d at 1219-20 (citing \textit{Hagshenas} for the proposition that a minority’s fiduciary duties continue even after the completion of a freeze-out); Ruca Hardware, Ltd. v. Chien, No. 94 C 3635, 1994 U.S. Dist. LEXIS 14064, at *22 (N.D. Ill. Oct. 4, 1994) (citing \textit{Hagshenas} and stating that minority shareholders in close corporations owe other shareholders the same fiduciary duties owed by partners), \textit{on reconsideration}, No. 94 C 3635, 1995 U.S. Dist. LEXIS 6678 (N.D. Ill. May 17, 1995); Sebastian v. Zuromski, No. 91 C 4529, 1993 U.S. Dist. LEXIS 3343, at *10 (N.D. Ill. Mar. 18, 1993) (applying the \textit{Hagshenas} reasoning and finding that the defendant shareholder owed a continuing fiduciary duty to the corporation which did not terminate until there was a final sale order for stock or an order of dissolution); Dearborn Process Serv., Inc. v. Storner, 149 B.R. 872, 880 (Bankr. N.D. Ill. 1993) (explaining that resignation by a shareholder from a position of an officer or director does not relieve the shareholder of fiduciary duties because the resignation does not terminate the shareholder’s status as a shareholder). \textit{Cf} Dowell v. Biter, 652 N.E.2d 1372, 1379 (Ill. App. Ct. 1995) (purporting to follow \textit{Hagshenas} but saying that fiduciary duties of shareholders in close corporations depends on more than simply the status as a shareholder and might depend on exerting control).

minority share in the corporation did not owe a fiduciary duty to the corporation solely as a shareholder; therefore, the court refused to enjoin the former officer/director from competing with the corporation.212

Although the majority and minority rules differ on whether non-controlling shareholders in close corporations owe fiduciary duties, both rules agree that the controlling shareholder owes fiduciary duties. Even here, however, the majority and minority rules share common ground only to a point. Under the minority rule, it is quite clear that a controlling shareholder’s fiduciary duty does not extend to activity exercised as a shareholder. As the Delaware Supreme Court stated, Delaware law "does not . . . require . . . controlling shareholders [to] sacrifice their own financial interest in the enterprise for the sake of the corporation or its minority shareholder."213 Thus, a controlling shareholder in Delaware may generally sell its stock to whomever it chooses and retain the premium,214 has no fiduciary obligation to provide financing to the corporation, despite the corporation’s needs,215 and may vote in its own self-interest even if that interest is contrary to the corporation’s best interest.216 Clearly, such self-interested conduct is the antithesis of a fiduciary obligation. Absent a contract,217 the controlling shareholders could vote for whomever they

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212See id. (holding specifically that the former officer could compete with company’s product because as a minority shareholder, he did not owe a continuing duty to the majority shareholder or the corporation). Accord J. Bar H., Inc. v. Johnson, 822 P.2d 849, 861 (Wyo. 1991) (finding that no fiduciary duty remains after a freeze-out occurs).

213Jedwab v. MGM Grand Hotels, Inc., 509 A.2d 584, 598 (Del. Ch. 1986). See supra note 177 (listing Delaware cases holding that only when controlling shareholders act in their corporate capacity do they owe fiduciary duties). While most of these holdings in Delaware involve conduct by the controlling shareholder in a public corporation, Nixon makes clear that these obligations would be no different were the shareholder in a non-public corporation. See supra note 172 and accompanying text (discussing that fiduciary duties in all types of Delaware corporations are the same).

214See Mendel v. Carrol, 651 A.2d 297, 305 & nn.15-18 (Del. Ch. 1994) (holding that Delaware law allows a controlling shareholder to retain premium from sale of stock).

215See Odyssey Partners v. Fleming, 735 A.2d 386, 411-12 (Del. Ch. 1999) (refusing to require the controlling shareholder to provide, among other things additional vendor credit despite the corporation’s heavy financial difficulties).

216Thorpe, 676 A.2d at 444 (holding that controlling shareholders have a right to vote as shareholders in their own self interest); Odyssey Partners, 735 A.2d at 411 (finding that a controlling shareholder did not breach its fiduciary duty by failing to take on additional financial obligations or refusing to waive its preemptive rights and citing Thorpe for the proposition that a shareholder may act in its own self-interest); Hunt, 985 P.2d at 731-33 (holding explicitly that controlling shareholders may act in their own self-interest and additionally noting that minority shareholders do not owe fiduciary duties).

217Shareholders, regardless of whether or not they are in a statutory close corporation, can enter into voting agreements that will obligate them to vote for designated people as directors. See Del. Code Ann. tit. 8, § 218 (2001); see also Nixon, 626 A.2d at 1379-80 (stating that the Delaware corporate code provides adequate protection for minority shareholders to contract for their own protection and specifically identifying Del. Code Ann. tit. 8 §§ 102, 109, 141(a), & 218
chose, and any expectation—reasonable or not—by a shareholder like Wilkes that he would be a director would be irrelevant. Majority-rule courts do not give similar latitude to shareholders because the majority views all activities, including the sale of stock or voting, as constrained by fiduciary duties. 218

Finally, there is another subtle yet significant difference between the two rules. While both rules require those with fiduciary duties to act in the best interest of the corporation, only the majority rule requires these fiduciaries to act directly in the best interest of other shareholders. 219 The implication of this added duty is that, as in Wilkes, the shareholder's expectation of employment will be honored absent a legitimate corporate purpose not to employ that shareholder, and, as in Chesterton, the defendant will be deemed to be breaching his fiduciary duty by causing the corporation to lose its qualification for Subchapter S tax election, an election which arguably benefits only the shareholders and not the corporation. 220 Courts in minority-rule jurisdictions might reach contrary results if a fiduciary did not harm the corporation.

3. Partnership or Corporate Fiduciary Duties?

A third difference between the majority and minority rules is whether the monitor of a fiduciary's behavior should be corporate or partnership fiduciary duties. The majority rule reasons that because close-corporate shareholders view each other like partners, these shareholders should be governed by the partnership fiduciary duty. 221 The court in Rodd further

(2001) as providing mechanisms to be used as protection for minority shareholders).

218 See, e.g., Chesterton, 128 F.3d at 5-7 (explaining that since all shareholders owe fiduciary duties to the corporation, minority shareholders may not act in their own self-interest); I.P. Homeowners, Inc. v. Radtke, 558 N.W.2d 582, 591-92 (Neb. Ct. App. 1997) (holding that since minority shareholders violated their fiduciary duties to the corporation by purchasing property for themselves, rather than for the corporation, the court imposed a constructive trust on the property); Jones v. H. F. Ahmanson & Co., 460 P.2d 464, 471 (Cal. 1969) (holding that the majority shareholders' sale of stock required the majority to share the premium from that sale with all shareholders in order to satisfy the fiduciary duties owed by the majority to the minority).

219 See Chesterton, 128 F.3d at 5-7 (requiring the majority shareholder to act in the best interest of both the corporation and the other shareholders); Russell v. First York Sav. Co., 352 N.W.2d 871, 874 (Neb. 1984), rev'd on other grounds, 364 N.W.2d 14 (Neb. 1985) (finding that shareholders in a close corporation owe fiduciary duties to one another as well as to the corporation); Walta v. Gallegos Law Firm, P.C., 40 P.3d 449, 458-59 (N.M. Ct. App. 2001) (explaining that shareholders in a close corporation owe each other fiduciary duties substantially similar to partnership duties). See also supra note 152 (noting that fiduciaries owe duties primarily to the corporation under Delaware law).

220 See, e.g., Chesterton, 128 F.3d at 4-5; Wilkes, 353 N.E.2d at 657.

221 See supra note 115 and accompanying text (discussing that the majority rule courts apply partnership fiduciary principles to close corporate shareholders).
described the partnership standard and contrasted it with the corporate standard, concluding that the partnership standard is "more rigorous": 222

the standard of duty owed by partners to one another . . . [is] the "utmost good faith and loyalty." . . . We contrast this strict good faith standard with the somewhat less stringent standard of fiduciary duty to which directors and stockholders of all corporations must adhere in the discharge of their corporate responsibilities. Corporate directors are held to a good faith and inherent fairness standard of conduct and are not permitted to serve two masters whose interests are antagonistic. 223

Beyond simply asserting that the partnership fiduciary duty is higher, courts have done little to detail any specifics that actually elevate the level of fiduciary duties in a partnership. 224 Nevertheless, courts in several other states have followed Massachusetts law and imposed partnership fiduciary duties in a close corporation. 225

In contrast, minority-rule courts govern all corporations by corporate monitors: either the business judgment rule or entire fairness. 226 There is little controversy that a court's choice of monitor is of paramount importance. As the Delaware Supreme Court explained: "It is often of critical importance whether a particular decision is one to which the

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222 See Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515-16 (Mass. 1975) (explaining trust and confidence are essential in close corporation). See also supra text accompanying notes 59-63.

223 Id. at 515-16 (citations omitted).

224 See discussion infra Part IV.B (analyzing that courts have applied an inaccurate and romanticized interpretation of partnership fiduciary law).

225 See supra note 115 (highlighting states that adopted partnership fiduciary duty). See also Cressy v. Shannon Continental Corp., 378 N.E.2d 941, 945 (Ind. Ct. App. 1978) (analyzing a higher fiduciary duty because a close corporation is an "incorporated partnership" and therefore the shareholders have a partnership expectation of equal ownership); Russell v. First York Sav. Co., 352 N.W.2d 871, 874 (Neb. 1984) rev'd on other grounds, 364 N.W.2d 14 (Neb. 1985) (finding shareholders in close corporations owe the higher fiduciary duty that partners owe each other).

226 See Nixon v. Blackwell, 626 A.2d 1366, 1376 (Del. 1993) (citing Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983)) (stating corporate monitors will govern all issues regardless of whether the corporation is public, closely held, or a statutory close corporation, and applying the entire fairness test to determine whether the directors, when they were on both sides of the transaction, demonstrated the "utmost good faith and the most scrupulous inherent fairness of the bargain"). See also Hunt v. Data Mgmt. Res., Inc., 985 P.2d 730, 732-33 (Kan. Ct. App. 1999) (refusing to apply "special treatment" for a corporation that failed to meet Kansas' statutory close corporation requirements). See generally BALOTTI & FINKELSTEIN, supra note 152, §§ 4.6, 4.10 (discussing how Delaware courts have refused to create a specific doctrine applicable to minority investors in the absence of statutory authority and discussing the application of the business judgment rule and the entire fairness test).
business judgment rule applies or the entire fairness rule applies. It is sometimes thought that the decision whether to apply the business judgment rule or the entire fairness test can be outcome-determinative.\textsuperscript{227}

Given that controlling shareholders in Delaware corporations may act in their own self-interest when acting solely as shareholders, they would be free to vote for whomever they wanted, and could support or block any transaction submitted for a shareholder vote. On the other hand, if the controlling shareholders became corporate directors, they would clearly owe fiduciary duties. As such, they would have to make their decisions on hiring, awarding compensation, declaring dividends, and repurchasing stock consistently with their fiduciary duties. Normally, these actions are not conflict-of-interest transactions, and would be governed by the deferential business judgment rule. Indeed, courts give directors in Delaware corporations broad latitude on these issues,\textsuperscript{228} requiring, for example, plaintiff to show "fraud or gross abuse of discretion"\textsuperscript{229} before a court will second guess the judgment of a board of directors that refused to declare dividends.

Nevertheless, Delaware courts often do not adopt such a hands-off attitude to business decisions when they are made in the context of a close corporation; the change, however, is not because Delaware courts monitor close corporations differently but because some routine matters, such as setting salaries for officers and directors, often will be conflict-of-interest decisions in a close corporation. When that occurs, the court, as it did in Nixon,\textsuperscript{230} will monitor the transaction under entire fairness,\textsuperscript{231} rather than

\textsuperscript{227}Nixon, 626 A.2d at 1376. See also Mills Acquisition Co. v. Macmillian, Inc., 559 A.2d 1261, 1279 (Del. 1988) (stating that "[b]ecause the effect of the proper invocation of the business judgment rule is so powerful and the standard of entire fairness so exacting, the determination of the appropriate standard of judicial review frequently is determinative of the outcome of derivative litigation"); Siegel, supra note 149, at 27-28 (noting that the two corporate monitors are bipolar).

\textsuperscript{228}See Mills Acquisition Co., 559 A.2d at 1279 (stating that "when a court reviews a board action, challenged as a breach of fiduciary duty, it should decline to evaluate the wisdom and merits of a business decision unless sufficient facts are alleged with particularity or the record otherwise demonstrates, that the decision was not the product of an informed, disinterested, and independent board"). See also 1 BALOTTI & FINKELSTEIN, supra note 152, § 4.6 (discussing how courts in Delaware apply the business judgment rule to allow directors broad discretion).

\textsuperscript{229}See Baron v. Allied Artists Pictures Corp., 337 A.2d 653, 658-59 (Del. Ch. 1975) (finding the board did not engage in fraud or a gross abuse of discretion and approving corporate directors' decision withholding dividends because it was a matter of prudent business judgment). See also Gabelli & Co. Profit Sharing Plan v. Liggett Group, Inc., 479 A.2d 276, 280 (Del. 1984) (stating it is well settled law that decision to declare a dividend is a matter of the board's business judgment and the court will not interfere unless there is fraud or a gross abuse of discretion).

\textsuperscript{230}See supra note 157 and accompanying text.

\textsuperscript{231}See 1 DENNIS BLOCK ET AL., BUSINESS JUDGMENT RULE: FIDUCIARY DUTIES OF CORPORATE DIRECTORS 315 (5th ed. 1998). "Different rules apply where the compensation has not been approved by either disinterested directors or shareholders. There, as in any other conflict of interest transaction[,] \ldots directors who have approved their own compensation bear 'the burden
under the deferential business judgment rule. The Delaware Supreme Court has defined the entire fairness monitor as follows:

When directors of a Delaware corporation are on both sides of a transaction they are required to demonstrate their utmost good faith and most scrupulous inherent fairness of the bargain . . . .

The concept of fairness has two basic aspects: fair dealing and fair price. . . . However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.\(^{232}\)

If a plaintiff is successful in convincing the court to monitor the transaction by entire fairness, the plaintiff has moved the transaction a long way toward probable invalidation. This is because the entire fairness monitor is "unflinching in its demand,"\(^{233}\) and requires the fiduciary to prove innumerable subjective considerations, without any safety net to identify what the court will deem to be fair.

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\(^{232}\)See Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983) (citations omitted) (defining "entire fairness" as fair dealing and fair price in the context of freeze-out merger):

The concept of fairness has two basic aspects: fair dealing and fair price. The former embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained. The latter aspect of fairness relates to the economic and financial considerations of the proposed merger, including all relevant factors: assets, market value, earnings, future prospects, and any other elements that affect the intrinsic or inherent value of a company’s stock. However, the test for fairness is not a bifurcated one as between fair dealing and price. All aspects of the issue must be examined as a whole since the question is one of entire fairness.

Id. See also Harbor Fin. Partners v. Sugarman, No. 14,834-NC, 1997 Del. Ch. LEXIS 49, at *5 (Del. Ch. Apr. 3, 1997) (noting "[e]ven if the price was fair, it does not necessarily follow that the transaction was entirely fair" because "the defendants must also show [that] . . . (the) decision to repurchase its notes from Giant resulted from a proper process").

\(^{233}\)Weinberger, 457 A.2d at 710.
In most transactions, the Wilkes test and the corporate standard of entire fairness will share some common ground. In fact, this commonality is a major reason that some commentators view the majority and minority rules as converging. For example, both Wilkes's legitimate business purpose test and Delaware's entire fairness standard would allow the best interests of the corporation to trump the minority's demands. Furthermore, while Wilkes would allow the minority to show a less harmful way to achieve the accepted business purpose, the flexibility of the fair dealing prong of Delaware's entire fairness standard might also allow for such a consideration.

In addition, both rules describe their standard as one of "utmost good faith," although the majority insists that its "utmost good faith" demands more of fiduciaries. Despite its corporate tone, however, the court in Wilkes did not allow the corporation to function under corporate principles regarding shareholder voting, appointing officers, and declaring dividends. Although it

234See infra text accompanying note 373-74 (discussing the difference between the law in Delaware and Massachusetts regarding freeze-out mergers).

235See supra note 24.

236See Nixon, 626 A.2d at 1376-77 (reasoning dissimilar treatment was entirely fair because it was in corporation's best interest); Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976) (acknowledging that the majority shareholders must have a large measure of discretion to establish policy that is in the best interests of the corporation).

237The Delaware Supreme Court has made clear that the entire fairness standard is flexible and designed to ensure that the fiduciaries have fulfilled their duties. See, e.g., Kahn v. Tremont Corp., 694 A.2d 422, 432 (Del. 1997) (reasoning entire fairness must be assessed in light of the "cumulative manner" in which fiduciary duties have been discharged); Kahn v. Lynch Communication Sys., Inc., 669 A.2d 79, 84 (Del. 1995) (stating, "[T]he test is not bifurcated or compartmentalized but one requiring an examination of all aspects of the transaction to gain a sense of whether the deal in its entirety is fair.").

238Compare Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 515 (Mass. 1975) (describing the standard of duty owed to shareholders in close corporation as the partnership duty of the "utmost good faith and loyalty") with Nixon, 626 A.2d at 1376 (citing Weinberger, 457 A.2d at 710) (requiring directors to demonstrate the "utmost good faith and the most scrupulous inherent fairness of the bargain" when the directors are on both sides of the bargain). The Delaware Supreme Court has furthered defined the requirement of "utmost good faith" as one that is "unflinching in its demand that where one stands on both sides of a transaction, he has the burden of establishing its entire fairness, sufficient to pass the test of careful scrutiny by the courts." Weinberger v. UOP, Inc., 457 A.2d 701, 710 (Del. 1983). See also In re Tri-Star Pictures, Inc., Litig., 634 A.2d 319, 333 (Del.1993) (finding where a controlling shareholder's self-serving manipulation of corporate affairs caused the minority interests economic injury alone, the majority could not demonstrate their "utmost good faith and the most scrupulous inherent fairness of the bargain"); Mills Acquisition Co. v. Macmillan, Inc., 559 A.2d 1261, 1280 (Del. 1988) (noting that the directors can demonstrate their "utmost good faith and most scrupulous inherent fairness of [the bargain]" by demonstrating fair dealing and fair price).

239See Rodd, 328 N.E.2d at 515-16. But see infra notes 339-49 and accompanying text (discussing whether the majority rule does, in fact, impose a higher standard on fiduciaries).

acknowledged that a controlling shareholder must have ample discretion, the court in Wilkes did not accord the majority that power. Instead, the court was willing not only to review decisions that these shareholders made—whom to elect as directors—but the court also required the defendants as directors to show a legitimate business purpose for their failure to appoint Wilkes as an officer, rather than deferring to their decision under the business judgment rule. The court reasoned that because the defendants had not shown that Wilkes was guilty of misconduct, their removing him as an officer and director did not further a valid business purpose. The court's analysis gave no deference to the majority shareholders' right to decide with whom they would work, nor found it relevant that Wilkes no longer got along with the majority of the other owners.

Wilkes would be unsuccessful in Delaware in challenging these transactions unless he could shift the burden to the defendants to prove the entire fairness of their decisions. As the majority's receipt of a salary was a conflict of interest, Wilkes would be successful in shifting the burden to the defendants to prove the entire fairness of that transaction. He would not directly profit in a minority-rule jurisdiction, however, even if his challenge were successful; he merely would prevent the other shareholders from taking disproportionately large salaries, which might increase his bargaining power with them. Although possibly successful in decreasing the size of the defendants' salaries, Wilkes would not be successful in his other claims; Delaware courts would neither usurp the functions of the directors and shareholders nor honor his expectations, reasonable or not.

Differences with those majority-rule states that continue to follow the equal opportunity rule go deeper. Adherents to the equal opportunity rule require equality as a result. Delaware, in contrast, considers inequality as

241 Id. at 663.
242 Id.
243 See Wilkes, 353 N.E.2d at 664 (refusing to find majority's dislike for the plaintiff as a legitimate business purpose).
244 See supra notes 76-80 and accompanying text (recounting that Massachusetts court in Wilkes used both the legitimate business purpose test and the doctrine of reasonable expectations).
245 See BAIOTTI & FINKELSTEIN, supra note 152, § 4.9 (noting that when a transaction leads to personal gain for a director, the director becomes an interested director and a conflict of interest arises).
246 It is possible that the Delaware Supreme Court could perceive Wilkes as de facto "squeezed out," a scenario the Delaware Supreme Court referenced in dictum in Riblet Products Corp. v. Nagy, 683 A.2d 37 (Del. 1996). In Nagy, the Delaware Supreme Court said that the majority may owe fiduciary duties to an employee as a minority shareholder where he is fired and thus squeezed out. Id. at 40. See also discussion infra Part IV.D (discussing squeeze-outs). The difference between Nagy and Wilkes is that in Nagy, the minority shareholder had an employment contract, which is what the court decided governed the case. Id.
247 See supra note 121 (listing states that continue to follow equal opportunity rule).
a factor in selecting entire fairness as the standard of review and in the process of ultimately evaluating the transaction, but explicitly rejects the notion that equality is a prerequisite to achieving a fair result.

The above comparison challenges one of the myths regarding close corporate law, namely, that the majority and minority rules are similar. While the majority rule's standard, as articulated in Wilkes, and the minority rule's entire fairness test share some common ground, the majority and minority rules otherwise contrast sharply in many respects. As a result, courts have had to choose between the competing viewpoints. The next section separates the myth from the reality regarding the choices that courts have actually made.

III. WHY THE MAJORITY RULE IS NOT THE MAJORITY RULE

Although recent casebooks and articles continue to refer to Rodd and its progeny as the majority rule, it is likely that Rodd never attained such a dominant status and certainly is not the majority rule today. As noted above, of the thirty-three states that have considered this debate, only five states could be characterized as being "true" majority-rule states in that they adopt the position that all shareholders in close corporations owe enhanced, partnership fiduciary duties. Even one of these states, Rhode Island, treats the majority rule merely as a rebuttable presumption.

Some might also include in the majority-rule seven states that have followed some, but not all, of the majority-rule principles. One of these states is California, which adopted the equal opportunity rule even before Rodd was decided. California, however, does not appear to follow any

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248 See generally Siegel, supra note 149, at 68-69 (discussing different triggers for the entire fairness test).
249 See supra note 152 and accompanying text (discussing Nixon's holding that fairness can be achieved without equality).
250 See cases cited in chart col. 1-7, app. A.
251 See supra notes 18-19. Massachusetts, the source of the majority rule, is in this category, along with Montana, Nebraska, New Mexico, and Rhode Island. See cases cited chart cols. 1-2, app. A.
252 See Lawton v. Nyman, 327 F.3d 30, 38-37 (1st Cir. 2003) (holding that the Rhode Island Supreme Court does recognize a fiduciary duty among shareholders in a closely-held corporation and this duty is a heightened duty unless there is an express agreement among the shareholders to the contrary); A. Teixeira & Co. v. Teixera, 699 A.2d 1383, 1387 (R.I. 1997) (noting that while the presumption favors applying partnership law, evidence to operate as a corporation would preclude applying partnership law to the corporation).
253 See cases cited in chart cols. 3-4, app. A.
254 See, e.g., Stephenson v. Drever, 947 P.2d 1301, 1307-08 (Cal. 1997) (stating that controlling shareholder's fiduciary duties include good faith, inherent fairness and equal opportunity for minority shareholders); Jones v. H. F. Ahmanson & Co., 460 P.2d 464, 471 (Cal. 1969) (holding that any use of the corporation or controlling power must benefit all shareholders
other aspect of the majority rule. A second state, Indiana, is difficult to characterize because some Indiana cases appear to embrace the majority rule wholeheartedly, while others intertwine corporate principles along with partnership principles. Four other states purport to adopt the majority's heightened fiduciary duty but then impose that duty on only the traditional corporate actors, as does the minority rule, instead of on all shareholders. Given the controversy about whether the majority's version of fiduciary duties is, in fact, higher than that imposed by the minority, any state that adopts only this aspect of the majority rule might not, in reality, be different from the minority rule. Finally, a fifth state, Tennessee, adopts the converse principles of these four states: Tennessee imposes fiduciary duties on all shareholders—as does the majority rule—but the equally).


See, e.g., Melrose v. Capitol City Motor Lodge, Inc., 705 N.E.2d 985, 991 (Ind. 1998) (applying corporate analysis to the transaction while acknowledging that shareholders in closely-held corporations owe one another enhanced fiduciary duties); Maul v. Van Keppel, 714 N.E.2d 707, 709-11 (Ind. Ct. App. 1999) (finding that corporate analysis is generally applied to close-corporate transactions unless the shareholders explicitly agree to act like and be regulated like a partnership); Krukemeir v. Krukemeir Mach. & Tool Co., 551 N.E.2d 885, 888-89 (Ind. Ct. App. 1990) (finding that the business judgment rule was appropriately applied to the majority's actions despite the fact that the corporation resembled an incorporated partnership).

See chart col. 4, app. A (identifying Colorado, Illinois, North Carolina, and Ohio as states that apply heightened fiduciary duties only to traditional corporate actors); see also Wischart v. Zions Bancorporation, 49 P.3d 1200, 1204 (Colo. Ct. App. 2002) (applying enhanced fiduciary duties in the context of close corporations only to corporate directors and requiring directors to disclose "all material facts and circumstances surrounding or affecting a proposed transaction" with a shareholder);

Anest v. Audino, 773 N.E.2d 202, 210 (Ill. App. Ct. 2002) (finding that individuals who control corporations owe heightened fiduciary duties to the corporation and its shareholders and finding that a minority shareholder will owe a similar duty only where it holds a position akin to a corporate officer or director); Freese v. Smith, 428 S.E.2d 841, 847 (N.C. Ct. App. 1993) (holding that the general rule is that shareholders do not owe each other heightened fiduciary duties but noting that a controlling shareholder will owe fiduciary duties to minority shareholders); Morrison v. Gugle, 775 N.E.2d 404, 412 (Ohio Ct. App. 2001) (stating that majority or controlling shareholders breach their heightened fiduciary duty to minority shareholders when the control of the corporation is used to disadvantage minority shareholders absent a legitimate business purpose).

See discussion infra Part IV.B.
duties are corporate ones.²⁶⁰

Stretching the majority-rule count to its farthest plausible limit could include those states which are "too close to call" and therefore cannot clearly be categorized. In this category are six states plus the District of Columbia; each of these jurisdictions has applied the majority rule in one or two cases, but, for a variety of reasons, it is not clear that these courts will continue to follow the majority rule.²⁶¹ Specifically, Georgia applied the majority rule in earlier cases,²⁶² but now seems to apply traditional corporate principles without having overruled its earlier cases.²⁶³ Nevada enacted some amendments to its close corporate statute, thus adherence to any previous majority-rule opinions is questionable.²⁶⁴

Three states—Alabama, Vermont, and Wisconsin—plus the District of Columbia are also in the "too close to call" column. Alabama cases contain a plethora of rhetoric supporting the majority rule, but the rulings hold only the traditional corporate actors, such as controlling shareholders,

²⁶⁰See Nelson v. Martin, 958 S.W.2d 643, 648-50 (Tenn. 1997) (imposing a fiduciary relationship on all shareholders in a close corporation but imposing the corporate fiduciary duty to act in good faith and fairness rather than partnership fiduciary duties); Hall v. Tennessee Dressed Beef Co., 957 S.W.2d 536, 541 (Tenn. 1997) (confirming that shareholder duties in close corporations are not partnership duties and are comparable to those owed by corporate officers or directors but stating that a fiduciary duty is imposed on all shareholders).

²⁶¹See cases cited in chart col. 8, app. A (identifying Alabama, Georgia, Michigan, Nevada, Vermont, Wisconsin, and D.C. as yet uncommitted to either the majority or minority rule).

²⁶²See, e.g., Corbin v. Corbin, 429 F. Supp. 276, 280 (M.D. Ga. 1977) (prohibiting a corporation from terminating dividend payments because the termination was designed to force a sale by minority, in violation of the heightened fiduciary duty owed by the majority to minority shareholders); Comolli v. Comolli, 246 S.E.2d 278, 280-82 (Ga. 1978) (applying the majority-rule principle of equal opportunity and requiring directors to repurchase shares from all shareholders on equal terms).

²⁶³See, e.g., Parks v. Multimedia Techs., Inc., 520 S.E.2d 517, 525 (Ga. App. 1999) (applying traditional corporate principles by requiring officers and directors in closely-held corporations to adhere to traditional corporate duties of good faith and to act in the best interests of the corporation); Gardiner v. McDaniel, 415 S.E.2d 303, 304 (Ga. App. 1992) (refusing to find that fiduciary duties exist among all shareholders, despite the fact that the shareholders were in a close corporation).

²⁶⁴Previous Nevada cases indicated that its courts will apply partnership duties to shareholders in a close corporation where a joint purpose or shareholders intent indicates that partnership treatment is applicable. See, e.g., Clark v. Lubritz, 944 P.2d 861, 864-65 (Nev. 1997) (enforcing an oral agreement between shareholders to continue operate and applying partnership fiduciary duty of full and frank disclosure to all shareholders). Nevada, however, enacted new provisions to its close corporation statute that require any agreement to treat a close corporation as a partnership to be made in writing, and if the agreement eliminates the board of directors, that change must be reflected in the corporation's bylaws. See NEV. REV. STAT. § 78A.070 (1989). This indicates that a court may not be able to apply partnership duties to close corporations unless the shareholders' intent to operate as a partnership is embodied in a written agreement.
to the corporate standards, rather than to a partnership fiduciary duty. Vermont has a single case that appears to adopt only one aspect of the majority rule; however, this Vermont case largely rests on another Vermont case that was actually applying Massachusetts law to a Massachusetts corporation. Wisconsin may be considered a majority-rule state based on Jorgenson v. Water Works, Inc., which required all shareholders to be treated equally. Although Jorgenson was brought pursuant to the Wisconsin dissolution statute, the court stated that the lower court's holding on oppression and dissolution was not appealed and, therefore, was not under consideration. Therefore, Jorgenson's holding requiring equal treatment for all shareholders would fit squarely under the majority rule. In contrast to Jorgenson, however, other Wisconsin cases are explicit that Wisconsin has not adopted the majority rule. Finally, based on one pre-Rodd case decided over forty-five years ago, the District of Columbia may be considered a supporter of the majority rule. The scant District of Columbia caselaw appears to distinguish this one case, however, thereby making it difficult to be sure which rule the District of Columbia courts will

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265 See James v. James, 768 So.2d 356, 358 (Ala. 2000) (noting that partnership fiduciary duties may exist in close corporation and that shareholders in a close corporation maintain a fiduciary duty to act fairly toward the minority but ultimately applying corporate principles to determine that an act committed primarily against the corporation will not result in damages for the minority simply because the action was unfair to the minority); Galbreath v. Scott, 433 So.2d 454, 457 (Ala. 1983) (noting that shareholders in a close corporation may have a partnership fiduciary duty to act fairly toward the minority but applying traditional corporate principles to hold that a minority shareholder's claim is still secondary to the corporation's claim if the actions of the majority primarily injure the corporation).

266 See P.F. Jurgs & Co. v. O'Brien, 629 A.2d 325, 331 (Vt. 1993). In Jurgs, the court cited to Solomon v. Atlantis Dev. Inc., 516 A.2d 132, 136 (Vt. 1986), which applied Massachusetts law to a Massachusetts corporation and noted that all shareholders in a closely-held corporation owe each other duties of good faith and loyalty. The Jurgs court nevertheless rejected plaintiff's claim that such duty was breached where the termination of the minority shareholder's interest was consistent with the shareholders' agreement. Therefore, it is unclear whether the Vermont court in Jurgs intended to adopt the majority-rule principle of all shareholders owing fiduciary duties to each other.

268 Id. at 232.
269 Id. at 235.
271 See Helms v. Duckworth, 249 F.2d 482, 487 (D.C. Cir. 1957) (finding that shareholders in closely-held corporations owe one another enhanced fiduciary duties to deal fairly and make full disclosure to one another).
eventually adopt.  

Finally, Michigan is in the "too close to call" column. Michigan has several cases that apply a traditional corporate analysis, as does the minority rule. In a case interpreting its dissolution statute, however, Michigan's court of appeals reasoned that in a close corporation, a higher fiduciary duty is owed. It is unclear whether this *dictum* regarding the state's dissolution statute will impact on cases outside the statute, and thereby switch an otherwise minority-rule state into the majority camp.

No doubt, some will quarrel that my reading of these cases is either too generous or too parsimonious in categorizing support for the majority rule. In reality, few cases are as straight-forward as are those from Massachusetts and Delaware. Conflicting cases in states like Indiana, Alabama, Vermont and Wisconsin, as well as in the District of Columbia, make clear conclusions difficult. Furthermore, one could credibly classify states that accept some principles from each rule either as majority or as minority-rule states. The most liberal interpretation, however, makes the total of majority-rule supporters no more than nineteen states plus the District of Columbia, and, as described above, the vast majority of this support is extremely tenuous. A fairer count of those that support the majority rule would total either five or no more than twelve states.

While the breadth of support for the majority rule has been overstated, the level of support for the minority rule has been understated. Articles that depict the Delaware view as aberrant imply that Delaware is

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272 See Egan v. McNamara, 467 A.2d 733, 739-40 (D.C. 1983) (distinguishing *Helms* and finding that the attorney/shareholder who drafted a repurchase agreement in a close corporation owed neither an attorney/client duty nor a corporate fiduciary duty to the other shareholders, but instead owed a duty to the corporation as an entity).


274 See Estes v. Idea Eng'g's & Fabrications, Inc., 649 N.W.2d 84, 91 (Mich. Ct. App. 2002) (acknowledging that the unique issues facing shareholders in close corporations "require a higher standard of fiduciary responsibility [that is] . . . more akin to partnership law").

275 Michigan, Vermont, and D.C. provide particularly thin support for the majority rule. *See supra* notes 264, 270-72.

276 See cases cited in chart cols. 1-2, app. A (identifying Massachusetts, Montana, Rhode Island, Nebraska, and New Mexico as clear majority-rule jurisdictions).

277 See cases cited in chart cols. 1-4, app. A (identifying Massachusetts, Montana, Rhode Island, Nebraska, New Mexico, California, Indiana, Colorado, Illinois, North Carolina, Ohio, and Tennessee as a mixture of definite and possible majority-rule jurisdictions).
isolated from the mainstream view. 278 To the contrary, the minority rule consists of fifteen states and, unlike the count for the majority rule, these fifteen states are solid supporters of the minority rule. Four of these states—Delaware, Florida, Kansas, and Louisiana—do not have judicial dissolution statutes that allow for a shareholder cause of action for oppression. 279 Therefore, all of the caselaw in these states regarding this topic is based solely on fiduciary law. Another seven states—Connecticut, Idaho, Maine, Maryland, Mississippi, Missouri, and West Virginia—have oppression statutes but the statutes are either rarely invoked or narrowly interpreted; therefore, when courts in each of these states have held that they follow traditional corporate principles in their treatment of close corporations, they too, are ruling solely based on fiduciary law. 280 In addition, four states—Iowa, South Dakota, Texas, and Virginia—utilize their oppression statutes, but nonetheless follow the minority rule when deciding cases outside the statute. 281 Thus, fifteen states clearly follow the

278 See discussion supra note 14.
279 See cases cited in chart col. 5, app. A.
280 See, e.g., Lux v. Environmental Warranty, Inc., 755 A.2d 936, 944 (Conn. App. Ct. 2000) (applying traditional corporate principles in the context of a close corporation by refusing to find that a minority shareholder is in a fiduciary position to the other shareholders); McCann v. McCann, 61 P.3d 585, 590 (Idaho 2002) (stating that directors in a close corporation owe fiduciary duties to one another, the shareholders and the corporation but acknowledging that the business judgment rule is still applicable to the directors' conduct and will immunize the directors' actions if they acted in good faith and with honest business judgment); Rosenthal v. Rosenthal, 543 A.2d 348, 352-53 (Me. 1988) (recognizing the special nature of close corporations that operate similar to partnerships, but holding that the conduct of the majority shareholders must be analyzed under the business judgment rule); Lerner v. Lerner Corp., 750 A.2d 709, 720-22 (Md. Ct. Spec. App. 2000) (rejecting both the legitimate business purpose test and reasonable expectations test, and finding that the entire fairness is the proper measure of shareholder actions in a close corporation); Derouen v. Murray, 604 So.2d 1086, 1090-93 (Miss. 1992) (applying traditional corporate analysis without providing special consideration to the close corporation context and ordering the lower court to reconsider the case in light of the corporate duties owed by the majority shareholder); Jones v. Sherman, 857 S.W.2d 468, 472 (Mo. Ct. App. 1993) (applying traditional corporate principles in the context of a close corporation and finding that a controlling shareholder's duties are "owed to the corporation, not its individual shareholders, officers or directors"); State ex rel. Smith v. Evans, 547 S.E.2d 278, 279 (W. Va. 2001) (holding that shareholders, regardless of whether they are in a close corporation or a public corporation, have an uncontrollable right to manage the affairs of the corporation in the absence of fraud and do not owe enhanced fiduciary duties to one another). It should be noted that Maine recently enacted its oppression statute, effective July 1, 2003. See ME. REV. STAT. ANN. tit. 13-C, § 1430 (West 2001).

281 See, e.g., Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc., 430 N.W.2d 447, 451 (Iowa 1988) (stating that fiduciary duties are owed only by directors, officers and majority stockholders, and applying traditional corporate analysis to find that defendant owed no fiduciary duty until he acquired control); Mueller v. Cedar Shore Resort, Inc., 643 N.W.2d 56, 63 (S.D. 2002) (holding that a minority shareholder's expectations must be balanced against the corporation's need to conduct business and analyzed in accordance with the traditional business judgment rule standards); Pabich v. Kellar, 71 S.W.3d 500, 505-06 (Tex. App. 2002) (ruling under the statute and stating that a shareholder in a close corporation does not, as a matter of law, owe
minority rule. This group of fifteen states includes two states, Florida and Mississippi, whose courts initially indicated that they would follow the majority rule but have since become minority-rule advocates. 282 Furthermore, given the conflicting holdings and the intertwining of corporate and partnership principles in cases in California, Indiana, Tennessee, Colorado, Illinois, North Carolina, and Ohio, and the seven jurisdictions in the "too close to call" column, some or all of these states could be counted in the minority camp just as credibly as in the majority-rule camp. 283

Thus, five states are strong majority-rule states, fifteen states strongly support the minority rule and thirteen other states plus the District of Columbia show some support for both rules. This dissection of the cases clearly refutes the characterization of Massachusetts caselaw as the majority rule and the depiction of Delaware law as both aberrant and isolated. As these numbers do not support either characterization, they provoke inquiry about how the caselaw and literature that created and repeated these characterizations could be so erroneous.

Several answers are obvious. One is that courts and commentators may cite to cases decided twenty or more years ago which either followed Rodd or had dicta to that effect. Several of those jurisdictions, however, have more recent cases that espouse the principles set forth in Nixon, but have never squarely overruled their earlier cases. 284 A second reason is shown by the discussion above of the majority-rule states. If one searches for dicta supporting the majority rule, much is available. But comparing the

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282 See, e.g., Derouen, 604 So.2d at 1090-93 (applying traditional corporate analysis without providing special consideration to the close-corporation context and describing the duties owed by a majority shareholder/officer as akin to those owed by corporate officers and directors); Draper v. Hay, 555 So.2d 1306 (Fla. Dist. Ct. App. 1990) (finding that majority shareholders in a close corporation do not owe fiduciary duties to the minority shareholders with respect to the sale of the majority's stock even if the sale is to a competing business and diminishes the value of the minority's stock).

283 See supra notes 251-72 and accompanying text; see also cases cited in chart cols. 3-4, 8, app. A. See also states in chart col. 11, app. A, some of which have conflicting cases.

284 See, e.g., Galbreath, 433 So.2d at 457 (describing the fiduciary duty solely as the corporate duty to act fairly toward minority interests); Draper, 555 So.2d at 1306 (failing to explicitly reject majority principles but supporting the proposition that majority shareholders do not owe a fiduciary duty to the minority shareholders in regard to a sale of stock because no fiduciary duties are owed when shareholders are acting in their personal capacity); Derouen, 604 So.2d at 1091-93 (refusing to overrule majority-rule principles but applying traditional corporate fiduciary duties to majority shareholders).
dicta to the analysis and holding often provides support for both rules, and comparing cases within a single state often produces a checkered pattern, rather than a linear conclusion. A third reason is how to categorize states that adopt some, but not all, majority-rule principles, or have not yet had the opportunity to rule on all aspects of the majority rule.

The least obvious reason for the gross discrepancy, however, is likely the main culprit: the inflated calculations of those states that support the majority rule may stem from those commentators who assume that the thirty-seven states that have adopted oppression statutes have either codified the majority rule or view these statutes and Rodd's principles as "two sides of the same coin." Almost no oppression statute, however, can be fairly read as a codification of the majority rule. Only two statutes codify the majority-rule concept that all shareholders owe duties to one another, and notably, neither mentions that these duties are "heightened" or "partnership" duties. Instead, unlike Rodd and its progeny, most statutes do not impose duties on all shareholders, but rather limit the statutorily-imposed duties to officers, directors and controlling shareholders, which codifies the minority rule. Moreover, the oppression statutes cannot be equated with the majority rule because some states with oppression statutes have adopted the minority rule. While commentators may be correct that these statutes reflect concerns unique to close corporations, clearly legislatures have not

285 Compare Burt v. Burt Boiler Works, Inc., 360 So.2d 327, 331-32 (Ala. 1978) (discussing that in the context of close corporations, more jurisdictions have recognized that majority shareholders owe enhanced fiduciary duties) with id. at 332-33 (applying corporate analysis to hold that the majority did not use its control to the detriment of the corporation or the shareholders by ousting the other shareholders from their board positions).

286 Compare Alaska Plastics, Inc., 621 P.2d at 276 (citing to Rodd as precedent for adopting the standard that shareholders in a close corporation owe one another fiduciary duties) with Collins v. Blair, 68 P.3d 1222, 1230 (Ala. 2002) (finding that the majority shareholder did not violate fiduciary duties by petitioning a federal agency for return of fishing rights because the majority acted in the best interests of the corporation).

287 See cases cited in chart col. 4, app. A.

288 See Moll, supra note 8, at 761 ("In the close corporation context, therefore, it is sensible to view the parallel development of the statutory cause of action and the enhanced fiduciary duty action as two sides of the same coin—i.e., the shareholder's cause of action for oppression."); see also Robert Art, Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties and Reasonable Expectations, 28 IOWA J. CORP. L. 371 (2003) (analyzing close corporate fiduciary duties as cases of oppression); Thompson, supra note 8, at 739 (noting that the fiduciary duty requirements of Rodd, the "direct cause of action for oppressive conduct," and "greater acceptance of alternative remedies to dissolution all," reflect the same underlying concerns for minority shareholders in close corporations).


291 See cases cited in chart cols. 6-7, app. A.
resolved these concerns by codifying the majority rule.

Furthermore, it is incorrect to include cases decided under these oppression statutes that espouse majority-rule principles as advocates of the majority rule.\textsuperscript{292} Inclusion of such cases ignores that \textit{Rodd} is not statutorily based, and belittles the minority rule's antipathy for judicial legislation. The dispute between Massachusetts and Delaware is based on caselaw regarding the content and applicability of common law fiduciary duties; any state purporting to follow either side in the debate must similarly be based on the common law, not on a statute. Some states from both camps appreciate this distinction and largely ignore their oppression statute, reasoning that their oppression statute does not address the contours of fiduciary law outside of the dissolution context.\textsuperscript{293}

Primarily, however, the basis on which commentators suggest that such statutes are a codification of the majority rule is the frequency with which the statutes themselves,\textsuperscript{294} or more often, the courts interpreting them,

\textsuperscript{292}See Thompson, \textit{supra} note 18, at 716 (delineating Minnesota, North Dakota, New Jersey, and New York as states that support the majority rule because they have interpreted their oppression statutes using majority-rule principles). North Dakota's statute specifically applies a reasonable expectations analysis to determining whether a majority has breached its fiduciary duty to the minority. \textit{See, e.g.}, Balvik v. Sylvestre, 411 N.W.2d 383 (N.D. 1987) (measuring the majority shareholder's conduct against partnership fiduciary duty and reasonable expectations concepts to find oppression). Additionally, Minnesota has applied majority rule concepts when analyzing an action under its oppression statute. \textit{See} Powell v. MVH Holdings, Inc., 626 N.W.2d 451, 463-64 (Minn. Ct. App. 2001) (finding the equal opportunity rule generally available to minority shareholders alleging oppression).

\textsuperscript{293}\textit{See, e.g.}, Lynch v. Buchanan, 377 A.2d 592, 594 (Md. App. 1977) (interpreting the statute narrowly and finding that it was not "intended to extend in any material way the long standing rule of law," which required \textit{ultra vires}, illegal or fraudulent acts in order to award dissolution); Daniels, 804 P.2d at 368-69 (acknowledging that enhanced fiduciary duties apply in the context of a close corporation but refusing to find statutory oppression by majority where the majority attached burdensome conditions on an offer to purchase shares from the minority because this was not a dissolution claim). Courts also differ about whether to apply these dissolution statutes to non-dissolution issues, such as those that were presented in \textit{Rodd} and \textit{Wilkes}. \textit{See, e.g.}, Woodward v. Andersen, 627 N.W.2d 742, 752 (Neb. 2001) (analyzing fiduciary duty concepts under the dissolution statute regarding whether majority shareholder acted unfairly toward the minority by refusing to appoint a second director and refusing to hold shareholder meetings). \textit{Contra} Dilaconi v. New Cal. Corp., 643 P.2d 1234, 1234 (N.M. App. 1982) (refusing to apply the dissolution statute and applying the business judgment rule to actions by the majority that the minority shareholder claimed were self-dealing because this was not a dissolution claim).

\textsuperscript{294}See, \textit{e.g.}, 805 ILL. COMP. STAT. 5/12.56(d) (1995) (stating that courts may take into consideration the reasonable expectations of the corporation's shareholders); N.D. CENT. CODE § 10-19.1-115(4) (1985) (allowing courts to consider both fiduciary duties and reasonable expectations of the shareholders); MINN. STAT. ANN. § 302A.751 (West Supp. 1992) (permitting courts to consider the reasonable expectations of the shareholders "as they exist at the inception and develop during course of the shareholders relationship with the corporation"); OR. REV. STAT. § 60.952(4) (2001) (directing courts to consider the reasonable expectations of the shareholders when determining the appropriate remedy to apply). \textit{Cf.} N.C. GEN. STAT. § 55-14-30 (1990) (providing in the commentary that state courts may consider the reasonable expectations of the shareholders).
define "oppression" based on the reasonable expectations of shareholders. The logic is that because Massachusetts recognizes the doctrine of reasonable expectations, any statute or court that similarly recognizes the reasonable expectations doctrine must also be adopting the majority rule. This syllogism is erroneous. While Massachusetts recognizes the reasonable expectations doctrine, some majority-rule states have rejected it, either in whole or in part. Therefore, the doctrine of reasonable expectations

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295See, e.g., Brooks v. Hill, 717 So.2d 759, 765-66 (Ala. 1998) (analyzing the reasonable expectations of the minority shareholder to determine whether the minority shareholder was oppressed by the majority when the majority attempted to squeeze out the minority); Smith v. Leonard, 876 S.W.2d 266, 272 (Ark. 1994) (refusing to find that the majority shareholders oppressed the minority by reasoning that the minority's claim that their reasonable expectations of investment had not been met was insufficient); Muellenberg v. Bikon Corp., 669 A.2d 1382, 1387 (N.J. 1996) (finding that in determining whether there is oppression, a court must analyze the reasonable expectations of the shareholders); In re Kemp & Beatley, Inc., 473 N.E.2d 1173, 1176-77 (N.Y. 1984) (finding oppression where the corporation acted so as to defeat the minority's reasonable expectations that it would receive a return on the investment to have the corporation repurchase its shares); Masinter v. WEBCO Co., 262 S.E.2d 433, 442 (W. Va. 1980) (interpreting the oppression statute according to the reasonable expectation doctrine and finding that a freeze-out by the majority includes the wrongful denial by the majority of the reasonable expectations of the minority shareholders); Morrow v. Prestonwold, Inc., No. CV000445844S, 2001 Conn. Super. LEXIS 3616, at *13 (Conn. Super. Ct. Dec. 20, 2001, as amended Mar. 22, 2002) (adopting the reasonable expectations approach to defining oppressive conduct under the oppression statute). Other states consider reasonable expectations along with breach of fiduciary duty. See, e.g., Bauer v. Bauer, 54 Cal. Rptr. 2d 377, 381-84 (Cal. Ct. App. 1996) (rejecting the reasonable expectations doctrine when analyzing the "persistent unfairness" provision in the oppression statute but allowing the expectations of the shareholders to be considered under fiduciary duty concepts where it is reasonably necessary for protection of the rights or interests of shareholders in a close corporation); Polk v. Hergert Land & Cattle Co., 5 P.3d 402, 404-05 (Colo. Ct. App. 2000) (discussing oppression as including reasonable expectations but noting that it is closely related to a breach of fiduciary duty); Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 380 (Iowa Ct. App. 1988) (noting that the allegedly oppressive conduct by those controlling the corporation must be analyzed in terms of the fiduciary duties owed by the majority and the reasonable expectations of the minority); Mueller v. Cedar Shore Resort, Inc., 643 N.W.2d 56, 63 (S.D. 2002) (interpreting the oppression statute to include both the reasonable expectations of the shareholders and the fiduciary duties owed by the majority but noting that the reasonable expectations must be measured against the corporation's best interests in accordance with the business judgment rule); Scott v. Trans-System, Inc., 64 P.3d 1, 6 (Wash. 2003) (finding that oppression may evaluated under either a reasonable expectation approach or a fair dealing approach, including an analysis of the fiduciary duties owed by the majority). Cf. Allchin v. Chemic, Inc., No. 14-01-00433-CV, 2002 Tex. App. LEXIS 5125, at *20-*21 (Tex. App. July 18, 2002) (permitting a court to analyze either reasonable expectations or fiduciary concepts under the oppression statute but specifying that a court must exercise caution when determining if oppression exists and must carefully balance the reasonable expectations with the best interests of the corporation). But see Douglas K. Moll, Reasonable Expectations vs Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed? 42 B.C. L. REV. 989, 993 (2001) (noting that the reasonable expectations doctrine is based on implied contract rather than on fiduciary duties and explaining that reasonable expectation doctrine is considered an implied multilateral contract among shareholders).

296See Bauer, 54 Cal. Rptr.2d at 381-84 (rejecting the reasonable expectations doctrine when interpreting the persistent unfairness provision in its dissolution statute). Cf. Kiriakides, 541 S.E.2d at 265-66 n.25 (allowing consideration of a shareholder's reasonable expectations when