Altering Rules: The New Frontier for Corporate Governance

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Corporate law has taken a contractarian turn. Shareholders are increasingly contracting around its foundational rules—statutory rights, the fiduciary duty of loyalty, even the central role of the board—and Delaware courts are increasingly enforcing these contracts. In the one case where they did not, the legislature swiftly overruled the decision and adopted a new statutory provision permitting boards to completely cede their powers to a shareholder by contract. These developments have sparked a polarized debate, with some calling for a return to mandatory rules, while others push for total contractual freedom.

We argue, however, that the best approach lies neither in rigid mandatory rules nor unchecked contractual freedom—but in recognizing the potential of corporate law's altering rules. Altering rules define how parties can opt out of the default rules of governance. Our theory identifies corporate altering rules' essential features, namely, whose consent is required to change a default (process) and who is bound by that decision (scope). We show that the central role of altering rules in corporate law is not simply to make changing a default more or less difficult, as is widely supposed, but rather to combine process and scope in ways that define distinct bargaining environments, shaping how insiders negotiate over governance. Corporate law can fine-tune these features in ways that both encourage contractual innovation and manage intra-corporate risks. In response to recent cases and legislation, we propose new altering mechanisms that will broaden decision-making to include non-signatory shareholders, protecting them from harmful externalities.

Altering rules, as they exist now, represent only a fraction of their potential. Rethinking their design opens the door to a vast, largely unexplored

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landscape of possibilities that could guide corporate governance in its new era of contractual innovation.

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Introduction

Should corporations enjoy total contractual freedom to reshape their governance, or are there foundational rules of corporate law that must remain inviolable? If such limits exist, what rules should be mandatory, and what principles should guide how the other rules are altered?[1]

These questions, central to corporate law and theory,[2] have long been of limited practical relevance. For much of the past century, the mandatory status of corporate law's core governance rules— statutory shareholder

1. Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2032 (2012) ("[R]ules that establish the necessary and sufficient conditions for displacing a default."). Brett McDonnell was perhaps the first to clearly analyze features of corporate law as altering rules. *See* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. Rev. 383, 384-85 (2007) (developing a theory of altering rules based on their relative "stickiness"—that is, the difficulty with which they can be changed); *see also* Eyal Zamir, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283 (2020) (featuring Ian Ayres); James Si Zeng, *The Calculus of Shareholders' Consent: A Constitutional Economics Theory of Corporate Charter Amendment Rules*, 41 U. PA. J. INT'L L. 429 (2019). A vast literature is relevant to analyzing altering rules of corporate law because it studies the governance mechanisms and devices through which corporate decisions are generally made. *See, e.g.*, Lucian Arye Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489, 503 (2002); Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1 (2018); Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227 (2018); Edward Rock et al., *Fundamental Changes*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (2d ed. 2009).

2. Perhaps the best-known version of this debate was a seminal Columbia Law Review symposium in 1989. We will have more to say on some of the positions from that symposium later. The following articles were discussed in the symposium: Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Lewis A. Kornhauser, *The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel*, 89 COLUM. L. REV. 1449 (1989); Melvin Aron Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461 (1989); Ralph K. Winter, *The "Race for the Top" Revisited: A Comment on Eisenberg*, 89 COLUM. L. REV. 1526 (1989); Fred S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530 (1989); Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549 (1989); Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 COLUM. L. REV. 1599 (1989); John C. Coffee Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989); *see also* Jonathan R. Macey, *Corporate Law and Corporate Governance: A Contractual Perspective*, 18 J. CORP. L. 185 (1993); Katharina Pistor, Yoram Keinan, Jan Kleinheisterkamp & Mark D. West, *Innovation in Corporate Law*, 31 J. COMP. ECON. 676 (2003); Lucian Arye Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Jens Dammann, *The Mandatory Law Puzzle: Redefining American Exceptionalism in Corporate Law*, 65 HASTINGS L.J. 441 (2013); Roberta Romano & Sarath Sanga, *The Private Ordering Solution to Multiforum Shareholder Litigation*, 14 J. EMPIRICAL LEGAL STUD. 31 (2017); Edward Rock et al., *Fundamental Transactions*, *in* REINIER KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (Oxford Univ. Press 2017); Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 COLUM. L. REV. 1075 (2017); Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CALIF. L. REV. 1437 (2018). Some scholars have argued that the status of a rule as "default" or "mandatory" does not even matter. *See, e.g.*, Bernard S. Black, *Is Corporate Law Trivial: A Political and Economic Analysis*, 84 NW. U. L. REV. 542 (1989-1990).

rights, the fiduciary duty of loyalty, the central role of the board—has remained largely unchallenged.[3]

That era is over. Recent innovations in corporate governance and the ensuing litigation have breathed new life into the debate, forcing courts, practitioners, and scholars alike to reconsider the boundaries of contractual freedom in corporate governance. Delaware's courts—the undisputed vanguard of corporate law—are now regularly tasked with interpreting shareholder agreements that seek to contract around what were once seen as corporate law's unalterable foundations.[4] What began as whispered dicta two decades ago has now evolved into a chorus of challenges, as shareholders contract away their rights to inspect books and records, remove directors, and sue for breaches of fiduciary duty.[5] In cases like *Manti Holdings, LLC v. Authentix Acquisition Co.*,[6] "*Fugue*,"[7] and *West Palm Beach Firefighters' Pension Fund v. Moelis*,[8] shareholders have attempted to contract around key statutory rights and governance structures traditionally thought to be mandatory. Delaware courts have largely authorized these contractual experiments, and when the courts have hesitated, the legislature has stepped in to embrace contractual freedom.

Moelis was the lightning rod. Far more than any other case, it ignited controversy—both because the contract at issue challenged the bedrock of Delaware's corporate statute and for the fierce backlash the decision

3. Indeed, many major developments in corporate law, especially those involving the enforcement of fiduciary obligations, can be interpreted as attempts to enable new kinds of transactions and governance structures whilst respecting this inviolable core. *See, e.g.*, Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199, 1217 (Del. 2021) ("'At its core, the [DGCL] is a broad enabling act' that 'allows immense freedom for businesses to adopt the most appropriate terms for the organization, finance, and governance of their enterprise' '*provided* the statutory parameters and judicially imposed principles of fiduciary duty are honored.'" (quoting Salzberg v. Sciabacucchi, 227 A.3d 102, 116 (Del. 2020))) (emphasis added). There are countless examples of this: DGCL Section 144 enables interested (i.e., conflicted) transactions but subjects them to a potentially onerous authorization process and standard of review. This rule does not eliminate a director or officer's fiduciary duty of loyalty (which would obligate them not to make decisions that further their own interests over the corporation's), but instead provides a path for pursuing a potentially beneficial transaction in spite of the conflict. Similarly, *Kahn v. M&F Worldwide Corp.*, 88 A.3d 635 (Del. 2014) enables controller takeovers without entire fairness review provided that certain procedural protections are in place. Perhaps the most notorious episode is the case of *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985) and the legislative response, DGCL Section 102(b)(7). In *Van Gorkom*, the Delaware Supreme Court held a board personally liable for breach of its fiduciary duty of care in connection with a sale of the company; in § 102(b)(7), the Delaware legislature enabled corporations to avoid outcomes like *Van Gorkom* by adopting a charter amendment eliminating directors' personal liabilities.

4. *See* Gladriel Shobe & Jarrod Shobe, *The Dual-Class Spectrum*, 39 YALE J. ON REGUL. 1286, 1288 (2022) (noting that there are "myriad ways insiders obtain control rights"); Ann M. Lipton, *The Three Faces of Control*, 77 BUS. LAW. 801, 803 (2022) ("[C]orporate control rights are increasingly allocated in unique and idiosyncratic ways.").

5. *See, e.g.*, Kortüm v. Webasto Sunroofs, Inc., 769 A.2d 113, 125 (Del. Ch. 2000) (suggesting that shareholders might be able to contractually waive their statutory right to inspect a corporation's books and records, but also holding that "[t]here can be no waiver of a statutory right unless that waiver is clearly and affirmatively expressed in the relevant document").

6. 261 A.3d 1199 (Del. 2021).

7. New Enter. Assocs., L.P. v. Rich, 295 A.3d 520 (Del. Ch. 2023) [hereinafter *Fugue*].

8. 311 A.3d 809 (Del. Ch. 2024).

invalidating it provoked from the corporate bar. In *Moelis*, the Chancery court held that shareholders cannot contract around the centerpiece of Delaware's corporate statute—Section 141(a)—which enshrines a board-centric model of governance.[9] Yet within weeks of that ruling, the corporate bar proposed,[10] and the Delaware legislature eventually adopted, a new statutory provision, Section 122(18).[11] This provision overturned *Moelis* and empowered boards to delegate their core powers to a shareholder by contract—a modification that previously would have required a charter amendment.[12] The legislative response dramatically expanded the scope of permissible shareholder contracting, and it did so in the face of uncommonly high levels of criticism.[13]

On their face, these controversies are about whether a given rule should be contractible. Yet at the heart of this contractarian turn lies a deeper question. As shareholders contract around the foundations of corporate law, courts and legislatures must decide not just *whether* to permit opt out, but *how*. The choice is not simply between mandatory rules or default rules. It is also about the mechanisms—the altering rules—that define how corporations and shareholders can effectively opt out of default arrangements. This, we suggest, is the central issue and the one that is usually overlooked.

In this Article, we argue that the best approach to these controversies lies in neither rigid, mandatory rules, nor the free-for-all, anything-goes model of Section 122(18). Instead, the answer lies in *better altering-rule design*. Yet to do this, we must first understand corporate law's altering rules. Scholars and courts often fail to appreciate the possibilities of altering-rule

9. *Id.* at 816.

10. *See* Sarah Sanga & Gabriel Rauterberg, *Proposed Amendments to DGCL on Stockholder Contracting Would Create More Problems Than They Purportedly Solve*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 5, 2024), https://corpgov.law.harvard.edu/2024/04/05/proposed-amendments-to-dgcl-on-stockholder-contracting-would-create-more-problems-than-they-purportedly-solve [https://perma.cc/J39C-FEK9]; Thomas W. Christopher, Francis E. Lupinacci, Kathrin Schwesinger & Nasir Tak, *The Delaware General Assembly to the Rescue: Proposed Legislative Fixes to Uncertainty Created by Three Significant Delaware Chancery Court Decisions*, WHITE & CASE (Apr. 15, 2024), https://www.whitecase.com/insight-alert/delaware-general-assembly-rescue-proposed-legislative-fixes-uncertainty-created-three [https://perma.cc/BN3J-Y34W].

11. S.B. 313, 152nd Gen. Assemb. (Del. 2024) ("New § 122(18) does not relieve any directors, officers or stockholders of any fiduciary duties they owe to the corporation or its stockholders . . . .").

12. *Id.*; *see also* Cole Kreuzberger, Moelis *No More: DGCL Section 122(18)'s Emphasis on Flexibility and its Implications for Corporate Practitioners*, VILLANOVA L. REV. BLOG (Sept. 13, 2024), https://www.villanovalawreview.com/post/2683-_moelis_-no-more-dgcl-section-122-18-s-emphasis-on-flexibility-and-its-implications-for-corporate-practitioners [https://perma.cc/Q9KP-WW5Z] ("Due to the amendment, Delaware corporations can enter into *Moelis*-type agreements with stockholders without the needing to amend their charters.").

13. Jill E. Fisch & Anat Alon Beck, *Does the Moelis Decision Warrant a Quick Legislative Fix?*, CLS BLUE SKY BLOG (June 10, 2024), https://clsbluesky.law.columbia.edu/2024/06/10/does-the-moelis-decision-warrant-a-quick-legislative-fix [https://perma.cc/3W8X-ZFJT] ("By implementing unlimited contractual freedom, the Proposal also jeopardizes the longstanding distinction between mandatory and default rules in Delaware corporate law.").

design. Indeed, they often fail to grasp the basic stakes involved in choosing one altering rule over another.

We suggest that the fundamental role of corporate law's altering rules lies not just in making the decision to opt out of a default easier or harder, as is widely supposed, but in *shaping the bargaining environment in which insiders make the decision to opt out*. Our theory identifies two core dimensions by which altering rules shape this environment: *process*, which determines who participates in the decision to opt out and whose consent is required, and *scope*, which determines who is bound by the ultimate decision. By turning the dials of process and scope—that is, by specifying who must consent, what decision rule applies, and who is bound by the decision—corporate law establishes the fundamental parameters of a bargaining game.

Our framework illuminates why today's debate over mandatory corporate rules is fundamentally different from earlier iterations. When these issues were debated in the 1980s, the focus was on large public companies and a specific mechanism for opting out of corporate law: the charter amendment.[14] These companies faced the classic corporate agency problem—the separation of ownership from control[15]—compounded by the rational apathy of a highly dispersed shareholder base. Board-initiated bylaws and shareholder proposals played relatively minor roles.[16]

In recent decades, however, a new frontier of corporate governance has emerged: the shareholder agreement.[17] Unlike traditional mechanisms, shareholder agreements allow some (or all) shareholders to contractually modify their collective governance rules.[18] These agreements may also involve directors, officers, the corporate entity, and even third parties, adding layers of complexity to the governance framework. Though a longstanding feature of closely held firm governance, shareholder

14. Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 452 (2001) (commenting on the overwhelming focus on publicly traded corporations).

15. For the canonical origin of this discussion, see ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION & PRIVATE PROPERTY (1932).

16. In writing a Foreword to the Columbia Law Review Symposium of 1989, Lucian Bebchuk framed the subject as "contractual freedom in corporate law," asking, "To what extent should corporations be allowed to opt out of the rules of corporate law by adopting charter provisions to that effect?" *See* Bebchuk, *supra* note 2, at 1395; *see also* Gordon, *supra* note 2 (focusing on opportunistic use of amendments); Romano, *supra* note 2, at 1601-02 (discussing the extent to which mandatory corporate laws are binding).

17. *See* Gabriel Rauterberg, *The Separation of Voting and Control: The Role of Contract in Corporate Governance*, 38 YALE J. ON REGUL. 1124, 1131 (2021); Robert B. Thompson, *Private Ordering and Contracting Out in Twenty-First-Century Corporate Law*, 74 CASE W. RSRV. L. REV. 13 (2023).

18. Rauterberg, *supra* note 17, at 1126.

agreements have grown into a powerful yet controversial tool, particularly in venture capital and private equity-backed companies.[19]

The central distinction between these two instruments for altering rules—charter amendments and shareholder agreements—lies in the distinct bargaining environments they create. Traditional routes to governance changes are effectively one-sided bargaining frameworks that resemble either take-it-or-leave-it offers (e.g., charter amendments) or unilateral decisions (e.g., board-initiated bylaw amendments).[20] But shareholder agreements, particularly in private companies, can offer a more dynamic alternative. These agreements are formed through genuine negotiation among shareholders, directors, and other insiders—back-and-forth processes that are rarely present in public-company charter or bylaw amendments. The result is not only a potentially more equitable division of the surplus, but also a larger surplus overall, as parties are incentivized to innovate when they receive a substantial share of the surplus. This capacity for productive bargaining, going beyond the simple frameworks of the charter and bylaws, motivates the case for expanding corporations' freedom to contractually reshape governance structures.

We argue that altering rules serve to promote specific bargaining frameworks among corporate insiders when they change defaults. Normatively, our approach suggests that corporate lawmakers (whether courts or the legislature) should approach altering rules in the spirit of "mechanism design"—an economic framework focused on creating strategic environments that lead to optimal outcomes. In the context of corporate law, the goal of altering rule design should be to first identify the primary opportunism hazards linked to modifying a given default and then to engineer bargaining frameworks that enable opt-out while mitigating these risks. As proof of concept, we apply this approach to shareholder agreements and two major recent controversies in Delaware corporate law: (1) the Delaware Chancery Court's decision in *Fugue* and (2) its decision in *Moelis* and

19. *See* Steven N. Kaplan & Per Strömberg, *Financial Contracting Theory Meets the Real World: An Empirical Analysis of Venture Capital Contracts*, 70 REV. ECON. STUD. 281, 288 (2003); William Carney, Robert Bartlett III & George Geis, *Corporate Finance, Principles and Practice* 566 (4th ed. 2019); *see also* Voting Agreement § 1.2 (Updated October 2024), NVCA (2024), https://nvca.org/document/voting-agreement-updated-october-2024 [https://perma.cc/CQ2F-FLY6] (discussing voting agreement and its relation to charter-based director-designation rights); Certificate of Incorporation (Updated October 2024), NVCA art. IV, § B, cl. 3 (2024), https://nvca.org/document/certificate-of-incorporation-updated-october-2024 [https://perma.cc/FJ9R-GGX6] (discussing the election of directors and its allocation across charter classes by class-specific voting rights); *see generally* Michael Ewens & Joan Farre-Mensa, *Deregulation of the Private Equity Markets and the Decline in IPOs*, 33 REV. FIN. STUDS. 5463 (2020) (analyzing the National Securities Markets Improvement Act of 1996, one of a number of factors that has changed the going-public versus staying-private trade-off in venture capital and companies backed by private equity).

20. For an incisive analysis of these bargaining features in public firms, see Ryan Bubb, Emiliano Catan & Holger Spamann, *Shareholder Rights and the Bargaining Structure in Control Transactions* (Eur. Corp. Governance Inst., Working Paper No. 798, 2024), https://ssrn.com/abstract=4929197 [https://perma.cc/PVU4-YDX4].

the subsequent legislative battle, which culminated in the adoption of Section 122(18).

The *Moelis* contract was between only the corporation and a single shareholder. When shareholder agreements involve only a subset of corporate insiders, they introduce profound new challenges for corporate governance, including the potential for side deals, rent-seeking, and intra-corporate externalities that harm non-signatories. Our approach focuses on how creative altering rules can be designed to manage these issues. Instead of prohibiting such agreements outright, we propose developing altering rules that include *nonparty consent* mechanisms. These rules would require shareholder agreements—particularly those with firm-wide impacts—to be approved or constrained through a broader process ensuring that non-signatory shareholders have a say in the outcomes that impact them. We propose several variations on these rules and demonstrate how they can address the challenges of real-world cases.

Nonparty consent rules address one of the key criticisms of the contractarian turn; namely, that allowing individual shareholders to contract away their rights can reduce the overall value of the firm for non-signatory shareholders.[21] The *Fugue* decision, for example, arguably overlooks the intra-corporate effects of such agreements (likely because the contract in that case happened to be signed by *all* shareholders, though the holding did not limit it to such instances).[22] By introducing the concept of a nonparty consent rule, we show how thoughtful altering rule design can address this concern.

Finally, we turn to Section 122(18).[23] Section 122(18) is among the most important changes to the Delaware General Corporation Law (DGCL) in decades. It revised Section 141(a), which enshrines Delaware's board-centric model of corporate governance.[24] Under Section 141(a),"The business and affairs of every corporation . . . shall be managed by . . . a board of directors, *except as may be otherwise provided . . . in its certificate of incorporation*."[25] Thus, Section 141(a) originally provided that board powers could be modified, but only by the charter—an instrument that requires firm-wide participation to change. Section 122(18), however, allows the board to now remake its powers simply through a contract with a shareholder(s).

Section 122(18) represents a misguided departure from the fundamental principles that we think should underlie altering rule design. The

21. *See* Lucian Arye Bebchuk, *A Rent-Protection Theory of Corporate Ownership and Control* 8 (Nat'l Bureau of Econ. Rsch., Working Paper No. 7203, 1999), http://ssrn.com/abstract=168990 [http://perma.cc/T29K-XR2E]; Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 584-94 (2016).

22. See Del. Code Ann. tit. 8, § 122(18) (2024).

23. *Id.* § 141(a).

24. *Id.*

25. *Id.*

provision allows boards to delegate sweeping decision-making powers to select shareholders by contract—without requiring the firm-wide processes traditionally mandated for such major governance changes. Unlike a charter amendment, which requires broader participation, Section 122(18) creates a narrow bargaining framework that heightens the risk of self-dealing and rent-seeking by controlling shareholders.[26] It also mistakenly assumes that ordinary fiduciary duties are sufficient to prevent abuse, ignoring the fact that such duties may be vague, toothless, or unenforceable in the very situations in which they are most needed, such as when controlling shareholders dominate a board or when post-IPO shareholders cannot sue on the basis of pre-IPO arrangements.

Yet prohibiting these contracts, as critics commonly suggest, is *also* the wrong move. The real solution, as ever, is to design better altering rules. A nonparty consent rule, for example, could potentially check opportunism hazards by giving non-signatory shareholders a voice in the process.

That leaves corporate law with a choice between two contrasting approaches to altering rules: the deliberate structure of *Fugue* and the laissez-faire permissiveness of Section 122(18). *Fugue* is superior. While it imposes procedural and substantive rules on the contracts it governs, these rules are not barriers—they are enablers. By setting clear, ex ante protections, *Fugue* creates an environment for efficient and robust bargaining where parties can craft deals with confidence in their enforceability. Section 122(18), by contrast, offers no such confidence. It permits boards to delegate sweeping powers to controlling shareholders without firm-wide input, effectively inviting conflicts of interest and opportunism. When such contracts are inevitably challenged, courts will be left to clean up the mess through vague, ex post fiduciary review—an approach that may implicitly establish altering rules for Section 122(18), but vague ones if that. The Section 122(18) approach, while seemingly permissive on its face, will ultimately prove messy, unpredictable, and ill-suited to fostering good deals. If Delaware courts and lawmakers want to preserve corporate integrity while promoting genuine contractual freedom, they should take a lesson from *Fugue* and take altering rules seriously.

Our Article proceeds in five parts. Part I traces Delaware's shift toward contractual governance, from its beginnings to its recent peak. Part II develops our theory of corporate altering rules and how they shape bargaining environments. Part III applies this theory to shareholder contracts, advocating for new altering rules based on nonparty consent. Part IV explores legal and normative implications by applying our framework to

26. Fisch & Beck, *supra* note 13 ("This protection is particularly valuable in private companies in which minority stockholders may have little or no access to critical governance features if those are contained in stockholder agreements and may, as a result, have little understanding of their peers' rights and responsibilities, the existence of conflicts of interests and, as a result, the company's risk exposure.").

recent cases like *Fugue* and the controversial Section 122(18). Finally, Part V addresses objections and qualifications, considering Delaware's brand, alternative entities, and the role of courts.

I. Delaware's Contractarian Turn

A. Beginnings

The first rumbling of Delaware's contractarian turn began twenty years ago. It involved shareholders' statutory right to inspect a corporation's books and records—a core informational right with mandatory status seemingly dictated by the statute's use of the word "shall."[27] But in *Kortüm v. Webasto Sunroofs, Inc.*,[28] the Chancery Court suggested in dicta that a shareholder agreement could potentially waive this right. The agreement before the court did not "expressly provide for a waiver of statutory inspection rights,"[29] yet the court introduced the provocative idea that shareholders *could* waive such statutory rights—provided the waiver was "clearly and affirmatively expressed."[30]

The idea gained traction in *Bonanno v. VTB Holdings, Inc.*,[31] where the Chancery Court turned specifically to Section 115 of the DGCL. Section 115 provides that neither the charter nor bylaws can prevent shareholders from bringing internal corporate claims in Delaware. The court found, however, that this protection did not extend to private contracts. By contract, shareholders can waive their Section 115 right to bring claims in Delaware.[32] Section 115, the court claimed, does not alter Delaware's policy favoring contractual freedom.[33]

The Delaware legislature continued this contractarian turn. It enacted statutory provisions prohibiting fee-shifting bylaws or charter provisions in litigation asserting internal corporate claims. At the same time, it made clear that these prohibitions again did *not* extend to shareholder contracts. In the accompanying commentary to the amendments, the legislature explained that shareholder agreements are outside the scope of these (and

27. DEL. CODE ANN. tit. 8, § 220(b) (2024) ("Any stockholder . . . shall . . . have the right . . . to inspect" the corporation's records); *see also* Edward P. Welch & Robert S. Saunders, *Freedom and Its Limits in the Delaware General Corporation Law*, 33 DEL. J. CORP. L. 845, 856 (2008).

28. 769 A.2d 113, 125 (Del. Ch. 2000).

29. *Id.*

30. *Id.*; *see also* In re Appraisal of Ford Holdings, Inc. Preferred Stock, 698 A.2d 973, 976-78 (Del. Ch. 1997) (suggesting that preferred stockholders could waive their appraisal rights through a shareholder agreement).

31. No. 10681-VCN, 2016 WL 614412, at *15 (Del. Ch. Feb. 8, 2016).

32. *Id*.

33. The court noted that the bill's synopsis suggested that the legislature did not intend "to prevent the application of [a] provision in a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced." *Id.* (quoting S.B. 75, 148th Gen. Assemb. § 5 (Del. 2015)).

possibly other) restrictions.[34] In both judicial and legislative maneuvers, Delaware signaled a turn to contractarian principles.

B. Acceleration

The last five years have witnessed a striking escalation in challenges to the mandatory content of corporate law. The first prominent development in this trend came in late 2021 when a divided Delaware Supreme Court handed down its decision in *Manti v. Authentix*.[35] The court held that shareholders may contractually waive their statutory right to appraisal.[36] *Manti* was a rare split decision, and a surprising one given the seemingly mandatory language of the statute, which again provides that stockholders "*shall* be entitled to an appraisal by the Court of Chancery of the fair value of the stockholder's shares of stock."[37]

The dissent warned of a slippery slope: If stockholders could waive their appraisal rights, what was to stop them from waiving all of their statutory rights?[38] Could they waive their Section 220 right to inspect books and records? How about their ability to challenge elections under Section 225? Their right to compel a stockholders' meeting under Section 211? Or their ability to sue for breach of fiduciary duty? If appraisal rights are subject to waiver, then so is any statutory right containing the word "shall."[39]

The majority, however, brushed aside these concerns with a theory aimed at distinguishing appraisal rights from other, nonwaivable statutory entitlements. It premised its theory on a distinction between features it deemed "fundamental" to the corporate structure and those it considered "not fundamental."[40] The appraisal right, it claimed, belonged to the latter

34. S.B. 75, 148th Gen. Assemb. §§ 2-4 (Del. 2015) (noting that neither Section 109(b) nor Section 102(f) was "intended . . . to prevent the application of such provisions pursuant to a stockholders agreement or other writing signed by the stockholder against whom the provision is to be enforced").

35. 261 A.3d 1199, 1216 (Del. 2021) (affirming the Court of Chancery's holding).

36. *Id.*

37. DEL. CODE ANN. tit. 8, § 262(a) (2024) (emphasis added).

38. *Manti*, 261 A.3d at 1204-05. This trend has not been without its critics. Perhaps the most outspoken has been Professor Jill Fisch. *See* Jill E. Fisch, *Stealth Governance: Shareholder Agreements and Private Ordering*, 99 WASH. U. L.Q. 913, 914 (2021); Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 373, 390-92 (2018); Jill E. Fisch, *The New Governance and the Challenge of Litigation Bylaws*, 81 BROOK. L. REV. 1637, 1638 (2016); *see also* Jill E. Fisch, *A Lesson from Startups: Contracting Out of Shareholder Appraisal*, 107 IOWA L. REV. 941, 942 (2022). In *A Lesson from Startups*, Professor Fisch argues that the functional role of appraisal waivers is primarily in shaping a governance ecology, rather than in serving as an individual right for shareholders. As a result, she argues that waivers should be permitted, but only in a corporation's charter. We strongly agree that, generally, governance creates intra-corporate effects. However, we belive that the right response to this reality lies in reimagining a broader set of altering rules.

39. As it turns out, the Delaware Chancery Court had already entertained or endorsed waivers for two of the four hypotheticals, while the right to sue for breach of fiduciary duty would follow two years later. *See Fugue*, 295 A.3d 520 (Del. Ch. 2023).

40. *Manti*, 261 A.3d at 1203-04.

and was therefore waivable.[41] *Manti* signaled the Delaware Supreme Court's ever-deepening embrace of contractarian principles.

C. Zenith

Two recent cases, *Fugue* (2023) and *Moelis* (2024), mark the zenith of Delaware's contractarian turn. In *Fugue*, the Court of Chancery held that stockholders may, under certain circumstances, waive their right to sue for breach of fiduciary duty.[42] By contrast, in *Moelis*, the Court of Chancery partially invalidated a stockholder agreement that granted the CEO and founder, Ken Moelis, veto rights over nearly every significant corporate decision, including the board's nominees for director elections.[43] In the *Moelis* opinion, the court reasoned that while many of the individual rights conferred in the agreement may be lawful and even commonplace, collectively they went too far.[44] DGCL Section 141(a), which enshrines Delaware's board-centric model of corporate governance, imposes a fundamental limit on how much governance power a board can cede *by contract*.[45] Simply put, a board cannot contract away most, let alone all, of its powers without running afoul of the law. *Moelis* suggested that, while stockholders and the corporation have broad contractual freedoms to reorder governance, there are inherent limits when it comes to contracting around Delaware's core principles.[46]

The boundaries established by *Moelis*, however, were immediately called into question. Only weeks after the *Moelis* decision, the institution charged with drafting statutory changes to Delaware corporate law—the Council of the Corporation Law Section of the Delaware State Bar Association—released (and then quickly revised) draft amendments to the DGCL designed to overturn the case. The Council, which regularly reviews and proposes amendments to Delaware's corporate law, initially suggested provisions that permit not only the kind of contract invalidated in *Moelis*, but also seemingly *any* contract involving corporations.[47]

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41. *Id.* at 1204 ("Section 262 does not prohibit sophisticated and informed stockholders, who were represented by counsel and had bargaining power, from voluntarily agreeing to waive their appraisal rights in exchange for valuable consideration.").

42. 295 A.3d 520, 538 (Del. Ch. 2023).

43. Complaint for Declaratory Relief at 2-4, West Palm Beach Firefighters' Pension Fund v. Moelis & Company, 311 A.3d 809 (Del. Ch. Mar. 13, 2023) (No. 2023-0309).

44. *See id.* at 7-8; West Palm Beach Firefighters' Pension Fund v. Moelis & Company, 311 A.3d 809, 853, 866 (Del. Ch. Mar. 13, 2023) (noting where the contract went "too far").

45. *Moelis*, 311 A.3d at 816 (extensive discussion of the board-centric model of corporate law).

46. *Id.* at 880.

47. The proposal would authorize corporations to "[m]ake contracts with one or more current or prospective stockholders . . . , [in which] the corporation may agree to: (a) restrict or prohibit itself from taking actions specified in the contract, . . . (b) require the approval or consent of one or more persons or bodies before the corporation may take actions specified in the contract . . . , and (c) covenant that the corporation or one or more persons or bodies will take, or

Following widespread criticism, including from us,[48] the Council revised its proposal. The now-adopted amendment focuses specifically on the kind of contract at issue in *Moelis*. It expressly permits the board to contract away its authority under DGCL Section 141(a) to any stockholder—provided that the same provision could have been included in the charter.[49] In this way, the amendment can be seen as a relaxation of an altering rule: whereas, previously, certain reallocations of corporate power could be accomplished only through a charter amendment, now they can also be accomplished through a shareholder contract.[50]

Since *Fugue* serves as a central case for our theory of altering rules, it is worth exploring it in greater detail.[51] The case involved a cloud-security company (Fugue) that was backed by several private funds, including leading venture-capital firms.[52] After unsuccessfully searching for an acquirer, the company sought new financing.[53] When its existing investors declined to provide new funds, the company turned to a new investor, George Rich, who agreed to lead recapitalization efforts.[54] Rich, however, had conditions: the other shareholders had to agree that if he later led a sale of the company, they would not sue him for breach of fiduciary duty.[55] The other shareholders consented, but when the sale eventually occurred, they sued. They argued that their agreement not to sue was facially invalid because fiduciary duties, and specifically the duty of loyalty, are mandatory; their right to sue for breach, therefore, could not be waived.[56]

In an exceptional opinion, Vice Chancellor Laster disagreed, holding that a written agreement not to sue for breach of fiduciary duty is enforceable, provided it (1) is "narrowly tailored" to a specific transaction and (2)

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refrain from taking, actions specified in the contract . . . ." *See* An Act to Amend Title 8 of the Delaware General Corporation Law, § 122(18), at 3-4, https://www.morrisnichols.com/assets/htmldocuments/2024%20DGCL%20Amendments%20Bill%20Form.pdf [https://perma.cc/SFY2-FJBP].

48. Sanga & Rauterberg, *supra* note 10.

49. DEL. CODE ANN. Tit. 8, § 141(a) (2024).

50. For analysis of the revised proposed amendment, see Marcel Kahan & Edward Rock, *Proposed DGCL § 122(18), Long-term Investors, and the Hollowing Out of DGCL § 141(a)*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/proposed-dgcl [https://perma.cc/9Y4T-Z2ZN]; Lucian A. Bebchuk, *The Perils of Governance by Stockholder Agreements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 21, 2024), https://corpgov.law.harvard.edu/2024/05/21/the-perils-of-governance-by-stockholder-agreements [https://perma.cc/3ECA-5WSA].

51. 295 A.3d 520 (Del. Ch. 2023).

52. *Id.* at 529.

53. *Id.*

54. *Id.*

55. More specifically, Rich's proposed investment required the investment funds to agree to a series of changes to Fugue's governance and capital structure. This included the execution of a shareholder agreement. That agreement contained a drag-along right providing that if the board and a majority of preferred stockholders approved a sale of the company then the signatories must also participate. Crucially, the agreement's signatories also committed not to sue Rich or his affiliates over that sale, including over any breach of duty of loyalty. *Id.*

56. *Id.* at 548.

passes a reasonableness test that focuses on the explicit, clear, and bargained-for nature of the exchange.[57] Additionally, Vice Chancellor Laster reasoned that the court must consider the sophistication of the parties involved.[58] The court thus permitted the agreement's opt-out provision, but it expressly conditioned its holding on the quality of the bargaining process. We refer to these conditions and factors as the *Fugue* doctrine. By our reading, the *Fugue* doctrine amounts to a "supra-contractual" altering rule. It essentially builds-in additional safeguards and requirements to the contract-formation process that are beyond the traditional elements of consideration and mutual assent.[59]

The significance of the *Fugue* doctrine lies in its recognition of the duty of loyalty as a foundational concept in corporate law. The duty of loyalty is both the bedrock of corporate law's anticonflict doctrines[60] and the driver of most corporate litigation. It regulates nearly every corporate activity, including ordinary-course transactions, mergers and acquisitions, regulatory compliance, director elections, and executive compensation.[61] Without it, managers could engage in self-dealing and other conflicted transactions at the expense of shareholders.

The traditional argument for the mandatory status of the duty of loyalty rests on a paternalistic rationale.[62] It assumes that shareholders cannot protect their own interests. This may be true for many corporations, especially public ones where small, passive, and "rationally apathetic" shareholders predominate.[63] But the argument is less compelling in corporations

57. *Id.* at 589-90.

58. *Id.*

59. One immediate objection to this interpretation is worth noting and rejecting. True, the court did not say a controller could waive the duty of loyalty; it only said that stockholders could waive their right to sue for breach of that duty. Further, since the corporation itself was a not a party to the contract, the board of directors could still enforce the duty by suing the controller. This is a senseless objection because controllers often dominate the board (either because they have the voting power to appoint directors or the persuasive power to control their votes). For practical purposes, eliminating minority stockholders' right to sue a controller is as good as eliminating everyone's right to sue a controller.

60. *See* Rauterberg & Talley, *supra* note 2.

61. *See* Leo E. Strine, Jr., Lawrence A. Hamermesh, R. Franklin Balotti & Jeffrey M. Gorris, *Loyalty's Core Demand: The Defining Role of Good Faith in Corporation Law*, 98 GEO. L.J. 629, 643 (2010) ("The makers of Delaware statutory and common law have spent the seventy-five years since Berle wrote these words putting his policy prescription into action. They have done so by conditioning all corporate action to a fundamental test of loyalty, which requires that the action have been undertaken in good faith to advance the interests of the corporation and its stockholders.").

62. Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post*: The Non-Contractual Basis of Fiduciary Relations*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 216-17 (Andrew S. Gold & Paul B. Miller eds., 2014) (describing the paternalistic motivations for mandating the duty of loyalty).

63. Even this concern, however, need not justify a mandatory rule. Brett McDonnell, for instance, argues instead that "imperfectly efficient markets and collective action and rational apathy problems," all of which raise concerns "that shareholders in public corporations may agree to rules that hurt their interests," may instead be accommodated by sticky defaults. McDonnell, *supra* note 1, at 400.

with fewer and more sophisticated shareholders. In such cases, these shareholders are backed by legal counsel and able to look after themselves. Thus, from a court's perspective, they might be allowed to opt out of the right to sue for breach of fiduciary duty—provided they can demonstrate their sophistication. This, in a nutshell, was the Court of Chancery's rationale in *Fugue*.[64]

Although *Fugue* itself authorized a relatively narrow stockholder contract, we view it as one of the key developments in corporate-law jurisprudence of the new century. While *Manti* applied only to a single statutory right (the appraisal right),[65] *Fugue* provides a roadmap for contracting out of all fiduciary-duty doctrines (albeit under very specific conditions).[66] The Delaware Supreme Court may still overturn or narrow its scope, perhaps by limiting its application to specific types of drag-along deals or suits.[67] But if *Fugue* is interpreted broadly, it could unleash a new era of corporate governance, one driven less by courts and legislatures, and more by private actors and contractual innovation.[68] This is why corporate law needs a theory of its altering rules—the rules that govern how shareholders can change their defaults. This is the theory to which we now turn.

II. A Theory of Corporate Law's Altering Rules

In large part, corporate law's power to shape governance lies in its ability to facilitate private ordering through a combination of mandatory, default, and altering rules. Mandatory rules are immutable rules that parties cannot change. Default rules apply unless displaced but can be changed by parties. Altering rules define how parties can change defaults. Many of corporate law's neglected possibilities lie in altering rule design–where the law shapes how parties will restructure their governance framework. In this part, we lay out our theory of altering rules in corporate law and explore how they implicitly structure the very bargaining environments in which corporate insiders make decisions.

64. 295 A.3d 520, 593 (Del. Ch. 2023) ("Sophisticated repeat players consented explicitly to a clear provision in a stockholder-level agreement that applies only to a specific transaction.").

65. 261 A.3d 1199, 1203 (Del. Ch. 2021).

66. 295 A.3d at 570.

67. *See, e.g.*, In re Trulia, Inc. Stockholder Litigation, 129 A.3d 884 (Del. 2016).

68. *Fugue* also improves on the logic of the only recent Delaware Supreme Court case on point: *Manti*. Manti Holdings, LLC v. Authentix Acquisition Co., 261 A.3d 1199 (Del. 2021). Recall that *Manti* held that shareholders could waive their statutory right to an appraisal, in spite of the statute's use of the word "shall" (which seemingly signals a mandatory rule). *Fugue* instead hones in on the altering rule and dispenses with the distinction between "foundational" and "non-foundational" features of the corporation. It also clarifies the precise requirements for effectively altering a default rule by contract.

A. The Anatomy of Corporate Altering Rules: Process and Scope

Altering rules in corporate law are composed of two fundamental components: process and scope. In a corporation, or any large business organization, it is often impracticable for every corporate insider to be personally involved in opting out of a default. The legal system addresses this challenge by specifying the characteristics of altering rules. They answer two key questions: (1) Who must make the decision to opt out? ("process"), and (2) Who is bound by that decision? ("scope"). These dimensions parsimoniously capture the structure of governance instruments in corporate law—charter amendments, bylaw amendments, board resolutions, and shareholder agreements—each of which forms part of a distinct method of altering governance rules.

Process refers to who decides to alter the rule. It involves specifying who must participate in the decision, who can initiate it, and what fraction of decision-makers must agree (e.g., majority, supermajority, or unanimity).[69] In corporate law, the process might involve the board of directors, a majority of shareholders, or more generally any subset of insiders. Each governance instrument defines a different process for opting out of the default rules. For example, a charter amendment requires a majority of the board to initiate a decision and a majority of shareholders to approve for it, whereas a board resolution can be adopted unilaterally by the board.

Scope refers to who is legally bound by the new rule. In some cases, the decisionmakers are the same parties bound by the rule. But more often, the two groups only partially overlap. For example, a board-initiated bylaw amendment may bind *all shareholders*, none of whom voted for the change, while a shareholder agreement binds *only the signatories*. Thus, the scope of an altering rule determines its reach—whether it displaces a default for a single individual, a subset of insiders, or the entire corporation.

Of the two components, scope is, in our view, the more neglected. It is the more overlooked side of the altering rule coin. But scope completes the question that every altering rule must implicitly answer. The question is not just "Who decides?", but "Who decides *for whom*?"

To give another example, consider DGCL Section 102(b)(7), which enables a corporation to use a charter provision to opt out of personal liability for breaches of the duty of care for both directors and officers. If a firm adopts this rule broadly, it could shield all directors and officers from personal liability. But a corporation could, in theory, opt out only for directors and not officers, or even only for a single director—making the

69. The importance of who can initiate a decision has been developed in a wide range of work. *See, e.g.*, Lucian Bebchuk & Assaf Hamdani, *Optimal Defaults for Corporate Law Evolution*, 96 NW. U. L. REV. 489 (2002); Scott Hirst, *The Case for Investor Ordering*, 8 HARV. BUS. L. REV. 227 (2018).

scope of alteration much narrower. The same process applies to both cases, but in principle it need not.

The interplay between process and scope defines the altering rules that shape corporate governance. Consider the example of a charter amendment that changes the corporation's dividend policy. The altering rule has broad scope because it applies to all shareholders. By contrast, a charter amendment might simply restrict the voting power of a single director—an altering rule that is narrow in scope, despite it sharing the same broad process of a charter amendment.

In this way, one can see that a governance instrument such as a charter amendment is *not in itself an altering rule*—instead, it typically lays out only one component of a rule (process). Table 1 further describes the traditional governance instruments in terms of the process and scope of the altering rules they implicitly implement. Table 2, which we reference throughout this Part, consolidates some examples of altering rules mentioned in the text, according to their combination of broad or narrow process and scope.

Table 1: Traditional Governance Instruments

Governance instrument	**Feature 1: Who decides?**	**Feature 2: Who is bound?**
Charter	Majority of board + majority of shareholders (by default)	Typically all, but sometimes only subsets or individuals
Bylaws	Majority of shareholders (by default; majority of board if so empowered in charter)[70]	Typically all, but sometimes only subsets or individuals
Board resolution	Majority of board (by default); a subset of board if so empowered by a majority of the board[71]	Typically all, but sometimes only subsets or individuals
Shareholder agreement	Unanimity (of parties to contract)	All parties to contract

70. DEL. CODE ANN. tit. 8, § 109(a) (2024).
71. *Id.* § 141(c).

Table 2: Examples of Altering Rules by Process and Scope

		Scope	
		Broad	Narrow
Pro-cess	Broad	• Change to shareholders' dividend rights via charter amendment • Exclusive forum provision via charter amendment (DGCL Section 115) • Changing the standard of review of controller takeovers from Entire Fairness to the Business Judgment Rule (*Kahn v. MFW*, Del. 2014)	• Adjusting voting power for an individual director via charter amendment (DGCL Section 141(d)) • Non-signatory shareholder approval requirement for a shareholder contract (see discussion of **nonparty consent rules**, below)
	Narrow	• Exclusive forum provision via bylaw amendment (DGCL Section 115) • Board resolution waiving corporate opportunities doctrine (DGCL Section 122(17)) • *Moelis*-type shareholder contract (see text)	• Shareholder voting agreement among a subset of small shareholders • Bilateral sale of stock among small shareholders • *Fugue*-type shareholder contract

B. Altering Rules Induce a Bargaining Environment

Our analysis of altering rules as combinations of process and scope leads to an essential insight: Altering rules do much more than simply determine how difficult it is to change a default rule. They are not merely a matter of "ease" or voting thresholds.[72] Instead, altering rules actively shape the bargaining environment in which governance decisions are

72. Our approach departs from common intuitions over the role and consequences of corporate law's altering rules, the most prominent of which is the intuition that the primary effect of shifting from one altering rule to another lies in how difficult opting out becomes. This view frames altering rules primarily in terms of ease: a majority vote, for example, is easier to effect than a supermajority. In this model, changes to rules that would give rise to the gravest opportunities of abuse and opportunism should (presumably) be more difficult to change, such as by having a higher voting threshold. This is a sensible intuition and starting point, and we would agree that an important consequence of choosing one rule over another is indeed that the rule may become more or less difficult or likely to be changed. *See* Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 S.M.U. L. REV. 383, 394 (2007).

made. In this sense, altering rules are mechanisms within the corporation designed to structure the strategic interactions between insiders.

To understand the stakes of choosing one altering rule over another, we must first recognize that the legal system—by specifying who must consent, what decision thresholds must be met, and who is bound by those decisions—is establishing the fundamental parameters of a bargaining game. The real power in altering rules lies in their ability to induce distinct bargaining environments that can foster—or frustrate—efficient, fair, and stable governance outcomes.

Consider two commonplace processes in corporate law: approval by a majority of both directors and shareholders (a "bilateral veto") and unanimous approval by both groups (a "multilateral veto"). A common intuition is that the key distinction between the two altering rules lies in the difficulty of opt out—unanimous approval is far more difficult to achieve.[73] This is true enough, but it is only part of the story. The central difference lies in how each rule shapes the strategic interactions of insiders. Requiring unanimity, for example, does more than just make opting out more difficult; it changes the nature of the bargaining environment itself. It gives each party a veto and thus changes the dynamics of their interactions.

We can further clarify the nature of altering rules by understanding them as an application of mechanism design—a concept which we borrow from economic theory. In mechanism design, the question is how to create rules that align participants' incentives in ways that achieve desired outcomes.[74] This is sometimes referred to as "reverse game theory" because, instead of analyzing how parties strategically interact under a given set of rules (as in traditional game theory), the task is to design the rules themselves to shape the strategic environment and induce certain outcomes. In corporate law, altering rules serve this function by establishing the framework within which corporate insiders—directors, officers, shareholders, and others—negotiate governance changes.

Thus, the main function of an altering rule in corporate law is not just to make it easier or harder to change the rules, but to *define the contours of a bargaining game that insiders play*. Process and scope—who decides for whom?—are the key dials which the law turns to adjust these contours, and in turn the interactions of the insiders. In designing these rules, the goal should not be to make opt out more or less difficult, or to promote an open-ended principle like freedom of contract. Rather the law should focus on the impacts of the bargaining environments induced by each rule. The goal should be to design a bargaining environment that maximizes value and minimizes opportunism.

73. *See, e.g.*, McDonnell, *supra* note 1, at 400.

74. PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 290-91 (2005) (describing mechanism design as "concerned with the question of how to structure contracts so that the game they induce results in a unique . . . equilibrium outcome.").

C. Bargaining Environments Induced by Altering Rules

Once we recognize that altering rules induce distinct bargaining environments, corporate law's most familiar mechanisms begin to reveal themselves in a new light. Altering rules are not mere checklists for opting out of defaults—they shape the strategic interactions between corporate insiders. They determine how decisions are made and the allocation of bargaining power. Each altering rule, by prescribing different formulations of process and scope, maps to a distinct bargaining game (if only roughly). To fully grasp the stakes of choosing one rule over another, we must examine these games. This section is an attempt to begin that examination.

1. The Ultimatum Game

Consider first the classic case of an altering rule accomplished through a charter amendment. The bargaining structure of a charter amendment operates as a take-it-or-leave-it offer: the board proposes a change, and shareholders are limited to either accepting or rejecting it.[75] This dynamic applies in most fundamental transactions such as mergers or sales of all or substantially all assets, where the board initiates the offer and shareholders have no opportunity to counter—they can only say yes or no.

The take-it-or-leave-it dynamic parallels the classic Ultimatum Game from economic theory.[76] In the Ultimatum Game, one party (the offeror) makes a single proposal, and the other (the offeree) can only accept or reject it. There is no negotiation or opportunity for counteroffers. This game heavily favors the offeror, as they hold all the bargaining power. In the corporate context, the board plays the role of the offeror, with all the bargaining and agenda-setting power that comes with it. Shareholders, as offerees, can only exercise veto power as a class. The key challenge for the board, then, is to anticipate shareholder reactions. A proposal too skewed in favor of the board risks outright rejection. From the board's perspective, the optimal offer is one that leaves the pivotal shareholder indifferent between acceptance and rejection, thus leaving the board with all the joint surplus.[77]

There are several practical factors that might temper this extreme result. Market forces and external pressures—such as the repeated nature of these transactions and concerns over negative shareholder activism—would incentivize directors to make more equitable offers even when the

75. *See* Bubb, Catan & Spamann, *supra* note 20, at 2.

76. John C. Harsanyi, *On the Rationality Postulates Underlying the Theory of Cooperative Games*, 5 J. CONFLICT RESOLUTION 179, 180 (1961).

77. For an application of this idea to the case of mergers, see Albert H. Choi & Eric Talley, *Appraising the "Merger Price" Appraisal Rule*, 34 J.L. ECON. & ORG. 543 (2018). The fiduciary duties of the board are another important force in shaping bargaining outcomes. *See* Bubb, Catan & Spamann, *supra* note 20.

altering rule formally grants them all the bargaining power. Experimental results support this. In practice, even offerors with all the bargaining power may still offer equitable terms to avoid rejection.[78] Moreover, tweaks to the charter amendment process can in turn influence the allocation of the joint surplus by subtly changing the board's optimal strategy. For example, if the process requires a two-third majority instead of a simple majority, then the board must tailor its offer to satisfy two-thirds instead of one-half of all shareholders. The bargaining power remains vested with the board, but the shareholders' outside option or "threat point" is strengthened.

But despite these moderating factors, the underlying structure of the game remains: the board sets the terms, and shareholders can take it or leave it. In many settings—and especially public companies with dispersed ownership—shareholders are passive actors in this framework.[79] The take-it-or-leave-it nature of the game only reinforces this passivity because shareholders, as offerees, are reactive.

This, in our view, is ultimately what fuels much of the existing literature's skepticism toward relaxing corporate law's mandatory rules.[80] This skepticism is often framed as a defense of the wisdom of the mandatory rules—but we think its true source lies in the rules for opting out, and especially the charter amendment process. The one-sidedness of the Ultimate Game, where shareholders are reduced to passive respondents, drives the skepticism. The issue is not with opt out per se, but rather the board-driven bargaining framework that the altering rule induces.

2. The Rubinstein Model

Unlike the take-it-or-leave-it dynamics of charter amendments and board resolutions, the altering rule baked into shareholder agreements—unanimity—creates the *possibility* of a more nuanced, back-and-forth bargaining environment. Here, anyone can initiate the contracting process, so genuine negotiation among shareholders, directors, and other parties becomes possible. This iterative structure—absent from many of corporate law's bargaining frameworks—is what allows for more creativity and innovation in governance. Combined with the unanimity requirement, it also supports a strong inference that the agreement itself represents a Pareto improvement for the signatories, as each party has negotiated terms that serve its own interests. This is why shareholder agreements have become particularly common in venture capital and private equity-backed companies.

78. Werner Güth & Reinhard Tietz, *Ultimatum Bargaining Behavior: A Survey and Comparison of Experimental Results*, 11 J. ECON. PSYCH. 417, 446-48 (1990).

79. *See* Bubb, Catan & Spamann, *supra* note 20.

80. *See supra* note 2 (collected articles from Columbia Law Review's 1989 symposium).

The classic model for analyzing this kind of back-and-forth negotiation is the Rubinstein bargaining model. In the model, parties take turns making offers and counteroffers until they reach an agreement.[81] Under ideal conditions, each side's bargaining power depends on how much they discount gains in the future: the party that can afford to hold out longer is in the stronger bargaining position. The key result is that a more patient party with a lower discount rate will capture a greater share of the surplus. In the context of shareholder agreements, the key feature to identify, therefore, is each side's discount rate, or more generally, each side's ability to hold out.

The Rubinstein model goes much further, especially when one considers the many extensions that factor in the impact of asymmetric information.[82] Differences in each party's information profoundly change the bargaining dynamic. In the corporate context, this often happens when certain insiders, like directors or controlling shareholders, hold privileged information about the company's operations or plans that are not available to shareholders or the broader public. Even within an iterative, back-and-forth Rubinstein-style framework, the informed party has the edge and can extract a greater share of the surplus.

The impacts can go beyond the allocation of surplus. Asymmetric information can also lead to complete bargaining failures, where value-creating deals fail to materialize. Shareholders, aware of their informational disadvantage, may approach negotiations with a rational but inefficiently high level of caution that leads them to reject even deals that work in their favor.

This insight has important implications for corporate law. A well-functioning bargaining framework should incorporate mechanisms for mitigating the distortionary effects of asymmetric information. For example, mandating shareholder access to a corporation's books and records—as provided under DGCL Section 220—might mitigate the chilling effect.[83] In this way, the effectiveness of a laissez-faire approach to shareholder contracting would depend critically on mandatory disclosure or access to information rules.

The Rubinstein model is naturally applied to shareholder contracting—but it is not confined to it. One could imagine tweaking existing altering rules to introduce opportunities for an iterative back-and-forth negotiation. For example, instead of the usual rule for charter amendments, where the board proposes and shareholders either accept or reject, imagine

81. Ariel Rubinstein, *Perfect Equilibrium in a Bargaining Model*, 50 ECONOMETRICA 97, 100-04 (1982).

82. Sanford J. Grossman & Motty Perry, *Sequential Bargaining under Asymmetric Information*, 39 J. Econ. Theory 120, 122-25 (1986); Lawrence M. Ausubel, Peter Cramton & Raymond J. Deneckere, *Bargaining with Incomplete Information*, in 3 HANDBOOK OF GAME THEORY WITH ECONOMIC APPLICATIONS 1897 (2002).

83. DEL. CODE ANN. tit. 8, § 220 (2024).

a modified rule that allows either the board or shareholders to propose amendments (for the other to accept, reject, or counter). This alternative would transform the charter amendment process from the one-sided, board-driven Ultimatum Game into something more akin to a Rubinstein-style game.

3. The Dictator Game

The off-diagonal cells in Table 2 highlight situations where process and scope are mismatched: one is broad while the other is narrow. By design, altering rules in these settings ensure that the decision-makers are not the same as those who are bound. These settings may give rise to significant concerns of opportunism, especially in cases where a small group displaces the default for a large group, or a when a group shut out of the process does not foresee the application of the rule.

Consider, for example, the altering rule for waiving the corporate opportunities doctrine. By default, directors may not appropriate a corporate opportunity without first presenting it to the board. This prevents directors from using their position to compete with the company. However, under DGCL Section 122(17), a simple board resolution—passed by a majority of the board—is sufficient to waive this requirement for an individual director.[84] Now imagine the board adopts such a resolution and waives the requirement for its CEO and controlling shareholder. Here, only a majority of the board decides but the decision impacts the entire firm. The CEO is released from the constraints of the corporate opportunities doctrine, and when the CEO competes with the company, neither the corporation nor its shareholders can sue the CEO for breach of fiduciary duty. Process is narrow, and scope is broad.

What kind of bargaining environment does this induce? A board resolution is, at root, a unilateral action. The bargaining dynamic here resembles the Dictator Game in economic theory.[85] In this game, one party (the "dictator") has complete control over the division of surplus, while the other party has no choice but to accept the outcome. Unlike the Ultimatum Game and the Rubinstein model, there is no opportunity to "reject." The board decides and the shareholders are bound.

Just as in other cases, this dynamic may be tempered by external factors. Market reactions, directors' and officers' fiduciary duties, reputational concerns, and other strategic considerations can incentivize directors to moderate the kinds of opportunism that the Dictator Game seemingly invites. The broader legal framework can also serve as a check. For example, DGCL Section 141(k) grants shareholders the right to remove

84. *Id.* § 122(17).

85. Christoph Engel, *Dictator Game a Meta-Study*, 14 EXPERIMENTAL ECON. 583, 585-88 (2011).

directors without cause.[86] This removal right significantly tempers the dictatorial nature of many board decisions. In this way, corporate law's altering rules do not operate in isolation but interact with other features of law to shape the overall bargaining framework.

This example echoes the earlier discussion of the role of Section 220 access to information rights in the context of the Rubinstein model. Just as information rights can help reduce bargaining failures induced by asymmetric information in the Rubinstein model, a robust removal right can help avoid the worst excesses inherent in the Dictator Game. Each provision—Sections 220 and 141(k)—adjusts the bargaining power of game. Section 220 does this by countering the rational tendency to be overly cautious when facing an information disadvantage,[87] while Section 141(k) does this by implicitly adding a second round after the Dictator Game, where shareholders (at least in principle) have an opportunity to play their own Dictator Game and remove the unacceptable director.[88]

Ultimately, the Dictator Game is not presented here as a "good" or "bad" framework—but merely an illustration of our approach to analyzing altering rules. Our approach is to recognize that each altering rule establishes a specific framework for bargaining, the details of which depend on their interaction with other provision of law and outside forces. The key is not to declare certain altering rules—or mandatory or default rules—as inherently problematic, but instead to analyze them as mechanism design problems, to identify the sources of bargaining success or failure, and to evaluate them according to their ability to realize desired outcomes.

III. Shareholder Contracting the Case for Nonparty Consent

With the conceptual framework of altering rules in place, we can now turn to the case of shareholder contracting. Which rules should shareholders be allowed to contract around? And what altering rules should govern?

This is no longer a theoretical exercise. Delaware's contractarian turn has placed shareholder contracts in the eye of a policy and doctrinal storm. The recent *Fugue* and *Moelis* decisions,[89] and the legislative response overruling *Moelis* (Section 122(18)),[90] have called into question the future of two foundations of corporate law: fiduciary duties and the central role of the board. If we are to navigate this contractarian turn effectively, we must do so with a clear understanding of how altering rules shape the bargaining frameworks in which insiders operate.

86. DEL. CODE ANN. tit. 8 § 141(k) (2024).

87. *Id.* § 220.

88. *Id.* § 141.

89. *Fugue*, 295 A.3d 520 (Del. Ch. 2023); W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809 (Del. Ch. 2024).

90. DEL. CODE ANN. tit. 8, § 122(18) (2024).

Our theory suggests that the right approach lies not in outright prohibitions of shareholder contracts, but rather in deliberately designing altering rules that manage the interests of both signatories and non-signatories alike. An understanding of how altering rules can protect non-signatory interests is, we argue, a key piece missing from the debate. We will show that by expanding the altering rules' process surrounding contract formation—without any adjustments to its scope—corporate law can both enable valuable governance innovation by sophisticated shareholders *and* mitigate the negative externalities on non-signatory parties.

A. The Problem with Shareholder Contracts

Before we can make progress on what the altering rules should be, we must first address a threshold question which has not been appreciated by the courts or commentators: Is there anything distinctive about *shareholder* contracting as opposed to contracting in general?

Our theory suggests there is. The distinction lies in the process and scope of the altering rules that apply—and, crucially, *could* apply—to shareholder contracts. In the typical contractual setting, process and scope are one and the same: only the contract parties decide and only the contract parties are bound. Shareholder contracts, however, are different. They can change governance rules that apply *even to non-signatory insiders*. This misalignment between process and scope—the off-diagonal elements of Table 2—introduces a unique set of hazards.

The *Moelis* case is illustrative. The CEO and controlling shareholder Ken Moelis, through an agreement with the board, acquired veto rights over nearly every significant corporate decision.[91] This included, among many others, control over the board's ability to both to nominate and recommend to stockholders candidates for election to the board.[92] These provisions empowered Moelis while disempowering non-signatory shareholders, who would otherwise have had the power to adopt their own rules on director nominations under Section 216.[93] Here, the altering rule implemented by contract was narrow in process (Moelis and the board were the only decision-makers) but extremely broad in scope (all shareholders were effectively bound).[94]

This misalignment of process and scope explains much of the discomfort with the contract in *Moelis*. Though they did not quite phrase it this way, critics of the contract and the legislative response in Section 122(18) (authorizing such contracts and more) implicitly recognized that shareholder contracts should not be able to bind non-signatory shareholders.[95]

91. *Moelis*, 311 A.3d at 821.
92. *Id.* at 818.
93. *Id.* at 827; DEL. CODE ANN. tit. 8, § 216 (2024).
94. *Moelis*, 311 A.3d at 818.
95. DEL. CODE ANN. tit. 8, § 122(18) (2024).

Yet we think that the common solution—prohibiting such agreements altogether—still misses the mark. The problem lies not with shareholder contracts per se but with the altering rules such contracts reflect. In *Moelis*, the altering rule was a narrow process coupled with a broad scope. It created a bargaining environment that, as we argue in Part IV, is especially prone to opportunism. The solution, then, is not necessarily to ban the contracts themselves, but to adjust the process and in turn the bargaining environment in ways that directly address these serious concerns.

B. The Solution is Better Altering Rules – Not More Mandatory Rules

The key to resolving the *Moelis* dilemma and others like it is not to mandate more rules but to fix the altering rules. As proof of concept, here we propose a new kind of altering rule—nonparty consent rules—which addresses many types of criticism of shareholder contracts by drawing nonsignatory shareholders into the process.

The approach draws directly from our theory. At a conceptual level, a nonparty consent rule broadens the process of an altering rule without changing its scope. By requiring broader consent for contracts with firmwide implications, nonparty consent rules establish a different bargaining framework, one in which affected shareholders have at least some say. This mitigates the concern over the negative externalities of shareholder contracts on nonparty insiders to the firm.

Such rules could take many forms. For example, a shareholder contract might require the affirmative vote of a majority of nonparty shareholders, or indeed an even lower threshold, such as one-third of nonparty shareholders. Yet another rule might require some threshold of nonparties to affirmatively *object* (instead of assent) to a shareholder contract within a given period. To give yet another example, a nonparty consent rule could allow nonparty shareholders to opt back into a rule that the agreement directly or indirectly displaced. Applied to the contract in *Moelis*, nonparty shareholders would continue to retain their powers to establish their own procedures to nominate directors under Section 216. In turn, this would enable—if not compel—the board to make a recommendation on non-Moelis director nominees without violating the shareholder agreement with Moelis (obligating the board to recommend Moelis' chosen directors). Each of these nonparty consent rules is an expansion in process that generates a distinct bargaining framework, with distinct implications for surplus allocation, nonparty bargaining power, and risks of opportunism.

The point here is not to advocate for one specific altering rule over another, nor even to insist that *Moelis*-style contracts be governed by a nonparty consent rule (though we find this a sensible policy). Rather, our claim is this: Combinations of process and scope give rise to an endless array of plausible bargaining frameworks. This fact by itself should substantially raise the burden of proof on those arguing in favor of outright

prohibition. Such arguments often tout the wisdom of a given mandatory rule—but only within the narrow context of a particular, given bargaining framework.

IV. Reordering the Foundations of Corporate Law

In light of our theory, how should corporate law's altering rules be designed? This question is particularly timely, as *Fugue* and *Moelis*,[96] along with the legislative response in DGCL Section 122(18),[97] provide a rare and illuminating opportunity to revisit the mandatory status of two foundational pillars of corporate law: fiduciary duties (*Fugue*) and the central role of the board (*Moelis*). Together, the cases cut to the heart of how power and responsibility are allocated in corporations.

Designing altering rules to address these concerns is not an obvious or straightforward task. Altering rules are inherently complex and must account for the messiness and compromise that permeates the DGCL. However, as argued in the previous part, the key lies in treating altering rule design as a mechanism design problem. Altering rules induce distinct bargaining frameworks, and the goal should be to make those frameworks fair and efficient.

In the sections that follow, we apply our theory to analyze *Fugue*, *Moelis*, and the new Section 122(18). We argue in favor of *Fugue*—not necessarily for its exact outcome, but for its underlying logic, which takes seriously altering rules as a framework for guiding bargaining. *Fugue* implicitly addresses the risk of opportunism in shareholder contracts by crafting an altering rule that aims to mitigate these concerns. *Moelis*, for its part, raises distinct issues, particularly regarding the impact on non-signatory shareholders who are not parties to the contract but are still affected by its terms.[98] But unlike *Fugue*, the court in *Moelis* was constrained by a statute, DGCL Section 141, which requires modifications to board power to be in the corporate charter.[99] This necessarily limited the court's ability to freely craft an optimal altering rule.

The greatest contrast to the sensible approach of *Fugue*, however, is the approach taken by the legislature in response to *Moelis*—now codified in the new Section 122(18).[100] The new section overrules *Moelis* in the worst possible way—not because it strikes the wrong policy balance, but because it fails to reflect any meaningful analysis of the interests at stake. Specifically, Section 122(18) overlooks the primary goal of altering rule

96. *Fugue*, 295 A.3d 520; *Moelis*, 311 A.3d 809.

97. DEL. CODE ANN. tit. 8, § 122(18) (2024).

98. *Moelis*, 311 A.3d at 875 (explaining that the ability to nominate candidates is core to all shareholders' rights).

99. *Id.* at 816 ("The immovable statutory object is Section 141(a) of the Delaware General Corporation Law . . . .").

100. DEL. CODE ANN. tit. 8, § 122(18) (2024).

design: to induce fair and efficient bargaining frameworks. It fails, among many other things, to distinguish between the interests of signatory and non-signatory shareholders. As a result, it risks encouraging collusive bargains that destroy value.

A. The Fugue *Approach: Structuring Bargaining Through Ex Ante Rules*

1. Applying Theory to Reality: The Case of *Fugue*

At first glance, *Fugue* may seem disconnected from our approach. The case, and the altering rule it crafts, are complex. There are multiple prongs and open-ended conditions.[101] *Fugue* held that a written agreement not to sue for breach of fiduciary duty is enforceable if it is both narrowly tailored to a specific transaction and passes a catch-all reasonableness test.[102] This test considers factors such as the clarity and specificity of the provision, the stockholder's knowledge of the provision and surrounding circumstances, their ability to foresee the consequences and reject the provision, their level of sophistication, and the involvement of legal counsel.[103]

By comparison, our approach to altering-rule design might initially seem more streamlined, even minimalist. But upon closer inspection, *Fugue*'s altering rule aligns well with our theoretical framework. The core of *Fugue* is that it treats the duty of loyalty as a default rule that can only be displaced through an altering rule that is *narrow in both process and scope*.[104] This design choice fits directly with our theory's key insight: altering rules must induce an efficient bargaining framework that addresses the risk of opportunism. True, the opinion does not explicitly use this terminology—but it clearly embodies this approach.

Under *Fugue*, waiving the duty of loyalty cannot be accomplished through broad mechanisms like a charter amendment that might bind entire classes of stockholders or the corporation as a whole.[105] Instead, *Fugue* mandates that any waiver must occur on a shareholder-by-shareholder basis.[106] It must occur within a contract that can only bind that contract's signatories.[107] This structure directly mitigates the major opportunism risk associated with opting out of the duty of loyalty, namely, the danger of unsophisticated shareholders being coerced or pressured into waiving the protections afforded by loyalty—or the risk that shareholders simply waive

101. *Fugue*, 295 A.3d at 589-92 (applying the *Manti* and *Altor Bioscience* tests).

102. *Id.* at 586, 589-90.

103. *Id.*

104. *Id.* at 586 ("A strong argument exists that a broad, unspecified waiver is facially invalid, such as a covenant not to assert any claims for breach of fiduciary duty under any facts. A narrow and targeted provision like the Covenant, however, is not facially invalid.").

105. *Id.*

106. *Id.* at 593 (emphasizing that the agreement ought to be stockholder-level).

107. *Id.* at 577 ("A stockholder-level agreement only binds its signatories, and other stockholders remain free to exercise their rights differently.").

such protections due to inattention or rational apathy. By requiring each shareholder's individual contractual consent, *Fugue* ensures that the duty remains enforceable—at least in principle—as long as at least one shareholder refuses to waive it.[108]

A critical implication of this approach is that the duty of loyalty remains *de facto mandatory* in public firms. In public companies, unanimous shareholder consent is virtually impossible—and this is a fitting result, since public companies are also settings in which shareholder rational apathy reigns.[109] In the rare cases where unanimity is achieved, this effectively results in a full waiver of the duty. *Fugue*'s approach all but guarantees that this will occur only within the confines of a private company, and only under the demanding conditions of shareholder sophistication outlined in *Fugue*. Thus, in such cases when unanimity is achieved and the duty is effectively waived, we can infer that such a waiver is likely to be Pareto improving. Admittedly, *Fugue*'s multi-pronged test adds layers of complexity that our theory does not fully capture.[110] Yet the core logic remains simple and fully aligned with our approach: *Fugue* enables freedom of contract while minimizing the risks of opportunism by crafting an altering rule that induces an efficient bargaining framework. In this case, the altering rule has narrow process and narrow scope.

2. A Weakness of *Fugue*—A Role For Nonparty Consent

Fugue's altering rule addresses the paternalistic concerns inherent in authorizing the conflicted exercise of power—in this case, in waiving one's right to sue for breach of fiduciary duty[111]—but that does not resolve all potential issues raised by such waivers. The criticisms of *Manti* apply here as well. Recall that in *Manti*, the waiver of appraisal rights was criticized for failing to account for the fact that the exercise of individual shareholders' rights—whether to vote, sell, or sue—creates positive externalities for other shareholders. In the case of *Manti*, the specific positive externality came from the threat of an appraisal suit. In theory, the threat would discipline managers during merger negotiations, resulting in (theoretically) better terms.[112]

In *Fugue*, the contract appeared to be signed by all shareholders; that is, although it is not expressly stated in the opinion, there did not appear to be any non-signatory shareholders objecting to the agreement.[113] But what

108. *Id.*

109. Bernard S. Black, *Shareholder Passivity Reexamined*, 89 MICH. L. REV. 520, 522 (1990).

110. *Fugue*, 295 A.3d at 589-92.

111. *Id.* at 574.

112. Of course, others might counterargue that the failure to waive such rights would alternatively chill value-creating deals ex ante, leading to worse outcomes for the target's shareholders.

113. *Fugue*, 295 A.3d at 533.

if there were? In this hypothetical case, the non-signatory shareholders, while not legally bound, may still be profoundly negatively impacted by the change in governance incentives effected by the waiver. This is a crucial distinction between *Fugue* and other potential cases in which the *Fugue* doctrine would apply. In *Fugue*, there were no nonparty effects because all shareholders (seemingly) signed onto the contract.[114] But there is nothing inherent in the *Fugue* doctrine that limits it to such cases.

Imagine if, for example, two controlling shareholders agreed not to sue each other for breach of fiduciary duty. The waiver may seem rational for those shareholders—each is indeed avoiding potential lawsuits from the other—but it could generate substantial negative externalities for the rest of the shareholders. Non-signatory shareholders, though not legally bound by the agreement, would lose the benefits of the oversight efforts each controller previously exerted—or at least could threaten to exert. The result is an intra-corporate negative externality, where the benefits of shareholder enforcement are eroded for the entire shareholder base because of a private agreement between a few key controllers.

This example highlights a key limitation of *Fugue*: it does not account for the potential negative impacts on nonparty shareholders. The court did not have to contend with these concerns.[115] But the doctrine itself leaves open the possibility that future agreements could produce intra-corporate externalities. Yet here, too, a nonparty consent rule would address such concerns. By adjusting the process of altering rules, nonparty consent rules would bring affected non-signatories into the bargaining framework—without actually binding them to the contract. This subtle shift in process mitigates the risks of intra-corporate negative externalities without resorting to a blanket prohibition on shareholder contracts, or a blanket requirement that such contracts be joined by all shareholders.

Whether such contracts should require a nonparty consent rule, we think, will depend on whether one thinks shareholders should be allowed to internalize the positive externalities of their oversight efforts—specifically by bargaining them away. Put differently, the question is whether shareholders are entitled to the benefits of other shareholders' threat of enforcing fiduciary duties. We think reasonable persons could differ. Yet we also think the process could likely be designed in a way that accommodates many different positions.

The broader point, again, is that the right approach to address these concerns is through careful altering rule design, not mandatory rules or unrestrained contractual freedom. At the very least, the burden of demonstrating the wisdom of a prohibition is high and must include a demonstration that every plausible bargaining framework somehow fails. This demonstration, we think, is particularly difficult given how many kinds of

114. *Id.*
115. *Id.*

altering rules are yet untested—nonparty consent rules being only one of many such possibilities.

B. The 122(18) Approach: Leaving Bargaining to Ex Post Enforcement

1. The Problem with Section 122(18)

The immediate origin of Section 122(18) is Vice Chancellor Laster's decision in *Moelis*,[116] which invalidated several key provisions in a contract between entities controlled by Ken Moelis and the public company he founded, Moelis & Co.[117] The shareholder agreement gave Moelis sweeping approval rights over nearly every consequential decision of the company.[118] It also granted Moelis the ability to designate individuals for the company's board and required the board to recommend his nominees to shareholders and place them on key committees.[119] The court ruled that these terms violated Section 141(a), which mandates that the board of directors is ultimately responsible for managing the business and affairs of the corporation.[120] Crucially, Section 141(a) permits modifications of this default only through the corporate charter.[121] *Moelis* held that the shareholder contract violated this core provision of Delaware corporate law.[122]

In response to the uproar following the *Moelis* decision, the Delaware legislature swiftly enacted Section 122(18), a new provision that authorizes the board to delegate its powers to a shareholder by contract.[123] Section 122(18) effectively undoes the proviso of Section 141.[124] Instead of requiring modifications to board powers to be in the charter, it enables boards to enter into contracts that transfer all or nearly all of their powers to certain shareholders without requiring any input from other shareholders.[125] This is a radical shift, and it marks a fundamental change to the altering rule that governs the board's default powers. The old rule required that any modification of board authority must be made in the charter—that is, it required a process involving firm-wide participation.[126] But under the new rule of Section 122(18), such modifications can now be made through a narrow contractual process.[127]

116. S.B. 313, 152nd Gen. Assemb. (Del. 2024).

117. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 817, 881 (Del. Ch. 2024).

118. *Id.* at 818.

119. *Id.*

120. *Id.* at 823; DEL. CODE ANN. tit. 8, § 141(a) (2024).

121. DEL. CODE ANN. tit. 8, § 141(a) (2024).

122. *Moelis*, 311 A.3d at 823.

123. DEL. CODE ANN. tit. 8, § 122(18) (2024).

124. *Id.* § 141.

125. *Id.* § 122(18).

126. *Id.* § 141.

127. *Id.* § 122(18).

Our fundamental criticism of Section 122(18) is not that it adopts a rule that differs from our ideal or preferred approach; rather, it fails to even *attempt* to get it right. At the most basic level, Section 122(18) authorizes broad reallocations of corporate power without the firm-wide process that is typically required for such fundamental changes.[128] Of course, in some circumstances, a narrow process may be appropriate, such as when the risks or stakes of opportunism are low. Section 122(18), however, allows for firm-wide governance changes in high-stakes situations that are structurally prone to extreme forms of opportunism.

The *Moelis* contract was between the board and a controlling shareholder.[129] But controlling shareholders often dominate boards.[130] This is exactly the kind of dominated if not collusive transaction that externalizes costs to non-signatory shareholders. It is akin to an interested transaction, such as when a CEO sells her own assets to the corporation at an inflated price.[131] Such situations are ordinarily subject to so-called "conflict-cleansing" procedures designed to mitigate the conflict. Yet Section 122(18) treats these highly conflicted agreements as if they were nothing more than an ordinary, arm's-length bargain. In doing so, it overlooks the fact that applying an altering rule designed for arm's-length transactions to a fundamentally conflicted situation generates a highly problematic bargaining environment. To prevent controllers from self-dealing, or even looting the company, the protections inherent in the charter amendment process should have been layered into the contract-based framework. But Section 122(18) essentially bypasses these protections—and then some—by enabling boards to reallocate corporate power with no input from shareholders and without the constraints of the usual conflict-cleansing procedures.[132]

In practice, the only previously regularly occurring situation in which Delaware corporations so profoundly reallocated their core powers was the case of "blank check preferred stock" provisions, which authorize the board to design and issue preferred stock terms without further shareholder approval.[133] This example is routinely brought up in debates over

128. *Id.*

129. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 824 (Del. Ch. 2024); Opening Brief in Support of Plaintiff's Motion for Summary Judgment at 2, *Moelis*, 311 A.3d 809 (Del. Ch. May 5, 2024) (No. 2023-0309) (noting that Ken Moelis was majority stockholder at the time of entering into the Shareholder Agreement).

130. Jens Dammann, *The Controlling Shareholder's General Duty of Care: A Dogma that Should Be Abandoned*, 2015 U. ILL. L. REV. 479, 480 (noting that controlling shareholders are those "who direct the actions of the board").

131. Richard W. Holtz, Note, *Interested Transactions by Corporate Directors: A Weakening of the Fiduciary Duty of Loyalty*, 28 SUFFOLK U. L. REV. 93, 97 (explaining that interested transactions are those that "create conflicts between the director's personal interests and those of the director's corporation").

132. DEL. CODE ANN. tit. 8, § 122(18) (2024).

133. A. GILCHRIST SPARKS III, DELAWARE CORPORATION LAW AND PRACTICE § 17.01 n.47 (2024).

Section 122(18) as a counter to the idea that the section is without precedent.[134] But this is a false comparison. The key difference with blank check preferred is that the authority for it comes directly from the charter, not from a contractual agreement.[135] Section 122(18), in contrast, allows the board to delegate power without the kind of firm-wide process one would encounter in a charter amendment.[136]

The structure of Section 122(18) is even more baffling considering how corporate law typically treats deals between the corporation and a controlling shareholder. In particular, Delaware courts recognize controller takeovers as inherently coercive because the controller can exert undue influence over both the board and minority shareholders, thereby potentially pressuring them to accept suboptimal terms.[137] To mitigate such risks, Delaware courts impose heightened scrutiny on such deals unless they satisfy certain onerous procedural safeguards designed to address the conflicts of interest and inherent coerciveness of controller transactions.[138] Section 122(18), however, ignores these risks altogether and applies a weak, arms-length bargaining model. A much stronger framework is needed.

Advocates of Section 122(18) argue that the provision is essentially safeguarded by fiduciary duties, which always act as a background check on any board action.[139] But such arguments fall short. If fiduciary duties cannot be enforced, or if the parties who can bring a fiduciary claim are themselves conflicted, then those duties are as good as null.

The situation in *Moelis* demonstrates this perfectly. The contract between Moelis and his company, Moelis & Co., was executed *before* the company's IPO—a typical arrangement for companies preparing to go public.[140] Yet under Delaware's contemporaneous ownership rule, only

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134. *See, e.g.*, James Z. Fang, Susanna Suh & Geoffrey E. Liebmann, *Delaware Corporate Statute Amended to Override Much of Recent Chancery Court Decision Invalidating Certain Stockholder Agreement Corporate Governance Provisions*, CAHILL 2 (July 30, 2024), https://www.cahill.com/publications/firm-memoranda/2024-07-30-delaware-corporate-statute-amended-to-override-much-of-recent-chancery-court-decision-invalidating-certain-stockholder-agreement-corporate-governance-provisions/_res.pdf [https://perma.cc/WD4F-GM79] (noting that most of the provisions at issue in *Moelis* could have been placed in a certificate of designations for preferred stock).

135. *Id.* (noting that the preferred stock option could only be achieved if the certificate of incorporation included a "blank check" preferred stock provision).

136. DEL. CODE ANN. tit. 8, § 122 (2024).

137. Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1116-17 (Del. 1994) (quoting Citron v. E.I. du Pont de Nemours & Co., 584 A.2d 490, 502 (Del. Ch. 1990)).

138. Kahn v. M&F Worldwide Corp., 88 A.3d 635 (Del. 2014).

139. *See, e.g.*, Cole Kreuzberger, Moelis *No More: DGCL Section 122(18)'s Emphasis on Flexibility and its Implications for Corporate Practitioners*, VILL L. REV. BLOG (Sept. 13, 2024), https://www.villanovalawreview.com/post/2683-_moelis_-no-more-dgcl-section-122-18-s-emphasis-on-flexibility-and-its-implications-for-corporate-practitioners [https://perma.cc/8CHQ-ULYX] (arguing that fiduciary law remains an effective bulwark on the scope of shareholder agreements).

140. W. Palm Beach Firefighters' Pension Fund v. Moelis & Co., 311 A.3d 809, 817-18 (Del. Ch. 2024).

shareholders who owned stock at the time the alleged corporate wrong occurred can bring a suit.[141] This means that post-IPO public shareholders—those most likely to be harmed by opportunistic deals—are barred from enforcing fiduciary duties. That leaves only the pre-IPO shareholders—who are often close allies of the founder or investment funds exiting the company after the IPO—to challenge these agreements, if they even wish to do so. The idea, therefore, that fiduciary obligations still control "in the background," is false. For a large class of *Moelis*-style contracts, fiduciary duties are weak, if not completely toothless.

In sum, Section 122(18) fails to appreciate the distinction between settings that call for a narrow versus broad process. It allows a narrow process—board approval—to accomplish almost anything, including the transfer of core powers to a controlling shareholder, and all in the name of a deeply undertheorized understanding of "freedom of contract."[142] This opens the door to problematic delegations of board power. Rather than showing how altering rule design can accommodate the major policy worries favoring a mandatory rule, Section 122(18) merely shows how an altering rule can ignore them.

2. A Better Way to Contractually Modify of Board Powers

Is there any good reason to expand the altering rule in DGCL 141 to allow for contractual (as opposed to charter-based) delegation of board powers? We think there may be several good reasons—provided, of course, the modification is accomplished via the right altering rule.

The most plausible argument in favor of permitting contractual delegations is that it enables efficient breach. Unlike the charter approach, the contractual approach theoretically leaves room for the board to disregard the constraint. When a corporate action violates the charter, that action is void and unenforceable.[143] But when a corporate act violates a contract, it may still be valid—it simply opens up the corporation to potential liability for breach of contract. Using contracts to modify board powers thus introduces flexibility: a future board could breach the agreement if it is in the best interests of the company, that is, if choosing to pay damages or face some other remedy is better than complying with the rule.

But even if we accept the idea that a contract-based governance regime could introduce beneficial flexibility, the approach embodied by Section 122(18) is still clearly deficient. A more thoughtful approach would

141. DEL. CODE ANN. tit. 8, § 327 (2024).

142. Fisch & Beck, *supra* note 13 (noting that the proposed amendment creating § 122(18) implemented "unlimited contractual freedom").

143. Wagner v. BRP Grp., Inc., 316 A.3d 826, 849 (Del. Ch. 2024) ("For purposes of voidness doctrine, corporate acts that violate the charter are void, although potentially subject to validation under Sections 204 and 205.").

draw from the principles established in *Fugue*.[144] Such an approach would attempt to identify the core opportunism hazards at play and then design an altering rule to mitigate those hazards. In *Fugue*, the court's primary concern was preventing predation on unsophisticated shareholders—shareholders who might waive their rights without understanding the consequences.[145] *Fugue*'s altering rule sought to ensure that waivers of the duty of loyalty would not occur in such cases.[146]

The key challenge with *Moelis* and Section 122(18) is different: It is not about protecting the contractual parties from themselves, as in *Fugue*, but about protecting *non*parties from the intra-corporate effects of conflicted board and controller actions. Here, the focus should not be on ensuring that the contracting parties fully understand what they are waiving—in all likelihood, parties to *Moelis*-style contracts already fully understand the consequences. Rather the goal should be to craft an altering rule that takes into account the interests of nonparties—that is, the interests of shareholders who are not at the table but who will nonetheless be impacted by the delegation of board authority. This, of course, was the whole purpose behind Section 141's requirement that such changes be made through a charter amendment, as such a process requires firm-wide involvement.[147]

Our position is not that the old charter-based approach is the *only* viable altering rule—or even that it is necessarily the best one. The critical issue, in our view, is not the formal mechanism of the charter amendment itself, but the bargaining framework that such a process induces. Recall that charter amendments mirror the structure of the Ultimatum Game.[148] The board, as the proposer, has all the bargaining power. In contrast, a contract-based altering rule resembles—or at least has the *potential* to resemble—the Rubinstein bargaining game, which allows for a more nuanced back-and-forth negotiation.[149] In practice, context will dictate which framework is more appropriate. Indeed, in some cases such as closely held companies, a charter amendment process may in fact yield a Rubinstein-style negotiation, while in other cases, such as cases of extreme differences in bargaining power or attentiveness, a contract could devolve into a take-it-or-leave-it offer.

The essential point is that the process should incorporate the interests of nonparties, whether through a charter amendment, a contract coupled with a nonparty consent rule, or some other approach. There is nothing magical about the charter per se. It contains no special instrumental

144. *Fugue*, 295 A.3d 520 (Del. Ch. 2023).

145. *Id.* at 590-91 (indicating that such provisions are "likely to be few and limited to agreements between *uber*-sophisticated parties").

146. *Id.*

147. DEL. CODE ANN. tit. 8, § 141 (2024).

148. *See supra* notes 75-77 and accompanying text.

149. *See supra* notes 81-83 and accompanying text.

benefit. In our theory, the charter amendment simply happens to be a well-established method for effecting a broad process. The right approach is to develop an altering rule that induces the right bargaining environment. This is the lesson from *Fugue*, and the lesson that should have informed the development of Section 122(18).

V. Objections and Qualifications to Our Approach

In this section, we respond to several important objections to our more flexible approach to corporate altering rules. A reader may wonder (1) whether this approach undermines Delaware's brand because it complicates the standardization benefits of Delaware corporate law, (2) whether it is unnecessary because alternative entities, such as the limited liability company, already exist and have few or no mandatory rules, (3) whether the courts are up to the task of designing these rules, and (4) whether there are other important features to altering rules (there are). We address each in turn. We then turn to a number of questions raised by our approach.

A. Delaware's Brand

One potential objection is that Delaware's success flows from the simplicity and uniformity of the corporate governance of companies incorporated there. That uniformity allows investors to avoid having to read cumbersome and complicated charters and permits stable expectations as to what corporate law looks like, reflecting its mandatory rules. Although we think that Delaware does have a valuable brand, the simplicity and uniformity of Delaware corporate governance cannot explain it.

The idea that Delaware corporations have simple and uniform corporate governance is a mythology. Private companies incorporated in Delaware routinely have extremely varied, complex, and creative corporate governance.[150] Venture capital-backed startups are typically incorporated in Delaware and represent an important source of dynamism and growth for the U.S. economy.[151] The leading provider of standard form terms for these startups, the National Venture Capital Association, supplies model legal documents that are widely adopted.[152] The model charter runs to 49

150. Amy Simmerman, William B. Chandler III & David Berger, *Delaware's Status as the Favored Corporate Home: Reflections and Considerations*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (May 8, 2024), https://corpgov.law.harvard.edu/2024/05/08/delawares-status-as-the-favored-corporate-home-reflections-and-considerations [https://perma.cc/8XG7-MVG9] (noting that Delaware has maintained dominance, in part, due to the flexibility its law affords corporations).

151. Josh Lerner & Ramana Nanda, *Venture Capital's Role in Financing Innovation: What We Know and How Much We Still Need to Learn*, 34 J. ECON. PERSPS. 237, 253 (2020).

152. *NVCA Model Legal Documents*, NVCA (2024), https://nvca.org/model-legal-documents [https://perma.cc/D2AJ-BQQD].

pages.[153] It creates multiple classes and series of stocks and grants distinct and lengthy lists of powers and privileges to each. The model voting agreements runs to 23 pages.[154] Empirical research on the provisions that late-stage startups adopt suggests that simplicity is, in fact, the exception.[155] Complexity and creativity is the rule.

It is not just private corporations either. Delaware public corporations can and do tailor their governance. They can go public subject to complicated shareholder agreements.[156] The multi-class structures of Google and the voting trusts of Facebook are well-known. Beyond high-tech giants, though, even Visa has a nearly 50-page charter.[157] The country's most dynamic and valuable companies exhibit considerable governance complexity. Providing new avenues for arriving at optimal governance is unlikely to move the dial materially on this dimension. Sophisticated investors already need to read corporate charters to understand the governance of Delaware corporations.

Thus, far from being adverse, our approach is consistent with Delaware's brand. Delaware corporate law has never been static. Its history involves repeated revision to its statute and an evolving common law jurisprudence. [158] The constant, if anything, has been an incremental responsiveness and adaptiveness to changing business, legal, and economic circumstances.[159] Indeed, the current trend—decades in the making—has been to eschew substantive second-guessing of managers' decisions in favor of promoting *processes* through which high-quality decisions are reached.

B. Alternative Entities

The second objection is that our approach is largely unnecessary because those who want greater contractual freedoms can select from several

153. *Certificate of Incorporation (Updated October 2024)*, NVCA (2024), https://nvca.org/document/certificate-of-incorporation-updated-october-2024 [https://perma.cc/FJ9R-GGX6].

154. *Voting Agreement (Updated October 2024)*, NVCA (2024), https://nvca.org/document/voting-agreement-updated-october-2024 [https://perma.cc/CQ2F-FLY6].

155. Dhruv Aggarwal, Ofer Eldar, Yael V. Hochberg & Lubomir P. Litov, *The Rise of Dual-Class Stock IPOs*, 144 J. FIN. ECON. 122, 127 (2022) (providing evidence of complexity of startup charters pre-IPO).

156. Rauterberg, *supra* note 17, at 1148-54.

157. Amended and Restated Certificate of Incorporation of Visa, Inc., Form 8-K Ex. 3.1) (Jan 24, 2024), https://www.sec.gov/Archives/edgar/data/1403161/000119312507212797/dex31.htm [https://perma.cc/W4M3-K65T].

158. Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 DEL. J. CORP. L. 885, 900-01 (1990); Lawrence A. Hamermesh, *The Policy Foundations of Delaware Corporate Law*, 106 COLUM. L. REV. 1749, 1755 (2006); Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709, 709 (1987); Roberta Romano, *The States as a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REGUL. 209, 216-20 (2006).

159. Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1063 (2000); Marcel Kahan & Edward Rock, *Symbiotic Federalism and the Structure of Corporate Law*, 58 VAND. L. REV. 1573, 1619-22 (2005).

alternative business entities. The United States affords many popular alternatives to the partnership and the corporation, such as the limited liability company, statutory trust, and limited partnership. These statutes focus on providing maximal contractual flexibility. The Delaware LLC statute announces that "[i]t is the policy of this [Act] to give the maximum effect to the principle of freedom of contract."[160] Given this, a reader may reasonably wonder why increasing contractibility in the corporation is necessary, and whether it collapses the distinction between the corporation and these alternative entities.

But even if every entity form permitted a firm to contract around a default, the entities would remain fundamentally distinct because they differ in *how* they permit alterations.[161] What distinguishes entities is not just what they permit, but *how* they permit it. Even if there were no mandatory rules, entities would still fundamentally differ because they offer different altering rules—and we do *not* argue in favor of permitting corporations to alter defaults in the same way as the LLC. On the contrary, we do not think a charter should be able to waive the fiduciary duty of loyalty for all shareholders, in the way an LLC operating agreement can for all LLC members. Our argument is that corporate law needs to appreciate the latent richness of the altering rules available to it, so that courts can develop and make use of this flexibility in permitting firms to waive defaults.

Our vision of corporate law's contractual freedom is not one that is unfettered by rules, so that powerful shareholders or managers can do whatever they please. Rather, our vision of corporate contractual freedom is one that is carefully managed through the development of appropriate altering rules that enable firms to tailor the fundamentals of their governance.

C. Are Courts Up to the Task?

More broadly, any plausible approach to opt out in corporate law must have far more to say about the role of the courts than we have had the space to develop here. Perhaps the core mandatory feature of

160. DEL. CODE ANN. tit. 6, § 18-1101(b) (2018). On LLCs use of this freedom, see Peter Molk, *Protecting LLC Owners While Preserving LLC Flexibility*, 51 U.C. DAVIS L. REV. 2129, 2190 (2018) ("By preserving contractual freedom for investors that can protect themselves, LLCs will continue to offer the maximum potential for efficient governance relationships. In addition, by providing a robust set of protections for everyday investors, LLCs will remain an appropriate form for those parties seeking a simple, low-cost means of achieving limited liability and preferential tax treatment.").

161. Vice-Chancellor Laster supplies a compelling version of this argument. *Fugue*, 295 A.3d 520, 530 (Del. Ch. 2023) ("Another rhetorically powerful argument asserts that permitting a stockholder to covenant not to sue for breach of the duty of loyalty will collapse the distinction between a corporation and an LLC. That is not so, as the fundamental differences between corporations and LLCs operate at the basal level of their statutes and constitutive documents. There is a superficial similarity between the ability of investors in corporations and LLCs to contract about their investor-level rights, but that resemblance does not turn corporations into LLCs.").

corporate law is not a specific substantive doctrine, but the central role of the courts in reviewing corporate action.[162] Under our approach, Delaware's courts would retain a fundamental, if somewhat different role in a world where altering rules were more creatively and pervasively used.

Just to sketch some considerations, we envision courts playing an important common law policymaking role in designing altering rules, absent systematic legislative attention to the process. They would also play an important role in reviewing the adequacy of disclosures made in connection with alterations, in reviewing officers and directors' conduct in arranging the process, and in interpreting firms' privately ordered altering rules.

D. Secondary Features of Altering Rules

Some scholars have highlighted, for example, the importance of notice or disclosure requirements.[163] In corporate law, a distinction is also often made between altering a default at the time the corporation is formed ("initial" changes) and altering the default for existing corporation ("midstream" changes). The altering rule for staggering the board of directors is one such example.[164]

But in our view, these features are not as fundamental. What makes process and scope essential is that they define how and whether corporate insiders affect other insiders who did not consent to a change in governance. We see this as the distinctive motivation for altering rule design in corporate law. These features also apply not just to stockholder contracts, but to all methods of displacing a default in corporate law. They are

162. John C. Coffee Jr., T*he Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618, 1621-24 (1989). Professor Coffee sketches a subtle position between the advocates and opponents of corporate mandatory rules that emphasizes the reach and limits of courts' competence to monitor opportunism, a set of standards by which courts should review opt out decisions, and substantive limits on the process of opt out (like transaction specificity). *Id*. at 1674-76, 1690-91. *See also* John C. Coffee, Jr., *No Exit?: Opting Out, the Contractual Theory of the Corporation, and the Special Case of Remedies*, 53 BROOK. L. REV. 919, 972-74 (1988) (advocating for quality-constrained private ordering that requires corporations opting out of traditional norms of corporate governance to prove that the amendment is not against public policy). Among the ways that Professor Coffee envisions a corporation satisfying the public policy requirement, subject to a set of additional standards, is to show they adopted a model provision drafted by a representative group. Under our understanding of this argument, this would allow for substantial tailoring of otherwise mandatory norms, although not the "anything goes" private ordering that Easterbrook and Fischel arguably sought. For instance, the opt outs in *Manti* and *Fugue* would presumably qualify, given that they are based on the widely adopted model forms of the NVCA. *Id*. at 974 ("Informed shoppers look at the label, and so might informed courts.").

163. *See, e.g.*, Jill E. Fisch, *Governance by Contract: The Implications for Corporate Bylaws*, 106 CALIF. L. REV. 375, 406-08 (2018).

164. The default board structure calls for a single class of directors, with each director up for election each year. A corporation can stagger the board by changing the number of classes to two or three. If three, then a third of the directors are up for election each year. There are both initial and midstream altering rules for this. Both initial and midstream staggering can be accomplished in either the charter or bylaws. But only midstream staggering requires a vote of the stockholders. DEL. CODE ANN. tit. 8, § 141(d) (2024).

inherent in every corporate altering rule. They also shape the basic bargaining environment by which a corporation's members decide whether to contract around a rule.

Conclusion

Corporate law is at a crossroads. Delaware's courts are increasingly asked to rule on shareholder contracts that challenge the foundational principles of corporate governance. These cases ask courts to weigh corporate law's traditional mandatory rules against the evolving demands of contractual freedom. How can courts do this in a way that both promotes innovation in governance while guarding against abuse?

In this article, we offer a new response. Rather than fixating on the debate over the merits of contractual freedom versus mandatory rules, courts should focus on the design of *altering rules*—the mechanisms that allow corporations to displace default rules. Altering rules, as we have shown, do much more than simply ease or restrict opt out; they shape the bargaining environments within which these governance choices are made.

We laid out a theory of corporate altering rules, identifying process and scope as their two key features. This framework identifies a much richer landscape of potential rules than has been previously recognized. As an example, we introduced the concept of a nonparty consent rule, where shareholders can contractually alter governance structures only with the consent of non-signatory shareholders. Such rules can mitigate the intracorporate harms inherent in shareholder contracting. Nonparty consent rules are just one example of how better-designed altering rules can expand the frontier of corporate governance while defending its foundational values.

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