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EQUITY, MAJORITARIAN GOVERNANCE, AND THE OPPRESSION REMEDY

Paul B. Miller^{*}

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INTRODUCTION

Equity has made many important – if now largely forgotten¹ – contributions to the law of organizations. It has articulated, in whole or in part, venerable legal forms that enable coordinated activity and investment, including trusts and partnerships. It has also contributed indirectly to the legislative development of modern forms of organization, including LLPs, statutory trust entities, and corporations.² And equity has added a variety of equitable constraints and remedies to those available at law.

Of equity's contributions to the law of organizations, perhaps most prominent is its provision for fiduciary constraints on the exercise of fiduciary powers. Trustees, partners, directors, officers and other managers of organizations are deemed fiduciaries, and so are subjected to fiduciary duties, backstopped by equitable remedies.³

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¹ The contributions live on; it is equity's authorship of them that is forgotten. On equity's jurisdiction over corporations, see Roscoe Pound, *Visitation Jurisdiction over Corporations in Equity*, 49 HARV. L. REV. 369 (1936). Pound explains that since the 17th century, "corporations were subject to visitation in order to maintain their good government and to ensure their adherence to the purposes of their institution." *Id.* at 371.

² Peter G. Turner, *Equitable Doctrines in Business Associations*, in *EQUITY AND ADMINISTRATION* 149 (Peter G. Turner, ed., 2016).

³ See generally Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L.J. 235 (2011); Paul B. Miller, *Justifying Fiduciary Remedies*, 63 U. TORONTO L.J. 570 (2013); and Samuel L. Bray, *Fiduciary Remedies*, in *THE OXFORD HANDBOOK OF FIDUCIARY LAW* 449 (Evan J. Criddle, Paul B. Miller, and Robert H. Sitkoff, eds., 2019).

The fiduciary regulation of managers is important. Fiduciary duties and remedies are the primary legal⁴ mechanisms for ensuring managerial accountability relative to an organization's purposes.⁵ This is, in turn, an important kind of protection for an organization's members; it vindicates their expectations that the organization's purposes bind those allied to it. Fiduciary regulation also safeguards wider social and economic interests in the law's facilitation of private organization. Barriers to trust requisite to coordination⁶ – and, thus, effective organization – are high enough as it is.⁷ Absent a reasonable level of legal security for expectations that managers respect the representative nature of their mandates,⁸ those considering whether to contribute to an organization might not risk disappointment of trust. For these reasons and more, it is understandable that several chapters in this volume address fiduciary duties of managers.

When one thinks of corporate governance, one often thinks immediately of directors and officers. But shareholders contribute significantly to governance, too, and only partly through franchise.⁹ As we will see, in a way that is characteristic of its

⁴ I use words 'legal' and 'law' here and, occasionally, elsewhere, in a generic sense meant to encompass legal and equitable doctrine.

⁵ As discussed in Paul B. Miller, *Corporations*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW (Andrew S. Gold et al., eds., 2020).

⁶ On trust and coordination in organizations, see Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, *Trust in Large Organizations*, 87 A.E.A. PAP. & PROC. 333 (1997) Janine Nahapiet and Sumantra Ghoshal, *Social Capital, Intellectual Capital, and the Organizational Advantage*, 23 ACAD. MGT. REV. 242 (1998), Piotr Sztompka, *TRUST: A SOCIOLOGICAL THEORY* (1999), and ELINOR OSTROM AND JAMES WALKER, EDS., *TRUST AND RECIPROCITY: INTERDISCIPLINARY LESSONS FOR EXPERIMENTAL RESEARCH* (2003).

⁷ Brian Broughman, Elizabeth Pollman, and D. Gordon Smith, *Fiduciary Law and the Preservation of Trust in Business Relationships*, in FIDUCIARIES AND TRUST: ETHICS, POLITICS, ECONOMICS AND LAW (Paul B. Miller and Matthew Harding, eds., 2020).

⁸ Paul B. Miller, *Fiduciary Representation*, in FIDUCIARY GOVERNMENT (Evan J. Criddle et al., eds., 2018).

⁹ Though the literature is focused primarily on franchise; in particular, whether it is effective, and should be enhanced. See Lucian A. Bebchuk, *The Case for Increasing Shareholder Power*, 118 HARV. L. REV. 833 (2005); Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675 (2007); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006); William W. Bratton and Michael Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653 (2010); and Ronald J. Gilson and Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Reevaluation of Governance Rights*, 113 COLUM. L. REV. 863 (2013).

relationship to law more widely, equity normally leaves it to law – here: contract and corporate law – to supply the terms on which shareholders are to interact and jointly contribute to corporate governance.¹⁰ Equity contributes adjectivally to corporate law to protect minority shareholders from conduct by controlling shareholders that is *inequitable* but perfectly *lawful*. Through these interventions, equity aims to ensure that shareholders treat each other fairly with mind to their respective legitimate expectations.

I have said that equity intervenes to ensure fairness in relationships between shareholders. But ‘fairness’ is not, on its own, an operative construct in equity. Rather, equity has different ways of articulating, doctrinally, what is required by way of fair treatment. And that is significant here, because equity has vacillated between two strategies in achieving fairness between shareholders: (1) imposition of fiduciary duties on controlling shareholders, which operate generally and prospectively to force alignment of shareholders’ interests; and (2) provision for relief on grounds of oppression, a doctrine that operates exceptionally and retrospectively to facilitate shareholder exit or to rectify the effects of misalignment in the interests of shareholders.

There is a clear preference for fiduciary regulation in American equity, in marked contrast to the preference for the oppression doctrine in commonwealth jurisdictions. As I will explain, the direction taken by American equity is hard to defend. It is so significantly out of step with the direction taken elsewhere that it might be symptomatic of creeping amnesia about equity.¹¹ But whatever the explanation, I will argue that American equity

¹⁰ On civilian alternatives to equitable intervention, see Pierre-Henri Conac, Luca Enriques, and Martin Gelter, *Constraining Dominant Shareholders’ Self-Dealing: The Legal Framework in France, Germany, and Italy*, 4 EUR. COMP’Y & FIN. L. REV. 491 (2007).

¹¹ For discussion, see Henry E. Smith, *Fusing the Equitable Function in Private Law*, in PRIVATE LAW IN THE 21ST CENTURY (Kit Barker et al., eds, 2017) and Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW: FUSION AND FISSION (John C.P. Goldberg et al., eds., 2018).

has responded to a problem that calls for equitable intervention but has done so inaptly, generating confusion about what shareholders owe each other and why. Convergence on the oppression remedy in commonwealth jurisdictions, by comparison, reveals equity to be a vibrant and important part of modern private law, even as there remain important questions about the bases and limitations of the remedy.

The analysis will unfold as follows. Part I introduces shareholder participation in corporate governance, explains why and how law provides for it on majoritarian terms, and notes how pathologies common to majoritarian governance – including, especially, the tyranny of the majority problem – crop up in corporations. Part II positions fiduciary duties and the oppression remedy as implicating two divergent modes of equitable intervention – supplemental and corrective – in response to manifestations of the tyranny of the majority problem in corporations. Part III explains why the fiduciary response is inapt and overbroad relative to that afforded by the oppression remedy. In recognition that variants on the oppression remedy are the product of modern legislative innovation, Part IV demonstrates that and how they are nonetheless substantively equitable. And Part V canvasses insights that experience with the oppression remedy supplies to those interested in equity more generally.

I. THE PROBLEM: CORPORATE TYRANNY OF THE MAJORITY

In organizations that feature enfranchised members, there inevitably arises a question central to their role in organizational governance: by what principle(s) and process(es) is group decision-making to be achieved? Rules must be settled upon if the group is to act corporately. For these rules to be workable, they must make it possible for

actions taken by a group to be (a) deciphered as *decisions*; and (b) accepted as decisions that reflect – in an authoritative, and thus legally effective, way – the will of the group.

A) Majority Rule

There are, of course, a number of options. One is a unanimity rule. Sometimes – especially in closely held organizations – members will contract for such a rule. However, unanimity rules have obvious drawbacks. Apart from the obvious ones of protracted indecision and costly bargaining, they skew the incentives of members toward rent-seeking and hold up behavior. Thus, it is more customary to see the adoption of a variant on majority rule. By relaxing modestly (via a supermajority rule) or significantly (via a simple majority rule) the extent of agreement required for group decision-making, majority rule make group decision-making more feasible and efficient – and, thus, viable – as a mechanism of organizational governance.

Independently of these considerations in favor of majority rule are other contingent, but still important, factors. Where control rights in economic organizations are tied to investment and granted to members on a votes-per-share rather than votes-per-person basis,¹² and where shares are freely transferrable, members with a controlling stake¹³ will usually have a vested economic interest in the control premium embedded in the market value of their shares. To the extent that the practical capacity to command such a premium

¹² I recognize that shareholder voting rights are configured differently in different corporations, and that these differences raise a variety of important questions. I set these aside here, and assume for the sake of argument the conventional ‘one vote per share’ configuration of voting rights for a corporation with a single class of shares. For critical analysis of other configurations, see Henry T.C. Hu and Bernard S. Black, *The New Vote Buying and Hidden (Morphable) Ownership*, 79 S. CAL. L. REV. 811 (2006).

¹³ The shareholder with effective control will normally hold a majority of shares but that is not always the case. Courts are focused on regulating the exercise of control, however realized. See *Smith v. Atlantic Properties, Inc.*, 12 Mass. App. Ct. 201, 422 N.E.2d 798, 1981 Mass. App. LEXIS 1151 (Mass. App. Ct. July 6, 1981) and *Jedwab v. MGM Grand Hotels, Inc.*, 509 A.2d 584, 593 (Del. Ch. 1986). See also AMERICAN LAW INSTITUTE, *PRINCIPLES OF CORPORATE GOVERNANCE*, § 1.110(a) (1994). I am grateful to Lyman Johnson for emphasizing this point.

is a function of private ownership of the nature and number of shares requisite to control, our system of private property warehouses a rich set of additional legal and moral reasons for continued recognition of a settled framework of legal rules that enable majority rule.

B) Tyranny

Contrary to popular belief, the corporate form does not mimic the legal and political structure of the state, nor is corporate governance, in principle or practice, usually democratic.¹⁴ Corporate governance does not assume the formal equality of shareholders, nor does it promote deliberation, debate, and voting for its own sake. However, pathologies of majority rule in democratic government have echoes in corporations. Some of these pathologies coalesce as a tyranny of the majority problem.

In political communities, tyranny of the majority manifests in a number of ways, including popular indifference or outright hostility to the interests of a minority. The effects and underlying attitudes are problematic for political communities precisely insofar as conventional law and politics (reasonably) assume the moral sensibility of majority rule, and on that basis (unreasonably) excuse or neglect realities of minority oppression. Support for majority rule can lead one to excuse or ignore morally base or egregious conduct simply because it reflects the will of a properly constituted majority.

Corporate tyranny is admittedly not as consequential as political tyranny as it implicates a narrower range of morally salient interests; notably, the vested economic interests (investment) of members and associated expectancies. But that is not to diminish the context-relative significance of the problem, because economic organizations that

¹⁴ As noted in Robert B. Thompson and Paul H. Edelman, *Corporate Voting*, 62 VAND. L. REV. 129 (2009). See also Grant M. Hayden and Matthew T. Bodie, *One Share, One Vote and the False Promise of Shareholder Homogeneity*, 30 CARDOZO L. REV. 445 (2008).

feature enfranchised members are normally premised (and so invite reliance) on their relative equality of interest, however those interests are defined, and however many defined classes of member an organization might have.

C) Manifestations, in General Terms

Turning to corporate tyranny of the majority, I offer a few observations. The first is that at the highest level of abstraction, corporate tyranny parallels that of politics. It manifests in injury or unfairness suffered by a minority at the behest of a majority or controlling interest, whether motivated by malice, prejudice, indifference, or obliviousness to the interests of the minority.

Second, because the motives of an enfranchised group can be difficult to identify and correct as a matter of law, and because the mechanisms by which groups act are often central to effective governance and not readily adjusted so as to prevent tyranny, legal responses to tyranny of the majority are often, sensibly, focused on remedying its *effects*.

Third, narrowing our focus to corporate tyranny, it should be borne in mind that, people being people, the motivations for behavior that is objectively tyrannical are multifarious and sometimes mindboggling. Why would one shareholder (or faction) treat another shareholder (or faction) unfairly through abusive exercise of control rights? In some cases, it's nothing personal; just sheer opportunism, driven by greed or a desire for other perquisites and privileges of control. But as cases involving close corporations reveal, in other cases it *is* personal; deeply so. A conflict between shareholders that manifests in tyrannical behavior is, in these contexts, but an expression of strife between friends, family members, and associates who've had a falling out and, predictably, cannot cabin personal conflicts. In such cases, appreciation whether and how behavior is tyrannical cannot be

arrived at simply by analyzing the relative legal and economic positions of the parties in an organization in virtue of their formal roles and standing. It requires searching examination of motive in the wider context of their personal lives, interactions, and relationships.

Fourth, corporate tyranny is complex in respect of means as well as motive. A controlling shareholder looking to punish, extract value from, or otherwise injure a minority shareholder may do so in different ways. Corporate tyranny is thus often polycentric in its manifestation. It could simply implicate the parties in their mutual relationship as shareholders, as where a controlling shareholder agitates successfully for alteration of rights attached to shares, attempts to dilute the minority's interest, or alters the capital structure of the corporation. But given that the corporate form enables shareholders to relate to corporations and each other in multiple capacities (e.g., as employees, creditors, directors, or officers), tyrannical behavior can be accordingly complex, implicating several relational nexi through which one party can attempt to gain leverage over, exploit, or injure another. And this behavior often will be directed at pressure points that arise because of the minority's non-shareholding positions (e.g., as employee or director). A controlling shareholder can exploit control over the fate of a minority shareholder in respect of non-shareholding positions for reasons of spite (e.g., to more effectively or pervasively cause injury) or to force concessions or exit from a shareholding position. Effective response to polycentric problems here, as elsewhere, requires a flexible approach to investigation, analysis, and remedies. To restrict one's attention to the relative position of the parties as shareholders is to miss much of the tyranny and its ingenuity, and to leave its victims without adequate redress.

D) Specific Examples

We may now consider illustrations of corporate tyranny drawn from reported cases. Before we do, though, it bears repeating that decisions made on the basis of principles of majority rule are *lawful in form* but *potentially tyrannical in substance and effect*. The risk of tyranny inheres in the technically valid exercise of decision-making power by a group on the basis of majority rule; it is uniquely problematical, partly because it is likely to be excused or discounted for reason of its lawfulness and because of the moral and prudential reasons that favor majority rule.

Examples of lawful but tyrannical exercise of power by shareholders cover matters susceptible to the direct or indirect exercise of such power. Consider cases in which controlling shareholders exercise their power to approve the sale of corporate assets or to bring about approval or ratification of a contract or other transaction in order to profit personally from it, effectively expropriating value from the corporation and, by extension, minority shareholders.¹⁵ Then there are cases in which a controlling shareholder directs the issuance of new shares, or amendment of rights attached to existing shares, diluting the interest of a minority and/or their representation on the board, or depriving the minority of the benefit of rights attached to their shares.¹⁶ Consider also cases in which a controlling shareholder directs the Board to terminate the employment of a minority shareholder or forces their removal from the board, notwithstanding settled expectations of a position on the board or continued employment.¹⁷ And reflect on cases in which a controlling

¹⁵ Donahue v. Rodd Electrottype Co., 328 N.E.2d 505 (Mass. 1975).

¹⁶ eBay Domestic Holdings, Inc. v. Newmark, No. 3705, 2010 WL 3516473 (Del. Ch. Sept. 9, 2010).

¹⁷ In re Matter of Kemp & Beatley, Inc., 473 N.E.2d 1173, 1178 (N.Y. 1984) and Balvik v. Sylvester, 411 N.W.2d 383 (N.D. 1987). For discussion see Douglas Moll, *Shareholder Oppression v. Employment at Will in the Close Corporation: The Investment Model Solution*, 1999 U. ILL. L. REV. 517 (1999).

shareholder tries to force the minority out of their shareholding position, coercing a sale of the shares at less than fair market value.¹⁸

II. TWO EQUITABLE SOLUTIONS

For a time, the courts took a hard luck approach to cases like these. With a nod to caveat emptor, it was suggested that minority shareholders should be understood to have accepted the risk of harsh treatment in purchasing a minority stake. They should not, having come to regret the burdens of their bargain, be heard to complain about harsh but lawful conduct.¹⁹ In other cases, courts – understandably – expressed worry about eroding majority rule and destabilizing commercial expectations that had coalesced around it.

A) Early Indecision About Intervention

Courts gradually recognized that a policy of non-intervention was hard to justify.²⁰ But while it became clear that intervention would be premised on an assertion of equitable jurisdiction, it was unclear what avenue(s) of intervention could and should be taken.

Indecision is reflected in early English cases in which courts offered moral exhortation – in terms that could be taken as implying a number of possible grounds for intervention – without settling on a doctrinal entry point.²¹ It appears that judges in these

¹⁸ See cases discussed in Mary Siegel, *Fiduciary Myths in Close Corporation Law*, 29 DEL. J. CORP. L. 377, 384 (2004).

¹⁹ Some commentators have suggested that the reticence reflected courts' settled attitudes toward equitable intervention in the affairs of partnerships, reflecting the derivation of equitable mechanisms of intervention in companies and corporations from that which had been developed in the context of general partnerships. See A.J. Boyle, *The Minority Shareholder in the Nineteenth Century: A Study in Anglo-American Legal History*, 29 MOD. L. REV. 317, 318 (1965) (explaining that "In the previous century [i.e., the 18th] it had been established that the Chancellor would not interfere in the internal disputes of a partnership 'except with a view to dissolution'.").

²⁰ Not least because many shareholders cannot be said to have consented to anything by virtue of acquisition of their shares (e.g., those holding shares by way of inheritance). I am grateful to Deborah DeMott for emphasizing this point.

²¹ Brian Cheffins, *The Oppression Remedy in Corporate Law: The Canadian Experience*, 10 U. PA. J. INT'L BUS. L. 305, 308 (1988) ("equitable protection afforded by the courts was at best erratic and uncertain and at worst completely ineffective.").

cases were genuinely unclear about how to frame the problem juridically. What, if anything, do patterns in objectively tyrannical behavior suggest about general terms of interaction that are apt for shareholders? How ought such conduct be remedied? These were, and are, genuinely difficult questions. Thus the grasping moral exhortation, with judges variously suggesting: that shareholders are parties to a contract of sorts, and that those with a controlling interest ought not to be permitted to act unconscionably; that all shareholders have an implied obligation to exercise their control rights in good faith and in the common interest of all shareholders; and that shareholders, while entitled to act self-interest, are constrained in equity from exercising control in a manner that is oppressive, burdensome, or harsh in its effects on other shareholders.

Indecision over doctrinal bases of intervention took place against a backdrop of a narrow but important avenue of relief open to members of companies since the 19th century in England and much of the wider commonwealth.²² The avenue was introduced by way of an equitable principle, adapted from partnership law, that enabled shareholders to seek an order that a corporation be wound up on grounds of “justice and equity.”²³ Just and equitable wind up was an extreme remedy (forced dissolution) and so viewed as reserved for extreme circumstances (e.g., fraud, or conduct akin to fraud).²⁴ This made it less than attractive to shareholders. While valuable in extreme cases, it was inadequate as a general solution to the problem of corporate tyranny.

²² Michael J. Trebilcock, *A New Concern for the Minority Shareholder*, 19 MCGILL L.J. 106 (1973). See also Nigel Furey, *The Statutory Protection of Minority Shareholders in the United Kingdom*, 22 WAKE FOREST L. REV. 81, 82 (1987).

²³ *In re Yenidje Tobacco Co. Ltd.*, [1916] 2 Ch. 426 (C.A.) and *Ebrahimi v. Westbourne Galleries*, [1973] AC 360.

²⁴ Cheffins, *supra* note 21, at 309. For critical discussion, see Carlos L. Israels, *The Sacred Cow of Corporate Existence: Problems of Deadlock and Dissolution*, 19 U. CHI. L. REV. 778 (1952).

Cumulatively, though, these experiences proved generative. As courts sifted through imprecise exhortations that shareholders be “fair,” act conscionably, and show good faith, they also experimented with the wind-up remedy. Some read a wider jurisdiction into underlying statutory provisions: one allowing the award of alternative equitable remedies. Unfortunately, access to the alternative remedies was conditioned on the petitioner’s ability to meet the high bar of establishing a good claim to a wind-up order. This scuppered the effort to widen the remedy, limiting its effectiveness.

Ultimately, the pressures placed on the wind-up remedy were too much for it to bear without it becoming wholly unfocused. Equity had to find another way forward. But by what doctrinal avenue could it respond aptly without unsettling majority rule? As noted earlier, equity came to take divergent paths in different parts of the world. The first, taken in most American states including Delaware, engaged equity’s jurisdiction over fiduciary relationships. The second, initiated in England and subsequently adopted in much of the commonwealth, premised intervention on oppression, with analysis of same involving searching, fact-intensive assessment of shareholders’ reasonable expectations. Each of these modes of intervention has become part of the settled landscape of corporate law in the jurisdictions in which they operate. I will briefly present each in turn before turning to evaluative reflections in Part III.

B) Equity’s Modes of Intervention: Supplemental and Corrective

Equity contributes to the legal systems in which it figures by way of two modes of intervention.²⁵ Some of equity’s best-known contributions are primary rights that it has supplied sporadically or in complex forms of interaction. Where equity intervenes by

²⁵ Paul B. Miller, *Equity as Supplemental Law*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk, Irit Samet and Henry E. Smith, eds., 2020).

supplying new rules of general application such as primary rights, it serves as a gap filler in the system of first-order law by *generating supplemental law*.²⁶

Equity's other important contributions have a different character. Equity makes them through doctrines that enable and channel *ex post* judicial review of conduct that is lawful but inequitable. *Ex post* review enabled by equity involves tailored correction of inequities generated by first order law through one-off adjustments that usually involve intervention in the enforcement of legal rights or exercise of legal powers. The doctrines through which equity's *remedial or corrective* interventions are engaged are a form of second-order law, directed at judges and designed to ensure integrity in the administration of justice. The products of equity's corrective interventions are not new law but rather a vanishing trace of fine adjustments to enforcement practices.²⁷

Courts engaging equity ordinarily deem a grievance to merit intervention in *either* supplemental *or* corrective mode. That is, a grievance is either – usually over a run of cases – found to be generic and so amenable to supplemental intervention, *or* it is found to be idiosyncratic and so to require corrective intervention. Equity will sometimes pivot from corrective to supplemental mode where repeat litigation establishes genericity. But it tends to default to its corrective mode and usually chooses between corrective and supplemental intervention.

C) Equity in Supplemental Mode: *Ex Ante* Fiduciary Regulation

Given wide variation in manifestations of corporate tyranny, it might come as a surprise that equity would intervene in supplemental mode. But, as noted, in the United

²⁶ *Id.*

²⁷ Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism*, Harvard Public Law Working Paper No. 15-13 (2015).

States, the dominant response came to be supplementation of *ex ante* rules of corporate governance through the extension of fiduciary duties to controlling shareholders.

Of course, equity had already contributed importantly to corporate governance by defining fiduciary duties for directors and eventually extending them to officers.²⁸ The juridical basis for attributing presumptive fiduciary status to directors and officers – consistent with that of other fiduciaries – lies in their being entrusted with the authority to act representatively for the corporation and its shareholders.²⁹ In that light, and as I will explain in Part III, below, it is rather more surprising that American equity extended fiduciary duties to shareholders. But that has been our experience.³⁰ American equity protects minority shareholders from abuse by deeming controlling shareholders accountable as their fiduciaries, and so as subject to fiduciary duties that operate as *ex ante* constraints on the exercise of shareholder rights and powers. This engagement of equity's supplemental mode of intervention implies that the problem of abuse of power by controlling shareholders is generic and of a "fiduciary" nature, such that fiduciary duties promise an apt resolution of it. More specifically, it suggests that corporate tyranny is uniformly generated by self-interested behavior, and that self-interested behavior by shareholders in the exercise of their rights and powers is generally inappropriate.

In some respects, the extension of fiduciary duties to shareholders has been doctrinally idiosyncratic. Courts have generally *not* held that shareholders are categorically

²⁸ For critical discussion, see Lyman Johnson, *The Three Fiduciaries of Delaware Corporate Law*, in this volume, and Kelli Alces Williams, *Self-Interested Fiduciaries and Invulnerable Beneficiaries: When Fiduciary Duties Don't Fit*, in this volume.

²⁹ Miller, *supra* note 8; Paul B. Miller, *The Fiduciary Relationship*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 63 (Andrew S. Gold and Paul B. Miller, eds., 2014); and Paul B. Miller, *The Identification of Fiduciary Relationships*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 367 (Evan J. Criddle, Paul B. Miller and Robert H. Sitkoff, 2019).

³⁰ *Donahue*, 328 N.E.2d 505 (Mass. 1975); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657 (Mass. 1976); and *Americas Mining Corp. v. Theriault*, C.A. No. 30, 2012 (Del. Sup. Ct.).

fiduciary as such – i.e., qua shareholders – based on the actual or presumed factual or legal incidents of shareholding. Thus, shareholders are not – in contrast to partners, for example – fiduciaries of one another in respect of the exercise of rights and powers attached to their stake in an entity. Rather, *controlling* shareholders are fiduciaries of *minority* shareholders simply in virtue of the type and/or concentration of shares owned and the material influence this gives them over the corporation and its management. Furthermore, controlling shareholders are not subject to conventional standards of fiduciary loyalty. They are not prohibited from acting in self-interest, nor are they forbidden from making profits from their “fiduciary” position. Instead, they are prohibited from profiting *unfairly* by reaping gains at the expense or otherwise to the exclusion of minority shareholders.

D) Equity in Corrective Mode: *Ex Post* Judicial Review for Oppression

In England and most commonwealth jurisdictions, there is a clear preference for corrective rather than supplemental intervention as a modality of response to corporate tyranny, structured by way of statutory provisions that enable judicial review of grievances on the basis of oppression. Where they have considered it, courts in these jurisdictions have rejected the notion that any shareholder is a fiduciary of another simply in virtue of ownership of shares and enjoyment or exercise of associated rights, irrespective of the extent of control they have by virtue of the nature and/or concentration of shares owned.³¹

Unlike its precursor, the wind-up remedy, the oppression remedy grants courts wide discretion in determining the merits of grievances *and* in remedying a grievance deemed

³¹ The position taken in commonwealth jurisdictions is nicely summarized by Turner, *supra* note 2, at 156: “members of joint stock companies and, later, companies incorporated under the general Acts of incorporation, did not and generally do not owe fiduciary obligations to one another. The doctrine that developed is that members may vote in their several interests provided they do so in good faith. Members who vote with a desire to oppress a minority of their number are seen by equity to act in bad faith. Otherwise the members ... are essentially free to act as they wish.”

well founded. Under the oppression remedy, a petitioner alleges that the conduct of the controlling shareholder (or faction) directly or indirectly (e.g., through action or inaction by the Board) violated its reasonable expectations and resulted in oppressive or unfair consequences suffered by the petitioner personally. The petitioner will invite the court to exercise its unlimited remedial discretion in vindication of those expectations.

The modern oppression remedy was inaugurated by the 1948 U.K. *Companies Act*.³² Designed specifically for the protection of minority shareholders, s.210 of the *Act* granted courts broad powers to investigate and remedy claims of oppression.³³ The remedy was limited to shareholders and, at least initially, courts were inclined to construe “oppression” narrowly.³⁴ Thus, some concluded that conduct is oppressive only where it evinces a “lack of probity” and/or is “burdensome, harsh and wrongful” in its effects.³⁵ U.K. legislators responded by relaxing the grounds for relief,³⁶ adding “unfair prejudice”³⁷ to “oppression,” mindful that effective cabining can be achieved by traditional limiting principles in equity (e.g., the requirement that a petitioner establish that they have no adequate remedy at law).

Other jurisdictions followed the lead of U.K. law. The Australian remedy is framed more broadly than that of the U.K., with stated grounds for intervention including “oppression,” “unfair prejudice,” and “unfair disregard,” but remains limited to

³² Companies Act 1948, 11 & 12 Geo.6 c.38.

³³ Per Scottish Co-operative Wholesale Society Ltd v. Meyer, [1959] AC 324.

³⁴ As explained by Hoffman LJ in *Re Saul D. Harrison plc* [1995] 1 BCLC 14, [1994] BCC 475.

³⁵ See the discussion in Cheffins, *supra* note 21, at 320.

³⁶ Furey, *supra* note 22, at 93: “Unfortunately, section 210 was so beset with prerequisite conditions to court intervention that it proved to be almost totally ineffective ... Accordingly, in 1962 the Jenkins Committee recommended various changes to section 210 ... these changes were realized in sections 459-461 of the Companies Act of 1985 by the repeal of section 210 and the incorporation of section 75 of the Companies Act of 1980.”

³⁷ For current provisions, see Companies Act 2006 c. 46, ss. 994-996.

shareholders. The Canadian variant³⁸ is broader still, and has been considered the remedy with the highest latent potency in Anglo-American corporate law.³⁹ Like its Australian cousin, the Canadian remedy allows claimants to plead “oppression,” “unfair prejudice,” or “unfair disregard.” Canadian courts have pointedly refused invitations to closely define these grounds for intervention.⁴⁰ Furthermore, Canadian law, like that of Australia and the U.K., grants courts unlimited remedial discretion. Finally, Canadian law does not limit the remedy to shareholders. Directors and officers can petition for relief, and, most controversially, creditors can, too.

A few U.S. states have pivoted from fiduciary regulation to the oppression remedy. Different states have different iterations of the remedy, but generally speaking, like other jurisdictions, they focus on protecting the reasonable expectations of minority shareholders from inequitable violation.⁴¹ While the remedy is reasonably broad in its responsiveness to the multifarious kinds of inequity that can be suffered by shareholders, it is usually narrower than are the variants in U.K. and commonwealth law. Some states have grafted the oppression remedy into the wind-up remedy, making oppression an independent equitable basis for wind-up rather than a stand-alone remedy.⁴² Others have read a broader remedial discretion into wind-up provisions.⁴³ In either event, many states limit access to

³⁸ Canada Business Corporations Act, RSC 1985, c. C-44, s.241.

³⁹ Cheffins, *supra* note 21, at 305 (1988).

⁴⁰ BCE Inc. v. 1976 Debentureholders [2008] 3 SCR 560 (SCC).

⁴¹ Robert C. Art, *Shareholder Rights and Remedies in Close Corporations: Oppression, Fiduciary Duties, and Reasonable Expectations*, 28 J. CORP. L. 371, 376-395, 389 (2003).

⁴² The history is related by Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 709 (1992). See also: MODEL BUS. CORP. ACT §14.30(2) (2001).

⁴³ Thompson, *id.*, at 699 (“Courts ... are more likely today than in the past to interpret the statutory grounds for dissolution in a way that provides relief for minority shareholders ... Judges are more inclined to use buyouts or other alternative remedies, even in the absence of specific statutory authorization.”). See also Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VAND. L. REV. 749, 760 (2000).

the remedy to shareholders in closely held corporations. And American iterations sometimes provide for intervention on the basis of fraud, illegality and oppression rather than “unfair disregard” and “unfair prejudice,” though the upshot of these differences is not clear.⁴⁴

Having briefly canvassed the development of the oppression remedy, I wish now to offer some observations about oppression analysis that hold for most iterations of the remedy, and to explain how oppression litigation is structured.

First, as to modality of analysis: the oppression remedy is engaged by way of petitions for discretionary relief rather than the assertion of an *ex ante* entitlement or allegation of breach of same. The oppression remedy does not define general terms of interaction for shareholders, nor does it even operate on the basis of fixed assumptions about which *ex ante* entitlements might be placed in issue in connection with a shareholder’s petition for relief. Rather, the remedy signals the availability of judicial review and equitable relief in vindication of expectations reasonably held by shareholders⁴⁵ that are not protected – or were not adequately protected – at law.⁴⁶ While different

⁴⁴ According to Art, *supra* note 41, courts have emphasized that conduct complained of by a minority shareholder need not be fraudulent or illegal to justify intervention, but oppression has been interpreted in different ways. Some equate it with fiduciary disloyalty, others with conduct that reveals some general moral fault or failing. He also notes an emerging tendency to frame oppression in terms of the unfair violation of reasonable expectations.

⁴⁵ *Kemp*, 473 N.E.2d at 1179 (“oppression should be deemed to arise ... when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner’s decision to join the venture.”). See also Douglas K. Moll, *Reasonable Expectations v. Implied-in-Fact Contracts: Is the Shareholder Oppression Doctrine Needed?* 42 B.C. L. Rev. 989, 1001-1003 (2001).

⁴⁶ The expansive reading of provisions enabling “just and equitable” wind up of companies was conducted in the same spirit. *Per* reasons given by Lord Wilberforce in *Ebrahimi*, [1973] AC 360, at 379: “The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged by the company structure... The ‘just and equitable’ provision ... does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way” (emphasis supplied).

jurisdictions express the grounds for intervention in different ways, they are usually treated as open-textured. Finally, the oppression remedy calls for the exercise of broad and discretionary remedial powers under which a court may devise a remedy that responds aptly to the material effects of an inequity suffered by the petitioner.⁴⁷ Significantly, aptness is understood to encompass due regard for the legitimate expectations of persons other than the petitioner, including such expectations as are defined by law rather than equity.⁴⁸

Second, oppression litigation usually proceeds through five phases. First, a petitioner (aggrieved shareholder) must give notice to the respondent(s) in such a manner as to afford them the opportunity to take corrective action. Second, assuming that there is no obstacle on standing, the petitioner must make filings which plead facts suggestive of unfair violation of a reasonable expectation, held personally, that is not protected at law.⁴⁹ Third, in some jurisdictions, the petitioner's filings will be expected to engage with stipulated grounds for intervention through pleadings showing that and how conduct complained of was fraudulent, oppressive, or unfair. Fourth, the petitioner may petition for a particular remedy, understanding that remedies are left to discretion of the court. And fifth, the court will, based on its investigations and review of the pleadings and evidence,

⁴⁷ In commonwealth jurisdictions, it is customary that remedial discretion is granted in sweeping terms. See, for example, Canada Business Corporations Act, RSC 1985, c. C-44, s.241(3) ("In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing [a lengthy schedule of possible remedies]"). Some American jurisdictions have recognized in courts a similarly broad remedial discretion. *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395-396 (Or. 1973).

⁴⁸ *Naneff v. Con-Crete Holdings Ltd.*, [1995] O.J. No. 1377 (Ont. Ct. App.).

⁴⁹ A now-dated study of Australian cases indicated that the most commonly pleaded factual basis of a petition under the Australian oppression remedy is exclusion from participation in management. See Ian M. Ramsay, *An Empirical Study of the Use of the Oppression Remedy*, 27 AUSTL. BUS. L. REV. 23, 28 (1999).

determine whether the claimant suffered oppression and, if so, whether and how it should be remedied.

III. EVALUATING THE SOLUTIONS

Recognizing that fiduciary regulation of shareholder relationships is settled law in much of the United States, I nevertheless believe that it stands as a serious misstep. The forces that generate shareholder conflicts, and the material inequities that result from same, are not amenable to effective resolution through general law. Equity ought to have intervened, but not in supplemental mode. Furthermore, fiduciary regulation is a particularly inapt form of supplemental law in this context. Fiduciary duties are not an all-purpose salve for sharp or opportunistic behavior. They have a narrower remit.

By contrast, the oppression remedy is a more effective and appropriate avenue for intervention. It does not involve reordering the *ex ante* entitlements of shareholders, diminishing the rights of one through the allocation of new rights to another. Instead, it enables petitions for discretionary relief on the conventional basis of inequity in the exercise or enforcement of rights. As I will explain, this form of intervention is valuable and apt where, as here, the problem is not with the law's initial allocation of rights but with varieties of inequity in their exercise. It is also valuable insofar as it enables exceptional response to exceptional circumstances, leaving first-order law intact for the benefit of the vast majority of shareholders who act equitably in the exercise of control rights.

A) The Case Against Fiduciary Regulation

The first critical observation that I will venture about the fiduciary regulation of shareholder relationships is to note how odd it is, in general, to alter terms of interaction that obtain between shareholders *ex ante* in response to problems that arise sporadically *ex*

post from the improper use or leveraging of such terms. Each shareholder is, in virtue of ownership of an individual share, in a position of formal equality relative to other shareholders in a given class of shares. The entire point of defining rights attached to shares by class is to ensure the formal equality of shareholders and the fungibility of their securities. The mischief at issue in corporate tyranny is not a product of shareholders' rights in their shares, nor even the implications of these rights for corporate governance. It is, rather, a product of the concentration of shares and associated rights, and thus the extent of practical control that might be wielded by a shareholder (or faction) who has amassed sufficient shares in a given corporation. Furthermore, given that corporate tyranny is highly variable in its manifestation, it is surprising that one would look to equity to address the problem by supplying new general terms of interaction (fiduciary duties) that do not apply to all shareholders, and so respect their formal equality. This produces an asymmetry in the relative legal position of shareholders, effectively redistributing *post hoc* the legal benefits and burdens of share ownership. Given that equity ordinarily supplements the law in a manner that respects and leaves intact surrounding law,⁵⁰ one would have expected that supplementation of the rights and duties of shareholders – if justified – would take the form of new law that respects their formal equality as well as their property in their shares.

Independently of the misfit between the tyranny of the majority problem and equity's supplemental mode of intervention, there are reasons to think that fiduciary regulation, specifically, is inapt.⁵¹

⁵⁰ Miller, *supra* note 25.

⁵¹ For other criticisms, see Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 GEO. L. J. 1207, 1223-1226 (2009).

One is that shareholder relationships do not bear the hallmarks of a fiduciary relationship. In fiduciary relationships properly so called one party – the fiduciary – undertakes a mandate calling for the exercise of discretionary legal powers for other-regarding purposes (those of the grantor of the mandate).⁵² Relationships of long-settled fiduciary status conform to this general description, including those between trustees and beneficiaries, agents and principals, and directors and corporations. But relationships between shareholders do not. Shareholders' interest in their shares and in any associated control rights is fundamentally proprietary in nature. An individual does not, in purchasing or otherwise acquiring shares, receive or accept a mandate to act for others.⁵³ The rights and powers incidental to her ownership of shares are personal to her, as is her property in the security itself. And there is nothing in the acquisition of a majority or controlling block of issued shares of a corporation that should cause us to think that the acquirer has been authorized or has undertaken to act for others, or that she has willingly relinquished property in her shares and the standing to deal with same in self-interest.⁵⁴ Whereas directors and officers assume offices under which they receive fiduciary powers to bind the corporation and its shareholders, shareholders clearly do not undertake to represent anyone and their powers are properly construed as personal.

Further evidence of doctrinal misfit is found in turning one's attention to fiduciary duties and remedies. Consistent with the representative nature of the mandates they have undertaken, fiduciaries are obligated to suppress self-interest and to actively pursue the

⁵² See works cited, *supra* note 29.

⁵³ As is sometimes recognized by American courts. For example, the Oregon Supreme Court emphasized that "each shareholder represents himself and his own interests only, and he in no sense acts as a trustee or representative of others." *Ostlind v. Ostlind Valve Inc.*, 15 P.2d 779, 788 (Or. 1946).

⁵⁴ As has been noted – without recognition of paradox - in *Brodie v. Jordan*, 857 N.E.2d 1076 (Mass. 2006).

interests or ends of others. The fiduciary duty of loyalty is normally specified by strict prophylactic rules that require fiduciaries to avoid even the appearance of conflict.⁵⁵ It is telling that the “fiduciary” duties of controlling shareholders are not framed in this way. Shareholders are not forbidden from considering their own interests in acting on their rights or in exercising their powers. Nor are they prohibited from buying shares in corporations that are, or may be, adverse in commercial interest. The standards that have been imposed are decidedly more permissive and amorphous,⁵⁶ calling for good faith and solidarity, and are consistent with a shareholder acting in an entirely self-regarding way. These thin constraints are fiduciary only by designation.

Finally, the approach taken to remedying shareholder “disloyalty” is telling that underlying misconduct is not treated as a genuinely fiduciary wrong. The default form of relief for fiduciary disloyalty is that of profit-stripping equitable remedies.⁵⁷ These remedies reallocate gains from disloyal fiduciaries to beneficiaries on the basis that the latter have the rightful claim to them in equity. Other important remedies correct for impropriety in the exercise of power by fiduciaries by treating acts in excess of power as void or voidable at the instance of the beneficiary.⁵⁸ Neither of these kinds of remedy, so prominent in fiduciary law, are typically awarded in response to the “fiduciary” misdeeds of a controlling shareholder. The latter might be required to compensate a minority shareholder for losses, to sell his own shares, or to buy out the shares of a minority shareholder at fair market value. But a controlling shareholder is not required to forfeit his

⁵⁵ MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* (2010).

⁵⁶ One court described them as a “compilation of platitudes.” See *Chiles v. Robertson*, 767 P.2d 903, 911 (Or. Ct. App. 1989).

⁵⁷ *Miller*, *supra* note 3, and *Bray*, *supra* note 3.

⁵⁸ *Bray*, *id.*

property in his shares or in the profits realized on his investment. And that is because shareholders are not *really* fiduciaries of one another; the position otherwise in U.S. law is taken half-heartedly, at best.

All of this being said, it is not entirely surprising that courts less versed in equity would turn to fiduciary law in this context. After all, in *some* cases the pathologies of majority rule are revealed through self-seeking behavior by shareholders. Furthermore, in *all* cases, the pathologies attend majority *power* or *control*. I have insisted that the powers – legal and factual – wielded by shareholders through ownership of shares are acquired and held in a personal rather than fiduciary capacity. But one who cares less for doctrinal analyticity than effective policy might maintain that fiduciary constraints are an effective instrument through which to curb abuse of power between shareholders.

This view betrays superficial assessment of the pathologies of majoritarian governance in corporations. While sometimes conduct complained of by a minority shareholder will involve opportunistic behavior by a controlling shareholder, in other cases it does not. In commonwealth jurisdictions, courts have been careful to note that conduct need not be self-interested or suggestive of bad faith to be considered oppressive. In some cases, it might involve intentional or reckless infliction of harm upon a minority shareholder without any corresponding gain reaped by the controlling shareholder. In other cases, there may be neither harm to be redressed, nor gain against which to make attachment; rather, the basis of the complaint will be denial of information or of participation, or repudiation of an expectancy of employment or some other benefit. Across the cases, one finds a recurrent theme: the pathologies of majoritarian governance manifest as *violations of reasonable expectations that are not, and could not readily have been,*

protected at law. Accepting that to be so, one must also accept that fiduciary regulation will be an inadequate (because incomplete) response to the problem to which it is addressed.

B) The Case for the Oppression Remedy

Despite decades of experience, there continue to be hard questions about how the oppression remedy should be delineated. For example, it is unclear which constituents' interests should be protected and why. Similarly, it is unclear whether there might be value in closer – if still non-exhaustive – stipulation of the meaning of “oppression” and cognate grounds for intervention. Furthermore, the factors that should inform judicial discretion in settling specific remedies for oppression remain opaque.

Without, then, supposing that the oppression remedy offers a panacea for shareholder conflict, and without endorsing for a particular iteration of it, I wish presently to explain why, in general terms, *some version* of an oppression remedy is the preferable means by which to structure equitable intervention in corporate tyranny cases.⁵⁹

To a considerable extent, the relative advantages of the oppression remedy are attributable to general characteristics of equity's corrective mode of intervention. Recall that, in corrective mode, equity neither supplies first-order law nor displaces or varies it. Rather, it intervenes exceptionally in the enforcement or routine application of the law on the basis of grievances that raise issues of conscience or abuse of right. These grievances do not impugn first-order law *precisely because* corrective equity proceeds on the

⁵⁹ For an economic analysis in support of the remedy on the basis of transactions costs savings, see Brian R. Cheffins, *An Economic Analysis of the Oppression Remedy: Working Towards a More Coherent Picture of Corporate Law*, 40 U. TORONTO L. J. 775, 789-811 (1990).

assumption that the grievances it hears could not have been addressed through development of first-order law.

The first point in favor of the oppression remedy is, then, that it does not presume to rewrite corporate law or to fetter contract and property law as they apply to corporations and to shareholders. It does not, for example, inhibit the concentration of shares amongst shareholders, require that certain rights or duties be attached to shares, or impose duties, liabilities or other burdens on the exercise of rights or powers by shareholders. Rather, equity here takes notice of existing first-order law and assumes its soundness. It seeks only to ensure that first-order law is not abused or misused so as to defeat the reasonable expectations of a minority shareholder.

The second point in favor of the oppression remedy lies in its invocation of familiar grounds for equitable intervention, and its marshalling of equity's traditional institutional strengths in inquisitorial evaluation of grievances for which good merits assessment requires fact-intensive investigation and judgment. Because the oppression remedy is not premised on the assertion of a legal entitlement, courts enjoy discretion in determining whether to entertain grievances and in merits assessment is not artificially cabined by ex ante substantive or procedural rules. Merits assessment is not unbounded: courts must be able to articulate reasons for deciding whether there was an inequitable violation of a reasonable expectation that was unprotected, or inadequately protected, at law. But courts are afforded wide latitude making a merits assessment on the basis of an encompassing view of material facts, law and policy. Latitude for judge-led, inquisitorial probing of merits is important in this context because the conduct that generates *prima facie* meritorious grievances knows no consistent pattern. If experience teaches anything, it is

that controlling shareholders can misuse or abuse their rights and powers in innumerable ways, through schemes or lapses as varied as the personalities behind them. The oppression remedy proves equal to this variegation by permitting courts to reach fact-driven assessments of the propriety of conduct that is, strictly speaking, entirely lawful, but is offensive to justice for reasons that cannot be reduced to a rule.

The third point in favor of the oppression remedy is that it affords courts unparalleled remedial flexibility, again in a way that is consistent with tradition in equity. Because the grievances that sound in oppression admit of no general measure, so the remedies that promise an apt response to oppression will be correspondingly varied. A shareholder can petition for a particular remedy but the petition will not be treated as a “claim” as of “right” precisely because intervention is not premised on enforcement of a right such as might narrow the scope of apt remedies. A court may consider not just the equity of the petitioner’s cause but the equities of anyone with a direct interest that might be affected by a remedial order. Remedial discretion thus enables courts to ensure that no inequity is done in the name of equity. This is a matter of special importance and delicacy in the context of disputes over the governance of complex organizations.

IV. THE SENSE IN WHICH THE OPPRESSION REMEDY IS (CORRECTIVELY) EQUITABLE

I have said that the oppression remedy is an instantiation of equity’s corrective mode of intervention, contrasting it with equitable supplementation of first-order law. However, this framing might strike some as unusual. It might be thought unusual because the oppression remedy is a modern legislative innovation. It is not a legacy of the centuries-old judge-made equity of chancery courts. So, those who view equity as a thing frozen in

time – a body of doctrines encased, as if in resin, in the equity that predates the *Judicature Acts* – might view my framing with skepticism. As I will explain, the skepticism is unfounded because the premises underlying it are wrong. But, if only because it is an acid test that helps clarify the oppression remedy *and* the continuing importance of corrective equity to modern law, it is worth asking: *In what sense is the oppression remedy equitable?*

The reasons for viewing the oppression remedy as an instantiation of corrective equity are neither historical nor institutional. They are substantive. The oppression remedy is substantively equitable in that it bears distinguishing hallmarks of doctrines that channel correctively equitable intervention.⁶⁰ I highlight six hallmarks in what follows.

First, the oppression remedy is engaged *ex post* by way of application for judicial review. Corrective equity is distinguished from law - and from supplemental equity - in that it does not contribute to the law's *ex ante* specification of terms of interaction.⁶¹ Rather, it enables second-order intervention in first-order law for reasons of conscience and justice having to do with the use or enforcement of first-order law.⁶² As noted above, the oppression remedy operates in just this way. It does not displace or amend terms of interaction supplied by corporate law. It is invoked and operates *ex post* upon petition by an aggrieved shareholder. It permits the court to determine whether, *notwithstanding the law* (which would leave the shareholder's grievance unrecognized), the petition reveals inequitable violation of the shareholder's reasonable expectations.

⁶⁰ Many of the properties that I highlight below have been isolated as distinguishing features of equity by Henry Smith in his work on equity as a system providing for second-order correction of opportunistic misuse of first-order law. Smith, *supra* note 27. It should be emphasized that the properties adverted to below are distinguishing marks of remedial or corrective but *not* supplemental equity, given that supplemental equity fills out first order law. Miller, *supra* note 25.

⁶¹ Miller, *id.*

⁶² Smith, *supra* note 27.

Second, the oppression remedy is addressed primarily to judges. Consistent with its *ex post* operation, corrective equity is also distinguished from first-order law in that it does not articulate norms for the guidance of individuals. Rather, it articulates broad bases for judicial intervention in first-order law. In other contexts, these bases have been framed in terms of fraud, breach of confidence or trust, and undue influence. Here, they are put in the similarly open-textured language of oppression and unfairness. These bases for intervention have sometimes been criticized for their failure to provide shareholders with clear guidance. But these criticisms miss the point because the rubrics are addressed to judges, not shareholders. Vague, morally-inflected language is meant to indicate to judges the kinds of situation that might call for exceptional equitable intervention.

Third, judges have wide discretion in determining whether to hear a petition and whether it has merit. Generally speaking, consistent with our commitment to the rule of law, judges are required to hear and to impartially adjudicate claims brought on the basis of a legal rule and, where (in the case of a duty-imposing rule) they find it abrogated, they must respond in a particular way (e.g., by giving public reasons that announce and explain their findings in light of the rule, and/or by issuing remedial and enforcement orders that are responsive to the rule and the fact and manner of its violation). Because corrective equity is exceptional and premised on the primacy and soundness of the law in relation to which corrective intervention is sought, judges are widely acknowledged to have wider discretion in deciding whether to hear and how to dispose of petitions in equity. Here, too, the oppression remedy is consonant with corrective equity. Pertinent legislative provisions grant courts wide latitude in determining whether to hear petitions on the basis of oppression and in evaluating their merit.

Fourth, judicial assessment of the merits of petitions brought under the oppression remedy involves often laborious inquisitorial investigation and review of facts material to the relationship between the parties, including those bearing on personal, institutional, market, and other contexts within which their interactions took place. Courts must consider the relative position of the parties as a matter of law, but investigation of the factual basis of a petition is focused primarily on identifying the petitioner's material interests and associated expectations that lie beyond protection at law, as well as the fate of those interests and expectations. Doctrinal analysis is focused on determining whether the petitioner's expectations were reasonably held *considering that they were not protected at law*, and if so, whether they were violated through conduct that is objectively inequitable. Here, too, the oppression remedy is of a piece with corrective equity more broadly. Equitable doctrine frames a court's decision whether to intervene, but determining the merits of a petition and how a merited grievance should be remedied is highly fact-contingent.

Fifth, petitions deemed to present well-founded grievances in oppression typically involve opportunism or polycentric problems. As Henry Smith has explained, corrective equitable intervention is often premised on opportunistic misuse or abuse of law, or polycentric problems that complicate and confound the just application of legal rules.⁶³ Recognizing that these problems do not exhaust the grounds for corrective equitable intervention, it is nevertheless telling that many successful petitions for relief on the basis of oppression involve facts suggestive of them. Thus, for example, cases in which a controlling shareholder agitates to force a minority shareholder to sell its shares at less than

⁶³ *Supra* note 27.

fair market value or instigates profit-gouging self-dealing transactions clearly involve opportunism. Equally, cases in which a grievance canvasses the petitioner's treatment in multiple roles (e.g., as shareholder, director, and/or employee) involve polycentric problems of fact and law (i.e., sorting out the reasonable expectations held by the petitioner, recognizing differences in the materiality of considerations of fact and of law across roles, and that these differences might have been exploited by the controlling shareholder).

Sixth, courts have unlimited discretion in the choice of remedies for oppression and, in exercising it, generally seek to provide tailored, corrective responses to meritorious grievances. As others have noted, legal remedies are also subject to judicial discretion (e.g., as to kind and quantum) and so cannot be viewed as but an entailment of the violation of a primary right.⁶⁴ Nevertheless, discretion is narrower in respect of legal remedies than for equitable remedies. That is in part because some legal remedies are an apt response to a wrong and others not. Discretion over equitable remedies is wider because they are often not responses to wrongs but are, rather, responses to inequities that resist generalization. Legislative conferral of unlimited remedial discretion upon courts under the oppression remedy has been much commented upon. But viewed in light of characteristic features of equitable remedies, it is unremarkable. Here, as elsewhere, wide remedial discretion is compelled by recognition that the circumstances calling for corrective relief in equity are idiosyncratic, and that equity's interventions must be tailored to suit them.

⁶⁴ Nicholas Cornell, *What Do We Remedy?* in *CIVIL WRONGS AND JUSTICE IN PRIVATE LAW* (Paul B. Miller and John Oberdiek, eds., 2020) and Charlie Webb, *Duties and Damages*, in *OXFORD STUDIES IN PRIVATE LAW THEORY*, VOL. 1 (Paul B. Miller and John Oberdiek, eds., 2020).

V. CONCLUSION: LESSONS ON THE PLACE OF EQUITY IN MODERN LAW

We have established that the oppression remedy is a correctively equitable form of intervention in corporate law. It allows minority shareholders to seek vindication of reasonable expectations inadequately protected at law in exceptional circumstances. We have also established that the oppression remedy promises superior (more apt, and effective) handling of the tyranny of the majority problem in corporations than does the extension of fiduciary duties to controlling shareholders.

I conclude now with some general lessons for current scholarship on equity. We may begin on the negative side of the ledger. Perhaps most notable is further confirmation of the costs of a now-moribund sensibility about equity. It is striking that American equity has charted a path that diverges so sharply from that of commonwealth countries. The path taken here might well be counted as doctrinal evidence of the negative consequences of collective amnesia about equity; a condition that has already been lamented by American scholars⁶⁵ but is surely not confined to the United States. Wherever it arises, amnesia might mean that lawmakers are less likely to think of legislating for correctively equitable intervention, even where it provides the best means by which to respond to a problem.

Cheeringly, though, there are also positive lessons. And these go to the constructive contributions of equity to modern law. Several jurisdictions have provided for equitable intervention in corporate law through a legislated oppression remedy. The remedy has been developed differently in different jurisdictions, and has not been without controversy, with much criticism echoing the familiar charge that equity threatens to destabilize law. But

⁶⁵ See works cited, *supra* note 11.

decades of experience have shown the charge to be overblown. The oppression remedy is now an unexceptional fixture of commonwealth corporate law. And this, in itself, is a good news story for equity. It shows that corrective equity is not a redundant appendage or crystalline set of doctrines.

Finally, experience with the oppression remedy suggests that the time has come for rethinking equity's place amongst legal institutions. Some traditionalists will see as genuinely equitable only those doctrines devised by chancery courts before the *Judicature Acts*. But viewing equity in this way requires one to ignore evidence of its continuing relevance and vitality, and it suppresses the impulse lawmakers might otherwise have to innovate through equity. There is no reason to think that innovations achieved through equity need to come from judges, much less judges in specialist courts. Rather, experience with the oppression remedy suggests quite the opposite: legislators can see the need for corrective equity in modern law and provide judges with sensible bases for expanded equitable jurisdiction.