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ARTICLE

HOW TO EVALUATE NON-MAJORITY CONTROL: WHAT HISTORY AND STATUTES TELL US

PART TWO: THE DEFINITIONAL CONSENSUS

J. Travis Laster[*]

[*] Vice Chancellor, Delaware Court of Chancery. This Article is the second of two companion pieces. A version was presented at the 2025 DeStefano Lecture at Fordham University School of Law.

INTRODUCTION

During the last two decades, two schools of thought coexisted in Delaware regarding non-majority control. One school took a formal approach that (i) examined control over the board, (ii) discounted the effects of sources of influence other than the voting power associated with stock ownership, and (iii) elevated the threshold at which voting power became significant to a de facto floor of 35%. Decisions applying those principles regularly dismissed cases at the pleading stage after concluding it was not reasonably conceivable that a non-majority stockholder could exercise control. Another school used a functional approach that (i) examined control over corporate conduct, (ii) considered multiple sources of influence, and (iii) recognized that lower levels of voting power could support non-majority control. Decisions applying those principles were less likely to grant pleading-stage dismissals. A group of influential commentators attacked the functional approach as novel and anomalous, and their advocacy contributed to an amendment to the Delaware

General Corporation Law that defined the term "controlling stockholder" in formal terms (the "Safe Harbor Definition").

This Article and a companion piece explore the claim that the functional school was novel and anomalous. The companion article examines the approaches that courts have historically taken when evaluating non-majority control (the "Historical Article").[1] The Historical Article demonstrates that functionalism has been the dominant approach since at least 1912, while the formal school is a recent innovation. Its tenets emerged in 2006 and coalesced in a recognizable framework around 2014. The Historical Article identifies the core claims of the two schools.

This Article examines statutory definitions of control. It focuses on statutory regimes that use the concept of control (1) in business settings where fiduciary duties would apply and (2) for the same policy reasons that equity imposes fiduciary duties on controllers, viz. (a) ensuring that the law reaches those actually responsible for exercising power, not merely figureheads nominally empowered to act, and (b) constraining the ability of those in control to impose unfair transactions. Using the Historical Article's identification of the two schools' core claims, this Article examines statutory definitions of control to evaluate whether they are functional or formal. All are functional.

The statutory regimes fall into two categories. The first regulates relationships between investors and corporations. The second regulates relationships between controlling stockholders, including holding companies, and their subsidiaries.

The most prominent statutes in the first category are the Securities Act of 1933 (the "Securities Act" or the "1933 Act") and the Securities Exchange Act of 1934 (the "Exchange Act" or the "1934 Act"). The Securities and Exchange Commission (the "SEC") promulgated a definition of control for use with both statutes (the "Securities Law Definition"). The Securities Law Definition applies to all public companies, making it the best known and most widely applicable test for control. The 1933 and 1934 Acts and the Securities Law Definition all take a functional approach.

State securities laws also fall into the first category. Every state has a state securities law, making those laws a good

1. J. Travis Laster, *How to Evaluate Non-Majority Control: What History and Statutes Tell Us – Part One: The Historical Dominance of Functionalism*, 31 FORDHAM J. CORP. & FIN. L. 1 (2025) [hereinafter Historical Article].

barometer of consensus. States have generally followed the 1933 and 1934 Acts by taking a functional approach to control, with some adding presumptions of non-majority control at specified levels of voting power.

The second category is larger. It starts with the Public Utility Holding Company Act of 1935 (the "Utility Act"), which regulated relationships between holding companies and subsidiaries operating utilities. That statute uses a functional approach with a presumption of non-majority control at 25% voting power.

The second category continues with the Trust Indenture Act of 1939 (the "Indenture Act"), which regulates relationships between issuers and bond trustees, and the Investment Company Act of 1940 (the "Investment Act"), which regulates relationships between investment companies and operating companies. Both use a functional approach supplemented by presumptions of non-majority control at specified levels of voting power.

The second category also encompasses statutes that regulate the relationships between holding companies and subsidiaries operating as banks or insurers. Those statutes generally take a functional approach, but use designated levels of voting power, usually 25%, to establish the existence of non-majority control. At lower levels of ownership, federal banking regulations deploy a sophisticated framework that presumes the existence of non-majority control when a particular level of voting power is combined with other sources of influence.

The second category also includes a federal statute that regulates foreign investment in the United States by governing the relationships between entities affiliated with foreign governments and entities that operate domestically. That statute uses a particularly nuanced set of tests reflecting assessments of how particular contract rights affect non-majority control.

The second category concludes with two types of corporate statutes: business combination statutes and control share statutes. Business combination statutes address the risk that an acquirer could secure control, then engage in self-dealing. Delaware has a representative business combination statute that takes a functional approach and adds a presumption of non-majority control at 20% voting power. Control share statutes operate differently by requiring a stockholder vote when a person acquires a level of voting power associated with non-majority control. Delaware does not have a control share statute, but other jurisdictions universally require an initial vote at 20% voting power or lower, a second vote at one-third voting power, and a third vote at majority voting power. Those statutes support the functional approach by recognizing that relatively low levels of voting power can support non-majority control.

This Article's review of statutory definitions reveals consensus features. Although some authorities have asserted that definitions of control vary widely across different areas of the law, that claim is not accurate. Statutory regimes that govern situations where fiduciary duties also apply and that deploy the concept of control for similar purposes invariably take a functional approach.

This Article and the Historical Article point to the same conclusion. Both sources of evidence—the history of non-majority control and the statutory consensus—demonstrate that functionalism constitutes the dominant approach to control in American law. Accounts that attempted to paint the functional approach as novel and anomalous were and remain inaccurate.

I. THE CONCEPT OF NON-MAJORITY CONTROL

A consensus exists that a person who can exercise a majority of a corporation's voting power possesses control.[2] A similar consensus exists that a person holding less than a majority of the voting power *can* possess control.[3] But the possibility of non-

2. *See, e.g.*, Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co., 417 U.S. 703, 716 n.13 (1974) (describing the fiduciary status of controlling stockholders as "settled law"); Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 12 (1971) ("The controlling stockholder owes the corporation a fiduciary obligation—one designed for the protection of the entire community of interests in the corporation—creditors as well as stockholders." (internal quotation marks omitted)); Pepper v. Litton, 308 U.S. 295, 306 (1939) ("A director is a fiduciary. So is a dominant or controlling stockholder or group of stockholders." (citations omitted)).

3. *E.g.*, Kahn v. Lynch Commc'n Sys., Inc., 638 A.2d 1110, 1113 (Del. 1994) (imposing fiduciary duties on a stockholder who "owns a majority interest in or *exercises control* over the business affairs of the corporation" (internal quotation marks omitted)); Citron v. Fairchild Camera & Instr. Corp., 569 A.2d 53, 70 (Del. 1989) (imposing fiduciary duties on a majority stockholder or a minority stockholder who exercises "actual control of corporate conduct"); Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987) ("Under

majority control raises questions. What test should a court use to determine when non-majority control exists? Should non-majority control always require some level of stock ownership? Is there a minimum level of voting power that non-majority control requires? What other sources of influence count?

A. The Functional Approach

For more than a century, courts answered those questions on a case-by-case basis by treating the existence of non-majority control as a question of fact. In the late nineteenth and early twentieth centuries, American courts began imposing fiduciary duties on stockholders who could exercise a majority of a corporation's voting power.[4] The rationale was functional. A

Delaware law a shareholder owes a fiduciary duty only if it owns a majority interest in or exercises control over the business affairs of the corporation.").

4. *See* Wheeler v. Abilene Nat'l Bank Bldg. Co., 159 F. 391, 393–94 (8th Cir. 1908) (holding that a dominant stockholder's "power to control and direct the action of the corporation places him in its shoes, and constitutes him the actual, if not the technical, trustee for the holders of the minority of the stock"); Ervin v. Or. Ry. & Nav. Co., 27 F. 625, 631 (C.C.S.D.N.Y. 1886) ("When a number of stockholders combine to constitute themselves a majority in order to control the corporation as they see fit, they become for all practical purposes the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders. Although stockholders are not partners, nor strictly tenants in common, they are the beneficial joint owners of the corporate property, having an interest and power of legal control in exact proportion to their respective amounts of stock. The corporation itself holds its property as a trust fund for the stockholders who have a joint interest in all its property and effects, and the relation between it and its several members is, for all practical purposes, that of trustee and *cestui que* trust."); Glengary Consol. Mining Co. v. Boehmer, 62 P. 839, 839 (Colo. 1900) ("So far as the rights of the minority are concerned, the majority, in furtherance of their plan to reap a benefit to themselves through a transaction in which the minority do not participate, become the corporation itself, and assume the trust relation occupied by the corporation towards its stockholders."); Farmers' Loan & Tr. Co. v. N.Y. & N. Ry. Co., 44 N.E. 1043, 1047–49 (N.Y. 1896) (collecting cases); Peabody v. Flint, 88 Mass. 52, 55 (1863) (rejecting argument that minority stockholders could not sue majority for breach of duty); *see also* Hawes v. City of Oakland, 104 U.S. 450, 460 (1881) (noting that a stockholder can sue for breach of duty "where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of other shareholders, and which can only be restrained by the aid of a court of equity").

majority holder can elect and remove directors, adopt bylaws, and veto major transactions that the board initiates and that require stockholder approval, but that is it. The majority stockholder principally wields influence indirectly based on the voting power it can potentially exercise.[5]

With courts attentive to the functional realities of internal governance, it did not take long for a court to conclude that an influential minority stockholder exercised control. In 1912, the United States Supreme Court took that step in finding that a non-majority stockholder exercised control.[6] The justices treated the existence of non-majority control as a question of fact and took into account Union Pacific's "dominating stock interest"[7] (37.5%, later increased to 46%), its accumulation of the stock for the

5. Deborah A. DeMott, *The Mechanisms of Control*, 13 CONN. J. INT'L L. 233, 236 (1999) ("Shareholders' control is often latent and indirect in form. . . . Holding a majority of voting power does not in itself place a shareholder in a position of active control. If the shareholder assumes no additional role within the corporation, the shareholder is not a direct participant in operational decisions or in the formulation of strategic policy. Nonetheless, shareholders hold power to control in a latent form because they may be able to remove directors, and in all events may replace the incumbents if they resign or when their terms expire."); *see* Iman Anabtawi & Lynn Stout, *Fiduciary Duties for Activist Shareholders*, 60 STAN. L. REV. 1255, 1296–97 (2008) ("It is a mistake to view the idea of shareholder control as an all-or-nothing inquiry (either a shareholder has complete 'control' or it has none). Shareholder power and influence can depend on context. At one extreme lies the sole shareholder who holds 100% of a firm's outstanding voting stock and enjoys virtually complete authority over every decision made by the firm's board of directors. At the other extreme is the rationally apathetic, atomized individual investor who has no influence over anything and indeed cannot be bothered to return a proxy by mail. Between these two extremes lies a vast range of possible allocations of power between individual shareholders and directors. Indeed, more than one shareholder or shareholder group can be said to "control" the firm in some fashion or another." (footnote omitted)); Jerry B. Helwig, Note, *The Fiduciary Duty of Controlling Shareholders*, 7 CASE W. RSRV. L. REV. 467, 468 n.2 (1956) ("The doctrine by which the holders of a majority of the stock of a corporation who dominate its affairs are held to act as trustees for the minority, does not rest upon technical distinctions."); *id.* at 478 ("[M]ost courts have begun to place greater emphasis upon the power of majority stockholders to control corporate property and affairs by virtue of their stock ownership, and no longer require actual domination on the part of directors before a fiduciary relation will be recognized.").

6. United States v. Union Pac. R.R. Co., 226 U.S. 61 (1912).

7. *Id.* at 79, 86.

purpose of securing control,[8] and the subsequent appointment of Union Pacific's president as president and chairman of the executive committee at the controlled company.[9] This approach established a pattern that later cases would follow by considering multiple sources of influence (the "Multiple Sources Principle"), including the past interactions between the two entities ("Historical Evidence") and whether the alleged controller held powerful governance positions ("Powerful Roles").

Two more features of the functional approach quickly followed. During the 1920s and 1930s, leading commentators recognized that control could rest on a relatively small block amid otherwise dispersed ownership ("Small Block Control").[10] In their landmark work, *The Modern Corporation and Private Property*,[11] Adolf A. Berle, Jr. and Gardiner C. Means concluded that 15% ownership likely marked the lower bound at which a stockholder could exercise control without management support,[12] making 20% ownership a reasonable threshold for presumptive Small

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8. *Id.* at 95.

9. *Id.*

10. *E.g.*, ADOLF A. BERLE, JR., STUDIES IN THE LAW OF CORPORATE FINANCE 43 (1928) ("[C]orporations having widely distributed stockholders are commonly dominated by the holders of a concentrated minority without legal device of any sort."); WILLIAM Z. RIPLEY, MAIN STREET AND WALL STREET 95 (1927) ("Corporations have always been suspectable to control by concentration of voting power. Far less than half of the capital stock may be as effective for such control as possession of an actual majority. But it is elemental—requiring no proof—that the larger the number of shareholders, the more easily may a small, concentrated block of minority shares exercise sway over all the rest. . . . With 300,000 scattered holdings, a possible 15 or 20 per cent of the votes can never be overmatched at an election."); THOMAS CONYNGTON & R.J. BENNETT, CORPORATION PROCEDURE 682 (1927) ("[N]ot infrequently a minority elects the board of directors and thus controls the corporation."); 2 WILLIAM W. COOK, A TREATISE ON THE LAW OF CORPORATIONS HAVING A CAPITAL STOCK § 317, at 1079–80 (8th ed. 1923) ("Often a minority interest is a controlling interest; and, in fact, most great corporations are controlled by those who own only a minority interest, and often a very small minority interest."); Adolf A. Berle, Jr., *Nonvoting Stock and Bankers' Control*, 39 HARV. L. REV. 673, 673 (1926) ("Control of American corporations by holders of a minority of the capital stock is no novelty to business men or lawyers.").

11. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

12. *Id.* at 83.

Block Control.[13] But Berle and Means did not stop there. They recognized that control did not inherently require stockholder status, observing that "[c]onceivably it can be exercised without any such interest."[14] Through this analysis, they introduced the concept of control by contract ("Contractual Control").

Decisions from the United States Supreme Court endorsed the functional approach. In *Slattery*[15] and *Rochester*,[16] the justices rejected arguments for a bright-line rule that non-majority control could not conceivably exist without at least one-third of the voting power (the "One-Third Floor"). Both decisions treated the existence of non-majority control as a question of fact, applied the Multiple Sources Principle, and examined stock-related voting power as just one source of influence. The decisions also recognized the importance of Powerful Roles, Historical Evidence, and the possibility of Contractual Control.[17]

In Delaware, courts likewise used a functional approach. The test was whether a person could exercise "actual control of corporate conduct"[18] (the "Conduct Control Test"). Decisions did not claim that non-majority control was easy or hard to show. Control was a question of fact, and the issue was what the evidence indicated. Consistent with the Multiple Sources Principle, possible sources of evidence included Powerful Roles, Historical Evidence, and other factors.

Decisions over six decades apart exemplify that approach. In the landmark decision of *Guth v. Loft, Inc.*,[19] Chancellor Josiah O. Wolcott used functional principles to find, after trial, that Charles G. Guth, the corporation's president, chairman, and holder of

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13. *Id.* at 82–83; *accord* ADOLF A. BERLE, JR., ECONOMIC POWER AND THE FREE SOCIETY 9–10 (1958); WILLIAM J. GRANGE, CORPORATION LAW FOR OFFICERS AND DIRECTORS 267 (1935) (endorsing Berle's analysis and agreeing that a 15 to 20% stake would generally be sufficient to exercise control in a public corporation).

14. BERLE & MEANS, *supra* note 11, at 69.

15. Nat. Gas Pipeline Co. of Am. v. Slattery, 302 U.S. 300 (1937).

16. Rochester Tel. Corp. v. United States, 307 U.S. 125 (1939).

17. *Id.* at 145–46; *Slattery*, 302 U.S. at 307–08.

18. Citron v. Fairchild Camera & Instr. Corp., 569 A.2d 53, 70 (Del. 1989); *accord* Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334, 1344 (Del. 1987); Gilbert v. El Paso Co., 490 A.2d 1050, 1055 (Del. Ch. 1984), *aff'd*, 575 A.2d 1131 (Del. 1990).

19. Guth v. Loft, Inc., 5 A.2d 503 (Del. 1939).

approximately 11% of its stock, exercised control.[20] Guth argued that the board had allowed him to take a corporate opportunity, but Chancellor Wolcott found that if approval had been given, then Guth's control rendered it ineffective. Chancellor Wolcott put the most weight on Powerful Roles (Guth's status as a director and CEO), as well as Guth's forceful personality and his relationships with other directors. Wolcott also considered evidence relating to the terms of the transaction being challenged ("Transactional Evidence").[21]

Just after the new millennium, then-Vice Chancellor Leo E. Strine, Jr. issued a bookend decision. In *Cysive*,[22] a corporation's chairman, CEO, and 35% stockholder negotiated with a special committee and reached agreement on a going-private merger.[23] Strine reasoned that the question of control "must take into account whether the stockholder, as a practical matter, possesses a combination of stock voting power and managerial authority that enables him to control the corporation, if he so wishes."[24] He explained that "whether a large blockholder is so powerful as to have obtained the status of a 'controlling stockholder' is intensely factual [and] it is a difficult [question] to resolve on the

20. Loft, Inc. v. Guth, 2 A.2d 225, 237 (Del. Ch. 1938) ("Guth was in an unquestioned position of dominance in the affairs of Loft. He had won control of the corporation after an intense and bitter contest for proxies from the stockholders in March of 1930. He is a man of great force and determination—one who having obtained control was not likely to relinquish a particle of it to others. With the exception of Patton and Dr. Sullivan, who came on the board in 1930 and 1934 respectively, I doubt if there was a single director who would have ventured to question not to say oppose any action which Guth favored."), *aff'd*, 5 A.2d 503 (Del. 1939); *see id.* at 238 ("Guth was not only a director of Loft. He was also its president. He was dominant in its affairs, so much so that the belief is warranted that in actual practice he handled its affairs and directed its management as though he were its sole proprietor."). None of the various *Guth*-related decisions identify how many shares Guth owned, but they provide information indicating that the percentage had to be low and was likely around 11%. *See* Historical Article, *supra* note 1, at 27–28. Chancellor Wolcott did not discuss Guth's stock ownership, demonstrating that he did not view that source of influence as essential to a finding of control.

21. *Id.* at 237 ("The extent to which [Guth] availed himself of Loft's funds in advances to himself individually and . . . his own personal company (Pepsi) emphasizes the absoluteness of his sway.").

22. *In re* Cysive, Inc. S'holders Litig., 836 A.2d 531 (Del. Ch. 2003).

23. *Id.* at 535.

24. *Id.* at 553.

pleadings."[25] He also acknowledged that the analysis of control "intertwined with" the facts surrounding the challenged transaction.[26] In other words, it required consideration of Transactional Evidence.

Focusing initially on the CEO's stock ownership, Strine observed that "[i]n practical terms," a 35% block was "large enough . . . to be the dominant force in any contested Cysive election."[27] He also considered the dynamics of voter turnout, observing that "a 100% turn-out is unlikely even in a contested election" and that the block was "very potent in view of that reality."[28] Strine also relied on "the fact that Carbonell is Chairman and CEO of Cysive, and a hands-on one, to boot."[29] He concluded that the CEO "has that capability and would be perceived as having such capability by rational independent directors, public stockholders, and other market participants."[30]

The *Cysive* decision openly applied functional principles. It approached control as an issue of fact and applied the Conduct Control Test. In finding control to exist, the decision considered not just voting power, but also Powerful Roles and the informal influence wielded by a founder and inspirational corporate leader.

B. *The Formal Approach*

The first decade of the 2000s witnessed growing concern about excessive stockholder litigation. Many lawsuits attacked

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25. *Id.* at 550–51.
26. *Id.* at 551; *see id.* ("In cases when the determination of whether control exists turns on disputed facts, it is impossible to determine whether a large block holder is a controlling stockholder until an evidentiary hearing is held. Because the proof of that question overlaps with the trial evidence regarding the fairness of the merger process, it will rarely, if ever, be efficient to hold such a hearing before trial. Rather, it will be efficient for all concerned to try the questions at the same time because the defendants' attempt to show that the independent directors acted freely and assertively in the corporation's best interests without being controlled by the large block holder is evidence both that the large block holder was not in control and that the merger was negotiated fairly.").
27. *Id.* at 552.
28. *Id.* at 552 n.30.
29. *Id.*
30. *Id.*

transactions involving alleged controlling stockholders, prompted by legal innovations favoring those challenges and more companies where control could credibly be alleged.[31] Commentators worried that by foreclosing the possibility of pleading-stage dismissal, Delaware law facilitated rent-seeking.[32] Then-Vice Chancellor Strine was a prominent proponent of that view.[33] Although the concerns principally involved the standard of review, the skepticism spilled into the analysis of non-majority control. Creating a path to pleading-stage dismissals would require a more formal approach.

The shift began in 2006 with two decisions—*PNB Holding*[34] and *Superior Vision*[35]—that introduced more formal concepts. In a post-trial decision, *PNB Holding* asserted that non-majority control was difficult to show (the "Hard-To-Show Concept"),[36] that it should require influence comparable to a majority ownership ("Majority Equivalence"),[37] that it must include the ability to engage in retribution against non-compliant directors and stockholders ("Retributive Capacity"),[38] and that voting power below one-third was unlikely to be significant (the "One-Third-Is-Low Concept").[39] *Superior Vision* reframed the test for non-majority control as requiring control over the board rather than control over corporate conduct (the "Board Control Test").[40] The decision also

31. *See* Ann M. Lipton, *After* Corwin*: Down the Controlling Shareholder Rabbit Hole*, 72 VAND. L. REV. 1977, 1987–2005 (2019).

32. *See, e.g.*, Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2 (2005); Peter V. Letsou & Steven M. Haas, *The Dilemma That Should Never Have Been: Minority Freeze Outs in Delaware*, 61 BUS. LAW. 25 (2005); Elliott J. Weiss & Lawrence J. White, *File Early, Then Free Ride: How Delaware Law (Mis)Shapes Shareholder Class Actions*, 57 VAND. L. REV. 1797 (2004).

33. *See* William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *Function Over Form: A Reassessment of Standards of Review in Delaware Corporation Law*, 58 BUS. LAW. 1287 (2001).

34. *In re* PNB Hldg. Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999 (Del. Ch. Aug. 18, 2006).

35. Superior Vision Servs., Inc. v. ReliaStar Life Ins. Co., No. CIV.A. 1668-N, 2006 WL 2521426 (Del. Ch. Aug. 25, 2006).

36. *In re PNB Hldg.*, 2006 WL 2403999, at *9 (citation omitted).

37. *Id.*

38. *Id.* at *9–10.

39. *Id.* at *9. Each of these claims was novel. *See* Historical Article, *supra* note 1, at 49–52.

40. *Superior Vision*, 2006 WL 2521426, at *2.

suggested that the analysis generally should not account for contract rights ("Contractual Irrelevance").[41]

Those innovations paved the way for the formal school, but they did not initially catch on. In 2013, however, then-Chancellor Strine assembled the elements of the formal approach in *Morton's*,[42] holding that a complaint did not support a pleading-stage inference of non-majority control. Relying on his decision in *PNB Holding*, he cited the Hard-To-Show Concept and framed the standard as requiring Majority Equivalence with Retributive Capacity. To give content to the test, he incorrectly described his decision in *Cysive* as "perhaps, [this court's] most aggressive finding that a minority blockholder was a controlling stockholder" and summarized the case as involving a blockholder who "held 35% of the company's stock," was "the company's visionary founder, CEO, and chairman," and who had appointed two of his family members to executive positions.[43] With the test framed this way, the application was straightforward. The alleged controller in *Morton's* was a private equity sponsor that took a portfolio

41. *Id.* at *5. Both claims were novel. *See* Historical Article, *supra* note 1, at 52–58.

42. *In re* Morton's Rest. Grp., Inc. S'holders Litig., 74 A.3d 656 (Del. Ch. 2013).

43. *Id.* at 665. The claim that *Cysive* represented the Delaware Court of Chancery's "most aggressive finding" of non-majority control was inaccurate. In *Mizel*, then-Vice Chancellor Strine drew a pleading-stage inference that a chairman, president, CEO, and 32.7% blockholder exercised control. Mizel v. Connelly, No. Civ.A. 16638, 1999 WL 550369, at *3 (Del. Ch. July 22, 1999). In *Ply Gem*, Vice Chancellor Noble drew a pleading-stage inference that a chairman, CEO, and 25% blockholder exercised control. *In re* Ply Gem Indus., Inc. S'holders Litig., No. CIV.A. 15779-NC, 2001 WL 755133, at *7 (Del. Ch. June 26, 2001). In *Williamson*, Chancellor Chandler credited that two stockholders holding 17.5% of the voting power plus charter-based blocking rights exercised control. Williamson v. Cox Commc'ns, Inc., No. Civ.A. 1663-N, 2006 WL 1586375, at *4 (Del. Ch. June 5, 2006). In *Moran*, then-Vice Chancellor Walsh found after trial that 20% ownership was a "recognized threshold for measuring control of a publicly held corporation." Moran v. Household Int'l, Inc., 490 A.2d 1059, 1080 (Del. Ch. 1985), *aff'd*, 500 A.2d 1346 (Del. 1985). In *Robbins*, then-Vice Chancellor Berger found after trial that a 31% stockholder exercised control. Robbins & Co. v. A.C. Israel Enters., Inc., 1985 WL 149627, at *5 (Del. Ch. Oct. 2, 1985). In *Burry Biscuit*, then-Vice Chancellor Seitz drew a pleading-stage inference that a founder, chairman, CEO, and 10% blockholder exercised control. Rosenthal v. Burry Biscuit Corp., 60 A.2d 106, 108 (Del. Ch. 1948). And in *Guth*, the granddaddy of Delaware non-majority control cases, Chancellor Wolcott found after trial that a chairman, CEO, and not more than 11% stockholder exercised control. *See supra* Part I.A.

company public, then sold down to 27.7%.[44] Two of its executives served on the ten-member board, and one served as the de facto chair. Noting that the pled facts "do not rise to the same level" as *Cysive* (the "*Cysive*-As-Floor Concept"),[45] Chancellor Strine rejected the inference of non-majority control.

Shortly after issuing *Morton's*, Strine became Chief Justice. A year later, *KKR* followed the *Morton's* formula to reject a pleading-stage inference of control.[46] On appeal, in a decision remembered as *Corwin*,[47] Chief Justice Strine authored the first Delaware Supreme Court decision to reference the Board Control Test and the concept of Majority Equivalence.[48] It was also the first Delaware Supreme Court decision to reference the Hard-To-Show Concept.[49]

After *Corwin*, a series of Court of Chancery decisions treated *Morton's* and *KKR* as establishing a recipe for evaluating non-majority control. First, they deployed the Hard-To-Show Concept.[50] Next, they invoked the Board Control Test,[51] often with

44. *In re Morton's*, 74 A.3d at 660.

45. *Id.* at 666.

46. *In re* KKR Fin. Hldgs. LLC S'holder Litig., 101 A.3d 980, 991–93 (Del. Ch. 2014) (noting that the complaint's allegations demonstrated "KKR, through its affiliate, managed the day-to-day operations of KFN" but that they did "not support a reasonable inference that KKR controlled the KFN board—which is the operative question under Delaware law—such that the directors of KFN could not freely exercise their judgment in determining whether or not to approve and recommend to the stockholders a merger with KKR"), *aff'd sub nom.*, Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304 (Del. 2015).

47. Corwin v. KKR Fin. Hldgs. LLC, 125 A.3d 304 (Del. 2015).

48. *Id.* at 307.

49. *Id.*

50. *E.g.*, *In re* Essendant, Inc. S'holder Litig., No. CV 2018-0789-JRS, 2019 WL 7290944, at *8 (Del. Ch. Dec. 30, 2019) ("For obvious reasons, the test for freighting a minority stockholder with the fiduciary obligations of a controlling stockholder is not an easy one to satisfy." (internal quotation marks omitted)); Donnelly v. Keryx Biopharmaceuticals, Inc., No. CV 2018-0892-SG, 2019 WL 5446015, at *5 (Del. Ch. Oct. 24, 2019) ("[D]emonstrating actual control by a minority blockholder is 'not easy'" (quoting *In re* Rouse Props., Inc., C.A. No. 12194-VCS, 2018 WL 1226015, at *11 (Del. Ch. Mar. 9, 2018))); Larkin v. Shah, C.A. No. 10918-VCS, 2016 WL 4485447, at *13 (Del. Ch. Aug. 25, 2016) (asserting that to plead non-majority control "is no easy task").

51. *E.g.*, *Donnelly*, 2019 WL 5446015, at *5 ("Demonstrating control by a stockholder who owns less than 50% of a company requires showing the minority stockholder exercised actual domination and control over the

additional requirements of Majority Equivalence and Retributive Capacity.[52] To give content to the test, they cited the *Cysive*-As-Floor Concept and asserted that lesser levels of influence could not support a reasonable inference of control.[53] That recipe consistently resulted in pleading-stage dismissals.[54]

C. The Persistence of Functionalism

As the formal school gained momentum, other Delaware decisions persisted in applying functional principles.[55] Those

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directors." (internal quotation marks omitted)); *In re* USG Corp. S'holder Litig., C.A. No. 2018-0602-SG, 2020 WL 5126671, at *18 (Del. Ch. Aug. 31, 2020) ("The Plaintiffs have failed to plead facts from which I can reasonably infer that Knauf exercised actual control over USG's Board. Consequently, it is not reasonably conceivable that Knauf was a conflicted controller of USG."), *aff'd sub nom.*, Anderson v. Leer, 265 A.3d 995 (Del. 2021); Thermopylae Cap. Partners, L.P. v. Simbol, Inc., C.A No. 10619-VCG, 2016 WL 368170, at *14 (Del. Ch. Jan. 29, 2016) ("[A] stockholder who—via majority stock ownership or through control of the board—operates the decision-making machinery of the corporation, is a classic fiduciary . . . ."); *In re* Crimson Expl. Inc. S'holder Litig., Civil Action No 8541-VCP, 2014 WL 5449419, at *12 (Del. Ch. Oct. 24, 2014) ("[A] large blockholder will not be considered a controlling stockholder unless they actually control the board's decisions about the challenged transaction."); *see also* Klein v. Wasserman, C.A. No. 2017-0643-KSJM, 2019 WL 2296027, at *8 (Del. Ch. May 29, 2019) (citing "effective control of the board" as one way to establish general control).

52. *See, e.g.*, *In re* Oracle Corp. Derivative Litig., C.A. No. 2017-0337-SG, 2023 WL 3408772, at *19 (Del. Ch. May 12, 2023), *aff'd*, 339 A.3d 1 (Del. 2025); *In re USG*, 2020 WL 5126671, at *14; Skye Min. Invs., LLC v. DXS Cap. (U.S.) Ltd., C.A No. 2018-0059-JRS, 2020 WL 881544, at *26 (Del. Ch. Feb. 24, 2020); *In re Essendant*, 2019 WL 7290944, at *7; *In re* Zhongpin Inc. S'holders Litig., C.A. No. 7393, 2014 WL 6735457, at *6 (Del. Ch. Nov. 26, 2014), *rev'd on other grounds sub nom.*, *In re* Cornerstone Therapeutics Inc, S'holder Litig., 115 A.3d 1173 (Del. 2015); *In re* Sanchez Energy Derivative Litig., C.A. No. 9132-VCG, 2014 WL 6673895, at *8 (Del. Ch. Nov. 25, 2014), *rev'd sub nom.*, Del. Cnty. Emps. Ret. Fund v. Sanchez, 124 A.3d 1017 (Del. 2015).

53. *E.g.*, *In re* GGP, Inc. S'holder Litig., C.A. No. 2018-0267-JRS, 2021 WL 2102326, at *23 n.244 (Del. Ch. May 25, 2021); Sciabacucchi v. Liberty Broadband Corp., C.A. No. 11418-VCG, 2017 WL 2352152, at *18 (Del. Ch. May 31, 2017); *In re Rouse*, 2018 WL 1226015, at *19; *Larkin*, 2016 WL 4485447, at *14; *Zhongpin*, 2014 WL 6735457, at *7; Veloric v. J.G. Wentworth, Inc., C.A. No. 9051-CB, 2014 WL 4639217, at *10 n.44 (Del. Ch. Sep. 18, 2014).

54. *See* Historical Article, *supra* note 1, at 65–68.

55. *See* Blue v. Fireman, C.A No. 2021-0268-MTZ, 2022 WL 593899, at *16 (Del. Ch. Feb. 28, 2022) (Zurn, V.C.) (finding it reasonably conceivable that creditor

controlled debtor where, despite not owning any stock, creditor held a proxy giving it the power to vote 83% of the outstanding voting power); Reith v. Lichtenstein, C.A No. 2018-0277-MTZ, 2019 WL 2714065, at *8 (Del. Ch. June 28, 2019) (Zurn, V.C.) (finding it reasonably conceivable that hedge fund exercised control through influence from 35.61% stock, demonstrated ability to change the size and composition of the board, a management services agreement, and relationships with one interim and two permanent executives); Firefighters' Pension Sys. of City of Kansas City, Mo. Tr. v. Presidio, Inc., 251 A.3d 212, 258 (Del. Ch. 2021) (Laster, V.C.) ("Although Apollo no longer would designate a mathematical majority of the Board, Apollo still would control 42% of the Company's voting power, appoint four of nine directors, and retain a contractual veto right over any change in the CEO. This potent combination of rights would enable Apollo to maintain effective control over the Company, even without the ability to appoint a mathematical majority of the Board."); Berteau v. Glazek, C.A No. 2020-0873-PAF, 2021 WL 2711678, at *2, *27 (Del. Ch. June 30, 2021) (Fioravanti, V.C.) (drawing an inference of control where parent owned a 33.5% block, the subsidiary disclosed that the parent "will continue to be able to exert significant influence over our operations and business strategy," and where parent executives served as three of the seven directors on the board, with one also serving as chairman and another as president and CEO); *Skye Min. Invs.*, 2020 WL 881544, at *26–27 (Slights, V.C.) (drawing an inference of control where minority equity holders who owned 25% of the equity used their influence and a set of contractual blocking rights to force an entity into bankruptcy, where they were able to purchase its assets at a steep discount); Voigt v. Metcalf, C.A No. 2018-0828-JTL, 2020 WL 614999, at *1, *3–7 (Del. Ch. Feb. 10, 2020) (Laster, V.C.) (finding it reasonably conceivable that private equity firm exercised control over the portfolio company based indicia that included (i) ownership of 34.8% of its voting power, (ii) four private equity firm insiders on a twelve-member board, (iii) relationships of varying significance over another four directors, and (iv) a governance agreement that gave the private equity firm the right to select the board chair or its lead director and a host of veto rights actions the board otherwise could take unilaterally, plus (v) the private equity firm's direction of the transaction process). Members of the Court of Chancery applied functional principles at other stages of litigation as well. *See In re* Tesla Motors, Inc. S'holder Litig., C.A. No. 12711-VCS, 2020 WL 553902, at *4 (Del. Ch. Feb. 4, 2020) (Slights, V.C.) (finding disputes of material fact existed precluding a grant of summary judgment finding that Elon Musk did not control Tesla); FrontFour Cap. Grp. LLC v. Taube, C.A. No. 2019-0100-KSJM, 2019 WL 1313408, at *21–25 (Del. Ch. Mar. 11, 2019) (McCormick, V.C.) (finding after trial that two brothers exercised control through their influence as founders and senior executives combined with evidence of actual domination of independent directors). Still other decisions used functional principles to find a credible basis to suspect wrongdoing sufficient to support a books-and-records inspection. *Donnelly*, 2019 WL 5446015, at *5 (Glasscock, V.C.) (finding a credible basis to infer that owner of a 40% block with a director appointee and board observer "had significant influence on Keryx, as the company itself disclosed to cases continued to use the Conduct Control Test. They also continued to apply the Multiple Sources Principle, account for Powerful Roles, Historical Evidence, and Transactional Evidence, and recognize the possibility of Small Block Control and Contractual Control.[56]

Two functional decisions involving Elon Musk generated widespread attention.[57] Prominent commentators responded by criticizing the formal approach as novel and anomalous.[58] Their work proved highly influential, contributing to the Delaware General Assembly's passage in 2025 of a statute that defines "controlling stockholder" in formal terms, including a requirement of Majority Equivalence and a One-Third Floor.[59]

D. The Tenets of the Two Schools

The formal and functional schools make different claims about non-majority control. They can be summarized as follows:

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stockholders, that it exercised direct influence on the Board through its appointees, that it revived the merger when it otherwise might have died, that its approval was a prerequisite for the merger, and that it obtained, in connection with the merger, a side-agreement valued at $20 million, a benefit not shared with unaffiliated stockholders"); Kosinski v. GGP Inc., 214 A.3d 944, 953 (Del. Ch. 2019) (McCormick, V.C.) (finding credible basis to suspect that stockholder exercised de facto control through a 34% voting interest, power to replace one-third of the board, and a level of influence warranting disclosure in company's public filings).

56. *See* Historical Article, *supra* note 1, at 69–77.

57. *See* Tornetta v. Musk, 310 A.3d 430 (Del. Ch. 2024), *aff'd as to liability, rev'd as to remedy sub nom.*, *In re* Tesla Derivative Litig., 2025 WL 3689114 (Del. Dec. 19, 2025); *In re* Tesla Motors, Inc. S'holder Litig., No. CV 12711-VCS, 2018 WL 1560293 (Del. Ch. Mar. 28, 2018).

58. *See* Jill E. Fisch & Steven D. Solomon, *Control and Its Discontents*, 173 U. PA. L. REV. 641 (2025); Stephen M. Bainbridge, *A Course Correction for Controlling Shareholder Transactions*, 49 DEL. J. CORP. L. 525 (2025); Elizabeth Pollman & Lori W. Will, *The Lost History of Transaction-Specific Control*, 50 J. CORP. L. 1095 (2025); Lawrence A. Hamermesh, Jack B. Jacobs & Leo E. Strine, Jr., *Optimizing the World's Leading Corporate Law: A Twenty-Year Retrospective and Look Ahead*, 77 BUS. LAW. 321 (2022).

59. *See* Historical Article, *supra* note 1, at 96–97.

TABLE 1. FORMAL AND FUNCTIONAL APPROACHES TO NON-MAJORITY CONTROL

ISSUE	**FORMAL SCHOOL**	**FUNCTIONAL SCHOOL**
Issue of fact or law?	Question of fact but with requirements that can be applied as a matter of law	Question of fact
Test for Non-Majority Control	Board Control Test with control interpreted to require Majority Equivalence and Retributive Capacity	Conduct Control Test using ordinary meaning of "control"
Rhetorical Framing	Hard-To-Show Concept	Neither hard nor easy; turns on evidence
Sources	Primarily voting power	Multiple sources
Contract Rights	Irrelevant	Relevant
Powerful Roles	Deemphasized or Irrelevant	Relevant
Historical Evidence	Deemphasized or Irrelevant	Relevant
Transactional Evidence	Deemphasized or Irrelevant	Relevant
Block Size	One-Third-Is-Low Concept; *Cysive*-As-Floor Concept; One-Third Floor	Small Block Control

Those features can be used to evaluate whether statutory definitions of control use a formal or functional approach.

II. USING STATUTORY DEFINITIONS AS GUIDEPOSTS

This Article uses statutory definitions of control to evaluate whether the functional approach was novel and anomalous. Statutory definitions offer helpful guideposts because they are relatively straightforward. They openly assert what control means, which makes them less subject to debate than characterizations of major decisions or the cases issued during particular eras.

One potential objection to considering statutory definitions is that legislatures enact statutes for different purposes. Comparing definitions from statutes with different purposes could result in misleading conclusions. To the extent a statute serves different purposes than the equitable doctrine of fiduciary duties, the statutory comparison could be meaningless.

To address that concern, the Article selects statutory regimes that operate in the same areas as fiduciary duties. This Article also focuses on statutory regimes that deploy the concept of control for the same reasons that equity imposes fiduciary duties on controlling stockholders: to ensure that the law extends to those actually exercising authority, not only nominally empowered figureheads, and to constrain the ability of those with control to impose unfair transactions.

Based on those principles, this Article examines two groups of statutes. One group regulates relationships between entities and their investors. Those statutes include the 1933 and 1934 Acts and state securities statutes. The other addresses the relationships between controlling stockholders, such as holding companies, and their controlled affiliates. Those statutes include the Utility Act, the Indenture Act, the Investment Act, federal and state banking acts, state insurance acts, the Foreign Investment Risk Review Modernization Act of 2018 ("FIRRMA"), business combination statutes, and control share statutes.

By contrast, this Article does not rely on federal tax law, which imposes a brightline "80% voting and value test" as a hard floor for an "affiliated group" that can file a consolidated return.[60] That definition makes sense for federal tax law, which does not seek to impose accountability on a person who exercises actual authority or constrain unfair transactions. Instead, federal tax law seeks to limit the ability of related entities to file consolidated

60. Internal Revenue Code of 1986 § 1504(a)(1)–(2), 26 U.S.C. § 1504(a)(1)–(2) (2018).

returns in a manner that would deprive the federal government of revenue.[61] A brightline threshold achieves that result.

This Article also does not rely on regulatory regimes that use the concept of control in scenarios unlike those where fiduciary duties apply. For example, data privacy laws deploy a concept of control to ensure decision-maker accountability. The California Consumer Privacy Act applies to any "business" that collects and "determines the purposes and means of the processing of consumers' personal information."[62] It uses the concept of control to capture the larger business enterprise, defining the term as:

> [O]wnership of, or the power to vote, more than 50 percent of the outstanding shares of any class of voting security of a business; control in any manner over the election of a majority of the directors, or of individuals exercising similar functions; or the power to exercise a controlling influence over the management of a company.[63]

Thirty other states have either passed or are enacting comprehensive data privacy legislation as of the first quarter of 2025,[64] and all use the same definition for control. The data privacy statutes thus use a test for control drawn from corporate law, including the concept of "controlling influence" drawn from the Utility Act and the Investment Act. The different purposes for privacy laws, however, make them a less helpful source of insight.

Finally, this Article uses statutory definitions for the limited purpose of evaluating the claim that the functional approach was novel and anomalous. Some statutory regimes likely strive to be expansive when defining control, but that does not scramble the signal that choosing a functional approach sends. A statute could use an expansive formal test, such as by recognizing control at a low level of stock ownership. By opting for either a functional or

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61. *See* Martin J. McMahon, Jr., *Understanding Consolidated Returns*, 12 FLA. TAX REV. 125, 128 (2012) (quoting Internal Revenue Code § 1502's purpose of preventing "avoidance of such tax liability").

62. *See* California Consumer Privacy Act of 2018, Cal. Civ. Code § 1798.140(d)(1) (West 2018).

63. *Id.* § 1798.140(d)(2).

64. *See US State Privacy Legislation Tracker 2025*, IAPP, https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf [https://perma.cc/3YGX-FQGT] (last visited Mar. 16, 2026).

a formal approach, legislatures demonstrate what they believe to be the best method of framing the concept.

III. REGIMES ADDRESSING RELATIONSHIPS BETWEEN INVESTORS AND ENTITIES

The first group of statutes addresses relationships between entities and their investors. Those regimes guard against abuses by those in control, thereby playing a role comparable to fiduciary doctrine. This section examines the 1933 and 1934 Acts and state securities laws.

A. The Federal Securities Laws

Entering office after the Crash of 1929 and in the face of the Great Depression, President Roosevelt and the New Deal Congress sought to restore confidence by addressing market abuses, particularly abuses involving persons who controlled corporations through intermediaries.[65] To that end, the New Deal Congress enacted a series of securities-related statutes that included the 1933 and 1934 Acts, the Utility Act, the Indenture Act, and the Investment Act. Each exhibited the same philosophy: using a functional concept of control to reach beyond nominal legal actors to the persons pulling the strings. The 1933 and 1934 Acts focused on disclosures to investors and fall into the first category for analysis. The Utility Act, the Indenture Act, and the Investment Act took a more substantive approach and fall into the second category.

1. The 1933 and 1934 Acts

The New Deal Congress enacted the 1933 Act to govern public offerings. Its overarching goal was "to prevent further exploitation of the public by the sale of unsound, fraudulent, and worthless securities through misrepresentation."[66]

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65. *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 18–22 (2003); James M. Landis, *The Legislative History of the Securities Act of 1933*, 28 GEO. WASH. L. REV. 29, 30 (1959).

66. S. REP. NO. 73-47, at 1 (1933).

The 1933 Act responded to several control-related concerns. At the time, investors had no meaningful ability to find out who controlled an issuer,[67] even though controlled corporations comprised approximately one-third of the country's largest issuers.[68] Corporations frequently engaged in interested transactions, such as using a subsidiary to raise capital to finance the parent.[69] There was also the "dummy problem," which referred to the practice of using a controlled person or controlled entity to commit securities law violations.[70]

The Securities Act made extensive use of the concept of control in addressing those concerns. The statute "required issuers in primary public distributions to disclose to every investor all relevant information about corporate affairs and personalities,"[71] and it defined the term "issuer" to include anyone "directly or indirectly controlling or controlled by the issuer, or any person under direct or indirect common control with the issuer."[72] The Securities Act also required disclosure of secondary distributions by "controlling persons"[73] and empowered the SEC to demand consolidated balance sheets from issuers and their "controlling persons."[74] Finally, the Securities Act extended its mandates and prohibitions to "[e]very person who, by or through

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67. Note, *The Meaning of "Control" in the Protection of Investors*, 60 YALE L.J. 311, 314 (1951) [hereinafter *Protection of Investors*].

68. *Id.* at 314 n.17.

69. *See id.*

70. *See* S. 875, 73d Cong. § 4 (1933), *reprinted in* 77 CONG. REC. 2979 (1933) (describing a "dummy" as a "person who holds legal or nominal title to any property but is under moral or legal obligation to recognize another as the owner thereof; or a person who has nominal power or authority to act in any capacity but is under moral or legal obligations to act therein in accordance with the direction of another"); Laperriere v. Vesta Ins. Grp., Inc., 526 F.3d 715, 721 (11th Cir. 2008) (noting that Congress sought to "prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws."); *see also* Matthew W. Goulding, *Making It Easier to Milk the Cow: The Southern District of New York Collapses the Culpable Participation Doctrine and Sidesteps the Private Securities Litigation Reform Act*, 49 VILL. L. REV. 551, 556–57 (2004).

71. *Protection of Investors*, *supra* note 67, at 312.

72. Securities Act of 1933, ch. 38, § 2(11), 48 Stat. 74, 75 (1933) (codified as amended at 15 U.S.C. § 77b(a)(11)).

73. *Id.*

74. *Id.* § 19, 48 Stat. at 85 (codified as amended at 15 U.S.C. § 77s(a)).

stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under [the Securities Act]."[75]

Despite frequent references to control, Congress intentionally did not define the term so as "to permit the provision of the act to become effective wherever the fact of control actually exists."[76] Congress explained that the concept was "not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provision of the act to become effective wherever the fact of control actually exists."[77] The goal was to reach "not only the issuer but also affiliates or subsidiaries of the issuer and persons controlling the issuer."[78]

The following year, the New Deal Congress enacted the 1934 Act to address a variety of securities-related matters, including trading and proxy disclosures. The act sought to curtail "[s]peculation, manipulation, faulty credit control, investors' ignorance, and disregard of trust relationships by those whom the

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75. *Id.* § 15, 48 Stat. at 84 (codified as amended at 15 U.S.C. § 77o(a)) (providing for controlling person liability for false registration statement under section 77k and loss caused by materially false statement or omission on required disclosures under section 77*l*).

76. H.R. REP. NO. 73-85, at 14 (1933); *see* Lewis D. Lowenfels & Alan R. Bromberg, *Controlling Person Liability Under Section 20(a) of the Securities Exchange Act and Section 15 of the Securities Act*, 53 BUS. LAW. 1, 7–8 (1997).

77. H.R. REP. NO. 73-85, at 13–14 (1933).

78. *Id.* ("The last sentence of this definition, defining 'issuer' to include not only the issuer but also affiliates or subsidiaries of the issuer and persons controlling the issuer, has two functions. The first function is to require the disclosure of any underwriting commission which, instead of being paid directly to the underwriter by the issuer, may be paid in an indirect fashion by a subsidiary or affiliate of the issuer to the underwriter. Its second function is to bring within the provisions of the bill redistribution whether or outstanding issues or issues sold subsequently to the enactment of the bill. All the outstanding stock of a particular corporation may be owned by one individual or a select group of individuals. At some future date they may wish to dispose of their holdings and to make an offer of this stock to the public. . . . The concept of control herein involved is not a narrow one, depending upon a mathematical formula of 51 percent of voting power, but is broadly defined to permit the provisions of the act to become effective wherever the fact of control actually exists.").

law should regard as fiduciaries."[79] Congress hoped the 1934 Act would bring practices like insider trading "into disrepute and encourage the voluntary maintenance of proper fiduciary standards by those in control of large corporate enterprises whose securities are registered on the public exchanges."[80]

When enacting the 1934 Act, Congress expressed particular concern about the implications of control.[81] The act sought "[t]o catch the man who stands behind the scenes and controls the man who is in a nominal position of authority."[82]

As with the 1933 Act, the 1934 Act did not define control, because "[i]t would be difficult if not impossible to enumerate or to anticipate the many ways in which actual control may be exerted."[83] The term was "intended to include actual control as well as what has been called legally enforceable control."[84] According to the legislative history, "examples of the methods used" for legally enforceable control were "stock ownership, lease, contract, and agency."[85] The House Report also acknowledged the "well known" fact that actual control "may be

79. H.R. REP. NO. 73-1383, at 6 (1934); *see* Randall v. Loftsgaarden, 478 U.S. 647, 664 (1986) ("Congress intended to deter fraud and manipulative practices in the securities markets, and to ensure full disclosure of information material to investment decisions.").

80. H.R. REP. NO. 73-1383, at 13 ("It is hoped, however, that the publicity features of the bill will tend to bring these practices [of insider trading] into disrepute and encourage the voluntary maintenance of proper fiduciary standards by those in control of large corporate enterprises whose securities are registered on the public exchanges."); Securities Exchange Act of 1934, ch. 404, § 12, 48 Stat. 881, 892 (1934) (codified at 15 U.S.C. § 78l(b)(1)).

81. H.R. REP. NO. 73-1383, at 3 (explaining that "nearly one half of that corporate wealth is vested in the 200 largest nonbanking corporations" and that "disregarding a relatively few notable exceptions," those corporations were "controlled by those owning only a very small proportion of the corporate stock."); *id.* at 13 ("Men charged with the administration of other people's money must not use inside information for their own advantage. . . . [T]he most potent weapon against the abuse of inside information is full and prompt publicity. For that reason, this bill requires the disclosure of the corporate holdings of officers and directors and stockholders owning more than 5 percent of any class of stock . . . .").

82. 78 CONG. REC. 8086, 8095 (1934) (remarks of Rep. Lea).

83. H.R. REP. NO. 73-1383, at 26.

84. *Id.* (citing Handy & Harmon v. Burnet, 284 U.S. 136, 139 (1931), for the distinction between "actual" and "legally enforceable control").

85. *Id.*

exerted through ownership of much less than a majority of the stock of a corporation either by the ownership of such stock alone or through such ownership in combination with other factors."[86]

Like the 1933 Act, the 1934 Act used the concept of control extensively.[87] Among other things, it brought control persons within its disclosure regime,[88] and it extended liability to "[e]very person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder."[89]

Both the 1933 and 1934 Acts used a functional approach. They treated control as a question of fact to be approached using the Conduct Control Test and the Multiple Sources Principle. They contemplated Small Block Control and Contractual Control. They did not employ features of the formal approach, like the Board Control Test with Majority Equivalence or Retributive Capacity. They did not endorse the Hard-To-Show Concept or a bright-line rule like the One-Third Floor.

2. The Securities Law Definition

After the enactment of the 1933 and 1934 Acts, the SEC provided various definitions of control for parties to use when completing its forms,[90] but the definitions differed.[91] In 1948, the

86. *Id.*

87. *See, e.g.*, 15 U.S.C. § 78c(18), (21), (33) (using the formula "any person directly or indirectly controlling, controlled by, or under common control with" in the definition of associated persons); *id.* § 78c(22)(B), 23(B) (using the formula "controlled by such association" to define "securities information processor" and "clearing agency").

88. Securities Exchange Act of 1934, ch. 38, § 12(a), 48 Stat. 881, 892 (1934) (codified as amended at 15 U.S.C. § 78l(b)(1)).

89. *Id.* § 20(a), 48 Stat. 881, 899 (codified as amended at 15 U.S.C. § 78t).

90. *See, e.g.*, *In re* Doris Ruby Mining Co., Securities Act Release No. 33-1884, 1939 WL 37896 (Jan. 26, 1939) (issuing stop trading order where corporation failed to identify a controlling person as a parent and affiliate on its registration statement).

91. *See* Notice of Proposal to Amend Registration and Reporting Rules, Exchange Act Release No. 34-4121, 1948 WL 28639 (July 8, 1948) (SEC proposed rulemaking intending to publish a uniform set of rules and regulation); *see also* A.A. Sommer, Jr., *Who's "In Control"?—S.E.C.*, 21 BUS. LAW. 559, 563 n.12 (1966). Although the wording of the Exchange Act's control-related provisions differed marginally from those in the Securities Act, the SEC treated the concepts as equivalent, and the courts have agreed. *E.g.*, Hollinger v. Titan Cap. Corp., 914

SEC promulgated the Securities Law Definition as a uniform definition for both the 1933 and 1934 Acts. It states: "The term 'control' (including the terms 'controlling', 'controlled by' and 'under common control with') means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise."[92] That definition remains substantively unchanged to this day.[93]

The Securities Law Definition is plainly functional. It treats control as a question of fact and applies the Conduct Control Test by looking for "the power to direct or cause the direction of the management and policies of a person."[94] It envisions the use of the Multiple Sources Principle and explicitly recognizes Contractual Control by envisioning control "through the ownership of voting securities, by contract, or otherwise." The Securities Law Definition does not use formal concepts like the Board Control Test, nor does it require Majority Equivalence or Retributive Capacity. It does not impose any voting power based limit for stock ownership, such as the One-Third Floor. It does not even require stockholder status.

Notably, the SEC's functional approach does not provide brightline answers. Practitioners, however, accepted that fact.

> Like so many key notions the imprecise limits of [control] have been limned through the painstaking process of rule, interpretation, judicial decision and ad hoc determinations in "no action letters". Out of these there has come no mathematical standard, no slide rule computation, no certain rule which can infallibly guide counsel and client in making this most important determination. . . . [I]t has become axiomatic that in deciding who is a "controlling person" the entire situation within the corporation at the time of determination, together with some of the history of the

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F.2d 1564, 1578 (9th Cir. 1990) ("Although § 15 is not identical to § 20(a), the controlling person analysis is the same."), *cert. denied*, 499 U.S. 976 (1991).

92. Adoption of Amendments to General Rules and Regulations, Exchange Act Release No. 34-4194, 1948 WL 28703, at *3 (Dec. 17, 1948); *accord* Exchange Act Release No. 34-3285A, 1942 WL 76430, at *11 (Aug. 5, 1942).

93. 17 C.F.R. § 240.12b-2 (2025); *accord* 17 C.F.R. § 230.405 (2025). The only difference is a minor grammatical one to reflect modern usage: The modern language dropped the adverbial suffix "-ly" from "directly or indirectly."

94. *Id.* § 240.12b-2.

> corporation, must be considered; single factors—shareholdings, offices held, titles, conduct—are rarely determinative, at least not in the close cases . . . .[95]

Issuers and their lawyers acknowledged the need to make judgments about control, along with their inability to know in advance exactly when control would be found to exist.

B. State Securities Laws

State securities laws provide another helpful source of tests for control. Known as "blue sky" laws, they predated the federal securities law regime.[96] Kansas adopted the first blue sky law in 1911, and by the time the New Deal Congress enacted the 1933 and 1934 Acts, every state had some form of state-level regulatory statute.[97] Today, state securities regulators have jurisdiction over securities sold within a single state, the persons who sell them, and investment advisors who manage less than $25 million.[98] Just as the federal securities laws seek to regulate relationships between issuers and investors in a manner akin to fiduciary duties, so do state securities laws.

Since 1956, the North American Securities Administrators Association has maintained the Uniform Securities Act,[99] and the vast majority of states have adopted a version of it.[100] The Uniform Securities Act draws heavily on federal securities law concepts, including for its approach to control.[101]

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95. Sommer, *supra* note 91, at 563.

96. Joseph C. Long, *State Securities Regulation—An Overview*, 32 OKLA. L. REV. 541, 542 (1979); *see also Uniform Securities Acts*, N. AM. SEC. ADMIN. ASS'N, https://www.nasaa.org/industry-resources/uniform-securities-acts/ [https://perma.cc/KS33-ZWFW] (last visited Mar. 17, 2026).

97. *Id.*

98. *State Securities Regulators*, SEC. & EXCH. COMM'N (Jan. 11, 2005), https://www.sec.gov/answers/statesecre.htm [https://perma.cc/F9WJ-ZAXK].

99. *Uniform Securities Acts*, *supra* note 96. The most recent iteration is the Uniform Securities Act of 2002.

100. *Id.*

101. *See, e.g.*, UNIF. SECS. ACT (1956) § 202 cmt., https://www.nasaa.org/wp-content/uploads/2021/09/1956-Uniform-Securities-Act.pdf [https://perma.cc/FB63-3GAS] (last visited Mar. 17, 2026) [hereinafter *Uniform Securities Act of 1956*] (borrowing comparable provisions of the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, and SEC's Forms BD); UNIF. SEC. ACT (2002 § 102 cmt., https://www.nasaa.org/wp-content/uploads/2021/09/2002-Uniform-Securi

Like the 1933 and 1934 Acts, the Uniform Securities Act uses the term "control" but does not define it.[102] Like the 1933 and 1934 Acts, the Uniform Securities Act imposes joint and several liability on controlling persons for civil and administrative violations,[103] with forty-six states having adopted some version of that provision.[104] Thirty-three states use the concept of control when

ties-Act.pdf [https://perma.cc/MNY3-W6SA] (last visited Mar. 17, 2026) [hereinafter *Uniform Securities Act of 2002*] (first citing Reves v. Ernst & Young, 494 U.S. 56 (1990); then citing 2 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION (3d ed. rev. 1999)).

102. *See Uniform Securities Act of 2002* §§ 102 & cmt. 1, 605(a).

103. *Id.* § 509(g) (denying registration if controller violated the act); *id.* ("[A] person that directly or indirectly controls a person liable under subsections (b) through (f), unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist."); *accord id.* § 410(b) (substantially similar language extending administrative liability to controller). The 1956 act uses slightly different language. *See Uniform Securities Act of 1956* § 202 cmt. ("Every person who directly or indirectly controls a seller liable under subsection (a), . . . are also liable jointly and severally with and to the same extent as the seller, unless the non-seller who is so liable sustains the burden of proof that he did not know and in exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged.").

104. *See* ALA. CODE § 8-6-19(c) (2025); ALASKA STAT. ANN. § 45.56.710(g)(1) (West 2025); ARIZ. REV. STAT. ANN. § 44-1999 (2025); ARK. CODE ANN. § 23-42-106(d)(2)(B)(i) (West 2025); CAL. CORP. CODE § 25504 (West 2025); COLO. REV. STAT. ANN. § 11-51-604(5)(a) (West 2025); CONN. GEN. STAT. ANN. § 36b-27(c) (West 2025); DEL. CODE ANN. tit. 6, § 73-605(b) (West 2025); FLA. STAT. ANN. § 517.211(3) (West 2025); GA. CODE ANN. § 10-5-58(g)(1) (West 2025); HAW. REV. STAT. ANN. § 485A-509(g)(1) (West 2025); IDAHO CODE ANN. § 30-14-509(g)(1) (West 2025); 815 ILL. COMP. STAT. ANN. 5/13(A) (West 2025); IND. CODE ANN. § 23-19-5-9(d)(1) (West 2025); IOWA CODE ANN. § 502.509(7)(a) (West 2025); KAN. STAT. ANN. § 17-12a603(d) (West 2025); KY. REV. STAT. ANN. § 292.480(4) (West 2025); LA. STAT. ANN. § 51:714(B) (2025); ME. REV. STAT. ANN. tit. 32, § 16612 (2025); MD. CODE ANN., Corps. & Ass'ns § 11-703(c)(1) (West 2025); MASS. GEN. LAWS ANN. ch. 110A, § 410(b) (West 2025); MICH. COMP. LAWS ANN. § 451.2509(7)(a) (West 2025); MINN. STAT. ANN. § 80A.76(g)(1) (West 2025); MISS. CODE ANN. § 75-71-509(g)(1) (West 2025); MO. ANN. STAT. § 409.5-509(g)(1) (West 2025); MONT. CODE ANN. § 30-10-307(2) (West 2025); NEB. REV. STAT. ANN. § 8-1118(3) (West 2025); NEV. REV. STAT. ANN. § 90.660(4) (West 2025); N.H. REV. STAT. ANN. 421-B:5-509(g)(1) (West 2025); N.J. STAT. ANN. § 49:3-71(d) (West 2025); N.M. STAT. ANN. § 58-13C-509(G)(1) (West 2025); N.C. GEN. STAT. ANN. § 78A-56(c)(1) (West 2025); N.D. CENT. CODE ANN. § 10-04-17(6)(a) (West 2025); OKLA. STAT. ANN. tit. 71, § 1-509(G)(1) (West 2025); OR. REV. STAT. ANN. § 59.115(3) (West 2025); 70 PA. STAT. AND CONS. STAT. § 83(b) (West

determining whether a transaction is exempt from state-level regulation.[105]

Rather than formally defining control, the Uniform Securities Act offers commentary about the term's meaning that draws heavily on federal sources and the Securities Law Definition.[106] Thirty states, however, define control either by statute or through an agency regulation. Twenty-five states use the Securities Law Definition.[107] Others have variants that add an ownership

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2025); 7 R.I. GEN. LAWS ANN. § 7-11-605(d) (West 2025); S.C. CODE ANN. § 35-1-509(g)(1) (2025); S.D. CODIFIED LAWS § 47-31B-509(g)(1) (2025); TENN. CODE ANN. § 48-1-122(g) (West 2025); TEX. GOV'T CODE ANN. § 4008.055(a) (West 2025); VA. CODE ANN. § 13.1-522(C) (West 2025); WASH. REV. CODE ANN. § 21.20.430(3) (West 2025); W. VA. CODE ANN. § 32-4-410(b) (West 2025); WIS. STAT. ANN. § 551.509(7)(a) (West 2025); WYO. STAT. ANN. § 17-4-509(g)(i) (West 2025).

105. *See* ALASKA STAT. ANN. § 45.56.320(e)(1) (West 2025); CAL. CORP. CODE § 25102 (West 2025); COLO. CODE REGS. 704-1:51-3.33 (West 2025); CONN. GEN. STAT. ANN. § 36(b)-21(a)(19) (West 2025); DEL. CODE ANN. tit. 6, § 73-207(b)(15)(l) (West 2025); FLA. STAT. ANN. § 517.061(17)(b) (West 2025); HAW. REV. STAT. ANN. § 485A-201(1) (West 2025); IDAHO CODE ANN. § 30-14-201(1) (West 2025); ILL. ADMIN. CODE tit. 14, § 130.830 (2025); IND. CODE ANN. § 23-19-2-1(1) (West 2025); Iowa Code Ann. § 502.202(18) (West 2025); KAN. STAT. ANN. § 17-12a603(d) (West 2025); KY. REV. STAT. ANN. § 292.410(1)(p) (West 2025); ME. REV. STAT. ANN. tit. 32, § 16202(19) (West 2025); MICH. COMP. LAWS ANN. § 451.2202(1)(r) (West 2025); MINN. STAT. ANN. § 80A.45 (West 2025); MISS. CODE ANN. § 75-71-201(1) (West 2025); MO. ANN. STAT. § 409.2-201(1) (West 2025); MONT. CODE ANN. § 30-10-105(22)(e)(i) (West 2025); N.H. REV. STAT. ANN. 421-B:2-201(1) (West 2025); N.J. STAT. ANN. § 49:3-50(b)(2)(ii) (West 2025); N.M. STAT. ANN. § 58-13C-201(A) (West 2025); N.C. GEN. STAT. ANN. § 78A-17(2) (West 2025); N.D. CENT. CODE ANN. § 10-04-05(1) (West 2025); OHIO REV. CODE ANN. § 1707.058(D) (West 2025); OKLA. STAT. ANN. tit. 71, § 1-202 (West 2025); 7 R.I. GEN. LAWS ANN. § 7-11-401 (West 2025); S.C. CODE ANN. § 35-1-201(1) (2025); S.D. CODIFIED LAWS § 47-31B-201(1) (2025); 7 TEX. ADMIN. CODE § 139.27 (West 2025); WASH. REV. CODE ANN. § 21.20.320(15)(b) (West 2025); WIS. STAT. ANN. § 551.201(1)(a) (West 2025); WYO. STAT. ANN. § 17-4-201(a)(i) (West 2025).

106. *See Uniform Securities Act of 2002* § 509 cmt. 8 (citing 4 LOUIS LOSS & JOEL SELIGMAN, SECURITIES REGULATION 1703–27 (3d ed. rev. 2000)); *Uniform Securities Act of 1956* §§ 401(c) cmt., 401(l) cmt., 402(a)(10), 402(b)(3) (citing LOUIS LOSS, SECURITIES REGULATION (1951 with 1955 Supp.) for the meanings of "fraud," "solicitation," "current transaction," and other terms and phrases); *accord* LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 455–69 (5th ed. 2004) [hereinafter FUNDAMENTALS OF SECURITIES REGULATION].

107. *See* ALA. CODE § 8-6-2(24) (2025); ALASKA ADMIN. CODE tit. 3, § 8.950 (2025); 3-14-2 ARK. CODE R. § 102.01 (11); CONN. GEN. STAT. ANN. § 36b-41(6); 6 DEL. ADMIN .CODE § 708 (2025); FLA. STAT. ANN. § 517.021 (West 2025); HAW. CODE R. § 16-39-101 (West 2025); KAN. ADMIN. REGS. § 81-1-1 (2016); LA. STAT. ANN. § 51:702(4)

threshold to create a presumption of control. Only California uses a bright-line threshold to establish control, and it uses 10%.[108] No state uses a bright-line threshold to foreclose control.

Examples of statutes creating presumptions of control include the following:

- Illinois defines a "controlling person" as any person or group beneficially owning (i) 25% or more of the issuer's outstanding securities or (ii) "such number of outstanding securities of the issuer of such security as would enable such person, or group of persons, to elect a majority of the board of directors or other managing body of such issuer."[109]
- Maine defines control as either (i) ownership of 25% or more of the equity interest of the entity, (ii) "if under the federal Bank Holding Company Act of 1956, as amended, under the federal Home Owners' Loan Act, Section 1467A, as amended, or under the Federal Deposit Insurance Act, as amended, or regulations or policy statements issued thereunder, that company is presumed to control the subsidiary," or (iii) "a determination has been made by the superintendent that the company exercises a controlling influence over the management and policies of the subsidiary."[110]
- Michigan defines control as "the power to exercise a controlling influence over the management or policies of

(2025); MD. CODE REGS. (2025); 950 MASS. CODE REGS. 14.401 (2025); MINN. R. 2715.7100 (2025); 1-140 MISS. CODE R. § 1.03(G) (LexisNexis 2025); 48 NEB. ADMIN. CODE § 2-002 (LexisNexis 2025); OHIO REV. CODE ANN. § 1707.01(v)(i) (West 2025); Okla. Admin. Code § 660:11-11-1 (West 2025); OR. REV. STAT. ANN. § 59.015 (West 2025); 70 PA. STAT. AND CONS. STAT. § 1-102 (West 2025); S.C. CODE ANN. § 35-2-208 (2025); TENN. CODE ANN. § 48-1-102(7) (West 2025); 7 TEX. ADMIN. CODE § 107.2 (West 2025); UTAH ADMIN. CODE R 164-4-9 (LexisNexis 2025); VA. CODE ANN. § 13.1-501 (West 2025); W. VA. CODE R. § 111-1-15 (West 2025). New York has not adopted a version of the Uniform Act but follows the Securities Law Definition. N.Y. COMP. CODES R. & REGS. tit. 13, § 12.3 (West 2025).

108. CAL. CODE REGS. tit. 10, § 260.216.16 (2025) ("For the purposes of this section [on broker-dealer affiliation], 'controlling person' means any person owning or controlling 10% or more of the voting securities of a broker-dealer or the parent of a broker-dealer and any partner of a broker-dealer.").

109. 815 ILL. COMP. STAT. ANN. 5/2.4 (West 2025).

110. ME. REV. STAT. ANN. tit. 9-B, § 1011(4); 02-032-506 ME. CODE R. § 2(2) (LexisNexis 2025).

a company, unless such power is solely the result of an official position with such company," and a person who owns "more than 25% of the voting securities of a company is presumed to control that company."[111]

- Vermont uses the same definition as Michigan.[112]
- Nevada defines a "control person" as a person who (i) owns or controls 10% or more of the voting stock of a corporation, (ii) is an officer or director of the corporation, or (iii) "[i]s in a position to influence the decision-making processes of a corporation."[113]

Including the preceding five states, a total of thirteen establish a presumption of control at a specified ownership percentage. Three states presume control at 10% ownership.[114] Two states presume control at 20% ownership.[115] Eight states presume control at 25%.[116] No state uses a threshold to create a presumption against control.

The state securities laws thus use a functional test that follows the Securities Law Definition. None of the statutes use bright-line cutoffs to foreclose non-majority control or establish a presumption against control. Only one state securities statute—California—uses a bright-line rule, and it provides for the existence of non-majority control starting at 10% ownership. The thirteen states that use presumptions for control set the levels at 10%, 20%, or 25%, consistent with Small Block Control. The state securities statutes do not use formal concepts like the Board Control Test, Majority Equivalence, Retributive Capacity, or the One-Third Floor.

111. MICH. ADMIN. CODE r. 451.1.1(e) (2019).

112. VT. STAT. ANN. tit. 8, § 2101(4)(A); VT. ADMIN. CODE § 4-4-3:3(3.15)(a)(12)(A)(i) (2025).

113. NEV. ADMIN. CODE § 90.035 (West 2025).

114. KAN. ADMIN. REGS. § 81-1-1 (2016); NEV. ADMIN. CODE § 90.035 (West 2025); S.C. CODE ANN. § 35-2-208 (2025).

115. 48 NEB. ADMIN. CODE § 2-002 (2025); OKLA. ADMIN. CODE § 660:11-11-1 (West 2025).

116. 3-14-2 ARK. CODE R. § 102.01 (11); 6 DEL. ADMIN. CODE § 708 (2025); HAW. CODE R. § 16-39-101 (West 2025); 815 ILL. COMP. STAT. ANN. 5/2.4 (West 2025); LA. ADMIN. CODE tit. 10, pt. 13, § 103; MICH. ADMIN. CODE r. 451.1.1(e) (2019); VT. STAT. ANN. tit. 8, § 2101(4)(A); WASH. ADMIN. CODE § 460-24A-005 (2025).

C. Evaluating the Statutory Regimes Addressing Relationships Between Investors and Entities

The following table compares the attributes of the statutory regimes addressing relationships between investors and entities with the tenets of the formal and functional schools. The statutory regimes take a functional approach.

TABLE 2. FORMAL, FUNCTIONAL, AND INVESTOR STATUTE APPROACHES TO NON-MAJORITY CONTROL

ISSUE	**FORMAL SCHOOL**	**FUNCTIONAL SCHOOL**	**INVESTOR STATUTES**
Issue of fact or law?	Fact but with bright-line tests that can foreclose non-majority control	Fact	Fact with minority thresholds establishing presumptions of control
Test for Non-Majority Control	Board Control Test plus Majority Equivalence and Retributive Capacity	Ordinary meaning of control	Ordinary meaning of control
Rhetorical Framing	Hard-To-Show Concept	Neither hard nor easy; turns on evidence	None; presumptions in favor of non-majority control
Sources	Primarily voting power	Multiple sources	Multiple sources
Contract Rights	Irrelevant	Relevant	Relevant
Powerful Roles	Deemphasized or Irrelevant	Relevant	Relevant
Historical Evidence	Deemphasized or Irrelevant	Relevant	Relevant

ISSUE	**FORMAL SCHOOL**	**FUNCTIONAL SCHOOL**	**INVESTOR STATUTES**
Transactional Evidence	Deemphasized or Irrelevant	Relevant	Relevant
Block Size	One-Third-Is-Low Concept; *Cysive*-As-Floor Concept; One-Third Floor	Small Block Control	Small Block Control, including presumptions in favor of non-majority control

IV. CONTROLLERS AND CONTROLLED COMPANIES

A second broad category of statutes governs relationships between a controlling company and a controlled entity. The controlled entity can be a regulated company like a public utility, a bank, or insurance company. Or the statute can address a scenario where the acquisition of control creates concerns, such as an investment firm's control over an operating company, foreign control over an entity operating in the United States, or a successful partial acquisition by a hostile bidder. These statutes invariably use a functional test. Consistent with the concept of Small Block Control, some statutes use an ownership threshold to establish or presume control. Other statutes incorporate the Multiple Sources Principle and create presumptions of control based on combinations of stock ownership with other features such as Powerful Roles or contractual rights.

A. The Utility Act

After enacting the 1933 and 1934 Acts, the New Deal Congress turned to public utility holding companies. A congressional investigation uncovered widespread abuses in which holding companies exercised their control over operating subsidiaries to drain off their earnings.[117] Congress enacted the Utility Act in the

117. *See* H.R. REP. NO. 73-827 (1933-35) (describing abuses); *Protection of Investors*, *supra* note 67, at 234 (explaining that public utility companies were "notorious examples" of situations in which holding companies used their

belief that holding companies "should not profit from dealings with subsidiaries and affiliates where there is no semblance of actual bargaining to get the best value and the best price."[118] By seeking to police interested transactions, the Utility Act served a purpose comparable to fiduciary review.[119]

The Utility Act empowered the SEC to regulate the relationships between utility holding companies and any operating subsidiaries over which they exercised either "control" or a "controlling influence."[120] Like the 1933 and 1934 Acts, the Utility Act did not define "control," but the act did define the term "holding company" in a manner that defined control by implication. Under the Utility Act, the term "holding company" meant:

> (A) any company which directly or indirectly owns, controls, or holds with power to vote 10 per centum or more of the

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control to "drain off subsidiary earnings . . . through intercompany transactions").

118. H.R. REP. NO. 74-1318, at 2 (1935); *see Protection of Investors*, *supra* note 67, at 323–24 ("'Control' over several subsidiaries was often concentrated in the hands of a few people by a small investment in holding company stock. These people were then in a position to drain off subsidiary earnings through interlocking directorates or officerships and through intercompany transactions.").

119. *See Protection of Investors*, *supra* note 67, at 312–13 ("Congress next directed its attention to the abuses of holding and investment companies. This time, however, affirmative regulation rather than mere disclosure was deemed necessary. Holding company abuses were most flagrant in the public utility industry. . . . The act was made broad enough to cover any company in a position to exploit its subsidiaries—from the fully integrated holding company to the company which existed only to invest in its subsidiaries."); *id.* at 324–25 (describing holding company abuses).

120. Public Utility Holding Company Act of 1935, ch. 687, 49 Stat. 803 (1935) , *repealed by* Energy Policy Act, Pub. L. No. 109-58, 119 Stat. 972 (2005) (codified as amended at 42 U.S.C. §§ 16451 *et seq.*). The Public Utility Holding Company Act was eventually repealed by the Public Utility Holding Company Act of 2005, which transferred much of the SEC's regulatory authority to the Federal Energy Regulatory Commission. Before then, federal public utility regulation was split among several agencies, including the SEC. Douglas W. Hawes, *Public Utility Holding Company Act of 1935—Fossil or Foil?*, 30 VAND. L. REV. 605, 605 (1977). The principal task of the SEC was to regulate electric and gas utility holding company systems when selling securities and assets, engaging in intra-system transactions, and entering into servicing and management arrangements. *See id.*

> outstanding voting securities of a public-utility company of a company which is a holding company by virtue of this clause or clause (B), *unless the Commission, as hereinafter provided, by order declares such company not to be a holding company*; and
>
> (B) any person which the Commission determines, after notice and opportunity for hearing, directly or indirectly to exercise (either alone or pursuant to an arrangement or understanding with one or more other persons) such a controlling influence over the management or policies of any public utility or holding company as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that such person be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.[121]

That definition established two separate tests for control. One was a presumption of control based on ownership of 10% or more of a company's voting power, unless the SEC determined otherwise.[122] The other was an open-ended standard based on the ability "to exercise . . . such a controlling influence over the management or policies of any public utility or holding company" so as to make regulation "necessary or appropriate in the public interest or for the protection of investors or consumers."[123] The presumption of control at 10% voting power applied to "any company," while the open-ended test based on "controlling influence" applied to "any person," including both companies and individuals.

The SEC used the Securities Law Definition to interpret the concept of control under the Utility Act. In one section of a ruling addressing multiple subsidiaries, the SEC found that the power to exercise 33.13% of the voting power of a subsidiary represented "a present power to exercise control."[124] The SEC also considered Historical Evidence, including that the shares were purchased to

121. Public Utility Holding Company Act of 1935 § 2(7), 49 Stat. at 806. The Public Utility Holding Company Act of 2005 retained this definition. *See* 42 U.S.C. § 16451(8).

122. *Protection of Investors*, *supra* note 67, at 325–26 (noting that the Utility Act defined a holding company "as any company which owned at least 10% of the voting stock of a utility or another holding company" unless the company "could prove to the SEC that it did not exercise a 'controlling influence' over its immediate subsidiary").

123. Public Utility Holding Company Act of 1935 § 5, 49 Stat. at 812.

124. *In re* Koppers United Co., Public Utility Holding Company Act Release No. 35-3812, 1942 WL 33921, at *5 (Sep. 28, 1942) (ruling regarding Brockton Gas Light Company).

obtain control, as well as the likelihood that the block could control the outcome at a stockholder meeting.[125]

In another section of the same ruling but addressing a different subsidiary, the SEC found that a holding company's ownership of stock carrying 23.87% of total voting power deserved "very considerable weight" in assessing control.[126] The SEC again considered Historical Evidence, including the parent's involvement in past business decisions by the subsidiary,[127] and also considered Powerful Roles, such as the positions that parent executives held at the subsidiary.[128]

In a challenge to yet another ruling on multiple subsidiaries, a court upheld a finding of control based on a parent's 20% ownership stake, observing that "much less than a majority of stock is frequently sufficient for purposes of control."[129] The court elsewhere upheld a finding of control where partners in one firm owned 30% of a new firm established by their former colleagues.[130]

The preceding rulings addressed the issue of control. The SEC interpreted the concept of a controlling influence to require less than control.[131] Because this Article focuses on non-majority

125. *Id.*

126. *See id.* at *8 (ruling regarding Brooklyn Union Gas Company).

127. *Id.* at *8–17.

128. *Id.* at *18–20.

129. Morgan Stanley & Co. v. SEC, 126 F.2d 325, 328 (2d Cir. 1942) ("Furthermore, the 20% holding of United is the largest block of voting securities; and there is supporting evidence in the record showing various connections between United and Columbia. We are not unaware that much less than a majority of stock is frequently sufficient for purposes of control, and we see no reason to contest the legislative view that 10% may be sufficient.").

130. *Id.* at 329.

131. *See In re* H. M. Byllesby & Co. & the Byllesby Corp., Public Utility Holding Company Act Release No. 35-1882, 1940 WL 36326, at *9 (Jan. 15, 1940) ("It seems clear that Congress meant . . . something less in the form of influence over the management or policies of a company than 'control' . . . ."); *see also In re* West Penn Rys. Co., 1937 WL 32997, at *4 (Dec. 30, 1937) ("Sections 2(a)(7) and 2(a)(8) of the Act make a verbal distinction between situations involving the exercise of 'control' by one corporation over another, in which case the relationship of parent and subsidiary corporation is a necessary corollary, and situations involving the exercise of a 'controlling influence over the management of policies of' another company, in which case the other company is not to be treated as a subsidiary unless the Commission makes the further finding that the controlling influence so exercised is of such character' 'as to make it

control, it might not seem necessary to delve into the lesser concept, but some statutes have defined control in terms of the ability to exercise a controlling influence.[132] That makes it worth discussing.

Like the existence of control, the existence of controlling influence is a question of fact. One court defined it as "the act or process, or power of producing an effect which may be without apparent force or direct authority and is effective in checking or directing action, or exercising restraint or preventing free action" and noted that it "does not necessarily mean that those exercising controlling influence must be able to carry their point."[133] "A controlling influence may be effective without accomplishing its purpose fully."[134] It could be established by pointing to its existence "over one phase of a company's business, such as over underwriting policies."[135] As with the concept of "control," the SEC determined that "the form in which a 'controlling influence' is exercised is unimportant."[136] Its existence was "'determined by reference to realities and not by reference to legal abstractions.'"[137] Ultimately, "the difference between 'control' and 'controlling influence' is one of degree."[138]

necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.'"). *See generally* FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 106, at 469; *accord Protection of Investors*, *supra* note 67, at 326–27 ("The Commission announced early that 'controlling influence under the Holding Company Act required a good deal less than 'control' under the Securities Act."); Sommer, *supra* note 91, at 559 (noting that the term "controlling influence" has been "construed as a lesser degree of control").

132. *See infra* Part IV.D.2.

133. Detroit Edison Co. v. SEC, 119 F.2d 730, 739 (6th Cir. 1941) (finding a controlling influence existed where holding company controlled 19.28% of subsidiary, used subsidiary's offices, and had overlapping officers). *Compare SEC Interpretation of "Holding Company" and "Affiliate" under the Public Utility Holding Company Act*, 51, YALE. L.J. 1018, 1022 (1941) (discussing *Detroit Edison* ruling), *with* Smith Warder, *Holding Company Act – "Controlling Influence*," 40 MICH. L. REV. 274, 275–77 (1941) (criticizing *Detroit Edison* ruling).

134. *Detroit Edison*, 119 F.2d at 739.

135. *In re H. M. Byllesby*, 1940 WL 36326, at *11 n.23.

136. *Id.* at *9.

137. *Id.* at *11 (quoting *In re* Int'l Paper & Power Co., 1937 WL 32739, at *3 (May 5, 1937)).

138. FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 106, at 469.

The Utility Act took a functional approach to non-majority control. The statute itself recognized the existence of Small Block Control by creating a presumption of non-majority control at 10% ownership. Rulings treated non-majority control as a question of fact, applied the Multiple Sources Principle, and recognized Small Block Control, particularly when supported by Powerful Roles and Historical Evidence. The Utility Act did not use formal concepts like the Board Control Test, Majority Equivalence, Retributive Capacity, or any form of bright-line ownership floor. It did not require stockholder status.

B. The Investment Act

The New Deal Congress enacted the Investment Act to regulate companies primarily engaged in the business of investing and trading securities.[139] The first investment company was organized in 1922, and by 1929, there were over 600.[140] When the New Deal Congress took action, investment companies had acquired a level of assets that rivaled large banks and were in a position to control or influence the direction of operating companies.[141]

The Investment Act sought to ensure adequate disclosure, curtail interested transactions, and promote sound governance structures.[142] Congress was also concerned that small investors

139. *See* Investment Company Act of 1940, ch. 686, § 3(a), 54 Stat. 789, 797 (1940) (codified as amended at 15 U.S.C. § 80a-3(a)); Kelly S. Kibbie, *Dancing with the Derivatives Devil: Mutual Funds' Dangerous Liaison with Complex Investment Contracts and the Forgotten Lessons of 1940*, 9 HASTINGS BUS. L.J. 195, 196 n.2 (2013); H. Norman Knickle, *The Investment Company Act of 1940: SEC Enforcement and Private Actions*, 23 ANN. REV. BANKING & FIN. L. 777, 780–81 (2004); Alfred Jaretzki Jr., *The Investment Company Act of 1940*, 26 WASH. U. L.Q. 303, 312 (1941).

140. *Protection of Investors*, *supra* note 67, at 329 n.88.

141. *See* S. REP. NO. 76-1775, at 4 (1940); H.R. REP. NO. 76-2639, at 7 (1940).

142. *See* Investment Company Act of 1940, § 1(b)(1), (2), (4), 54 Stat. 789, 790 (1940) (codified as amended at 15 U.S.C. § 80a-1(b)(1), (2), (4)); *accord* Daily Income Fund, Inc. v. Fox, 464 U.S. 523, 536 (1984) ("As we have previously noted, Congress adopted the Investment Company Act of 1940 because of its concern with the potential for abuse inherent in the structure of investment companies. Unlike most corporations, an investment company is typically created and managed by a pre-existing external organization known as an investment adviser. Because the adviser generally supervises the daily operation of the fund and often selects affiliated persons to serve on the company's board of directors,

generally bought shares in an investment company to obtain diversification, but investment companies often favored concentrated positions in companies that they controlled or sought to control.[143] Investment company stockholders could suffer from the failure of a controlled company,[144] and stockholders of controlled companies could be exploited through interested transactions with the controller.[145] By seeking to regulate these transactions, the Investment Act served a purpose comparable to fiduciary duty law.

Unlike the Securities Law Definition, the Investment Act established a presumption of non-majority control based on voting power. It states:

> Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more

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the relationship between investment advisers and mutual funds is fraught with potential conflicts of interest." (citations and internal quotation marks omitted)); Knickle, *supra* note 139, at 783 ("For purposes of simplification, the Act can be summarized as having three distinct purposes: (i) requiring registration and disclosure; (ii) addressing the significant role of fund directors; and (iii) regulating conflicts of interest and fiduciary duties.").

143. *Protection of Investors*, *supra* note 67, at 329–30.

144. *Id.*

145. S. REP. NO. 76-1775, at 7 (1940) (reviewing past congressional and SEC studies on problems in the investment trust industry); *see also* H.R. REP. NO. 76-2639, at 7–8 (1940) ("These assets can be easily misappropriated, 'looted,' or otherwise misused for the selfish purposes of those in control of these enterprises. In the absence of regulating legislation, individuals who lack integrity will continue to be attracted by the opportunity available for personal profit in the control of the liquid assets of investment trusts and investment companies."). Like the Securities Act and the Exchange Act, the Investment Act extended liability to controlling persons, but it did so using standard anti-evasion language providing that "[i]t shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this subchapter or any rule, regulation, or order thereunder." *See* Investment Company Act of 1940, § 48(a), 54 Stat. 789, 846 (1940). Congress viewed that provision as a standard prohibition on a person exercising control to accomplish indirectly what the person could not do directly. *See* H.R. REP. NO. 76-2639, at 27 (1940) (describing Section 48(a) as one of the "the usual provisions" found in securities-related statutes).

> than 25 per centum of the voting securities of any company shall be presumed not to control such company.[146]

The presumption of non-majority control thus started at 25% ownership, a level inconsistent with a bright-line preclusion of control like the One-Third Floor.

More generally, the Investment Act initially defined "control" as "the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company."[147] That definition expanded on the Securities Law Definition by speaking in terms of "the power to exercise a controlling influence," rather than "the power to direct or cause the direction of the management and policies."[148]

To give meaning to "controlling influence," the SEC built on its interpretations under the Utility Act term.[149] Generally speaking, the SEC reasoned that a controlling influence meant something less than control.[150] In one ruling, the SEC explained

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146. 15 U.S.C. § 80a-2(a)(9) (2018).

147. *Id.*

148. 17 C.F.R. § 240.12b-2; *accord id.* § 230.405.

149. *See Protection of Investors*, *supra* note 67, at 331; *accord id.* at 332 & n.103. For a more detailed discussion of "controlling influence," see *supra* Part IV.A.

150. *See In re* H. M. Byllesby & Co. & the Byllesby Corp., Public Utility Holding Company Act Release No. 35-1882, 1940 WL 36326, at *9 (Jan. 15, 1940) ("It seems clear that Congress meant . . . something less in the form of influence over the management or policies of a company than 'control' . . . ."); *see also In re* West Penn Rys. Co., 1937 WL 32997, at *4 (Dec. 30, 1937) ("Sections 2(a)(7) and 2(a)(8) of the Act make a verbal distinction between situations involving the exercise of 'control' by one corporation over another, in which case the relationship of parent and subsidiary corporation is a necessary corollary, and situations involving the exercise of a 'controlling influence over the management of policies of' another company, in which case the other company is not to be treated as a subsidiary unless the Commission makes the further finding that the controlling influence so exercised is of such character 'as to make it necessary or appropriate in the public interest or for the protection of investors or consumers that the applicant be subject to the obligations, duties, and liabilities imposed in this title upon holding companies.'"). *See generally* FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 106, at 469; *accord Protection of Investors*, *supra* note 67, at 326–27 ("The Commission announced early that 'controlling influence under the Holding Company Act required a good deal less than 'control' under the Securities Act."); Sommer, *supra* note 91, at 559 (noting that the term "controlling influence" has been "construed as a lesser degree of control").

that Congress sought "to include within the orbit of 'control' situations where less than absolute and complete domination of a company is present" and that "facts other than voting power alone are to be taken into consideration in determining whether or not 'controlling influence' exists."[151] Those factors included "[h]istorical, traditional or contractual associations of persons with companies or a dominating persuasiveness of one or more persons acting in concert or alone."[152] The SEC also explained that the existence of a controlling influence did not require that it be "actually exercised"; "an ability or power to exercise from time to time a controlling influence in the management and policies of a company is 'control' for the purposes of the Act."[153]

Using the Investment Act definition, the SEC found control to exist in the following scenarios:

- A 17% stockholder whose officers served as four of the eleven members of the corporation's board of the subsidiary, where the other seven directors had joined the

151. *In re* M. A. Hanna Co., Investment Company Act Release No. IC-265, 1941 WL 37944, at *5 (Nov. 25, 1941); *accord In re* Invs. Mutual, Inc., Investment Company Act Release No. IC-4595, 1966 WL 84134, at *3 (May 11, 1966) ("'Controlling influence' also means the 'act or process, or power of producing an effect] which may be without apparent force or direct authority and is effective in checking or directing action, or exercising restraint or preventing free action.'").

152. *In re M. A. Hanna*, 1941 WL 37944, at *5; *accord In re* Chicago Corp., Investment Company Act Release No. IC-1203, 1948 WL 29459, at *4 (Aug. 24, 1948) ("Considered in the light of the legislative history and the overall purposes of the statute, it is clear that the statutory concept of control embraces within it those pressures and influences, at times admittedly delicate, by which an investment company can exercise a dominating persuasiveness in the affairs of the portfolio company."); *see also* Globe Woolen Co. v. Utica Gas & Elec. Co., 224 N.Y. 483, 489 (1918) (Cardozo, J.) ("A dominating influence may be exerted in other ways than by a vote.").

153. *In re M. A. Hanna*, 1941 WL 37944, at *5 ("Nor is the statutory definition to be restricted to cases where a controlling influence in the management and policies of a company is actually exercised; an ability or power to exercise from time to time a controlling influence in the management and policies of a company is 'control' for the purposes of the Act."); *accord In re Invs. Mutual*, 1966 WL 84134, at *3 ("A controlling influence need not be actually exercised; the latent power to exercise it is sufficient under the Act."); *In re Chicago Corp.*, 1948 WL 29459, at *10 ("It is sufficient if the power exists in a latent form. In determining the existence of this latent power, consideration may of course be given to events which have not occurred but may occur and which would result in the invocation of the latent power.").

board when the stockholder held 67% of the stock, where two of the stockholder's officers served in senior executive positions at the corporation and as two members of a five member executive committee, and where the two businesses had "a definite historical association" and were "closely associated";[154]

- A 27% stockholder who had been involved in the corporation's business since its formation, appointed three out of the corporation's eleven directors, and whose president acted as the chairman of the corporation's executive committee and devoted substantial time to its business, and where the stockholder managed several of the corporation's businesses by contract;[155] and
- A 3% stockholder who was closely associated with the investment advisor's largest stockholder, an individual whose family had dominated its affairs for years.[156]

The Investment Act took a functional approach to non-majority control. The Investment Act recognized the existence of Small Block Control by creating a presumption of non-majority control at 25% ownership. Rulings treated non-majority control as a question of fact, applied the Multiple Sources Principle, and considered Powerful Roles, Historical Evidence, and Transactional Evidence. The Investment Act did not use more restrictive concepts like the Board Control Test, Majority Equivalence, or Retributive Capacity. The Investment Act did not impose a bright-line voting power cutoff like the One-Third Floor.

154. *In re* Bessemer Sec. Co., Investment Company Act Release No. 485, 1943 WL 30569, at *4, *6–7 (Apr. 28, 1943).

155. *In re M. A. Hanna*, 1941 WL 37944, at *5.

156. *In re* Transit Inv. Corp., Investment Company Act Release No. 927, 1946 WL 24141, at *3–4 (Aug. 15, 1946) ("It is apparent from the record that Horan [a 3% stockholder] was closely associated with Joseph W. Salus [the largest stockholder] in Broad Street affairs, and was a close personal friend of Salus. Horan was also closely associated with other members of the Salus family, representing them in numerous important legal matters. It appears that during the period of Joseph Salus's last illness, he turned to Horan, who theretofore has handled the legal matters for Broad Street, to manage the bank. Upon Salus's death, Horan was unanimously elected president of Broad Street. . . . [This] rebuts the presumption arising by reason of his owning less than 25 per centum of Broad Street's voting securities.").

C. The Indenture Act

The New Deal Congress enacted the Indenture Act to regulate bond issuances.[157] A corporate bond indenture governs the debt securities that the borrower issues under its terms and generally empowers a trustee to exercise the bondholders' rights. Through the Indenture Act, Congress sought to address "a long-established practice whereby issuers and underwriters appointed bond indenture trustees whom they 'controlled' and whose cooperation was assured in subsequent bond defaults and reorganizations."[158] The Indenture Act flatly prohibited an issuer or underwriter from appointing any trustee who "directly or indirectly controls or is directly or indirectly controlled by or is under direct or indirect common control with" an obligor or an underwriter (if the indenture is in default).[159] By regulating bond trustees and their ties to issuers, the Indenture Act regulated an area traditionally governed by fiduciary duties.

Like the Securities Act and the Exchange Act, the Indenture Act did not define control. But the Indenture Act prohibited trustees from serving when they faced a disqualifying conflict of interest, then identified the following situations as involving a conflict:

- If the obligor or one of its directors, partners, or executive officers individually owned more than 10% or collectively more than 20% of the trustee's voting securities;[160]
- If the trustee beneficially owned more than 5% of the obligor's voting securities or more than 5% of the voting securities of the obligor's affiliates;[161] or
- If the trustee beneficially owned more than 10% of the underwriter's voting securities.[162]

157. Trust Indenture Act of 1939, ch. 411, 53 Stat. 1149 (1939) (codified as amended at 15 U.S.C. §§ 77aaa–77bbbb).

158. *Protection of Investors*, *supra* note 67, at 313.

159. Trust Indenture Act of 1939, 53 Stat. at 1159–60 (codified as amended at 15 U.S.C. § 77jjj(a)(5), (b)(3)).

160. *Id.* (codified as amended at 15 U.S.C. § 77jjj(b)(5)).

161. *Id.*

162. *Id.*

As a practical matter, the Indenture Act recognized that a conflict of interest existed at levels of ownership as low as 5%, implicitly suggesting an inference of control at that level.[163]

The Indenture Act took a functional approach. It recognized Small Block Control and called for considering Powerful Roles. It did not use restrictive concepts like the Board Control Test, Majority Equivalence, or Retributive Capacity. It did not impose a bright-line voting power cutoff like the One-Third Floor.

D. Banking Statutes

Banking law uses the concept of control extensively. Conceptually, banking regulation strives to support the economy's need for financial intermediation while at the same time managing the systemic risk inherent in the banking sector and the threat of spillover to non-banking sectors. The New Deal Congress enacted the Glass-Steagall Act of 1933, which addressed speculative bank investment and created the Federal Deposit Insurance Corporation.[164] For purposes of control, however, the signature statute is the Banking Holding Company Act of 1956 (the "Bank Act"), which uses the concept to address the danger of undue concentration in the banking industry.[165] The Bank Act also mandates that bank holding companies not control nonbanking

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163. *See* S. REP. NO. 76-253, at 8 (1939). When Congress enacted the Indenture Act, it was market practice to exculpate trustees for liabilities arising out of or relating to conflicts of interest. FUNDAMENTALS OF SECURITIES REGULATION, *supra* note 106, at 462.

164. *Banking Act of 1933 (Glass-Steagall)*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/glass-steagall-act [https://perma.cc/T2EL-VGF9].

165. S. REP. NO. 84-1095, at 2 (1955) ("[T]he principal problems in the bank holding company field arise from two circumstances: (1) The unrestricted ability of a bank holding company group to add to the number of its banking units, making possible the concentration of commercial bank facilities in a particular area under a single control and management; and (2) The combination under single control of both banking and nonbanking enterprises, permitting departure from the principle that banking institutions should not engage in business wholly unrelated to banking. Such a combination involves the lending of depositors' money, whereas other types of business enterprise, not connected with banking, do not involve this element of trusteeship.").

assets or conduct business unrelated to banking.[166] State bank holding company statutes have similar goals.

1. The Bank Act

The Bank Act defines a bank holding company as any company that exercises control over any bank.[167] The statute has two tests for non-majority control.[168]

The first test deems control to exist when a holding company "directly or indirectly or acting through one or more other persons owns, controls, or has power to vote 25 per centum or more of any class of voting securities of the bank or company."[169] This test uses 25% ownership as a brightline threshold, but to establish control rather than to foreclose it.

A second test authorizes the Board of Governors of the Federal Reserve System to determine that a holding company "directly or indirectly exercises a controlling influence over the management or policies of the bank or company."[170] That test deploys the concept of a controlling influence from the Investment Act, albeit with one change. Where the Investment Act presumes non-control when an investment company owns 25% or less of another company, the Bank Act presumes non-control at 5% ownership or less.[171]

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166. *Id.* at 1–2.

167. Bank Holding Company Act of 1956, ch. 249, § 2(a), 70 Stat. 133, 133 (1956) (codified as amended at 12 U.S.C. § 1841(a)(1)).

168. A third test deems control to exist when a holding company "controls in any manner the election of a majority of the directors or trustees of the bank or company." *Id.* The original 1956 legislation did not include that test. *See* Bank Holding Company Act of 1956, § 3(a), 70 Stat. 133, 133 (1956) (codified as amended at 12 U.S.C. § 1842).

169. Bank Holding Company Act of 1956, § 2(a), 70 Stat. at 133 (codified as amended at 12 U.S.C. § 1841(a)(1)).

170. *Id.*

171. *Compare* 15 U.S.C. § 80a-2(a)(9) (presumption of non-control in the Investment Act), *with* 12 U.S.C. § 1841(a)(3) (presumption of non-control in the Bank Act). The Federal Reserve has adopted regulations that start with the three statutory definitions and add a fourth: Control includes "[c]onditioning in any manner the transfer of 25 percent or more of the outstanding shares of any class of voting securities of a company upon the transfer of 25 percent or more of the outstanding shares of any class of voting securities of another company." 12 C.F.R. § 225.2 (2026).

The implementing regulations for the Bank Act include an entire subpart devoted to "Control and Divestiture Proceedings." Those regulations identify combinations of factors which, together with specific levels of ownership, create a presumption of control.

The implementing regulations also introduce the concept of a "[l]imiting contractual right," defined as "a contractual right of the first company that would allow the first company to restrict significantly, directly or indirectly, the discretion of the second company, including its senior management officials and directors, over operational and policy decisions of the second company."[172] That concept acknowledges the possibility of Contractual Control. Examples include any right that allows the first company to restrict or to exert significant influence over decisions by the second company related to:

- The "[a]ctivities in which the second company may engage, including a prohibition on entering into new lines of business, making substantial changes to or discontinuing existing lines of business, or entering into a contractual arrangement with a third party that imposes significant financial obligations on the second company";[173]
- "How the second company directs the proceeds of the first company's investment";[174]
- "Hiring, firing, or compensating one or more senior management officials of the second company, or modifying the second company's policies or budget concerning the salary, compensation, employment, or benefits plan for its employees";[175]
- "The second company's ability to merge or consolidate, or its ability to acquire, sell, lease, transfer, spin-off, recapitalize, liquidate, dissolve, or dispose of subsidiaries or assets";[176]

172. *Id.* § 225.31(e)(5).
173. *Id.* § 225.31(e)(5)(i)(A).
174. *Id.* § 225.31(e)(5)(i)(B).
175. *Id.* § 225.31(e)(5)(i)(C).
176. *Id.* § 225.31(e)(5)(i)(D).

- "The second company's ability to make investments or expenditures";[177]
- "The second company achieving or maintaining a financial target or limit, including, for example, a debt-to-equity ratio, a fixed charges ratio, a net worth requirement, a liquidity target, a working capital target, or a classified assets or nonperforming loans limit";[178]
- "The second company's payment of dividends on any class of securities, redemption of senior instruments, or voluntary prepayment of indebtedness";[179]
- "The second company's ability to authorize or issue additional junior equity or debt securities, or amend the terms of any equity or debt securities issued by the second company";[180]
- "The second company's ability to engage in a public offering or to list or de-list securities on an exchange, other than a right that allows the securities of the first company to have the same status as other securities of the same class";[181]
- "The second company's ability to amend its articles of incorporation or by-laws, other than in a way that is solely defensive for the first company";[182]
- "The removal or selection of any independent accountant, auditor, investment adviser, or investment banker employed by the second company";[183] or
- "The second company's ability to significantly alter accounting methods and policies, or its regulatory, tax, or liability status (e.g., converting from a stock corporation to a limited liability company)."[184]

Just as importantly, the regulations provide examples of contractual provisions that do *not* qualify as a limiting contractual right, including:

177. *Id.* § 225.31(e)(5)(i)(E).
178. *Id.* § 225.31(e)(5)(i)(F).
179. *Id.* § 225.31(e)(5)(i)(G).
180. *Id.* § 225.31(e)(5)(i)(H).
181. *Id.* § 225.31(e)(5)(i)(I).
182. *Id.* § 225.31(e)(5)(i)(J).
183. *Id.* § 225.31(e)(5)(i)(K).
184. *Id.* § 225.31(e)(5)(i)(L).

- "A right that allows the first company to restrict or to exert significant influence over decisions relating to the second company's ability to issue securities senior to securities owned by the first company";[185]
- "A requirement that the first company receive financial reports or other information of the type ordinarily available to common stockholders";[186]
- "A requirement that the second company maintain its corporate existence";[187]
- "A requirement that the second company consult with the first company on a reasonable periodic basis";[188]
- "A requirement that the second company provide notices of the occurrence of material events affecting the second company";[189]
- "A requirement that the second company comply with applicable statutory and regulatory requirements";[190]
- "A market standard requirement that the first company receive similar contractual rights as those held by other investors in the second company";[191]
- "A requirement that the first company be able to purchase additional securities issued by the second company in order to maintain the first company's percentage ownership in the second company";[192]
- "A requirement that the second company ensure that any security holder who intends to sell its securities of the second company provide other security holders of the second company or the second company itself the opportunity to purchase the securities before the securities can be sold to a third party";[193] or
- "A requirement that the second company take reasonable steps to ensure the preservation of tax status or tax

185. *Id.* § 225.31(e)(5)(ii)(A).
186. *Id.* § 225.31(e)(5)(ii)(B).
187. *Id.* § 225.31(e)(5)(ii)(C).
188. *Id.* § 225.31(e)(5)(ii)(D).
189. *Id.* § 225.31(e)(5)(ii)(E).
190. *Id.* § 225.31(e)(5)(ii)(F).
191. *Id.* § 225.31(e)(5)(ii)(G).
192. *Id.* § 225.31(e)(5)(ii)(H).
193. *Id.* § 225.31(e)(5)(ii)(I).

> benefits, such as status of the second company as a Subchapter S corporation or the protection of the value of net operating loss carry-forwards."[194]

Using these concepts, the Bank Act regulations establish presumptions of control based on various levels of equity ownership combined with other sources of influence:

- At 15% or greater equity ownership, control is presumed if the stockholder also appoints a director who serves as chair of the entity's board, has an employee or director serving as a senior management official, or has engaged in a transaction with the entity constituting 2% of the target's total annual revenues.[195]
- At 10% or greater equity ownership, the presence of one or more of the following factors creates a presumption of control, while their absence creates a presumption against control:
    - 25% or more of the board of directors are persons nominated by the stockholder or the board;
    - 25% or more representation on any committee that can bind the company; or
    - Transactions that are either not on market terms or generate 5% or more of annual revenue or expenses.[196]
- At 5% equity ownership, the presence of one or more of the following factors creates a presumption of control, while their absence creates a presumption against control:
    - 25% or more of the board of directors or any of its subsidiaries;
    - Two or more employees or directors serve as senior management officials;
    - An employee or director serves as chief executive officer;

194. *Id.* § 225.31(e)(5)(ii)(J).
195. *Id.* § 225.32(f)(1)–(3).
196. *Id.* § 225.32(e)(1)–(3). *But see id.* § 225.33 ("[A] first company is presumed not to control a second company if (1) The first company controls less than 10 percent of the outstanding securities of each class of voting securities of the second company; and (2) The first company is not presumed to control the second company under § 225.32 of this part.").

    - The ability to make or block the making of major operational or policy decisions;
    - Transactions or business relationships generating 10% or more of the entity's revenue; or
    - Contractual rights limiting the second company unless part of an acquisition or investment agreement.[197]
- Without any equity ownership, a presumption of control exists if a contractual counterparty has the ability to "direct[] or exercise[] significant influence or discretion over the general management, overall operations, or core business or policy decisions of the second company."[198]

These combinations create a sliding scale: As the level of equity ownership declines, control will still be presumed when other factors are present.

2. State Bank Holding Company Laws

State banking laws closely follow the federal Bank Act, and Delaware is a prime example. Like the Bank Act, Delaware banking law recognizes non-majority control based on the ability, "directly or indirectly or acting through one or more other persons," to "own, control or have the power to vote 25% of any class of voting securities" or "exercise a controlling influence over the management or policies of a bank, trust company, other financial institution or any other company."[199]

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197. *Id.* § 225.32(d)(1)–(5).
198. *Id.* § 225.32(b) ("Examples of such agreements include where the first company is a managing member, trustee, or general partner of the second company, or exercises similar powers and functions.").
199. DEL. CODE ANN. tit. 5, § 101(8) (West 2025). Control also exists when a person controls "in any manner the election of a majority of the directors or trustees" of a bank. *Id.*

Other states take similar approaches. Twenty-five other states join Delaware in tracking the Bank Act explicitly.[200] Another twelve use substantially similar language.[201]

Some states have enacted definitions of control that kick in at lower levels. New York, North Carolina, and California use 10% ownership to establish control, Idaho uses 24%, and Nevada uses 10% for entities and 20% for natural persons.[202]

Some states have modified other elements of the test for control. Massachusetts, Virginia, and Colorado discard the controlling influence test and only presume control based on 25% ownership.[203] New Mexico changes "influence" to "substantial influence."[204] Iowa changes "influence" to "controlling influence."[205] Minnesota and Pennsylvania lack a presumption of control and treat its existence as a question of fact.[206]

200. ALA. CODE 1975 § 5-1A-2(8) (2025); ARK. CODE ANN. §§ 23-45-102(a)(3), (6)(A), (6)(B) (2025); CONN. GEN. STAT. § 36a-2(17) (2025); FLA. STAT. § 655.005(1)(c) (2025); HAW. REV. STAT. § 412:12-101 (2025); KY. REV. STAT. ANN. § 286.3-900(1)(b), (d) (West 2025); LA. STAT. ANN. § 6:532(9) (2025); MD. CODE ANN., Fin. Inst., § 5-901(e) (West 2025); ME. REV. STAT. ANN. tit. 9 § 1011(4) (2025); MISS. CODE ANN. § 81-8-1(g) (2025); N.H. REV. STAT. ANN. § 383-B:2-201(5) (2025); N.J. STAT. ANN. 17:9A-409 (West 2025); OHIO REV. CODE ANN. § 1101.01(B) (West 2025); OKLA. STAT. tit. 6 § 102.17 (2025); OR. REV. STAT. § 706.008(2) (2005); 19 R.I. Gen. Laws § 19-6-1(1) (2025); S.C. CODE ANN. § 34-25-10(4) (2025), (10); S.D. CODIFIED LAWS § 51A-1-2(3) (2025); TENN. CODE ANN. §§ 45-2-107(a)(1)(B), (b)(1)(B) (2025); Tex. Fin. Code Ann. §§ 31.002(a)(3), (13) (West 2025); VT. STAT. ANN. tit. 8 §§ 11101(5), (17) (2025); WASH. REV. CODE. ANN. § 30A.04.010(3) (West 2025); W. VA. CODE § 31A-1-2(b) (2025); WIS. STAT. § 221.0901(2)(c) (2025); WYO. STAT. ANN. § 13-9-202 (2025); ARK. CODE ANN. §§ 23-45-102(a)(3), (6)(A), (6)(B) (2025).

201. ALASKA STAT. § 06.05.990(11) (2025); ARIZ. REV. STAT. ANN. § 6-141 (2025); GA. CODE ANN. § 7-1-605(a)(2) (2025); 205 ILL. COMP. STAT. 10/2(h) (2025); IND. CODE ANN. § 28-2-13-12 (West 2025); KAN. STAT. ANN. § 9-519(b)(1) (West 2025); MICH. COMP. LAWS § 487.11201(c) (2025); MO. REV. STAT. § 362.910(4) (2025); MONT. CODE ANN. § 32-1-109(8) (2025); N.D. CENT. CODE § 6-08-08.1(7) (2025); NEB. REV. STAT. § 8-909(3) (2025); UTAH CODE ANN. § 7-1-103(5) (West 2025).

202. CAL. FIN. CODE § 1280(a) (10%) (West 2025); IDAHO CODE ANN. § 26-501 (24%) (West 2025); N.C. GEN. STAT. § 53C-1-4 (10%) (2025); NEV. REV. STAT. § 666.003 (20% for natural persons and 10% for entities) (2025); N.Y. BANKING LAW § 141.3 (10%) (McKinney 2025).

203. MASS. GEN. LAWS ch. 167A, § 1(c) (2025); VA. CODE ANN. § 6.2-800 (2025); COLO. REV. STAT. § 11-101-401(23) (2025).

204. N.M. STAT. ANN. § 58-1-2.D (West 2025).

205. IOWA CODE § 524.103.19 (2025).

206. MINN. STAT. § 46.048.1; *id.* § 48.92.2; 7 PA. CODE § 102 cmt. (1965).

3. The Small Business Act

The Small Business Act of 1958 (the "Small Business Act")[207] is functionally a banking act. It provides federal subsidies to small business investment companies ("SBICs") to make long term loans to small businesses.[208] The act uses the concept of control to extend the restrictions on SBICs to persons who control SBICs.

Like other federal acts, the Small Business Act does not define control. The regulations start with the Securities Law Definition and define control of an SBIC to mean "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of [an SBIC] or other concern, whether through the ownership of voting securities, by contract, or otherwise."[209]

The regulations also define the concept of a "Control Person" to mean a person who controls an SBIC. That definition includes any person who owns 30% or more of the SBIC *and* who participates in the management of the SBIC.[210]

4. Evaluating the Banking Laws

The banking laws generally approach non-majority control in a manner akin to the functional school and contrary to the formal school. Consistent with the concept of Small Block Control, the Bank Act and the vast majority of state banking laws establish control at 25% or greater ownership, while at the same time permitting the possibility of control below that ownership threshold.

The Small Business Act takes a functional approach by following the Securities Law Definition. Consistent with the functional school's acknowledgement of Small Block Control and the influence of Powerful Roles, the Small Business Act recognizes the existence of control where a person owns a 30% position and participates in management.

207. *See* Small Business Investment Act of 1958, Pub. L. No. 85-699, 72 Stat. 689 (codified as amended at 15 U.S.C. §§ 681 *et seq*).

208. *See generally* J.B.K., *Showdown at Equity Gap: A Decade of the Small Business Investment Act*, 54 VA. L. REV. 772 (1968).

209. 13 C.F.R. § 107.50 (2026).

210. *Id.*

The regulations implementing the Bank Act both illustrate the functional approach and show how a definition can incorporate the Multiple Sources Principle while providing detailed guidance for practitioners. Those regulations identify combinations of rights and sources of influence which, at various levels of ownership, create a presumption of control. The federal regulations also skillfully incorporate the concept of Contractual Control. They do not use formal concepts like the Board Control Test, Majority Equivalence, Retributive Capacity, or the One-Third Floor.

E. Insurance Statutes

Like banking law, insurance law makes extensive use of the concept of control. Traditional insurance regulation specifies the types of assets insurers can own, addresses the content of policies, governs the payment of claims, oversees pricing, and limits sales and advertising practices.[211] Other forms of insurance regulation address monopoly risk, systemic failure, and holding company influence of non-insurance businesses.[212] Insurance statutes use the concept of control to ensure that insurer-level regulations apply at the holding company level and to holding company subsidiaries in the wider enterprise.

In the United States, insurance law is predominantly a creature of state law. The National Association of Insurance Commissioners ("NAIC") establishes standards and best practices for all states and territories, and it promulgates model insurance laws that states can adopt.

1. The Insurance Holding Company Acts

The NAIC has promulgated the Model Insurance Holding Company System Regulatory Act (the "Model Insurance Act"). Since its advent in 1969, the Model Insurance Act has maintained the following definition of control:

211. Rick Swedloff, *The New Regulatory Imperative for Insurance*, 61 B.C. L. REV. 2031, 2037 n.24 (2020).

212. Kelly Kirby, *Supervisory Colleges: Improving International Supervisory Coordination*, 19 CONN. INS. L.J. 149, 152 (2012).

> The term "control" (including the terms "controlling," "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing made in the manner provided by Section 4K that control does not exist in fact. The commissioner may determine, after furnishing all persons in interest notice and opportunity to be heard and making specific findings of fact to support the determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.[213]

The Model Insurance Act thus uses a functional definition of control that tracks the Securities Law Definition, supplemented with a presumption of control at 10% ownership.[214] The Model Insurance Act does not include a comparable presumption against control below 10% ownership, and it allows a state regulator to provide that control exists absent 10% or greater ownership. The Model Insurance Act includes the possibility of Contractual Control, but carves out "a commercial contract for goods or nonmanagement services."[215]

All fifty states have enacted a version of the Model Insurance Act. Forty-one states include a definition of control functionally identical to the Insurance Company Act.[216] Six adopted different

213. INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT § 1(C) (Nat'l Ass'n Ins. Comm'rs 2021) (emphasis added); INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT MODEL LEGISLATION § 1(c) (Nat'l Ass'n Ins. Comm'rs 1969) (same).

214. To rebut the presumption, the presumed controller must "fully disclose all material relationships and bases for affiliation [with] the insurer as well as the basis for disclaiming the affiliation." INSURANCE HOLDING COMPANY SYSTEM REGULATORY ACT § 4K (2021).

215. *Id.* § 1(C).

216. ALASKA STAT. § 21.22.200(3) (2025); ARIZ. REV. STAT. ANN. § 20-481.3 (2025); ARK. CODE ANN. § 23-63-503(2) (2025); CAL. INS. CODE § 1215(d) (West 2025); COLO. REV. STAT. § 10-3-801(3) (2025); DEL. CODE ANN. tit. 18, § 5001 (West 2025); FLA. STAT. ANN. § 628.801(1) (2025); GA. CODE ANN. § 33-13-1 (2025); HAW. REV. STAT.

definitions. Alabama lowered the ownership threshold for the presumption of control from 10% to 5%.[217] New Jersey broadened the regulator's discretionary power to find control.[218] Connecticut, Maryland, Oregon, and Texas went in the opposite direction by removing the presumption of control at 10%.[219]

2. Other Insurance Statutes

Other insurance statutes also use the concept of control. The NAIC's model act on insurance receiverships[220] and its model act addressing permissible investments[221] use the same definition as

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ANN. § 431:11-102 (2025); IDAHO CODE ANN. § 41-3802 (West 2025); 215 ILL. COMP. STAT. ANN. 5/131.1(b) (2025); IND. CODE 27-1-23-1(e) (2025); IOWA CODE § 521A.1.3 (2025); KAN. STAT. ANN. § 40-3302 (West 2025); KY. REV. STAT. ANN. § 304.37-010 (West 2025); LA. STAT. ANN. § 22:691.2(3) (2025); ME. REV. STAT. ANN. tit. 24, § 222.2.B (2025); MASS. GEN. LAWS ch. 175, § 206 (2025); MICH. COMP. LAWS § 500.1301–79 (2025); MINN. STAT. § 60D.15.4 (2025); MISS. CODE ANN. § 83-6-1(c) (2025); MO. REV. STAT. § 382.010(2) (2025); MONT. CODE ANN. § 33-2-1101 (2025); NEB. REV. STAT. § 44-2121(2) (2025); NEV. REV. STAT. § 692C.050 (2025); N.H. REV. STAT. ANN. § 401-B:1.III (2025); N.M. STAT. ANN. § 59A-37-2.C (2025); N.Y. INS. LAW §§ 1501(a)(2), (b) (McKinney 2025); N.C. GEN. STAT. § 58-19-5(2) (2025); N.D. CENT. CODE § 26.1-10-01 (2025); OHIO REV. CODE ANN. § 3901.32 (West 2025); OKLA. STAT. tit. 36, § 1631.3 (2025); 40 PA. CODE § 991.1401 (2025); 27 R.I. GEN. LAWS § 27-35-1 (2025); S.C. CODE ANN. § 38-21-10(2) (2025); TENN. CODE ANN. § 56-11-101(b)(3) (2025); VT. STAT. ANN. tit. 8, § 3681(3) (2025); VA. CODE ANN. § 38.2-1322 (2025); WASH. REV. CODE ANN. § 48.31B.005(3) (West 2025); W. VA. CODE, § 33-27-2 (2025); WYO. STAT. ANN. § 26-44-101 (2025).

217. ALA. CODE § 27-29-1(3) (1975).

218. N.J. STAT. ANN. § 17:27A-1 (West 2025).

219. CONN. GEN. STAT. §§ 38a-1, 38a-129 (2025); MD. CODE ANN., Ins. § 7-101(c) (West 2025); OR. REV. STAT. § 732.548 (2025); TEX. INS. CODE ANN. § 823.005 (West 2025).

220. INSURER RECEIVERSHIP MODEL ACT § 104(A) (Nat'l Ass'n Ins. Comm'rs 2007) ("The terms 'affiliate' of, or person 'affiliated' with, a specific person, 'control' and 'subsidiary' shall have the meanings ascribed to them in [insert citation equivalent to Section 1 of the NAIC Model Insurance Holding Company System Regulatory Act]").

221. INVESTMENTS OF INSURERS MODEL ACT § 2(P) (Nat'l Ass'n Ins. Comm'rs 2021) ("'Control' means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract (other than a commercial contract for goods or non-management services), or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if a person, directly or indirectly, owns, controls, holds with the power to vote or holds proxies

the Model Insurance Act. A model act addressing special purpose reinsurance vehicles uses a substantially identical definition,[222] as does a model act governing insurance guaranty associations.[223] States have widely adopted those acts and their definitions.[224]

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representing ten percent (10%) or more of the voting securities of another person. This presumption may be rebutted by a showing that control does not exist in fact. The commissioner may determine, after furnishing all interested persons notice and an opportunity to be heard and making specific findings of fact to support the determination, that control exists in fact, notwithstanding the absence of a presumption to that effect.").

222. SPECIAL PURPOSE REINSURANCE VEHICLE MODEL ACT § 3(C) (Nat'l Ass'n Ins. Comm'rs 2021) ("'Control' (including the terms 'controlling,' 'controlled by' and 'under common control with') means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or non-management services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if any person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not, in fact, exist. Notwithstanding the foregoing, for purposes of this Act, the fact that an SPRV exclusively provides reinsurance to a ceding insurer under an SPRV contract shall not by itself be sufficient grounds for a finding that the SPRV or the SPRV Organizer or owner is controlled by or under common control with the ceding insurer.").

223. PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION MODEL ACT § 5(F) (Nat'l Ass'n Ins. Comm'rs 2023) ("'Control' means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract other than a commercial contract for goods or nonmanagement services, or otherwise, unless the power is the result of an official position with or corporate office held by the person. Control shall be presumed to exist if a person, directly or indirectly, owns, controls, holds with the power to vote, or holds proxies representing, ten percent (10%) or more of the voting securities of any other person. This presumption may be rebutted by a showing that control does not exist in fact.").

224. The Property and Casualty Insurance Guaranty Association Model Act is adopted by forty-five states, including D.C. NAT'L ASS'N INS. COMM'RS, PROPERTY AND CASUALTY INSURANCE GUARANTY ASSOCIATION MODEL ACT ST-540-1 (2025), https://content.naic.org/sites/default/files/model-law-state-page-540.pdf [https://perma.cc/3NW7-DV7D]. The Insurer Receivership Model Act is adopted by thirty-six states. NAT'L ASS'N INS. COMM'RS, INSURER RECEIVERSHIP MODEL ACT ST-555-2 (2021), https://content.naic.org/sites/default/files/model-law-state-page-555.pdf [https://perma.cc/DYC5-3436]. The Investments of Insurers Model Act is

Some states have adopted a general definition of control drawn from the Model Insurance Act and made it generally applicable to all insurance laws in the state.[225]

3. Evaluating the Insurance Laws

The Model Insurance Act and the vast majority of state insurance laws take a functional approach to non-majority control. Consistent with Small Block Control, they establish a presumption of control at 10% ownership. The statutes do not prohibit the existence of control below that ownership threshold, but they also do not establish a presumption against it.

F. Federal Restrictions on Foreign Investment

FIRRMA empowers the Committee on Foreign Investment in the United States (the "Committee") to review any covered transaction with a foreign national and mitigate any threat posed to national security.[226] As part of its review, the Committee has to determine whether an entity is controlled by a foreign national, thereby bringing the transaction within the statute's coverage. While FIRRMA might initially seem one step removed from statutes governing banking law and insurance law, it too guards against divergent interests between the controller and the controlled company. Only the source of the potential conflict is different: a foreign government versus a controller with a divergent interest.

FIRRMA defines "control" as "the power, direct or indirect, whether exercised or not exercised, to determine, direct, or decide important matters affecting an entity, subject to regulations prescribed by the Committee."[227] That definition

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adopted by nine states. NAT'L ASS'N INS. COMM'RS, INVESTMENTS OF INSURERS MODEL ACT ST-280-8 (2024), https://content.naic.org/sites/default/files/model-law-state-page-280.pdf [https://perma.cc/9U7F-WW8C].

225. *See, e.g.*, CONN. GEN. STAT. § 38a-1 (2025); UTAH CODE ANN. § 31A-1-301(29) (West 2025); WIS. STAT. § 600.03 (2025).

226. Foreign Investment Risk Review Modernization Act of 2018, Pub. L. No. 115-232, 132 Stat. 2174 (2018) (codified as amended at 50 U.S.C. § 4565).

227. 50 U.S.C. § 4565. In fact, when the definition of control was first added in the Foreign Investment and National Security Act of 2007, the Committee had even broader discretion to find control: "The term 'control' has the meaning

resembles the Securities Law Definition, but substitutes "the power . . . to determine, direct, or decide important matters affecting an entity" for "the power to direct or cause the direction of the management and policies of a person." Congress has instructed that when implementing this definition, the Committee should take a middle-of-the-road approach, because a broad definition of control would chill foreign investment, while a narrow definition could jeopardize national security.[228]

FIRRMA regulations supplement its broad definition of control with a detailed regulatory framework. The regulations note that control can exist "through the ownership of a majority or a dominant minority of the total outstanding voting interest in an entity, board representation, proxy voting, a special share, contractual arrangements, formal or informal arrangements to act in concert, or other means."[229] The regulations then identify the following important matters that can support a finding of control, as well as "any other similarly important matters affecting an entity," listing:

> (1) The sale, lease, mortgage, pledge, or other transfer of any of the tangible or intangible principal assets of the entity, whether or not in the ordinary course of business;
>
> (2) The reorganization, merger, or dissolution of the entity;
>
> (3) The closing, relocation, or substantial alteration of the production, operational, or research and development facilities of the entity;
>
> (4) Major expenditures or investments, issuances of equity or debt, or dividend payments by the entity, or approval of the operating budget of the entity;
>
> (5) The selection of new business lines or ventures that the entity will pursue;

given to such term in regulations which the Committee shall prescribe." Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 2(a)(2), 121 Stat. 246, 246 (2007).

228. S. REP. NO. 109-264, at 2, 7 (2006).

229. 31 C.F.R. § 800.208(a) (2026).

> (6) The entry into, termination, or non-fulfillment by the entity of significant contracts;
>
> (7) The policies or procedures of the entity governing the treatment of non-public technical, financial, or other proprietary information of the entity;
>
> (8) The appointment or dismissal of officers or senior managers or, in the case of a partnership, the general partner;
>
> (9) The appointment or dismissal of employees with access to critical technology or other sensitive technology or classified U.S. Government information; or
>
> (10) The amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of the entity with respect to the matters described in paragraphs (a)(1) through (9) of this section.[230]

The regulatory regime thus focuses on the ability to make major decisions, then identifies the types of decisions that matter for control. The regulatory regime also makes clear that the source of the control over a major decision does not matter. It can be "direct or indirect," exists "whether or not exercised," and operate through a variety of means.

The regulations continue by identifying six "minority shareholder provisions" that "shall not in themselves be deemed to confer control over an entity." They are:

> (1) The power to prevent the sale or pledge of all or substantially all of the assets of an entity or a voluntary filing for bankruptcy or liquidation;
>
> (2) The power to prevent an entity from entering into contracts with majority investors or their affiliates;
>
> (3) The power to prevent an entity from guaranteeing the obligations of majority investors or their affiliates;
>
> (4) The right to purchase an additional interest in an entity to prevent the dilution of an investor's pro rata interest in that entity in the event that the entity issues additional instruments conveying interests in the entity;

230. *Id.* § 800.208(a)(1)–(10).

> (5) The power to prevent the change of existing legal rights or preferences of the particular class of stock held by minority investors, as provided in the relevant corporate documents governing such shares; and
>
> (6) The power to prevent the amendment of the Articles of Incorporation, constituent agreement, or other organizational documents of an entity with respect to the matters described in paragraphs (c)(1) through (5) of this section.[231]

The regulations also note that the Committee "will consider, on a case-by-case basis, whether [other] minority shareholder protections . . . do not confer control over an entity."[232]

Most significantly, the regulations provide examples of how the Committee will approach control. Three examples are particularly pertinent for non-majority control:

> Example 3. Corporation A, a foreign person, is a private equity fund that routinely acquires equity interests in companies and manages them for a period of time. Corporation B is a U.S. business. In addition to its acquisition of *seven percent* of Corporation B's voting shares, Corporation A acquires the *right to terminate significant contracts* of Corporation B. Corporation A *controls* Corporation B.
>
> Example 4. Corporation A, a foreign person, acquires a *nine percent* interest in the shares of Corporation B, a U.S. business. As part of the transaction, Corporation A also acquires *certain veto rights that determine important matters* affecting Corporation B, including the right to *veto the dismissal of senior executives* of Corporation B. Corporation A *controls* Corporation B.
>
> Example 5. Corporation A, a foreign person, acquires a *13 percent* interest in the shares of Corporation B, a U.S. business, and the right to appoint one member of Corporation B's seven-member board of directors. Corporation A receives minority shareholder protections listed in paragraph (c) of this section but receives no other positive or negative rights with respect to Corporation B. Assuming no other relevant facts, Corporation A *does not control* Corporation B.[233]

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231. *Id.* § 800.208(c).
232. *Id.* § 800.208(d).
233. *Id.* § 800.208(e)(3)–(5) (emphases added).

Consistent with Small Block Control and Contractual Control, these examples demonstrate that a combination of comparatively low stock ownership and key contract rights can establish control.

The FIRRMA regulations take a functional approach. They use a fact-specific definition consistent with the functional school that acknowledges the role of Multiple Sources and makes clear that the source of the control does not matter. Helpfully, the regulations identify a list of important issues where the ability to control the outcome constitutes control. The regulations also identify protective rights that will not give rise to an inference of control.

G. State Anti-Takeover Statutes

Two forms of anti-takeover statutes—business combination statutes and control share statutes—respond to the threat that a party will gain control and engage in interested transactions to the corporation's detriment.

1. Business Combination Statutes

A business combination statute prohibits a wide range of transactions between a corporation and a party that has acquired a degree of control, typically called an "interested stockholder," unless specified requirements have been met or a period of time has passed. By barring interested transactions for a period of time, usually three years, a business combination statute impedes the interested stockholder's ability to increase its control or use it to extract value from the company. The business combination statutes thus respond to the same problem of controller opportunism that the common law sought to address by imposing fiduciary duties on controllers.

Thirty-seven states have a business combination statute.[234] Delaware's statute is representative. It defines "control" as follows:

> "Control," including the terms "controlling," "controlled by" and "under common control with," means the possession,

234. The states without a business combination statute are Alabama, Alaska, Arkansas, California, Colorado, Hawaii, Louisiana, Montana, New Hampshire, New Mexico, Ohio, Vermont, and West Virginia.

> directly or indirectly, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting stock, by contract or otherwise. A person who is the owner of 20% or more of the outstanding voting stock of any corporation, partnership, unincorporated association or other entity shall be presumed to have control of such entity, in the absence of proof by a preponderance of the evidence to the contrary; Notwithstanding the foregoing, a presumption of control shall not apply where such person holds voting stock, in good faith and not for the purpose of circumventing this section, as an agent, bank, broker, nominee, custodian or trustee for 1 or more owners who do not individually or as a group have control of such entity.[235]

The statute thus uses a functional definition of control that tracks the Securities Law Definition and adds a rebuttable presumption of control at 20% ownership.

Delaware's business combination statute defines "interested stockholder" as:

> [A]ny person (other than the corporation and any direct or indirect majority-owned subsidiary of the corporation) that (i) is the owner of 15% or more of the outstanding voting stock of the corporation, or (ii) is an affiliate or associate of the corporation and was the owner of 15% or more of the outstanding voting stock of the corporation at any time within the 3-year period immediately prior to the date on which it is sought to be determined whether such person is an interested stockholder, and the affiliates and associates of such person.[236]

The statute thus identifies 15% as the level of ownership where concern about the ability to exercise control becomes warranted. The statute defines "affiliate" as "a person that directly, or indirectly through 1 or more intermediaries, controls, or is controlled by, or is under common control with, another person," echoing the Securities Law Definition.[237] The statute defines "associate" as another entity in which a person owns at

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235. DEL. CODE ANN. tit. 8, § 203(c)(4) (2025).
236. *Id.* § 203(c)(5). The statutory definition includes exceptions designed to mitigate the inadvertent or otherwise innocent triggering of interested stockholder status. *Id.*
237. *Id.* § 203(c)(1). *Compare id. with* 17 C.F.R. § 240.12b-2 (2026).

least 20% of any class of voting stock, reinforcing 20% ownership as an indicator of control.[238]

Five of the thirty-six other states that have adopted business combination statutes track the Delaware statute in recognizing a presumption of control at 20% ownership.[239] Twenty-eight states presume control at 10%.[240] Illinois, North Carolina, and North Dakota's statutes do not include an ownership threshold for presuming control.[241] The definitions for an interested stockholder also vary. Six parallel Delaware by using 15%

238. DEL. CODE ANN. tit. 8, § 203(c)(5). The Securities Law Definition is similar, but uses 10% instead of 20% as the ownership threshold. *Compare id. with* 17 C.F.R. § 240.12b-2.

239. DEL. CODE. ANN. tit. 8, § 203(4); FLA. STAT. ANN. § 607.0901(1)(f) (West 2025); IOWA CODE ANN. § 490.1110.3.d (West 2025); KAN. STAT. ANN. § 17-6427(c)(4) (2025); MASS. GEN. LAWS ch. 110F, § 3(e) (2025); OKLA. STAT. tit. 18, § 1090.3.D.4 (2025).

240. *See* ARIZ. REV. STAT. ANN. § 10-27018 (2025); CONN. GEN. STAT. § 33-840(6) (2025); GA. CODE ANN. § 14-2-1110(7) (2025); IDAHO CODE ANN. § 30-1701(8) (West 2025); IND. CODE ANN. § 23-1-43-8(b) (West 2025); KY. REV. STAT. ANN. § 271B.12-200(7) (West 2025); ME. REV. STAT. ANN. tit. 13-C, § 1109.1.F (2025); MD. CODE ANN., Corps. & Assns. § 3-601(g) (West 2025); MICH. COMP. LAWS § 450.1777(2) (2025); MINN. STAT. § 302A.011.48 (2025); MISS. CODE ANN. § 79-25-3(h) (West 2025); MO. REV. STAT. § 351.459(8) (2025); NEB. REV. STAT. § 21-2438 (2025); NEV. REV. STAT. § 78.418 (2025); N.J. STAT. ANN. § 14A:10A-3(h) (West 2025); N.Y. BUS. CORP. LAW § 912(a)(8) (McKinney 2024); OR. REV. STAT. § 60.825(4)(a) (2025); 15 PA. CODE § 2552 (2025); 7 R.I. GEN. LAWS ANN. § 7-5.2-3(8) (West 2025); S.C. CODE ANN. § 35-2-208(b) (2025); S.D. CODIFIED LAWS § 47-33-3(1)(k) (2025); TENN. CODE ANN. § 48-103-203(8) (2025); TEX. BUS. ORGS. CODE ANN. § 21.605 (2025); UTAH CODE ANN. § 16-10a-1802 (West 2025); VA. CODE ANN. § 13.1-725 (West 2025); WASH. REV. CODE ANN. § 23B.19.020(8) (West 2025); WIS. STAT. § 180.1140(6) (2025); WYO. STAT. ANN. § 17-18-102(b)(v) (2025).

241. 805 ILL. COMP. STAT. ANN. 5/7.85 (West 2025); N.C. GEN. STAT. § 55-9-01 (2025) (explicitly following federal law); N.D. CENT. CODE § 10-19.1-01.52 (2025).

ownership.[242] Twenty-one use 10%,[243] and eight use 20%.[244] Maine sets the threshold at 25%,[245] and Massachusetts at 5%.[246]

2. Control Share Statutes

Control share statutes trigger a stockholder vote on a proposed acquisition of a block of share deemed sufficiently large to create an inference of control—typically called a "control share acquisition"—with the control shares excluded from the vote.[247] Twenty-five states have a control share statute. Delaware does not.

242. DEL. CODE ANN. tit. 8, § 203(c)(5) (West 2025); FLA. STAT. ANN. § 607.0901(1)(k) (West 2025); 805 ILL. COMP. STAT. ANN. 5/7.85.D(2) (West 2025); KAN. STAT. ANN. § 17-6427(c)(5)(A) (West 2025); OKLA. STAT. tit. 18, § 1090.3.D.5 (2025); OR. REV. STAT. § 60.825(5)(a) (2025); WYO. STAT. ANN. § 17-18-102(b)(vii) (2025).

243. *See* ARIZ. REV. STAT. ANN. § 10-2701.10 (West 2025); CONN. GEN. STAT. § 33-840(9) (2025); GA. CODE ANN. § 14-2-1110(11) (West 2025); IDAHO CODE ANN. § 30-1701(1) (West 2025); IND. CODE ANN. § 23-1-43-10 (West 2025); IOWA CODE ANN. § 490.1110.3.e (West 2025); KY. REV. STAT. ANN. § 271B.12-200(10) (West 2025); MD. CODE ANN., Corps. & Assns. § 3-601(j) (West 2025); MICH. COMP. LAWS § 450.1778(2) (West 2025); MINN. STAT. § 302A.011.49 (2025); NEB. REV. STAT. § 21-2440 (2025); NEV. REV. STAT. § 78.423 (2025); N.J. STAT. ANN. § 14A:10A-3.j (West 2025); N.D. CENT. CODE § 10-19.1-72.1 (2025); 7 R.I. Gen. Laws § 7-5.2-3(10) (2025); S.C. CODE ANN. § 35-2-210 (West 2025); S.D. CODIFIED LAWS § 47-33-3(1)(q) (2025); TENN. CODE ANN. § 48-103-203(11) (West 2025); VA. CODE ANN. § 13.1-725 (West 2025); WASH. REV. CODE ANN. § 23B.19.020(1) (West 2025); WIS. STAT. § 180.1140(8) (2025).

244. ME. REV. STAT. ANN. tit. 13, § 1109.1.H (West 2025); MISS. CODE ANN. § 79-25-3(l) (West 2025); MO. REV. STAT. § 351.459(11) (2025); N.Y. BUS. CORP. LAW § 912(a)(10) (McKinney 2025); N.C. GEN. STAT. § 55-9-04 (2025); 15 PA. STAT. AND CONS. STAT. ANN. § 2553 (West 2025); TEX. BUS. ORGS. CODE ANN. § 21.602 (West 2025); UTAH CODE ANN. § 16-10a-1802(10)(a) (West 2025).

245. ME. REV. STAT. ANN. tit. 13-C, § 1109.1.H (West 2025). But Maine counterbalances the high "interested shareholder" threshold with a low, 10%, presumption for control.

246. MASS. GEN. LAWS ch. 110F, § 3(g) (2025). Although Massachusetts has the lowest threshold for an interested holder, it sets the "control" presumption at 20%, one of the highest.

247. *See* IND. CODE ANN. § 23-1-42-1 cmts (2025). ("'Control shares' are *not* 'all shares' owned by the acquiring person, but only the shares acquired in the 'control share acquisition' . . . that, when added to the acquiring person's pre-acquisition holdings, put the person over one of the three specified thresholds of voting power. . . . In a shareholder vote on the voting power of the 'control'

The thresholds for control-share acquisitions show where legislatures have perceived a level of control sufficient to require stockholder approval. The Indiana statute provides a representative definition:

> As used in this chapter, "control shares" means shares that, except for this chapter, would have voting power with respect to shares of an issuing public corporation that, when added to all other shares of the issuing public corporation owned by a person or in respect to which that person may exercise or direct the exercise of voting power, would entitle that person, immediately after acquisition of the shares (directly or indirectly, alone or as a part of a group), to exercise or direct the exercise of the voting power of the issuing public corporation in the election of directors within any of the following ranges of voting power:
>
> (1) One-fifth (1/5) or more but less than one-third (⅓) of all voting power.
>
> (2) One-third (⅓) or more but less than a majority of all voting power.
>
> (3) A majority or more of all voting power.[248]

Without stockholder approval, the stockholder cannot vote the control shares.[249]

The Indiana statute thus starts with an inference of control at 20%. The statute treats the level of influence conferred by blocks between 20% and one-third as functionally equivalent, then requires an additional vote once a stockholder's holdings exceed one-third. The statute treats ownership levels above one-third and below a majority as equivalent, then requires another vote once the stockholder's holdings would reach a majority.

The legislative history for the Indiana statute explains the source of the thresholds, noting that they were "not selected

shares,' however, *none* of the acquiring person's shares (*i.e.* both its shares owned before the acquisition and the 'control shares') are permitted to vote.").

248. *Id.* § 23-1-42-1.

249. *See id.* "Interest shares" include any shares the acquiring person or members of an acquiring group already owned before the acquisition, plus any share owned by the company's officers and employee directors. *See id.* § 23-1-42-3.

arbitrarily."[250] The legislature determined that the 20% figure represented "a significant level of dominance that, in a public corporation in which other shareholdings are generally dispersed, can amount to effective control for many purposes."[251] The one-third figure represented an amount that was "generally recognized as a sufficient block of shares to constitute effective control of such a corporation for most if not all practical purposes."[252] The majority threshold constituted "literal control."[253]

Of the twenty-five states with a control share statute, twenty-two set the first control share threshold at 20%.[254] Hawaii, Maryland, and Wyoming set the first threshold at 10%.[255] All set the second threshold at one-third and the third threshold at a majority.

3. Evaluating the State Anti-Takeover Statutes

The state anti-takeover statutes take a functional approach. Consistent with Small Block Control, they overwhelmingly recognize a presumption of control at 20% ownership or less, with thirty-two business combination statutes and twenty-five control share statutes inferring control at that level or below. Thirty-seven business combination statutes define an interested stockholder at levels of 20% or lower, implying an inference of control at that

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250. *Id.* § 23-1-42-1 cmt.

251. *Id.*

252. *Id.*

253. *Id.*

254. *See* ARIZ. REV. STAT. ANN. § 10-2722 (West 2025); FLA. STAT. ANN. § 607.0902 (West 2025); IDAHO CODE ANN. § 30-1604(1) (West 2025); IND. CODE ANN. § 23-1-42-1 (West 2025); KAN. STAT. ANN. § 17-1286 (West 2025); MASS. GEN. LAWS ch. 110D, § 1 (2025); MINN. STAT. § 302A.671.2(d) (2025); Miss. Code Ann. § 79-27-5(d) (2025); MO. REV. STAT. § 351.015(5) (2025); NEB. REV. STAT. § 21-2439 (2025); NEV. REV. STAT. § 78.3785 (2025); N.C. GEN. STAT. § 55-9A-01(b)(2) (2025); OHIO REV. CODE ANN. § 1701.01(Z)(1) (West 2025); OKLA. STAT. tit. 18, § 1145 (2025); OR. REV. STAT. § 60.801(4)(a) (2025); 15 PA. STAT. AND CONS. STAT. ANN. § 2562 (West 2025); S.C. CODE ANN. § 35-2-101 (2025); S.D. CODIFIED LAWS § 47-33-9(4) (2025); TENN. CODE ANN. § 48-103-302(4) (West 2025); UTAH CODE ANN. § 61-6-2 (West 2025); VA. CODE ANN. § 13.1-728.1 (West 2025); WIS. STAT. § 180.1140(2) (2025).

255. *See* HAW. REV. STAT. ANN. § 414E-2(c)(4)(A) (West 2025); MD. CODE ANN., Corps. & Assns. § 3-701(e)(1) (West 2025); WYO. STAT. ANN. § 17-18-102(b)(v) (West 2025).

level of ownership. Only Maine sets the threshold higher, and it uses 25%. All twenty-five control share statutes treat one-third ownership as sufficient for a second-level inference of control. The state anti-takeover statutes notably do not require any showing other than ownership to establish the presumption of control, such as meeting the Board Control Test or establishing Majority Equivalence. The business combination statutes also do not require stock ownership to support a finding of control. They expressly contemplate considering Multiple Sources and incorporate the concept of Contractual Control.

H. Evaluating the Regimes Regulating Relationships Between Controllers and Controlled Companies

The following table compares the attributes of the statutory regimes regulating the possible misuse of control with the tenets of the formal and functional schools. The statutory regimes take an overwhelmingly functional approach.

TABLE 3. FORMAL, FUNCTIONAL, AND RELATIONSHIP STATUTES' VARYING APPROACHES TO MISUES OF CONTROL

ISSUE	**FORMAL SCHOOL**	**FUNCTIONAL SCHOOL**	**RELATIONSHIP STATUTES**
Issue of fact or law?	Fact but with brightline tests that can foreclose non-majority control	Fact	Fact with minority thresholds establishing presumptions of control or control itself
Test for Non-Majority Control	Board Control Test plus Majority Equivalence and Retributive Capacity	Ordinary meaning of control	Ordinary meaning of control

ISSUE	**FORMAL SCHOOL**	**FUNCTIONAL SCHOOL**	**RELATIONSHIP STATUTES**
Rhetorical Framing	Hard-To-Show Concept	Neither hard nor easy; turns on evidence	None; minority thresholds establishing presumptions of control or control itself
Sources	Primarily voting power	Multiple sources	Multiple sources
Contract Rights	Irrelevant	Relevant	Relevant
Powerful Roles	Deemphasized or Irrelevant	Relevant	Relevant
Historical Evidence	Deemphasized or Irrelevant	Relevant	Relevant
Transactional Evidence	Deemphasized or Irrelevant	Relevant	Relevant
Block Size	One-Third-Is-Low Concept; *Cysive*-As-Floor Concept One-Third Floor	Small Block Control	Small Block Control, including minority thresholds establishing presumptions of control or control itself

V. STATUTORY SUPPORT FOR FUNCTIONALISM

Some authorities assert that different areas of the law take widely divergent approaches to control.[256] This Article has shown

256. *E.g.*, Weinstein Enters., Inc. v. Orloff, 870 A.2d 499, 506–07 (Del. 2005) (asserting that "the definition of "control" generally "varies according to the context in which it is being considered, *e.g.*, fiduciary responsibility, tort liability, filing consolidated tax returns, sale of control"); DeMott, *supra* note 5,

that claim to be inaccurate. Authorities that make the claim typically contrast fiduciary duty law (where control gives rise to fiduciary duties) with agency law (where the principal controls the agent) and principles of veil piercing (where control is one factor among many).[257] The latter two areas generally involve vicarious liability to unaffiliated third parties, with agency law imposing liability to third parties based on the principal's control over the agent, and veil piercing imposing liability to third parties based on a multi-factor test that includes control as one element. The concerns in those settings are one step removed from the relationships between entities and their investors (statutes in group one) or the ability of affiliated persons to use control to subvert regulatory schemes (statutes in group two). This Article shows that in those settings, statutory regimes exhibit a remarkable degree of consistency in their approaches to control.

The survey of control definitions reveals consensus features that provide strong support for functionalism as the dominant approach to control. Those same features reveal that the premises of the formal school are outliers. Attempts by critics to portray the functional school as a recent and anomalous approach are incorrect.

The most common test for control by far is the Securities Law Definition or a near variant. That test appears in all of the major New Deal statutes and in the state securities acts of twenty-five states. That test treats control as a question of fact and incorporates Multiple Sources, instantiating the basic premise of the functional school. Consistent with that school, it recognizes Contractual Control and implicitly recognizes Small Block Control. It rejects basic premises of the formal school, such as the One-Third Floor, the Board Control Test, and the requirement of Majority Equivalence.

Consistent with Small Block Control, many of the tests for control use a level of minority stock ownership to create a presumption of control. One recurring threshold is 20%, which appears in (i) the business combination statutes in Delaware and

at 234 ("What 'control' means, and what consequences it carries, vary greatly from context to context."); *see* Pollman & Will, *supra* note 58, at 1100 (observing that "the definition of 'control' may not be fixed across all areas of law").

257. *E.g.*, DeMott, *supra* note 5, at 234.

five other states,[258] (ii) twenty-two control share statutes as the initial threshold for a control-related vote,[259] and (iii) the securities statutes in two states.[260] The business combination statutes of eight states set the level of ownership for an interested stockholder at 20%.[261]

An arguably more frequent ownership level is 10%. Many statutes use that figure, including the Utility Act,[262] aspects of the Indenture Act,[263] the business combination statutes of twenty-

258. DEL. CODE ANN. tit. 8, § 203(4) (West 2025); FLA. STAT. ANN. § 607.0901(1)(f) (West 2025); IOWA CODE § 490.1110.3.d (2025); KAN. STAT. ANN. § 17-6427(c)(4) (2025); MASS. GEN. LAWS ch. 110F, § 3(e) (2025); OKLA. STAT. tit. 18, § 1090.3.D.4 (2025).

259. *See* ARIZ. REV. STAT. ANN. § 10-2722 (2025); FLA. STAT. ANN. § 607.0902 (2025); IDAHO CODE ANN. § 30-1604(1) (West 2025); IND. CODE ANN. § 23-1-42-1 (West 2025); KAN. STAT. ANN. § 17-1286 (2025); MASS. GEN. LAWS ch. 110D, § 1 (2025); MINN. STAT. § 302A.671.2(d) (2025); MISS. CODE ANN. § 79-27-5(d) (2025); MO. REV. STAT. § 351.015(5) (2025); NEB. REV. STAT. § 21-2439 (2025); NEV. REV. STAT. § 78.3785 (2025); N.C. GEN. STAT. § 55-9A-01(b)(2) (2025); OHIO REV. CODE ANN. § 1701.01(Z)(1) (West 2025); OKLA. STAT. tit. 18, § 1145 (2025); OR. REV. STAT. § 60.801(4)(a) (2025); 15 PA. CODE § 2562 (2025); S.C. CODE ANN. § 35-2-101 (2025); S.D. CODIFIED LAWS § 47-33-9(4) (2025); TENN. CODE ANN. § 48-103-302(4) (West 2025); UTAH CODE ANN. § 61-6-2 (West 2025); VA. CODE ANN. § 13.1-728 (2025); WIS. STAT. § 180.1140(2) (2025).

260. 48 NEB. ADMIN. CODE § 2-002 (2025); OKLA. ADMIN. CODE § 660:11-11-1 (West 2025).

261. ME. REV. STAT. ANN. tit. 13, § 1109.1.H (West 2025); MISS. CODE ANN. § 79-25-3(l) (West 2025); MO. REV. STAT. § 351.459(11) (2025); N.Y. BUS. CORP. LAW § 912(a)(10) (McKinney 2025); N.C. GEN. STAT. § 55-9-04 (2025); 15 PA. STAT. AND CONS. STAT. ANN. § 2553 (West 2025); TEX. BUS. ORGS. CODE ANN. § 21.602 (West 2025); UTAH CODE ANN. § 16-10a-1802(10)(a) (West 2025).

262. Public Utility Holding Company Act of 1935, ch. 687, § 2(7), 49 Stat. 803 806 (1935) (defining "holding company"); *accord* 42 U.S.C. § 16451(8).

263. 15 U.S.C. §§ 77aaa–77bbbb.

eight states,[264] the control share statutes in three states,[265] the bank holding company acts of five states,[266] five model insurance acts,[267] the insurance holding company statutes in forty-two states,[268] and

264. *See* ARIZ. REV. STAT. ANN. § 10-2701.8 (2025); CONN. GEN. STAT. § 33-840(6) (2025); GA. CODE ANN. § 14-2-1110(7) (2025); IDAHO CODE ANN. § 30-1701(8) (West 2025); IND. CODE ANN. § 23-1-43-8(a) (West 2025); KY. REV. STAT. ANN. § 271B.12-200(7) (West 2025); ME. REV. STAT. ANN. tit. 13, § 1109.1.F (2025); MD. CODE ANN., Corps. & Assns. § 3-601(g) (West 2025); MICH. COMP. LAWS § 450.1777(2) (2025); MINN. STAT. § 302A.011.48 (2025); MISS. CODE ANN. § 79-25-3(h) (2025); MO. REV. STAT. § 351.459(8) (2025); NEB. REV. STAT. § 21-2438 (2025); NEV. REV. STAT. § 78.418 (2025); N.J. STAT. ANN. § 14A:10A-3.h (West 2025); N.Y. BUS. CORP. LAW § 912(8) (McKinney 2025); OR. REV. STAT. § 60.825(4)(a) (2025); 15 PA. CODE § 2552 (2025); 7 R.I. GEN. LAWS § 7-5.2-3(8) (2025); S.C. CODE ANN. § 35-2-208 (2025); S.D. CODIFIED LAWS § 47-33-3(1)(k) (2025); TENN. CODE ANN. § 48-103-203(8) (West 2025); TEX. BUS. CODE ANN. § 21.605 (West 2025); UTAH CODE ANN. § 16-10a-1802 (West 2025); VA. CODE ANN. § 13.1-725 (2025); WASH. REV. CODE ANN. § 23B.19.020(8) (West 2025); WIS. STAT. § 180.1140(6) (2025); WYO. STAT. ANN. § 17-18-102(b)(v) (2025).

265. *See* HAW. REV. STAT. ANN. § 414E-2(c)(4)(A) (West 2025); MD. CODE ANN., Corps. & Assns. § 3-701(e)(1) (West 2025); WYO. STAT. ANN. § 17-18-102(b)(xviii) (2025).

266. CAL. FIN. CODE § 1280(a) (10%) (West 2025); IDAHO CODE ANN. § 26-501 (24%) (West 2025); N.C. GEN. STAT. § 53C-1-4 (10%) (2025); NEV. REV. STAT. § 666.003 (10% for entities and 20% for natural persons) (2025); N.Y. BANKING LAW § 141.3 (10%) (McKinney 2025).

267. *See supra* Part IV.E.

268. ALASKA STAT. § 21.22.200(3) (2025); ARIZ. REV. STAT. ANN. § 20-481.3 (2025); ARK. CODE ANN. § 23-63-503(2) (2025); CAL. INS. CODE § 1215(d) (West 2025); COLO. REV. STAT. § 10-3-801(3) (2025); DEL. CODE ANN. Tit. 18, § 5001(3) (2025); FLA. STAT. ANN. § 628.801(1) (West 2025); GA. CODE ANN. § 33-13-1 (2025); HAW. REV. STAT. ANN. § 431:11-102 (West 2025); IDAHO CODE ANN. § 41-3802 (West 2025); 215 ILL. COMP. STAT. ANN. 5/131.1(b) (West 2025); IND. CODE 27-1-23-1(e) (2025); IOWA CODE § 521A.1.3 (2025); KAN. STAT. ANN. § 40-3302 (2025); KY. REV. STAT. ANN. § 304.37-010 (West 2025); LA. STAT. ANN. § 22:691.2(3) (2025); ME. REV. STAT. ANN. tit. 24, § 222.2.B (2025); MASS. GEN. LAWS ch. 175, § 206 (2025); MICH. COMP. LAWS § 500.1301–79 (2025); MINN. STAT. § 60D.15.4 (2025); MISS. CODE ANN. § 83-6-1(c) (2025); MO. REV. STAT. § 382.010(2) (2025); MONT. CODE ANN. § 33-2-1101; NEB. REV. STAT. § 44-2121(2) (2025); NEV. REV. STAT. § 692C.050 (2025); N.H. REV. STAT. ANN. § 401-B:1.III (2025); N.M. STAT. ANN. § 59A-37-2.C (2025); N.Y. INS. LAW §§ 1501(a)(2), (b) (McKinney 2025); N.C. GEN. STAT. § 58-19-5(2) (2025); N.D. CENT. CODE § 26.1-10-01 (2025); OHIO REV. CODE ANN. § 3901.32 (West 2025); OKLA. STAT. tit. 36, § 1631.3 (2025); 40 PA. CODE § 991.1401 (2025); 27 R.I. GEN. LAWS § 27-35-1 (2025); S.C. CODE ANN. § 38-21-10(2) (2025); TENN. CODE ANN. § 56-11-101(b)(3) (West 2025); VT. STAT. ANN. tit. 8, § 3681(3) (2025); VA. CODE ANN. § 38.2-1322 (2025); WASH. REV. CODE ANN. § 48.31B.005(3) (West 2025); W. VA. CODE, § 33-27-2 (2025); WYO. STAT. ANN. § 26-44-101 (2025). This count includes Alabama, which uses 5%. ALA. CODE § 27-29-1(3) (1975).

the state securities laws of four states.[269] Twenty-two states set the level of ownership for an interested stockholder at 10% or lower, with one setting it at 5%[270] and twenty-one at 10%.[271]

Another common ownership level is 25%. That figure establishes a presumption of control in (i) the Investment Act,[272] (ii) the state securities laws of eight states,[273] and (iii) the definition of interested stockholder for one state.[274] It is sufficient to establish control under the Bank Act[275] and the state bank holding company acts in Delaware and thirty-eight other states.[276] The

269. KAN. ADMIN. REGS. § 81-1-1 (2016); NEV. ADMIN. CODE § 90.035 (West 2025); S.C. CODE ANN. § 35-2-208 (2025). California uses a brightline 10% threshold to establish control. CAL. CODE REGS. tit. 10, § 260.216.16 (2025).

270. MASS. GEN. LAWS ch. 110F, § 3(g).

271. *See* ARIZ. REV. STAT. ANN. § 10-2701.10 (2025); CONN. GEN. STAT. § 33-840(9) (2025); GA. CODE ANN. § 14-2-1110(11) (2025); IDAHO CODE ANN. § 30-1701(1) (West 2025); IND. CODE ANN. § 23-1-43-10 (West 2025); IOWA CODE § 490.1110.3.e (2025); KY. REV. STAT. ANN. § 271B.12-200(1) (West 2025); MD. CODE ANN., Corps. & Assns. § 3-601(j) (West 2025); MICH. COMP. LAWS § 450.1777(3) (2025); MINN. STAT. § 302A.011.49 (2025); NEB. REV. STAT. § 21-2440 (2025); NEV. REV. STAT. § 78.423 (2025); N.J. STAT. ANN. § 14A:10A-3.j (West 2025); N.D. CENT. CODE § 10-19.1-72.1 (2025); 7 R.I. GEN. LAWS § 7-5.2-3(10) (2025); S.C. CODE ANN. § 35-2-210 (2025); S.D. CODIFIED LAWS § 47-33-3(1)(q) (2025); TENN. CODE ANN. § 48-103-203(11) (West 2025); VA. CODE ANN. § 13.1-725 (2025); WASH. REV. CODE ANN. § 23B.19.020(1) (West 2025); WIS. STAT. § 180.1140(11) (2025). Seven others, including Delaware, use 15%. DEL. CODE ANN. tit. 8, § 203(5) (West 2025); FLA. STAT. ANN. § 607.0901(1)(k) (West 2025); 805 ILL. COMP. STAT. ANN. 5/7.85.D(2) (West 2025); KAN. STAT. ANN. § 17-6427(c)(5)(B) (2025); OKLA. STAT. tit. 18, § 1090.3.D.5 (2025); OR. REV. STAT. § 60.825(5)(a) (West 2025); WYO. STAT. ANN. § 17-18-102(b)(vii) (2025).

272. 15 U.S.C. § 80a-2(a)(9).

273. 3-14-2 ARK. CODE R. § 102.01(11) (LexisNexis 2025); 6 DEL. ADMIN. CODE § 708 (2025); HAW. CODE R. § 16-39-101 (LexisNexis 2025); 815 ILL. COMP. STAT. ANN. 5/2.4 (West 2025); LA. ADMIN. CODE tit. 10, pt. 13, § 103 (2025); MICH. ADMIN. CODE r. 451.1.1(e) (2019); VT. CODE R. § 4-4-3:3(3.15)(a)(12)(A)(i) (2025); WASH. ADMIN. CODE § 460-24-005 (2025).

274. ME. REV. STAT. ANN. tit. 13, § 1109.1.H (2025). But Maine counterbalances the high "interested shareholder" threshold with a low, 10%, presumption for control.

275. 12 U.S.C. § 1841(a)(1).

276. ALA. CODE § 5-1A-2(8) (1975); ALASKA STAT. § 06.05.990(11) (2025); ARIZ. REV. STAT. ANN. § 6-141 (2025); CONN. GEN. STAT. § 36a-2(17) (2025); DEL. CODE ANN. tit. 5, § 101(8) (West 2025); FLA. STAT. § 655.005(1)(c) (2025); HAW. REV. STAT. § 412:12-101 (2025); GA. CODE ANN. § 7-1-605(a)(2) (2025); 205 ILL. COMP. STAT. 10/2(h) (West 2025); IND. CODE ANN. § 28-2-13-12 (West 2025); KAN. STAT. ANN. § 9-519(b)(1) (2025); KY. REV. STAT. ANN. §§ 286.3-900(1)(b), (d) (West 2025); LA. STAT.

Small Business Act establishes control at 30% with management participation.[277] All twenty-five states with control share statutes set the second level of control at one-third ownership.

Contrary to the statutory consensus, the formal school rejects the idea that any level of minority stock ownership, standing alone, can create a presumption of control or be sufficient to establish control. The formal school takes the opposite approach, with the Safe Harbor Definition using the One-Third Floor to foreclose control before that level. The Safe Harbor Definition also imposes the Board Control Test and requires Majority Equivalence. The decisions in *PNB Holding*, *Superior Vision*, and *Morton's* sought to accomplish the same results as a matter of common law through assertions like the One-Third-Is-Low Concept and the *Cysive*-As-Floor Concept, the Board Control Test, and the requirement of Majority Equivalence.

The most sophisticated tests for non-majority control expressly follow the Multiple Sources Principle. Regulatory regimes like the Bank Act and FIRRMA combine ownership thresholds with other factors like board or officer roles, contractual ties, and stock dispersion. These approaches are consistent with the functional school's consideration of Powerful Roles and Contractual Control.

ANN. § 6:532(9) (2025); MD. CODE ANN., Fin. Inst., § 5-901(e) (West 2025); ME. REV. STAT. ANN. tit. 9, § 1011(4) (2025); MICH. COMP. LAWS § 487.11201(c) (2025); MISS. CODE ANN. § 81-8-1(g) (2025); MO. REV. STAT. § 362.910(4) (2025); MONT. CODE ANN. § 32-1-109(8) (2025); N.D. CENT. CODE § 6-08-08.1(7) (2025); NEB. REV. STAT. § 8-909(3) (2025); N.H. REV. STAT. ANN. § 383-B:2-201(5) (2025); N.J. STAT. ANN. § 17:9A-409 (West 2025); OHIO REV. CODE ANN. § 1101.01(B) (West 2025); OKLA. STAT. tit. 6, § 102.17 (2025); OR. REV. STAT. § 706.008(2) (2025); 19 R.I. GEN. LAWS § 19-6-1(1) (2025); S.C. CODE ANN. §§ 34-25-10(4), (10) (2025); S.D. CODIFIED LAWS § 51A-1-2(3) (2025); TENN. CODE ANN. §§ 45-2-107(a)(1)(B), (b)(1)(B) (West 2025); UTAH CODE ANN. 1953 § 7-1-103(5) (West 2025); W. VA. CODE § 31A-1-2(b) (2025); WASH. REV. CODE. ANN. § 30A.04.010(3) (West 2025); WIS. STAT. § 221.0901(2)(c) (2025); WYO. STAT. ANN. § 13-9-202 (2025); ARK. CODE ANN. §§ 23-45-102(a)(3), (6)(A), (6)(B) (2025); TEX. FIN. CODE ANN. § 31.002(a)(3) (West 2025), (13); VT. STAT. ANN. tit. 8 §§ 11101(5), (17) (West 2025). The count includes Idaho, which uses 24%. IDAHO CODE ANN. § 26-501 (West 2025).

277. 13 C.F.R. § 107.50 (2026).

VI. CONCLUSIONS ABOUT NON-MAJORITY CONTROL

The law governing non-majority control is remarkably uniform. The Historical Article showed that functionalism has been the dominant common law approach. This Article shows that functionalism has been and remains the dominant statutory approach.

The formal school that emerged in Delaware during the last two decades was novel and idiosyncratic. But when some Delaware decisions persisted in using the functional approach, influential commentators attacked those decisions as novel and anomalous. That narrative was incorrect. Although Delaware has now enacted a statutory version of formalism, the functional approach has always been dominant.

Commentators and policymakers can and should engage in good faith debates over the merits of different approaches to non-majority control. Those debates should not turn on a counterfactual effort to depict the formal school as dominant and the functional school as new.