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Mark J. Loewenstein, University of Colorado Law School

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WILKES V. SPRINGSIDE NURSING HOME, INC.: A HISTORICAL PERSPECTIVE

MARK J. LOEWENSTEIN*

INTRODUCTION

In *Wilkes v. Springside Nursing Home, Inc.* the Supreme Judicial Court of Massachusetts decided that a shareholder in a closely held corporation could not be frozen out from participating in the corporation unless there was a legitimate business reason for his exclusion and this business purpose “could [not] have been achieved through an alternative course of action less harmful to the minority’s interest.”¹ This opinion was preceded, fifteen months earlier, by *Donahue v. Rodd Electrottype Co.*, where the same court decided that a minority shareholder in a closely held corporation had to be extended an “equal opportunity” to sell her shares back to the corporation if that privilege was afforded to a controlling shareholder.² Both cases were grounded on the rationale that a closely held corporation ought to be viewed as a partnership and, as such, the shareholders owe to one another the fiduciary duties that partners owe to one another.³

Interestingly, in neither case did the court delve into the intricacies of partnership law.⁴ Rather, the court seemed to assume that if partnership law applied, the plaintiff in each case would prevail.⁵ While the court’s unstated assumption may not be correct—especially in a fact situation like the one in *Donahue*⁶—the notion that

* Monfort Professor of Commercial Law, University of Colorado Law School. The author thanks Shirin Chahal (Class of 2011) and Laura Ellenberger (Class of 2011) for their excellent research assistance. Ms. Chahal was also the primary author of Part III of this Article. The author also thanks Professors Andrew Schwartz and Eric Gouvin for their helpful comments and suggestions on an earlier draft of this Article.

1. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

2. *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 519 (Mass. 1975).

3. *Wilkes*, 353 N.E.2d at 663; *Donahue*, 328 N.E.2d at 515.

4. *Wilkes*, 353 N.E.2d at 661-62; *Donahue*, 328 N.E.2d at 512.

5. See *Wilkes*, 353 N.E.2d at 663; *Donahue*, 328 N.E.2d at 519-20.

6. See Mary Siegel, *Fiduciary Duty Myths in Close Corporate Law*, 29 DEL. J. CORP. L. 377, 439-40 (2004) (noting that partnership fiduciary law does not serve the function of prohibiting freeze-outs or requiring equal treatment, but rather, these concepts are statutory).

shareholders owe fiduciary duties to their co-shareholders would certainly give rise to shareholder liability in many circumstances in which liability would not otherwise arise.⁷ To take a simple example, in the absence of a fiduciary duty a shareholder may purchase shares from a co-shareholder without disclosing material information known to the buyer but not known to the seller.⁸ Fiduciary duty changes that.⁹

Donahue and *Wilkes* are each cases that could have reached the same conclusions on narrower grounds. In the case of *Donahue*, the court could have decided that the directors who authorized the repurchase had a conflict of interest and thus bore the burden of proving that their decision was fair to the corporation.¹⁰ While this may not have given plaintiff all she sought in the case, a remand would have given her leverage for a favorable settlement and, in the future, inhibited those controlling a corporation from favoring the interests of related stockholders. In *Wilkes*, the court could have ruled that the parties had a contractual understanding that they would all be directors, officers, and employees of the company, an understanding breached by the defendants.¹¹ Alternatively, the court could have ruled that the payments to the defendants were at least partially constructive dividends in which the plaintiff should have shared. But, as in *Donahue*, these rulings might not have given the plaintiff all he sought and, perhaps more importantly, would have precluded the broad doctrinal change made by these precedents.

7. *Id.* at 417.

8. See, e.g., *Chiarella v. United States*, 445 U.S. 222, 229 (1980) (“[A] purchaser of stock who has no duty to a prospective seller because he is neither an insider nor a fiduciary has been held to have no obligation to reveal material facts.”); see also *Gen. Time Corp. v. Talley Indus., Inc.*, 403 F.2d 159, 164 (2d Cir. 1968).

9. *Jordan v. Duff & Phelps, Inc.*, 815 F.2d 429, 435 (7th Cir. 1987); *Van Schaack Holdings, Ltd. v. Van Schaack*, 867 P.2d 892, 898 (Colo. 1994); *Bailey v. Vaughan*, 359 S.E.2d 599, 605 (W. Va. 1987).

10. E.g., *Pointer v. Castellani*, 918 N.E.2d 805, 819 (2009) (“Where a fiduciary is taking advantage of an opportunity for his own profit, he has the burden to show that all material facts were disclosed and that his actions did not harm the corporation and were fundamentally fair.” (citing *Demoulas v. Demoulas Super Mkts. Inc.*, 677 N.E.2d 159, 180 (1997))).

11. *Wilkes*, in his appellate brief, argued that the parties had a pre-incorporation agreement regarding the respective roles of the parties and their compensation. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 659 n.2 (Mass. 1976). This agreement, he argued, gave the parties fiduciary duties that continued on regardless of the form of the type of business entity that they formed. See *id.* at 659.

These two holdings, thus, are widely recognized as changing corporate law.¹² To what extent is this assessment accurate? What was the state of the law when *Wilkes* and *Donahue* were decided? Were these decisions part of an activist streak by the Massachusetts Supreme Judicial Court, or aberrational to its jurisprudence? Did the decisions stimulate legislative action, or retard it? This Article seeks to answer, at least preliminarily, these questions, proceeding first, in Part I, with an analysis of the precedent and other authority supporting and undermining the decisions. Part II then considers the nature of the court at the time of these decisions, looking briefly at other significant precedents decided by the court. Part III reviews statutory provisions dealing with minority shareholders and Part IV considers other post-1975 developments in business association law.

I. PRECEDENT CITED BY THE COURT

Donahue was a precedent-setting decision and, unsurprisingly, the court cited no authority for the key holding in the case¹³:

The rule of equal opportunity in stock purchases by close corporations provides equal access to these benefits for all stockholders. We hold that, in any case in which the controlling stockholders have exercised their power over the corporation to deny the minority such equal opportunity, the minority shall be entitled to appropriate relief.¹⁴

The court cited no precedent for the first sentence, and for the second included a footnote explaining that “[e]ven under the traditional standard of duty applicable to corporate directors and stockholders generally, this court has looked favorably upon stockholder

12. See, e.g., ROBERT HAMILTON, *CASES AND MATERIALS ON CORPORATIONS* 482 (8th ed. 2003) (“The basic holding of *Donahue* that fiduciary relationships exist within closely held corporations has been widely cited and accepted. Courts in more than 25 states have either cited *Donahue* approvingly or have cited cases that relied upon *Donahue* for this proposition.”); see also Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 *STAN. L. REV.* 271, 293-95 (1986) (calling *Donahue* a “much applauded” decision).

13. This holding was foreshadowed earlier in the opinion: “[I]f the stockholder whose shares were purchased was a member of the controlling group, the controlling stockholders must cause the corporation to offer each stockholder an equal opportunity to sell a ratable number of his shares to the corporation at an identical price.” *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 518 (Mass. 1975). The court did not cite any authority for this statement, but did indicate in a footnote that stockholders could give advance consent to a selective repurchase or could ratify it after the fact. *Id.* at 518 n.24.

14. *Id.* at 519.

challenges to *stock issues* which, in violation of a fiduciary duty, served personal interests of other stockholder/directors and did not serve the corporate interest.”¹⁵ Of course, stock issuances can occur only upon the approval of the board of directors, who must act in the best interests of the corporation.¹⁶ *Donahue* extends this concept because it requires those controlling the corporation to act in the *personal* interest of an individual stockholder, not just in the corporate interest.¹⁷ Under *Donahue*, if a stock repurchase from a controlling stockholder is in the best interests of the corporation, and a repurchase from a minority stockholder is not, the equal opportunity rule mandates the second repurchase, if that stockholder desires to sell.¹⁸ In that sense, *Donahue* stands traditional fiduciary duty on its head, at least for directors seeking to act in the best interests of the corporation.

Donahue and, therefore, *Wilkes*, did rely on four earlier Massachusetts cases to support the principle that stockholders controlling a closely held corporation are to be held “to a standard of fiduciary duty more exacting than the traditional good faith and inherent fairness standard.”¹⁹ The earliest of these was *Silversmith v. Sydeman*,²⁰ which the *Donahue* court characterized as implying that a stockholder-officer liquidating a corporation would be subject to “a more rigorous standard of fiduciary duty”²¹ in light of the fact that there were only two stockholders who acted as “partners” in the conduct and liquidation of the corporation.²² But the actual holding in *Silversmith* was unaffected by this observation; the defendant breached his duty of loyalty and good faith regardless of how his relationship with his co-owner was characterized.²³ While

15. *Id.* at 519 n.25 (emphasis added). The court cited as examples *L. E. Fosgate Co. v. Boston Mkt. Terminal Co.*, 175 N.E. 86 (Mass. 1931); *Elliott v. Baker*, 80 N.E. 450 (Mass. 1907); *cf. Andersen v. Albert & J. M. Anderson Mfg. Co.*, 90 N.E.2d 541 (Mass. 1950). *Id.*

16. See MODEL BUS. CORP. ACT § 6.21(b); see also *Norlin Corp. v. Rooney*, 744 F.2d 255, 264 (2d Cir. 1984).

17. *Donahue*, 328 N.E.2d at 518-19.

18. *Id.* at 519.

19. *Id.* at 516.

20. *Silversmith v. Sydeman*, 25 N.E.2d 215 (Mass. 1940).

21. *Donahue*, 328 N.E.2d at 516 (citing *Silversmith*, 25 N.E.2d at 68) (discussing how the relationship between the stockholders was like a partnership and despite the fact that the parties “had adopted [the] corporate form” to conduct their business, they would be held to the same fiduciary duty standard as the partners).

22. *Id.*

23. *Silversmith*, 25 N.E.2d at 217. The defendant, essentially, paid himself compensation and charged the corporation interest on a note, in each case without proper authorization. *Id.* at 217.

the case did include dictum to the effect that “the plaintiff and defendant were acting as partners,”²⁴ this was more a factual observation than a legal conclusion and, in any event, was irrelevant to the holding in the case.²⁵ Similarly, in *Samia v. Central Oil Co.*,²⁶ the second case cited by the *Donahue* court,²⁷ the defendants engaged in acts of self-dealing and breach of trust that justified recovery by the plaintiffs regardless of the size of the corporation.²⁸ Indeed, some of the acts were outside the corporation, such as one defendant’s improper acts as the executor of an estate.²⁹ The court in *Donahue* cited to its *Samia* dictum that the corporation there was a small family corporation, but, again, this observation did not influence the outcome of the case.³⁰

The third case cited by the *Donahue* court was *Sher v. Shandler*,³¹ which, tellingly, was not discussed by the court.³² In it, one stockholder in a two-person corporation purchased the stock of the other without disclosing material information known to the buyer but not the seller.³³ The seller was successful in a suit for rescission because the buyer failed to disclose the information.³⁴ The buyer’s disclosure obligation, however, arose because of an express contract between the parties that required each to keep the other fully informed of “all transactions relating to the business,”³⁵ a fact that the *Sher* court acknowledged.³⁶

The final cited case, which also was not discussed by the court,³⁷ was *Mendelsohn v. Leather Manufacturing Corp.* and, like *Sher*, involved the sale of stock from one stockholder in a closely held corporation to another.³⁸ And, as in *Sher*, there was an allega-

24. *Id.*

25. *Id.* at 217, 220.

26. *Samia v. Cent. Oil Co.*, 158 N.E.2d 469 (Mass. 1959).

27. *Donahue*, 328 N.E.2d at 516 (citing *Samia*, 158 N.E.2d at 469).

28. *Samia*, 158 N.E.2d at 476.

29. *Id.*

30. *Donahue*, 328 N.E.2d at 517 (citing *Samia*, 158 N.E.2d at 476).

31. *Sher v. Shandler*, 90 N.E.2d 536 (Mass. 1950).

32. *Donahue*, 328 N.E.2d at 517.

33. *Sher*, 90 N.E.2d at 538. This information concerned the fact that negotiations to conclude a lease favorable to the corporation were near completion and would enhance the corporation’s value. *Id.*

34. *Id.* at 540.

35. *Id.* at 537.

36. *Id.* at 539 (“It was the defendant’s duty, under the agreement referred to above, to disclose all information necessary to enable the plaintiff to form a sound judgment of the value of the interest that he was selling.” (emphasis added)).

37. *Donahue*, 328 N.E.2d at 517.

38. *Mendelsohn v. Leather Mfg. Corp.*, 93 N.E.2d 537, 540 (Mass. 1950).

tion that the buyer failed to make full disclosure to the seller.³⁹ The court seemed to acknowledge that the buyer owed duties of disclosure to the seller,⁴⁰ but this was dictum because the seller also subsequently signed a general release at a time in which he appeared to be fully informed of all material facts.⁴¹ Without the release, the plaintiff-seller might still have prevailed because the buyer was an officer and director of the corporation, and that circumstance precluded the buyer from purchasing shares from an outside stockholder without disclosing material, nonpublic information.⁴² But it is the buyer's status as a corporate insider that gives rise to the disclosure obligation, not the fact that the corporation is closely held.

In short, then, the supporting authority for the holding in *Donahue* was weak, at best. In contrast, existing Massachusetts precedent, which denied that stockholders in closely held corporations owed one another a fiduciary duty, suggested a contrary result, as the court readily acknowledged.⁴³ And prece-

39. *Id.* at 540-41.

40. *Id.* at 542 (“The mere absence of affirmative false representations, of course, would not preclude the plaintiff [seller] from impeaching the transaction. By reason of the fiduciary relationship existing between the parties [the buyer] could be guilty of fraud by failing to disclose to the plaintiff relevant facts concerning the operations of the enterprise.”); see also *Sher*, 90 N.E.2d at 539-40; *Akin v. Warner*, 63 N.E.2d 566, 570 (Mass. 1945); *Reed v. A.E. Little*, 152 N.E. 918, 920 (Mass. 1926); *Flynn v. Colbert*, 146 N.E. 784, 786 (Mass. 1925); *Arnold v. Maxwell*, 111 N.E. 687, 689 (Mass. 1916).

41. *Mendelsohn*, 90 N.E.2d at 542-43.

42. *Id.* at 541. This is the so-called “special fact doctrine,” which creates an exception to the general rule that the buyer has no duty to disclose and is imposed when the buyer is a corporate insider in possession of material nonpublic information and the seller is an outsider unaware of the information. *Strong v. Repide*, 213 U.S. 419, 431 (1909).

43. *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 517 (Mass. 1975) (citing *Cardullo v. Landau*, 105 N.E.2d 843 (Mass. 1952) (“Statements in other cases . . . which suggest that stockholders of a corporation do not stand in a relationship of trust and confidence to one another will not be followed in the close corporation context.” (citations omitted)); *Leventhal v. Atlantic Fin. Corp.*, 55 N.E.2d 20 (Mass. 1944); *Mairs v. Madden*, 30 N.E.2d 242 (Mass. 1940)).

Cardullo arose out of a sale by defendant of his 50% stock ownership in the corporation to the plaintiff, who was a 50% owner at the time of the sale. *Cardullo*, 105 N.E.2d at 844. Plaintiff complained that the defendant failed to disclose what defendant had paid for the shares and that a general release, previously executed by the plaintiff, should not bar his claim. *Id.* The court said that plaintiff's claim rested on finding a fiduciary duty from the defendant to the plaintiff because the release was “very comprehensive.” *Id.* at 845. The relationship of the parties, as co-owners of a firm, was insufficient to give rise to a fiduciary duty between them. *Id.* at 846.

In *Leventhal*, one of two stockholders in a two-stockholder corporation brought a suit in equity for interpretation of a contract between the two stockholders. *Leventhal*, 55 N.E.2d at 22. For reasons that are not articulated in the opinion, plaintiff argued that the contract created a partnership, and this was rejected by the court. *Id.* The court

dent from outside of Massachusetts also ran counter to *Donahue*.⁴⁴

Early in the opinion, the *Donahue* court cited and quoted from a 1957 federal district court case from the District of Columbia, *Helms v. Duckworth*,⁴⁵ to support the idea that a closely held corporation should be treated differently from corporations with a larger stockholder base.⁴⁶ *Helms*, which was widely cited in the treatises and articles that the *Donahue* court relied upon, involved a buy/sell agreement in a two-person corporation.⁴⁷ The agreement provided that upon the death of either stockholder, the survivor would buy the decedent's shares at the price designated in the

found that “[i]t was the intention of all the parties that the corporation should continue to conduct its business as a corporation.” *Id.*

In *Mairs*, the defendants purchased outstanding stock and thereby gained control. *Mairs*, 30 N.E.2d at 244-46. These purchases were made by the defendants while, as directors, they were negotiating with a third party who was seeking to acquire control of the corporation. *Id.* The defendants' purchase had the effect of mooting the third party's offer, since it was conditioned on obtaining control. *Id.* Plaintiffs complained that the defendants' actions deprived them of the opportunity to tender their shares to the third party and, as control now rested with defendants, the value of plaintiffs' stock was impaired. *Id.* The court denied relief, partially on the basis that the defendants, as stockholders, did not owe a fiduciary duty to the plaintiffs. *Id.*

44. *E.g.*, *Bellows v. Porter*, 201 F.2d 429, 433-34 (8th Cir. 1953) (“To warrant the interposition of the court in favor of the minority shareholders . . . , where such action is within the corporate powers, a case must be made out which plainly shows that such action is so far opposed to the true interests of the corporation itself as to lead to the clear inference that no one thus acting could have been influenced by any honest desire to secure such interests, but that he must have acted with an intent to subserve some outside purpose, regardless of the consequences to the company, and in a manner inconsistent with its interests.” (alteration in original) (quoting *Gamble v. Queens Cnty. Water Co.*, 25 N.E. 201, 202 (Mass. 1890))); *Keck v. Schumacher*, 198 So. 2d 39, 43 (Fla. Dist. Ct. App. 1967) (denying minority stockholder's claim for dissolution despite her termination as an employee of the corporation); *Hyman v. Velsicol*, 97 N.E.2d 122, 124 (Ill. App. Ct. 1951) (holding that reorganization adversely affecting minority stockholder would be upheld because it was in the corporation's interest that it proceed); *Keough v. St. Paul Milk Co.*, 285 N.W. 809, 820 (Minn. 1953) (“While stockholders in a corporation owe the duty of good faith to each other in the management of the affairs of the corporation, they do not stand to each other in a fiduciary relation within the rule we have stated.” (quoting *Bjorngaard v. Goodhue Cnty. Bank*, 52 N.W. 48, 49 (Minn. 1892))); *Gottfried v. Gottfried*, 73 N.Y.S.2d 692, 696 (Sup. Ct. 1947) (noting, in dictum, that terminating the employment of a minority stockholder in a closely held corporation can result in hardship, but adding that “[n]evertheless, such situations do not in themselves form a ground for the interposition of a court of equity”); *Boss v. Boss*, 200 A.2d 231, 234 (R.I. 1964) (holding that in dealing in corporate shares, shareholders can act in their own self-interests).

45. *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957).

46. *Donahue*, 328 N.E.2d at 511-13.

47. *Helms*, 249 F.2d at 483.

agreement.⁴⁸ Although the agreement contemplated that the price would be adjusted periodically by written consent, no such written modification was ever executed.⁴⁹ The administratrix petitioner argued that the stock was worth considerably more than the price specified in the agreement and enforcement would be unfair.⁵⁰ The court found that in a two-person venture such as this, there was a relationship of trust between the stockholders and each had to deal with each other fairly, honestly, and openly in order for the organization to survive.⁵¹ Accordingly, the court held that the surviving shareholder had a duty to bargain under the purchase agreement in good faith.⁵² *Helms* does support the notion that stockholders in a closely held corporation must deal with one another in good faith, but that good faith notion applies with equal force to all contractual obligations.⁵³ Normal contract doctrines of interpretation and good faith might have resulted in the same outcome.⁵⁴

Like *Donahue*, *Wilkes* rested on a thin reed. It relied heavily, of course, on *Donahue* and, like *Donahue*, proceeded from the assumption that stockholders in a closely held corporation owed one another partner-like fiduciary duties.⁵⁵ But *Wilkes* cut back slightly on *Donahue*, affording the controlling stockholders who have disadvantaged the minority stockholder the opportunity to demonstrate that their actions had “a legitimate business purpose.”⁵⁶ If they do so, “it is [up] to minority stockholders to demonstrate that the same legitimate objective could have been achieved though an

48. *Id.* at 484.

49. *Id.*

50. *Id.*

51. *Id.* at 487.

52. *Id.* at 486.

53. *Id.*; see U.C.C. § 1-304 (2004); RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

54. See generally Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN'S L. REV. 559, 581 (2006) (“[E]ven where no statutory authority exists to vary the ‘plain meaning’ of contract language, courts will do so based on common law principles of interpretation and gap-filling where such language is clearly at odds with parties’ expectations.”). Professor Dubroff discusses the well-known Massachusetts case of *Spaulding v. Morris*, 76 N.E.2d 137 (Mass. 1947), where the court quoted from an earlier Massachusetts case that announced a broad rule of interpretation: “‘Every instrument in writing is to be interpreted, with a view to the material circumstances of the parties at the time of the execution, in the light of the pertinent facts within their knowledge and in such manner as to give effect to the main end designed to be accomplished.’” *Id.* (quoting *Ditmore v. Dickey*, 144 N.E. 57, 60 (Mass. 1924)).

55. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 661-64 (Mass. 1976).

56. *Id.* at 663.

alternative course of action less harmful to the minority's interest."⁵⁷ For both of these propositions, the *Wilkes* court cited a New York case, *Schwartz v. Marien*,⁵⁸ and for the first proposition the court also cited a federal district court case from Georgia, *Bryan v. Brock & Blevins Co.*⁵⁹

Schwartz v. Marien does indeed support the proposition that when the board of directors takes an action that disadvantages a minority stockholder, it bears the burden of demonstrating that it had a "bona fide business purpose" that served the "best interests of the corporation."⁶⁰ *Schwartz* also suggested that, under the circumstances of that case, even if the board could demonstrate such a purpose, it must also demonstrate that "such objective could not have been accomplished substantially as effectively by other means" which did not adversely affect the complaining minority stockholder.⁶¹

Schwartz, however, was not grounded on the notion that the stockholders should be considered as fiduciaries of one another like partners in a partnership. Rather, this was a case in which the directors, acting in their respective capacities as directors, authorized the issuance of stock to themselves that resulted in a change of control.⁶² Prior to the issuance, the plaintiff owned 50% of the outstanding common stock, and a second family owned the other 50%.⁶³ Members of the second family controlled the board that authorized the stock issuance that gave them control.⁶⁴ Under universally accepted principles of corporate governance, the defendants, as directors, owed the corporation a fiduciary duty to act in the best interests of the corporation and, when their actions benefited them personally, they bore a heavy burden to demonstrate the fairness of their actions.⁶⁵ The New York court's decision in *Schwartz v. Marien* is just an application of this general principle and, as such, it stands in contrast to *Wilkes*.⁶⁶ In *Wilkes*, the de-

57. *Id.*

58. *Id.*; see *Schwartz v. Marien*, 335 N.E.2d 334 (N.Y. 1975).

59. *Wilkes*, 353 N.E.2d at 663; see *Brock & Blevins Co.*, 343 F. Supp. 1062 (N.D. Ga. 1972), *aff'd* 490 F.2d 563 (5th Cir. 1974).

60. *Schwartz*, 335 N.E.2d at 338.

61. *Id.*

62. *Id.* at 336.

63. *Id.*

64. *Id.*

65. *Id.*; see, e.g., *Pepper v. Litton*, 308 U.S. 295, 306 (1939); *Cheff v. Mathes*, 199 A.2d 548, 554 (Del. 1964); *Bennett v. Propp*, 187 A.2d 405, 409 (Del. 1962).

66. Compare *Schwartz*, 335 N.E.2d at 338, with *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 662 (Mass. 1976).

defendants also acted in their capacity as stockholders when they declined to reelect Wilkes to the Springside board,⁶⁷ and therein lies the radicalism of the *Wilkes* decision. It limits the ability of stockholders, acting as stockholders, to act in their own interests, instead burdening them with vague and unspecified duties to their fellow stockholders.

Schwartz does bear a resemblance to *Donahue* but is distinguishable from it. Both cases involve actions of the board of directors dealing in corporate stock—in *Schwartz* an issuance and in *Donahue* a repurchase.⁶⁸ In both cases, the minority stockholder complained of being precluded from participating, to their disadvantage.⁶⁹ There is, however, a subtle, but important, difference in the cases. In *Schwartz*, the action of the directors benefited them personally in their ability to control the corporation, but in *Donahue* the directors did not benefit personally.⁷⁰ One member of their family had his shares redeemed, but the defendant directors did not receive the proceeds of the redemption.⁷¹ Indeed, the relative ownership percentages of the remaining stockholders, including the plaintiff, increased.⁷² While *Schwartz*, *Wilkes*, and *Donahue* are certainly not inconsistent with one another, *Donahue* and *Wilkes* represent an important extension of *Schwartz*.

*Bryan v. Brock & Blevins Co.*⁷³ is even weaker authority for the proposition that the controlling group must demonstrate a legitimate business purpose for its actions. In *Bryan*, the plaintiff, a 15% stockholder in a closely held corporation, sought to enjoin a squeeze-out merger that would convert his stock ownership interest to cash.⁷⁴ He brought his action under Rule 10b-5.⁷⁵ The defendants had told the plaintiff that the company had decided to acquire his stock because of “a longstanding company policy” to limit share ownership to “active stockholders” and since plaintiff had retired he was no longer “active.”⁷⁶ But the court was unconvinced that

67. *Wilkes*, 353 N.E.2d at 661.

68. Compare *Schwartz*, 335 N.E.2d at 336, with *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 510 (Mass. 1975).

69. Compare *Schwartz*, 335 N.E.2d at 336, with *Donahue*, 328 N.E.2d at 510.

70. Compare *Schwartz*, 335 N.E.2d at 336, with *Donahue*, 328 N.E.2d at 510.

71. *Donahue*, 328 N.E.2d at 510.

72. *Id.*

73. *Bryan v. Brock & Blevins Co.*, 343 F. Supp. 1062, 1066 (N.D. Ga. 1972), *aff'd*, 490 F.2d 563 (5th Cir. 1974).

74. *Id.*

75. *Id.* at 1063 (citing the Securities Exchange Act of 1934, Employment of Manipulative and Deceptive Devices, 17 C.F.R. § 240.10b-5 (1964)).

76. *Id.* at 1064.

this was, in fact, the company's policy and, therefore, the merger lacked a "business purpose."⁷⁷ The decision is less than a model of clarity and the court never held that a merger lacking a business purpose violates Rule 10b-5.⁷⁸ Moreover, the court acknowledged that "in the absence of fraudulent activity in the merger proceedings, the defendants' position [that they need not demonstrate a business purpose] is conceivably supported by law."⁷⁹ The court went on to find such fraudulent activity—the defendants failed to disclose certain information regarding the company's expansion plans.⁸⁰

The case does include dicta supporting the holding in *Wilkes*, including an assertion that the merger could "hardly be interpreted to have been made in the best interest of [the plaintiff] as a minority shareholder."⁸¹ Ultimately, however, this is case about fraud, not fiduciary duty.⁸² *Bryan* was decided during a period in which the legality of squeeze-out mergers was being actively litigated in the federal and state courts, the former under Rule 10b-5 and the latter under state fiduciary principles.⁸³ With respect to the former, the United States Supreme Court ultimately held that Rule 10b-5 was limited to manipulative and deceptive devices and contrivances, and a mere breach of fiduciary duty unaccompanied by a misrepresentation or misleading statement would not support an action under the Rule.⁸⁴ As to state claims, the Delaware Supreme Court held in 1977 that a squeeze-out merger not motivated by a legitimate business purpose was a breach of the directors' fiduciary duty.⁸⁵ Six years later, however, that court reversed course and held that such a merger was permissible, but the board of directors had the burden of proving that such a merger was "entirely fair"—in terms of price and process—to the minority shareholders.⁸⁶ While not all state courts agree with this latter Delaware decision,⁸⁷

77. *Id.* at 1068.

78. *See id.*

79. *Id.* at 1067.

80. *Id.* at 1069.

81. *Id.*

82. *Id.* at 1067.

83. *See* Victor Brudney & Marvin A. Chirelstein, *A Restatement of Corporate Freezeouts*, 87 *YALE L.J.* 1354, 1355 (1978) (describing and explaining how "litigation in the freezeout field ha[d] become exceedingly active during the past ten years").

84. *Santa Fe Indus. Inc. v. Green*, 430 U.S. 462, 472 (1977).

85. *Singer v. Magnavox Co.* 380 A.2d 969, 980 (Del. 1977).

86. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 710 (Del. 1983).

87. *Coggins v. New England Patriots Football Club, Inc.*, 492 N.E.2d 1112, 1116-17 (Mass. 1986).

it seems fair to conclude that most courts would. The bottom line is that *Bryan* was of questionable authority when decided and clearly is no longer of any precedential value.

In short, then, *Wilkes* was, at the least, a generous extension of the precedent cited by the court and, more accurately, a break from it. Other cases, however, not cited by the *Donahue* or *Wilkes* courts, do point in the direction of finding a fiduciary duty among stockholders,⁸⁸ and academic literature roughly contemporaneous with *Donahue* and *Wilkes*,⁸⁹ particularly work by F. Hodge O'Neal,⁹⁰ built on those cases to provide strong support for the

88. *E.g.*, *Bellevue Gardens, Inc. v. Hill*, 297 F.2d 185, 186-87 (D.C. Cir. 1961) (upholding trial court's ordering the equitable remedy of liquidation where a pattern of conduct by the dominant stockholders was seriously prejudicial to the rights and interests of the minority); *Hartung v. Architects Hartung/Odle/Burke, Inc.*, 301 N.E.2d 240, 243 (Ind. Ct. App. 1973) ("[T]he shareholders in a close corporation, also referred to as an 'incorporated partnership,' stand in a fiduciary relationship to each another."); *Fewell v. Tappan*, 27 N.W.2d 648, 654-55 (Minn. 1947) (holding that claims for fraud and bad faith would be considered in light of an expectation of loyalty drawn from partnership principles); *Application of Pivot Punch & Die Corp.*, 15 Misc. 2d 713, 715 (N.Y. Sup. Ct. 1959) (drawing on partnership principles to determine whether a dissolution of the corporation would be beneficial to the stockholders); *Gaines v. Long Mfg. Co.*, 67 S.E.2d 350, 353-55 (N.C. 1951) (analogizing the duty of a controlling stockholder to that of a trustee and holding that an injunction was proper where minority stockholder had no adequate remedy at law to address allegedly harmful issuance of stock by the corporation); *Browning v. C & C Plywood Corp.*, 434 P.2d 339, 343 (Or. 1967) (finding squeeze out accomplished by issuance of shares was illegal; case remanded for appropriate remedy).

89. *See, e.g.*, F. O'NEAL, *CLOSE CORPORATIONS: LAW AND PRACTICE* (2d ed. 1971); F. O'NEAL, *OPPRESSION OF MINORITY SHAREHOLDERS* (1975); F. O'NEAL & J. DERWIN, *EXPULSION OR OPPRESSION OF BUSINESS ASSOCIATES* (1961); *see also* Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043, 1060 (1969); Edwin J. Bradley, *A Comparative Assessment of the California Close Corporation Provisions and a Proposal for Protecting Individual Participants*, 9 LOY. L.A. L. REV. 865, 866 (1976) [hereinafter *Comparative Assessment*]; Edwin J. Bradley, *Toward a More Perfect Close Corporation—The Need for More and Improved Legislation*, 54 GEO. L.J. 1145, 1147 (1966) [hereinafter *Towards a More Perfect Close Corporation*]; Michael W. Carnahan, *Relief to Oppressed Minorities in Close Corporations: Partnership Precepts and Related Considerations*, 1974 ARIZ. ST. L.J. 409, 420; Gaston H. Gage, *Close Corporations—Bad Faith of Majority*, 35 N.C. L. REV. 271, 279 (1957); Comment, *Minority Rights and the Corporate "Squeeze" and "Freeze"*, 1959 DUKE L.J. 436. In a symposium in the Northwestern Law Review devoted to close corporations, one author concluded a discussion of minority shareholders with this advice: "[I]t seems that the minority's rights should be enlarged to some extent, so that the legal tools which are placed in the hands of the majority cannot be used as instruments of oppression." Symposium, *The Close Corporation*, 52 NW. U. L. REV. 345, 396 (1957).

90. O'Neal, a recognized authority on closely held corporations, joined the faculty of the Washington University School of Law in 1977, was dean from 1980 to 1985, and was the George Alexander Madill Professor of Law when he retired in 1988. *Obituaries, F. Hodge O'Neal, 73, Ex-Law School Dean*, N.Y. TIMES, Jan. 24, 1991, at

Massachusetts court. O'Neal produced a treatise of over 600 pages devoted to the plight of minority shareholders in closely held corporations entitled *Oppression of Minority Shareholders*.⁹¹ The treatise has an unmistakable agenda—to identify the various ways that minority shareholders are squeezed out of a corporation and to suggest legal theories and planning techniques to address the problem.⁹²

O'Neal's treatise is as creative as it is thorough. For instance, in the course of discussing the *Wilkes* problem (“§ 3.06 Eliminating minority shareholders from directorate and excluding them from company employment”), O'Neal advises: “if [a shareholder who is dismissed from employment] has a cause of action against the majority shareholders . . . based on oppressive acts they have committed other than his discharge, he may be able to strengthen his case by using his arbitrary dismissal to evidence their bad faith.”⁹³

O'Neal promoted the idea that controlling shareholders owe fiduciary duties to the minority, calling the contrary view “outmoded.”⁹⁴ More importantly in the discussion of *Donahue* and *Wilkes*, O'Neal argued for partnership duties among shareholders,⁹⁵ characterizing a *Wilkes*-type squeeze out as “unjust.”⁹⁶ He concluded his treatise with a call to the judiciary and legislatures to take steps “to prevent the oppression of minority shareholders who lacked either the foresight or bargaining power to provide adequate protection for themselves.”⁹⁷ A few pages later he called for greater judicial activism:

Even in the absence of a statute specifically conferring broad powers on the courts to provide relief in shareholder disputes, there is no reason why the courts themselves should not be more energetic and imaginative in developing effective remedies for majority oppression of minorities. On the whole, American courts have been singularly conservative and unresourceful in providing remedies for oppressed minority shareholders.⁹⁸

D23. Earlier he had taught at the University of Mississippi and Vanderbilt University and had been dean of the law schools at Mercer and Duke. *Id.* He died in 1991 at the age of 73. *Id.*

91. F. HODGE O'NEAL, *OPPRESSION OF MINORITY SHAREHOLDERS* (1975).

92. *Id.* at 1.

93. *Id.* at 80.

94. *Id.* at 508.

95. *Id.* at 508-28.

96. *Id.* at 526.

97. *Id.* at 582.

98. *Id.* at 587-88.

Clearly, the Massachusetts court in *Donahue* and *Wilkes* took up the call.

Interestingly, O'Neal failed to give serious consideration to any counter-argument to judicial intervention.⁹⁹ For instance, where the legislature has provided a comprehensive scheme of regulation, is it appropriate for the courts to intervene?¹⁰⁰ Does judicial intervention upset an implicit bargain that the parties have made? Is judicial intervention a more efficient way to protect minority stockholders than legislative action?¹⁰¹ Are courts well equipped to re-fashion the bargain that the parties have made? Such questions may have caused other courts to eschew the *Donahue/Wilkes* approach to close corporations and defer to the legislature.¹⁰² In any event, O'Neal and other commentators at that time demonstrate zealotry on the issue that is apparent in the Massachusetts decisions as well.

II. THE COURT

The *Donahue/Wilkes* decisions must be considered with reference to the jurists who wrote the opinions and in the context of other decisions of the Massachusetts Court at or around the same time. Both the *Donahue* and *Wilkes* opinions were written by

99. Professor Harry Henn, however, did express the view that a private, contract solution might be preferable. HARRY HENN, *LAW OF CORPORATIONS* § 258, at 512 (1970). Henn did not seem to see a dire problem in the existing remedies for squeezed-out shareholders, stating, "Ingenuity on the part of counsel in drafting arrangements for the formation and operation of close corporations has, notwithstanding lack of statutory and judicial differentiation, enabled close corporations to achieve most of their legitimate objects thereby rendering the present situation tolerable to numerous small business corporations." *Id.*

100. Some commentators did seem concerned with this question. *See Comparative Assessment*, *supra* note 89, at 895-96; *Toward a More Perfect Close Corporation*, *supra* note 89, at 1145-46; *see also* Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 *NOTRE DAME L. REV.* 456, 484 (1985) (discussing the business judgment rule and other judicially created substitutes).

101. Around the time of the *Donahue/Wilkes* decisions commentators were advocating for legislative solutions. *See, e.g.,* Afterman, *supra* note 89, at 1076-77; *Toward a More Perfect Close Corporation*, *supra* note 89, at 1145; F. Hodge O'Neal, *Close Corporations: Existing Legislation and Recommended Reform*, 33 *BUS. LAW.* 873, 881 (1978) (summarizing developments in close corporation law and suggesting additional legislation that would be desirable).

102. *See, e.g.,* *Nixon v. Blackwell*, 626 A.2d 1366, 1381 (Del. 1993); *Cookies Food Prods., Inc. v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988); *Pabich v. Kellar*, 71 S.W.3d 500, 505-06 (Tex. App. 2002); *see also* Siegel, *supra* note 6, at 427-28 (discussing jurisdictions that have eschewed the legal principles represented by *Wilkes/Donahue*).

Chief Justices of the Court.¹⁰³ Chief Justice G. Joseph Tauro, author of *Donahue*, presided from 1970 to 1976¹⁰⁴ and Chief Justice Edward J. Hennessey, author of *Wilkes*, presided from 1976 to 1989.¹⁰⁵ Both justices earned reputations for persuasive writing, thorough research, and careful case analysis attuned to individual facts, but were also seen as “progressive,” overseeing fundamental changes in many aspects of Massachusetts state law.¹⁰⁶

Justice Tauro brought to the court a diverse professional career and broad experience. Born in 1909 to poor Italian immigrants,¹⁰⁷ he had been a general practitioner and trial lawyer for more than three decades, Chief Legal Counsel to the Governor, and, at the time of his nomination, Chief Justice of the Superior Court, the state’s highest trial court.¹⁰⁸ He had also been an active participant in the business and civic affairs of his community and a leader in professional organizations.¹⁰⁹ This practice-oriented background may explain why he was so willing to re-examine long-standing precedents and abandon them in favor of more progressive positions.¹¹⁰ In *Donahue*, for example, he eschewed a traditional analy-

103. *Wilkes v. Springside Nursing Home, Inc.* 353 N.E.2d 657, 657 (Mass. 1976); *Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 505 (Mass. 1976).

104. SUPREME JUDICIAL COURT OF MASSACHUSETTS OFFICE OF REPORTER OF DECISIONS, JUSTICES OF THE SUPREME JUDICIAL COURT (1804-PRESENT), available at <http://www.massreports.com/justices/AllJustices.htm> (last visited Apr. 19, 2011).

105. *Id.*

106. See, e.g., Honorable John M. Greaney, Dedication, *Dedication to Honorable Edward F. Hennessey*, 24 NEW ENG. L. REV. xxv, xxv (1990). Greaney observed that Chief Justice Hennessey had “the courage to break from precedent where changing societal values and conditions call[ed] for a new rule of law. . . . [Chief Justice Hennessey] adhered to the philosophy that stability in the law was important but should never supplant the need for judges to exercise their ‘creative powers’ to fashion, whenever necessary, thoughtful answers to difficult human problems.” *Id.*; see also Justice Benjamin Kaplan, *Address to a Special Sitting of the Supreme Judicial Court: Memorial to the Late Justice Robert Braucher*, 387 Mass. 1223, 1226, 1230 (1982) (commenting on Justice Braucher, Associate Justice of the Massachusetts Supreme Judicial Court from 1971 to 1981: “[i]n a community of professed liberals, Bob pronounced himself a conservative”).

107. *Obituaries, G. Joseph Tauro, Was Chief Justice of SJC and Superior Court*, BOS. GLOBE, Oct. 7, 1994, at 18.

108. *Honorable G. Joseph Tauro*, 61 MASS. L. Q. 19, 19 (1976).

109. *Id.*

110. See, e.g., *Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973) (abandoning common law distinctions between licensees, visitors, guests, etc. in favor of a single “common duty of reasonable care”); *Morash & Sons, Inc. v. Commonwealth*, 296 N.E.2d 461, 465 (Mass. 1973) (abandoning the doctrine of sovereign immunity when government creates or maintains a private nuisance); *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 843 (Mass. 1973) (abandoning common law doctrine that a tenant’s obligation to pay rent is based solely upon his possession of the premises); *George v.*

sis under corporate law, favored by the lower court,¹¹¹ and instead recognized a broad doctrine of protecting the expectations of minority stockholders.

At the time of Tauro's nomination, the Supreme Judicial Court was overburdened with an unworkably high caseload.¹¹² Within two years of his appointment, Chief Justice Tauro oversaw the establishment of a brand new intermediate appellate system.¹¹³ The new appellate court was "the most significant change in the organization of the Massachusetts court system" in over a century.¹¹⁴ After its establishment, Tauro wrote, "the appellate burdens on the Supreme Judicial Court have been eased somewhat, thereby allowing the justices to devote more time and study to the decision of those appeals presenting important legal issues of broad social impact."¹¹⁵ A survey of cases decided during Tauro's tenure demonstrates this progressive approach and the higher level of detail and research each justice employed to support the Court's decisions.

For example, *Fiorentino v. Probate Court* examined the constitutionality under the equal protection clause of a statutory two-year residency requirement to file for divorce in Massachusetts and generated two persuasive opinions, one the majority and one the dissenting, presenting a detailed analysis of the issues and a comprehensive review of the existing state and constitutional law.¹¹⁶ *Wilkes* itself cites to a number of treatises and law review articles in addition to case law to support its holding.¹¹⁷ This new scholarly acumen was praised by the state's bar journal, the Massachusetts Law Quarterly, which wrote, "The day of terse, unreasoned, unanimous declaration of the law from on high is apparently over. The day of the carefully, even meticulously exhibited reasoning process underlying the final result . . . is thankfully before us."¹¹⁸

Jordan Marsh Co., 268 N.E.2d 915, 918 (Mass. 1971) (allowing recovery for the infliction of emotional distress not caused by the commission of a common law tort).

111. *Donahue v. Rodd Electrottype Co.*, 328 N.E.2d 505, 508 (Mass. 1976) (stating that the lower court had used corporate standards to find "that the purchase was without prejudice to the plaintiff and implicitly found that the transaction had been carried out in good faith and with inherent fairness").

112. *Honorable G. Joseph Tauro*, *supra* note 108, at 21.

113. *Id.*

114. *Id.*

115. G. Joseph Tauro, *The State of the Judiciary—Annual Report of Chief Justice*, 60 MASS. L. Q. 241, 251 (1975).

116. *Fiorentino v. Prob. Ct.*, 310 N.E.2d 112, 112, 121-22 (Mass. 1974).

117. *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 663 (Mass. 1976).

118. *Case and Statute Comments*, 59 MASS. L. Q. 175, 180 (1974).

Overall, Tauro championed modernization in all facets of the judicial system he inherited. He advocated for new courthouse facilities, better trained trial attorneys, modern courthouse procedures and management, and, most importantly, modernization of the civil law of the state.¹¹⁹ On this latter problem, he strongly believed in judicial independence and wrote, “When dealing with a rule of law originally established by judicial decision I believe that its change, when required, should come by means of a judicial decision. In these circumstances, I do not believe that we should look to the Legislature for change.”¹²⁰ Since the existence and scope of the fiduciary relationship was traditionally developed by courts of equity, and since the application of fiduciary principles in corporate contexts had likewise been developed by judicial decision,¹²¹ it is not hard to connect Tauro’s judicial philosophies with *Donahue* and other progressive decisions marked by the “Tauro Era”¹²² of Massachusetts jurisprudence.

The activism of the Supreme Judicial Court during the Tauro Era is manifest in a number of decisions.¹²³ For example, in *Gaudette v. Webb*, the court created a new common law cause of action for wrongful death in an area already the subject of legislation, overruling five prior Massachusetts decisions that held the area

119. *Honorable G. Joseph Tauro*, *supra* note 108, at 21

120. *Lombardo v. D. F. Frangioso & Co.*, 269 N.E.2d 836, 840 (Mass. 1971) (Tauro, C.J., dissenting).

121. *See, e.g.*, *SEC v. Chenery Corp.*, 318 U.S. 80, 85-86 (1943) (Frankfurter, J.) (“To say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from his duty?”); *Pepper v. Litton*, 308 U.S. 295, 307 (1939) (holding directors owe fiduciary duties to shareholders); *S. Pac. Co. v. Bogert*, 250 U.S. 483, 487 (1919) (controlling majority has fiduciary relation to minority).

122. *Case and Statute Comments*, 58 MASS. L. Q. 297, 327 (1973).

123. The court’s progressive tendencies are also apparent in a number of decisions. For instance, in *Opinion of Justices*, 298 N.E.2d 840, 845 (Mass. 1973), the court rendered an advisory opinion to the Governor that an anti-bussing bill then pending in the Massachusetts House of Representatives violated the equal protection clauses of the Constitutions of the United States and Massachusetts; in *Board of Appeals of Hanover v. Housing Appeals Committee in Department of Community Affairs*, 294 N.E.2d 393, 411 (Mass. 1973), the court made it much more difficult for municipalities to exclude low income housing; and in *Green v. Commissioner of Corporations and Taxation*, 305 N.E.2d 92, 95 (1973), the court held that a woman’s domicile for tax purposes was not necessarily that of her husband’s. *But see* *Commonwealth v. Olivo*, 337 N.E.2d 904, 911 (Mass. 1975) (finding non-English speaking criminal defendant not entitled to have criminal complaint in Spanish); *Commonwealth v. Ross*, 296 N.E.2d 810, 816 (Mass. 1973) (taking a narrow view of the extent to which a black defendant in a criminal trial could require the judge, conducting a voir dire, to inquire into a potential juror’s racial prejudice).

completely in the province of statute.¹²⁴ In effect, the decision created a common law right alongside the existing statutory recovery. In *Boston Housing Authority v. Hemingway*, Justice Quirico's dissent expressed the concern that the majority had gone too far in imposing a broad, sweeping, and undefined warranty of habitability on landlords.¹²⁵ In *Lewis v. Lewis*, the court abolished the doctrine of interspousal immunity in claims arising out of automobile accidents and held that the general principle of providing a remedy for an injury outweighed the state's statutory prohibition against interspousal suits.¹²⁶ In *Diaz v. Eli Lilly and Co.* the court overruled longstanding precedent that denied a wife a claim against a negligent tortfeasor for loss of consortium as a result of injuries to her husband.¹²⁷ Finally, in *Donahue*, the court could have found for the minority shareholder based upon a breach of the defendants' fiduciary obligation as directors.¹²⁸ Several existing Massachusetts decisions would have supported this analysis,¹²⁹ thus avoiding its judicially-created heightened fiduciary standard among close corporation stockholders.

Overall, the judicial attitudes of both the Tauro and Hennessey Supreme Judicial Courts can be summarized as progressive with an eye towards modernization of the law and an adherence to the idea

124. *Gaudette v. Webb*, 284 N.E.2d 222, 229 (Mass. 1971).

125. *Bos. Hous. Auth. v. Hemingway*, 293 N.E.2d 831, 851 (Mass. 1973) (Quirico, J., dissenting).

126. *Lewis v. Lewis*, 351 N.E.2d 526, 527-32 (Mass. 1976).

127. *Diaz v. Eli Lilly & Co.*, 302 N.E.2d 555, 558, 562, 564 (Mass. 1973).

128. *Donahue v. Rodd Electrotpe Co.*, 328 N.E.2d 505, 508 (Mass. 1975). Put simply, the court could have ruled that through the buy-out the directors benefited indirectly or, for purposes of their fiduciary duty of loyalty, directors dealing with a family member have a conflict of interest.

129. *See, e.g., Anderson v. Albert & J.M. Anderson Mfg. Co.*, 90 N.E.2d 541, 544 (Mass. 1950) ("Directors cannot take advantage of their official position to manipulate the issue and purchase of shares of the stock of the corporation in order to secure for themselves the control of the corporation and then to place the ownership of the stock in such a position as will perpetuate that control. Such action constitutes a breach of their fiduciary obligations to the corporation and a wilful disregard of the rights of the other stockholders."); *L.E. Fosgate Co. v. Bos. Mkt. Terminal Co.*, 175 N.E. 86, 108 (Mass. 1931) ("It is settled that the directors of a corporation cannot lawfully issue treasury stock to themselves or to a confederate for the purpose of gaining control of the corporation without giving the other stockholders an opportunity to subscribe." (citing *Elliott v. Baker*, 80 N.E. 450 (Mass. 1907))); *Elliott*, 80 N.E. at 452 ("The directors of a corporation act in a strictly fiduciary capacity. Their office is one of trust and they are held to the high standard of duty required of trustees. . . . Corporate directors cannot manipulate the property, of which they have control in a trust [relation], primarily with the intent to secure a majority of the stock or of directors in any particular interest.").

of fundamental fairness. The court was willing to take a fresh look at the rationale and application of the law in light of changing social and economic conditions. Through numerous groundbreaking decisions in torts,¹³⁰ zoning and land use,¹³¹ corporations,¹³² criminal law,¹³³ and more,¹³⁴ the court saw that society was rapidly changing

130. *E.g.*, *Mone v. Greyhound Lines, Inc.*, 331 N.E.2d 916, 920 (Mass. 1975) (recognizing a cause of action on behalf of a fetus whose death was caused by a negligent injury to the mother); *Pridgen v. Bos. Hous. Auth.*, 308 N.E.2d 467, 477 (Mass. 1974) (finding landowner liable for injuries to trespasser caused by nonfeasance); *Diaz*, 302 N.E.2d at 564 (allowing wives, not just husbands, to bring a cause of action for loss of consortium); *Gildea v. Ellershaw*, 298 N.E.2d 847, 858-59 (Mass. 1973) (establishing new law that a public official acting in good faith and without malice or corruption is not liable to a private party for negligence or other error in making a decision within the scope of his authority); *George v. Jordan Marsh Co.*, 268 N.E.2d 915, 921 (Mass. 1971) (establishing emotional distress as an actionable tort in Massachusetts).

131. *See, e.g.*, *Blakeley v. Gorin*, 313 N.E.2d 903, 903 (Mass. 1974) (eminent domain case); *Cameron v. Zoning Agent of Bellingham*, 260 N.E.2d 143, 146 (Mass. 1970) (allowing different treatment of public housing units under town zoning laws); *McNeely v. Bd. of Appeal of Bos.*, 261 N.E.2d 336, 345 (Mass. 1970) (holding a private university must comply with zoning regulations).

132. In addition to *Donahue* and *Wilkes*, see *Commonwealth v. Beneficial Fin. Co.*, 275 N.E.2d 33 (Mass. 1971), where the Court departed from the Model Penal Code and held that the position a person holds in a corporation is not the criterion for establishing corporate criminal liability. The Code stated that a corporation was criminally liable only if the culpable activity “was performed, authorized, ratified, adopted or tolerated by the corporation’s directors, officers or other ‘high managerial agents.’” *Id.* at 71-72 (quoting MODEL PENAL CODE § 2.07 (Proposed Final Draft 1962)). Rejecting this rule, the court held that liability would occur if “the corporation ha[d] placed [an] agent in a position where he has enough authority and responsibility to act for and in behalf of the corporation in handling the *particular* corporate business, operation or project in which he was engaged at the time he committed the criminal act.” *Id.* at 86. In *Petruzzi v. Peduka Constr. Inc.*, 285 N.E.2d 101 (Mass. 1972), the court enforced a vague corporate compensation agreement that was never reduced to writing or reflected in corporate minutes because of the nature of small corporations and the informality in which they are often run.

133. *See, e.g.*, *Commonwealth v. O’Neal*, 327 N.E.2d 662, 667 (Mass. 1975) (voiding Massachusetts’s mandatory death penalty for rape-murder on the principle that the right to life is fundamental and due process requires that the state bears the burden to demonstrate a compelling interest in execution that could not be served by any less restrictive means); *Myers v. Commonwealth*, 298 N.E.2d 819, 828 (Mass. 1973) (granting criminal defendants a “mandatory statutory right[]” to cross-examine prosecution witnesses and present testimony before a determination of probable cause at preliminary hearings); *Commonwealth v. Henson*, 259 N.E.2d 769, 772 (Mass. 1970) (looking to objective circumstances of the crime, and not defendant’s *mens rea*, in affirming conviction for assault with a dangerous weapon).

134. *See, e.g.*, *A Juvenile v. Commonwealth*, 347 N.E.2d 677, 684-85 (Mass. 1976) (spelling out guidelines for transfer hearings that determine whether a juvenile offender should be tried as an adult); *Secretary of Admin. & Fin. v. Att’y Gen.*, 326 N.E.2d 334, 339 (Mass. 1975) (finding state attorney general may refuse to prosecute an appeal despite request of governor to do so); *Fiorentino v. Prob. Ct.*, 310 N.E.2d 112, 115, 121 (Mass. 1974) (holding two-year statutory residency requirement for obtaining a divorce based on cause outside the state is unconstitutional under the equal protection clause).

and felt that existing common law precepts were no longer useful or applicable in remedying important issues.¹³⁵ Also, perhaps due to the newly acquired luxury of more time for research and writing, the court's opinions often moved to discussions of the law beyond the disposition of the issue of the case.¹³⁶ This willingness to both extend existing law and fashion brand new law based on the practical realities of conflicts before it fits the reasoning and conclusions displayed in both *Donahue* and *Wilkes*.¹³⁷

III. STATUTORY PROVISIONS PROTECTING MINORITY SHAREHOLDERS

Remarkably, Massachusetts is among a minority of states whose corporate code provides no special protection for minority stockholders.¹³⁸ This is particularly striking inasmuch as the Massachusetts legislature adopted a substantially revised corporate code in 2004 modeled after the ABA's revised Model Business Corporation Act (MBCA).¹³⁹ The MBCA includes a provision, widely adopted,¹⁴⁰ that authorizes a court to dissolve a corporation if "the

135. *In the Supreme Judicial Court—Tort—Common Law Wrongful Death Action Created*, 57 Mass. L.Q. 293, 297 (1972); *Cases & Statute Comments*, 58 Mass. L.Q. 299, 321 (1973).

136. *See, e.g., Morash & Sons, Inc. v. Commonwealth*, 296 N.E.2d 461, 465 (Mass. 1973) (moving on from its holding on private nuisance to discuss the doctrine of sovereign immunity from tort liability generally); *see also Mounsey v. Ellard*, 297 N.E.2d 43, 57 (Mass. 1973). In response to the Court's abolishment of the common law distinctions between invitees, licensees or trespassers, Justice Quirico's partial dissent states, "I am unable to agree with the use of the present case as the vehicle for the promulgation of such a broad new rule of law which purports to have application beyond what I believe to be the scope and necessities of the present case." *Id.* at 55. Later, he writes: "The briefs and oral arguments before this court did not concern themselves with such a rule. . . . If such a fundamental change in our law is otherwise desirable, it should more appropriately be accomplished in a case in which the issue is raised, in which the court has the benefit of briefs and arguments directed specifically thereto, and in which the court can better weigh and consider the far reaching implications and consequences of such a change." *Id.* at 57.

137. *See Mounsey*, 297 N.E.2d at 53; *see also Donahue v. Rodd Electrotype Co.*, 328 N.E.2d 505, 508 (Mass. 1975); *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657, 657 (Mass. 1976).

138. *See MASS. GEN. LAWS ch. 156D, §§ 1.01-17.04* (2008).

139. MODEL BUS. CORP. ACT § 14.30(2)(ii) (2007). This provision has been adopted in some form by all fifty states. *See MODEL BUS. CORP. ACT ANN.* (rev. 2009). The introduction to the new Massachusetts act stated that it "is the first comprehensive revision of the Massachusetts law governing business corporations in approximately 100 years and is based on, but is not identical to, the American Bar Association's Model Business Corporation Act." MASS. GEN. LAWS ch. 156D, cmt. (2008).

140. As of 2010, twenty-three states have adopted a provision modeled after the Model Business Corporation Act's § 14.30(2)(ii). *See ALASKA STAT. § 10.06.628(b)(5)*

directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent.”¹⁴¹ This provision has been interpreted fairly broadly in a number of courts, giving the judiciary considerable leverage to require those in control of a corporation to deal fairly with minority shareholders.¹⁴² According to an article that appeared in the Massachusetts Law Review, the drafters of the Massachusetts act had as a goal “to facilitate legislative adoption” and, apparently, achieving that goal required the “[n]on-disturbance of special Massachusetts close corporation jurisprudence (*Donahue v. Rodd Electrotype Co. of New England* and its progeny).”¹⁴³ The predecessor Massachusetts corporate code also was silent on protecting minority stockholders.¹⁴⁴ Thus, in Massachusetts it is fair to say that the statute contemplates a special role for the judiciary in terms of protecting minority stockholders.

In contrast to Massachusetts, a number of states had various provisions protecting minority stockholders in the mid-1970s, when

(2008); ARIZ. REV. STAT. ANN. § 10-1430 (2004); ARK. CODE ANN. § 4-26-1108 (2001); COLO. REV. STAT. § 7-114-301 (2006); CONN. GEN. STAT. § 33-896 (2007); GA. CODE ANN. § 14-2-940 (2003); HAW. REV. STAT. ANN. § 414-411 (LexisNexis 2008); IDAHO CODE ANN. § 30-1-1430 (2005); 805 ILL. COMP. STAT. ANN. 5/12.56 (West 2004 & Supp. 2010); IOWA CODE ANN. § 490.1430 (West 2009); ME. REV. STAT. ANN. tit. 13-C, § 1430 (2005); MISS. CODE ANN. § 79-4-14.30 (West 2009 & Supp 2009); MO. ANN. STAT. § 351.494 (West 2001); MONT. CODE ANN. § 35-1-938 (2009); NEB. REV. STAT. § 21-20, 162 (2007); N.C. GEN. STAT. § 55-14-30 (2009); OKLA. STAT. ANN. tit. 18, § 441-1203 (West Supp. 2010); OR. REV. STAT. ANN. §§ 60.661(2)(b), 60.952 (West 2009); S.C. CODE ANN. § 33-14-300 (2006); S.D. CODIFIED LAWS § 47-1A-1430 (2007); TENN. CODE ANN. § 48-24-301 (2002); UTAH CODE ANN. § 16-10a-1430 (LexisNexis 2009); VT. STAT. ANN. tit. 11A, § 14.30 (1997).

141. MODEL BUS. CORP. ACT § 14.30(2)(ii).

142. See, e.g., *Stefano v. Coppock*, 705 P.2d 443, 446 n.3 (Alaska 1985) (citing *Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1179 (N.Y. 1984)) (adopting a “reasonable expectations” interpretation of oppression under Alaska’s dissolution statute); *Polk v. Hergert Land & Cattle Co.*, 5 P.3d 402, 404-05 (Colo. App. 2000) (interpreting Colorado’s oppression statute to be a “broad and flexible” tool that considers fiduciary duties owed to minority shareholders, reasonable shareholder expectations, and overall fairness); see also John H. Matheson & R. Kevin Maler, *A Simple Statutory Solution to Minority Oppression in the Closely Held Business*, 91 MINN. L. REV. 657, 701-09 (2007) (providing a state-by-state survey of dissolution statutes and the judicial interpretation of those provisions). Some courts have even recognized a right to judicial dissolution in the absence of a statute so providing. See, e.g., *Leibert v. Clapp*, 196 N.E.2d 540, 546 (N.Y. 1963).

143. Jerry Cohen & Jonathan C. Guest, Case and Statute Comment, *The New Massachusetts Business Corporation Act, Chapter 127, Acts of 2003*, 88 MASS. L. REV. 213, 213 (2004).

144. MASS. GEN. LAWS ch. 156D, §§ 1-55.

Donahue and *Wilkes* were decided.¹⁴⁵ The primary means of protection was the statute referred to above, giving the courts the power to dissolve the corporation if a minority shareholder could demonstrate “illegal, oppressive, or fraudulent conduct.”¹⁴⁶ This provision has been a part of the Model Business Corporation Act since its first iteration in 1946.¹⁴⁷ Other states, however, went beyond this simple dissolution provision. In 1972, New Jersey adopted provisions greatly enhancing the position of minority shareholders. For instance, the courts were authorized to order remedies other than dissolution and, at the same time, the threshold for ordering dissolution was lowered:

The Superior Court . . . may appoint a custodian, appoint a provisional director, order a sale of the corporation’s stock as provided below, or enter a judgment dissolving the corporation, upon proof that . . . in the case of a corporation having 25 or less shareholders, the directors or those in control have acted fraudulently or illegally, mismanaged the corporation, or abused their authority as officers or directors or have acted oppressively or unfairly toward one or more minority shareholders in their capacities as shareholders, directors, officers, or employees.¹⁴⁸

In 1975, the California legislature amended its corporate code to authorize the dissolution of a corporation when “[t]hose in control of the corporation have been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness towards any shareholders.”¹⁴⁹

The prompting of O’Neal and others was having its affect on state legislatures;¹⁵⁰ and the decisions in *Donahue* and *Wilkes*, if anything, spurred on this development. In 1981, Minnesota began

145. See e.g., KAN. STAT. ANN. §§ 17-7201 to 17-7216 (2007); ME. REV. STAT. tit. 13A §§ 102(5), 701, 703 (1974) (repealed by ME. BUS. CORP. ACT c. 640 § A-1, 2001 Me. LAWS 1464, 1464); MICH. COMP. LAWS ANN. §§ 450.1101-45-.1151 (West 2002); N.J. STAT. ANN. § 14A:2-7(1)(c) (West 2003); N.Y. BUS. CORP. LAWS § 620 (McKinney 2003); N.C. GEN. STAT. § 55-73(b) (2009); R.I. GEN. LAWS § 7-1.1-51 (1999).

146. MODEL BUS. CORP. ACT § 14.30(2)(ii).

147. Robert B. Thompson, *The Shareholder’s Cause of Action for Oppression*, 48 BUS. LAW. 699, 711 (1993) (citing Report of the Committee on Corporation Law in Proceedings of the ABA Section of Corporation, Banking and Mercantile Law at the Annual Meeting in Atlantic City, N.J. (Oct. 28-29, 1946)).

148. New Jersey Business Corporation Act, ch. 366, 1973 N.J. LAWS 964, 1036-37 (codified at N.J. STAT. ANN. § 14A:12-7(1)(c) (West 2003)).

149. Act effective January 1, 1977, ch. 683, 1975 CAL. STAT. 1514, 1597-98 (codified as amended at CAL. CORP. CODE § 1800(b)(4) (West 2009)).

150. See generally Matheson & Maler, *supra* note 142, at 662-74 (reviewing these statutory developments).

down a path of greater protection for minority shareholders, first with a provision that authorized judicial dissolution for behavior “persistently unfair” to the minority¹⁵¹ and, two years later, for behavior that was merely “unfairly prejudicial.”¹⁵² The Minnesota law also authorized a court to order a buyout of a minority shareholder, and, in considering whether to grant equitable relief, the court should consider the “reasonable expectations” of the complaining shareholder.¹⁵³ A few years later, the North Dakota legislature passed a similar statute, again focusing on the “reasonable expectations” of the shareholders.¹⁵⁴ Alaska¹⁵⁵ and Oregon¹⁵⁶ soon followed suit and, in 1990, the ABA amended the Model Business Corporation Act adding section 14.34.¹⁵⁷ Under this section, if a shareholder of a closely held corporation has petitioned for dissolution under section 14.30(2), which includes a claim of oppression, the corporation or one or more shareholders may elect to purchase the shares of the petitioning shareholder at fair value.¹⁵⁸

IV. JUDICIAL DEVELOPMENTS IN THE PAST 35 YEARS AND THE ADVENT OF THE LIMITED LIABILITY COMPANY

A. *Judicial Developments Since 1975*

It is beyond the scope of this Article to provide a complete or thorough analysis of the considerable number of cases involving the rights of minority shareholders over the past thirty-five years. A few observations, however, are in order. First, *Donahue* and *Wilkes* have been widely cited, both in judicial opinions and in the aca-

151. MINN. STAT. ANN. § 302A.751 (West 2004).

152. *Id.*

153. *Id.*

154. North Dakota Business Corporation Act, ch. 147, § 3, 1985 N.D. LAWS 411-13 (codified as amended at N.D. CENT. CODE § 10-19.1-115 (2010)).

155. ALASKA STAT. § 10.06.628(b)(5) (2008) (permitting dissolution for corporations with thirty-five or fewer shareholders when “liquidation is reasonably necessary for the protection of the rights or interests of the complaining shareholder or shareholders”).

156. *See* Act of June 5, 2001, ch. 316, § 58, 2001 Or. LAWS 738, 761 (codified as amended at OR. REV. STAT. § 60.661(2)). In 2001, the Oregon legislature adopted an expanded buyout provision for shareholders in close corporations that includes the reasonable expectations language. *Id.*

157. *See A Report of the Committee on Corporate Laws, Changes in the Revised Model Business Corporation Act—Amendments Pertaining to Closely Held Corporations*, 46 BUS. LAW. 297, 298-99 (1990).

158. MODEL BUS. CORP. ACT § 14.34 (2007).

democratic literature.¹⁵⁹ Courts have cited the opinions, together with O'Neal's treatise, to rationalize the protection of minority shareholders.¹⁶⁰ The tendency of the courts has been to construe the "oppression" statutes broadly so that oppression includes disappointing the reasonable expectations of the minority shareholder.¹⁶¹ This is, of course, the essence of *Wilkes*. While the Massachusetts court did not use the term "reasonable expectations," the plaintiff was granted relief precisely for that reason—*Wilkes* became involved in *Springside*, the court said, "with the expectation that he would continue to participate in corporate decisions."¹⁶² *Donahue* and *Wilkes* probably are favored by most academics,¹⁶³ who, in turn, assume that the decisions represent the majority rule in the United States.¹⁶⁴

This infatuation with *Donahue* and *Wilkes* is not, however, without its detractors. In her 2004 analysis of the legacy of these decisions, Professor Mary Siegel reaches a different conclusion, finding that "only five states . . . adopt the position that all shareholders in close corporations owe enhanced, partnership fiduciary

159. A Shepard's search result for *Wilkes* conducted on July 6, 2010 produced 530 total citations including 150 citing decisions and 192 citing law review articles. A Shepard's search result for *Donahue* on the same day produced 847 total citations including 281 citing decisions and 316 law review articles. SHEPARD REPORT FOR WILKES V. SPRINGSIDE NURSING HOME INC., LEXISNEXIS, www.Lexisnexis.com (Select Shepardize and search for *Wilkes v. Springside Nursing Home, Inc.*, 353 N.E.2d 657) (last visited October 20, 2010).

160. See, e.g., *Maschmeier v. Southside Press, Ltd.*, 435 N.W.2d 377, 380 (Iowa Ct. App. 1988) (adopting broad view of oppression); *In re the Judicial Dissolution of Kemp & Beatley*, 473 N.E.2d 1173, 1179 (N.Y. 1984) ("A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security would be oppressed in a very real sense when others in the corporation seek to defeat those expectations."); *Balvik v. Sylvester*, 411 N.W.2d 383, 387 (N.D. 1987) (citing *Kemp*); *Davis v. Sheerin*, 754 S.W.2d 375, 381 (Tex. Ct. App. 1988). See generally Matheson & Maler, *supra* note 142, at 676-80 (discussing these cases). "While the reasonable expectations model may not yet fully represent a majority rule, courts in at least twenty-one states have applied the language in some form. Courts in several states have adopted the reasonable expectations test without 'enabling' language from the statute itself; that is, courts have applied the test even when the statute only provides that dissolution is available when conduct is 'oppressive.'" *Id.* at 679 (footnotes omitted).

161. See cases cited *supra* note 160.

162. *Wilkes*, 353 N.E.2d at 664.

163. See Siegel, *supra* note 6, at 380 (concluding that articles on this topic cite the Massachusetts cases as "uniformly depict[ing] the [holdings in *Donahue* and *Wilkes*] as the superior rule").

164. *Id.* (explaining that academic writings "characterize the Delaware . . . view as an unfortunate aberration from the national norm," meaning the Massachusetts approach).

duties to each other.”¹⁶⁵ While she did find that some states have adopted some aspects of this position or expressed sympathy for it, she nonetheless concludes that “[e]ven the most generous interpretation, however, cannot transform the Massachusetts rule into anything resembling a true majority rule.”¹⁶⁶

Professor Siegel also analyzes a number of post-*Wilkes* decisions in Massachusetts, finding that these decisions narrow or limit the broad holdings of *Donahue* and *Wilkes*.¹⁶⁷ For instance, she cites *Merola v. Exergen*, where the Massachusetts Supreme Judicial Court upheld the firing of a minority shareholder, despite the absence of a legitimate business purpose, because those controlling the corporation needed “some room to maneuver.”¹⁶⁸ The *Merola* court held that for a shareholder’s expectation of employment to be reasonable, and thus garner the protections of the *Wilkes* rule, there must be a general policy regarding ownership and employment, stock acquisition must be a condition of employment, and there must be a history of distributing profits in the form of compensation.¹⁶⁹ While not overruled, *Wilkes* was cabined. Other Massachusetts cases similarly limited the reach of *Donahue* and *Wilkes*.¹⁷⁰

Against this ambivalence in Massachusetts, Professor Siegel analyzed a number of cases from outside of Massachusetts, led by Delaware,¹⁷¹ which reject the Massachusetts rule, in whole or in part.¹⁷² While the Delaware cases do clearly reject the Massachusetts rule, most other state court decisions are less emphatic in their

165. *Id.* at 382.

166. *Id.*

167. *Id.* at 396-98.

168. *Id.* at 394; *Merola v. Exergen Corp.*, 668 N.E.2d 351, 354-55 (Mass. 1996).

169. *Merola*, 668 N.E.2d at 354-55.

170. See Siegel, *supra* note 6, at 395-98 nn.91-108 (citing *Horizon House-Microwave, Inc. v. Bazy*, 486 N.E.2d 70, 77 (Mass. App. Ct. 1985) (upholding freeze-out merger)); *Goode v. Ryan*, 489 N.E.2d 1001, 1005 (Mass. 1986) (finding no general duty to purchase minority shareholder’s stock on death). Professor Siegel cited a number of cases that required the minority shareholder to bring claims based on excessive compensation derivatively, which means that the claim that such compensation freezes-out minority shareholders was rejected. See Siegel, *supra* note 6, at 395, n.93.

171. *Id.* at 423-35.

172. *E.g.*, *Riblet Products Corp. v. Nagy*, 683 A.2d 37, 39 (Del. 1996) (holding that contract precludes claim based on fiduciary duty); *Ueltzhoffer, v. Fox Fire Development Co.*, No. 9871, 1991 Del. Ch. LEXIS 204, at *22 (Del. Ch. Dec. 19, 1991), *aff’d*, 618 A.2d 90 (Del. 1992) (finding for the plaintiff, but declining to base its decision on fiduciary duty). From these and other cases, Professor Siegel concludes, among other things, that “Delaware’s position is that all corporations are to be governed by corporate, not partnership, principles.” Siegel, *supra* note 6, at 410.

refusal to distinguish between closely held and publicly held corporations.¹⁷³ In my opinion, a broad look at these cases suggests that the basic idea of *Donahue* and *Wilkes*—that in closely held corporations those controlling the corporation owe some fiduciary duties to the minority shareholders—seems fairly well accepted. Professor Siegel is correct, I believe, that the Massachusetts rule has been overstated and that its legacy is an evolving one. Perhaps this is the fairest conclusion that can be drawn from her analysis.

B. *The Advent of the Limited Liability Company*

One would be remiss, I believe, in providing an historical analysis of the *Donahue* and *Wilkes* cases without mentioning the impact of the limited liability company (LLC). This business entity first appeared in Wyoming shortly after *Wilkes* was decided. A Wyoming statute, passed in 1977, sought to create an entity with the tax attributes of a partnership, but with limited liability for all of the participants.¹⁷⁴ When the Internal Revenue Service indicated that a Wyoming limited liability company would be taxed as a partnership,¹⁷⁵ LLC statutes were quickly passed in jurisdictions across the country.¹⁷⁶ Today, all states have limited liability company acts, there have been two uniform limited liability company acts promulgated by the National Conference of Commissioners on Uniform State Laws,¹⁷⁷ and the LLC has become the dominant form of business entity in the United States for newly formed businesses.¹⁷⁸

What is important here is that LLCs are perceived to be contractual entities¹⁷⁹ in contrast to corporations, which are generally

173. Siegel, *supra* note 6, at 411 n.185.

174. Wyoming Limited Liability Company Act, WYO. STAT. ANN. §§ 17-15-101-147 (2009).

175. Rev. Rul. 88-76, 1988-C.B. 360; *see also* Announcement 88-118, 1988-38 I.R.B. 26; Joseph C. Vitek, *Tax Aspects of Limited Liability Companies*, 27 CREIGHTON L. REV. 191, 197 (1993).

176. Jimmy G. McLaughlin, *The Limited Liability Company: A Prime Choice for Professionals*, 45 ALA. L. REV. 231, 231 (1993).

177. UNIF. LTD. LIAB. CO. ACT §§ 101-1206 (1996); REVISED UNIF. LTD. LIAB. CO. ACT §§ 101-1106 (2006).

178. *See* Rodney D. Chrisman, Essay, *LLCs are the New King of the Hill: An Empirical Study of the Number of New LLCs, Corporations, and LPs Formed in the United States Between 2004-2007 and How LLCs Were Taxed for Tax Years 2002-2006*, 15 FORDHAM J. CORP. & FIN. L. 459, 460 (2010). The total number of new domestic LLCs formed in 2007 was 1,375,148, as opposed to 747,533 for new domestic corporations. *Id.* at 475. Thus, there were 1,839 new domestic LLCs formed in 2007 for every one new domestic corporation. *Id.*

179. *E.g.*, *Sutherland v. Sutherland*, No. 2399-VCL, 2009 WL 857468, at *4 (Del. Ch. Mar. 23, 2009) (noting that an exculpatory provision “is permissible under the Dela-

thought to be governed by mandatory statutory provisions.¹⁸⁰ The typical limited liability company act contains few protections for members and most of these protections are waivable in the operating agreement.¹⁸¹ Indeed, in many limited liability company acts, the only nonwaivable protection for members of the limited liability company is the requirement that the managers of the company act in good faith.¹⁸² In the world of business entities, then, statutory corporate law should provide any protections to which shareholders are entitled, while members of a limited liability company should look to the terms of the operating agreement for their protection.

Cases like *Donahue* and *Wilkes*, however, disturb this neat balance. Under these cases, courts of equity can monitor the way minority stockholders are treated and provide a judicially created remedy when that treatment falls short of what the court perceives as fair treatment. Massachusetts statutory law now supports this view, as the Massachusetts Business Corporation Act, in deference to the Massachusetts courts, contains no special protections for minority stockholders.¹⁸³ A critical question for the future is whether the free-wheeling nature of the *Donahue* and *Wilkes* cases will be repeated in the realm of limited liability company law. Moreover, is it appropriate to treat an LLC as an “incorporated partnership,” the basis for holding shareholders in a closely held corporation to partnership fiduciary duties? Will the Massachusetts courts treat an operating agreement like a corporate code; that is, they will treat it as an incomplete record of protections to be afforded to those with a minority stake and not in control?

The Massachusetts Supreme Judicial Court has taken that path. In *Pointer v. Castellani* the court, citing *Donahue* and *Wilkes*, held that the president of an LLC, who also owned a forty-three percent interest in the LLC, was wrongfully frozen-out when the other

ware Limited Liability Company Act and the Delaware Revised Uniform Limited Partnership Act, where freedom of contract is the guiding and overriding principle, it is expressly forbidden by the [Delaware General Corporation Law]”). See generally Myron T. Steele, *Freedom of Contract and Default Contractual Duties in Delaware Limited Partnerships and Limited Liability Companies*, 46 AM. BUS. L.J. 221 (2009).

180. See Mark J. Loewenstein, *A New Direction for State Corporate Codes*, 68 U. COLO. L. REV. 453, 457-66 (1997).

181. U.L.L.C.A. § 103(b)(4) (2006) (“The operating agreement may not . . . eliminate the obligation of good faith and fair dealing under Section 409(d), but the operating agreement may determine the standards by which performance of the obligation is to be measured, if the standards are not manifestly unreasonable.”).

182. See, e.g., COLO. REV. STAT. § 7-80-108 (2006); DEL. CODE ANN. tit. 6, § 18-1101(E) (2005).

183. See *supra* notes 139-144 and accompanying text.

members removed him from his position.¹⁸⁴ The court upheld the lower court's findings that the reasons for his dismissal were pretextual and, to the extent that the plaintiff did act inappropriately, there were measures short of dismissal (i.e., "communication" with the plaintiff)¹⁸⁵ that should have been employed by the defendants.¹⁸⁶ What is troubling about this decision, however, is that the court summarily concluded that the LLC met the definition of a "close corporation"¹⁸⁷ and, therefore, under *Donahue* the "stockholders" owe fiduciary duties to one another.¹⁸⁸ The court never considered whether a limited liability company should be treated differently than a corporation and, indeed, never acknowledged that the parties to this litigation had formed a limited liability company.¹⁸⁹ In fact, the court referred to the limited liability company as a "closely held corporate entity."¹⁹⁰ To those who trumpet the limited liability company as a contractual entity in which parties

184. *Pointer v. Castellani*, 918 N.E.2d 805, 818, 823 (Mass. 2009).

185. *Id.* at 818.

186. *Id.* at 818, 823.

187. *Id.* at 815.

188. *Id.*

189. *Id.*

190. *Id.* at 808. *Pointer* is not the only Massachusetts case applying *Wilkes* and *Donahue* to an LLC. In *One to One Interactive, LLC v. Landrith*, the appellate court affirmed a judgment in favor of a member of an LLC who complained that, in failing to abide by a buy-out agreement and in various other ways, his co-members breached their fiduciary duty to him. *One to One Interactive, LLC v. Landrith*, 920 N.E.2d 303, 306, 311 (Mass. App. Ct. 2010). Interestingly, the appellate court noted that the defendants admitted that they owed fiduciary duties to the plaintiff and the court went on to conclude that this duty was breached because the plaintiff's reasonable expectations were frustrated, citing *Wilkes*. *Id.* at 308. In *Holland v. Burke*, the trial court, without discussion, assumed that *Donahue* and *Wilkes* applied to an LLC, although the plaintiff was unsuccessful in persuading the court that the defendants had breached any such fiduciary duties. *Holland v. Burke*, No. BACV200500122A, 2008 WL 4514664, at *6, *12 (Mass. Dist. Ct. June 18, 2008); see also *Mastromatteo v. Mastromatteo*, No. 061329C, 2006 WL 3759512, at *2 (Mass. Dist. Ct. Nov. 28, 2006) (proceeding on the assumption that *Donahue* applied to LLC). The Tennessee appellate court also has ruled that the *members* of an LLC owe fiduciary duties to one another:

Pursuant to the above analysis, we are of the opinion that finding a majority shareholder [sic] of an LLC stands in a fiduciary relationship to the minority, similar to the Supreme Court's teaching in *Nelson [v. Martin]*, 958 S.W.2d 643 (Tenn.1997)], regarding a corporation, is warranted in this case. Such a holding does not conflict with the statute, and is in keeping with the statutory requirement that each LLC member discharge all of his or her duties in good faith.

Anderson v. Wilder, No. E2003-00460-COA-R3-CV, 2003 WL 22768666, at *6 (Tenn. Ct. App. Nov. 21, 2003) (citing *Nelson v. Martin*, 958 S.W.2d 643, 649-51 (Tenn. 1997)).

must protect themselves, the possibility that courts will interfere poses a serious risk.¹⁹¹

It is conceivable—perhaps probable—that more courts will treat LLCs as “incorporated partnerships” with the members owing one another fiduciary duties, notwithstanding any provisions in the statute that suggest otherwise. This would be an unfortunate development. Organizers of LLCs would have to anticipate and draft around such decisions, adding transaction costs to the formation of the entity. Another upshot will be the migration of LLC formation to Delaware, where the courts appear to be less inclined to blur the line between actual partnerships and LLCs.

CONCLUSION

Looking back at the questions posed at the beginning of this Article, it should be apparent that an examination of the history of *Donahue* and *Wilkes* does not provide easy answers and, indeed, raises additional questions. The decisions were indeed path breaking, although they do reflect a judicial endorsement of forcefully stated academic positions and were decided against a background of cases expressing concern for the plight of minority stockholders.¹⁹² *Donahue* and *Wilkes* are best understood as the product of a particularly activist state court, headed by judges with strong progressive philosophies generated by their life experiences.

The decisions have influenced courts around the country and are prominently discussed. Careful scholarship, however, has demonstrated that they are not as dominant as conventional wisdom suggests. Academic writing, which helped bring about the decisions, now, for the most part, continues to promote the principles that those decisions established.¹⁹³

As to the effect of the decisions on state legislatures, it is not easy to draw many conclusions. One inference, however, does seem clear: the Massachusetts legislature has abdicated to the Massachusetts courts the task of protecting minority stockholders from overreaching and oppressive conduct by those controlling Massachusetts corporations.¹⁹⁴ Less clear is the effect on other state legislatures. My impression is that the *Donahue* and *Wilkes* decisions

191. See, e.g., Myron T. Steele, *Judicial Scrutiny of Fiduciary Duties in Delaware Limited Partnerships and Limited Liability Companies*, 32 DEL. J. CORP. L. 1, 4 (2005).

192. See *supra* notes 87-101 and accompanying text.

193. See *supra* notes 90-101 and accompanying text.

194. See *supra* notes 137-143 and accompanying text.

heightened awareness across the country that minority stockholders were in a vulnerable position and, in response, many state legislatures and courts have responded.

The legacy of these decisions, however, does not end with the direct response to them. As more litigation involving limited liability companies occurs and is reported, we are likely to see courts expressing concern over “oppressive” conduct suffered by LLC members who failed to bargain, or bargained and failed, to protect themselves.¹⁹⁵ Will *Donahue* and *Wilkes* then have a second life? Only time will tell.¹⁹⁶

195. The call for judicial protection of members of a limited liability company has begun in the academy. See Douglas K. Moll, *Minority Oppression & the Limited Liability Company: Learning (or not) from Close Corporation History*, 40 WAKE FOREST L. REV. 883, 976 (2005) (“Just as courts developed the oppression doctrine to protect minority shareholders in close corporations, so too should courts extend the oppression doctrine to safeguard minority members in LLCs. Learning from close corporation history, in other words, is important to the LLC’s future.”).

196. Other than a single case from Tennessee and the Massachusetts cases described in note 190, *supra*, it appears that neither *Donahue* nor *Wilkes* has been cited by a court deciding a limited liability company case. A search run on July 8, 2010 on WestLaw with the search query (WILKES /2 SPRINGSIDE) (DONAHUE /2 RODD) & LLC “LIMITED LIABILITY COMPANY” in the database “allcases” yielded no additional cases. ALLCASES SEARCH, WESTLAW, www.westlaw.com (search for (WILKES /2 SPRINGSIDE) (DONAHUE /2 RODD) & LLC “LIMITED LIABILITY COMPANY”) (last visited July 8, 2010). On the other hand, there are cases such as *Yessenow v. Hudson*, where, reminiscent of *Donahue* and *Wilkes*, the court said “LLCs often have few members, who are regarded more as partners with direct obligations to one another than as mere shareholders in a corporation.” *Yessenow v. Hudson*, No. 2:08-CV-353 PPS, 2009 WL 1543495, at *4 (N.D. Ind. June 2, 2009); see also *Bushi v. Sage Health Care, PLLC*, 203 P.3d 694, 699 (Idaho 2009) (“We conclude that, under Idaho’s original LLC act, members of an LLC owe one another fiduciary duties.”). But see *Kaplan v. O.K. Technologies, L.L.C.*, 675 S.E.2d 133, 140-41 (N.C. App. 2009) (basing decision on the operating agreement, the court rejected the argument that members of a closely held LLC owe fiduciary duties to one another).