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## **The Fetishization of Independence Or The Means and Ends of Independence Or Rethinking and Refining Independence**

**Usha Rodrigues**

UGA School of Law

According to conventional wisdom, a supermajority independent board of directors is the ideal corporate governance structure. Debate nevertheless continues: empirical evidence suggests that independent boards do not improve firm performance. Independence proponents respond that past studies reflect a flawed definition of independence.

Remarkably, neither side in the independence debate has looked to Delaware, the preeminent state source for corporate law. Comparing Delaware's notions of independence with those of Sarbanes-Oxley and its attendant reforms reveals two fundamentally different conceptions of independence. Sarbanes-Oxley equates independence with outsider status: an independent director is one who lacks financial ties to the corporation and is not a close relative of management. Delaware's approach to independence, in contrast, is situational. As different conflicts arise in different contexts, the focus of concern - the influence from which we wish to insulate directors - varies as well.

There are at least two lessons for corporate reformers. First, the definition of independence should be refined to address the conflict at hand. For example, if the area of concern is executive compensation, the question is not merely whether the director lacks financial ties to the corporation and familial ties to corporate executives, but also whether the director lacks financial ties to the executives being compensated. Current independence rules overlook this obvious hole. Second, and more fundamentally, independent directors are useful only in situations where a conflict exists. An independent director - a part-timer whose contact with the corporation is necessarily limited - is not inherently better suited to further the interests of shareholders than is an inside director. Current rules thus over-rely on independence, transforming an essentially negative quality - lack of ties to the corporation - into an end in itself, and thereby fetishizing independence.