What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law

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Corporate law is on the cusp of a paradigm shift—a revolution in the definition of the stockholder's entitlement. For a century, a simple proposition sat at the heart of corporate law: a share of stock may have some trading price, but in an intracorporate dispute that trading price has no necessary bearing on the value of an individual stockholder's entitlements. Instead, the stockholder's entitlement is determined by inquiring into the value of the corporate enterprise as a whole, not the individual fractionalized share. First articulated in the context of appraisal rights, this proposition has served as the Atlas of Delaware's corporate law, providing the theoretical underpinnings of its entire doctrinal universe. It's the centerpiece of the fairness standard, and it serves as a measure of damages for stockholders who suffer from unfaithful conduct by corporate managers. This traditional paradigm is foundational in the merger context, animating landmark decisions like Unocal and Revlon, for the powers and obligations of boards of directors make little sense if trading prices are the measure of the stockholders' entitlement.

A new paradigm is emerging, however. In a series of important decisions, the Delaware Supreme Court has thoroughly refashioned the appraisal remedy, elevating the role of trading prices in delineating the stockholder's entitlement. These decisions have unfortunate consequences even in their native appraisal rights context. But they portend a far broader change that has thus far escaped the attention of commentators, one that goes to the very foundation of Delaware's corporate law.

As we show in this Article, the Delaware Supreme Court has redefined the nature of the stockholders' entitlement, and the implications are potentially revolutionary. Most notably, the new paradigm calls into question the power of corporate directors to fight off a hostile bid. In concrete terms, it directly undermines the high-profile line of cases that culminates in the controversial 2011 Airgas v. Air Products decision. In Airgas, which has stood for a decade as the high-water mark of board power under Delaware law, the court allowed directors to repel a bidder offering a large premium to the market price by crediting the board's view that the corporation's value—and the value to which the stockholders were entitled—exceeded both the unaffected trading price and the

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bidder's offer. If, as the Delaware Supreme Court suggests in its recent appraisal cases, the legal position of stockholders entitles them to nothing more than the trading price of their shares, then the justification for the board's sweeping powers in Airgas to defend the corporation against hostile suitors has been swept away.

I. INTRODUCTION

In a spate of recent decisions involving stockholder appraisal rights, the Delaware Supreme Court has embraced a shift in its doctrine that augurs foundational change for corporate law. These decisions have birthed a new regime in appraisal rights—a development that has attracted considerable commentary. Their greatest impact, however, may lie beyond appraisal and may be still to come. With these decisions, the Delaware Supreme Court has set loose a new conception of how trading prices bear on the stockholder's entitlement, one that would alter basic ideas surrounding mergers, stockownership, and the very nature of the corporation as a vehicle for co-ownership. Delaware's corporate law appears to be on the verge of a paradigm shift.[2]

At the heart of the shift is a question that has proved enduringly confounding: How should the stockholder's interest in the corporation be measured, in dollars and cents? Although a variety of doctrines allow a court to evade the question in many circumstances, sometimes the inquiry cannot be avoided. In particular, a court might be called to evaluate the value directors or others attribute to a corporation (as in a control fight), or it might be called itself to assign some value to the corporation (as when calculating damages or performing a statutory appraisal).

Where a public market exists in a corporation's shares of stock, the answer to this valuation question can seem alluringly simple: the bundle of entitlements held by the stockholder ought to be valued at an amount equal to the trading price of a share of stock. Outside of the corporate domain, this easy answer is, in fact, the law. When tax authorities, for example, must determine the value of a share of stock received by gift, the market price supplies a ready answer.

Delaware, however, has famously refused this easy answer when the question involves an internal corporate dispute.[3] In deciding what value a stockholder is entitled to receive, the trading price of the stock has had little or no bearing on the determination. At some level, this answer is unavoidable, since the trading price of a share of stock represents nothing more than the market's estimate of the value of the legal entitlements belonging to the owner of the share. In the tax context, the judicial inquiry is irrelevant to the stockholder's entitlements. But in the intracorporate context, the judicial inquiry *determines* the entitlements of the stockholder. To attempt to determine the content of the stockholder's legal entitlements by reference to a market price that itself depends entirely on the content of those legal entitlements would be an exercise in circularity.

The merger context puts these issues in the sharpest relief. For a century, Delaware has largely disregarded trading prices in this context. Instead, Delaware doctrine attends to a conceptual distinction between, on the one hand, the trading price of a marginal share

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2. *See* THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1962) (describing the importance of revolutionary changes, or 'paradigm shifts', in the history of science).

3. *See infra* Part I.

and, on the other hand, the hypothetical value of the entire corporation.[4] As the Court of Chancery noted in the landmark 1934 case of *Chicago Corp. v. Munds*, "no more than a moment's reflection is needed to refute" the idea that the trading price of a share of stock is "an accurate, fair reflection of its intrinsic value."[5] This conclusion was rooted not so much in a mistrust of market pricing, as such, but rather in the more fundamental insight that the market in question—for single shares of stock—was not the proper object of inquiry in a merger dispute.[6] The trading price of the stock represents the value of only the share of stock; the value of the corporation is something else, especially when the risk of opportunism is afoot.[7] As a result, in a corporate dispute at merger—whether a statutory appraisal or a fiduciary case for damages[8]—the court's focus is on "the corporation itself, as distinguished from a specific fraction of its shares."[9] In this inquiry, "the corporation is valued as an entity, not merely as a collection of assets or by the sum of the market price of each share of its stock."[10]

This principle is at the heart of Delaware's most important merger doctrines.[11] In the landmark *Unocal* case, the supreme court endorsed a corporate board's conclusion that a pending $54 offer for the corporation was "wholly inadequate,"[12] even though the stock had never traded higher than $44.[13] A board is not only empowered to reject a bid that exceeds the prevailing trading price, but it may also be compelled by its so-called *Revlon* duties to seek out better alternatives even where an above-market bid is in hand.[14] In *Smith v. Van Gorkom*, directors who assessed the adequacy of a bid by comparing it to the "current and historical stock price" were held to have committed such a basic error that they exposed themselves to personal liability.[15]

Deep change is afoot in Delaware, however. Beginning in 2017, the Delaware Supreme Court has issued a series of decisions involving appraisal rights—*DFC Global*, *Dell*, *Aruba,* and *Jarden*—that announced a shift in appraisal doctrine and more broadly in the fundamental conception of the stockholder's entitlement. In all four cases, the Delaware Supreme Court expressed a newfound deference to trading prices as the measure of this entitlement. In each case, stockholders had dissented from a public company merger, seeking an amount above what the target board had negotiated.[16] In *Dell*, the supreme court claimed that it was difficult to conceive of a difference "between Dell's stock price and the

4. *See infra* notes 55–56.

5. Chicago Corp. v. Munds, 20 Del. Ch. 142, 150 (Del. Ch. 1934).

6. *See infra* Part I.

7. Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985) ("[A] publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price represents only the value of a single share.").

8. *See infra* Part II.B.

9. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989).

10. Matter of Shell Oil Co., 607 A.2d 1213, 1218 (Del. 1992) (citations and internal quotations omitted).

11. Rutherford B. Campbell, Jr., *Fair Value and Fair Price in Corporate Acquisitions*, 78 N.C. L. REV. 101, 127 (1999) ("[T]he discrete common-law rules respecting the determination of fair price are in many respects similar to the discrete rules respecting fair value.").

12. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 950 (Del. 1985).

13. Mesa Petroleum Co. v. Unocal Corp., No. CIV. A. 7997, 1985 WL 44691, at *1 (Del. Ch. May 13, 1985), rev'd, 493 A.2d 946 (Del. 1985).

14. *See generally* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (establishing the requirement that a company's board of directors must try to obtain the highest price when a hostile takeover has become imminent).

15. Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985).

16. *See infra* Section II.

Company's intrinsic value," for that would be "contrary to the efficient market hypothesis."[17] Pursuing this reasoning, the Court indicated that the stockholder's entitlement could best be measured by trading prices where shares trade on an efficient market.[18] In *Aruba*, the Supreme Court noted that a stock's trading price was "an important indicator of [the corporation's] economic value that should be given weight."[19]

In *Jarden*, the supreme court reached the culmination of this line of reasoning. The trial court had concluded that stockholders were entitled only to the value of the pre-bid trading price.[20] On appeal, the dissenters contested this finding, pointing out that the lower court had "ignored . . . a 'long-recognized principle of Delaware law' that a corporation's stock price does not equal its fair value."[21] In affirming the lower court's decision, the supreme court proclaimed "[t]here is no 'long-recognized principle' that a corporation's unaffected stock price cannot equate to fair value."[22]

In this Article, we argue that these appraisal cases represent the beginnings of a paradigm shift in Delaware's corporate law. Although we and others have explored and critiqued the appraisal cases for their appraisal law implications, this Article is the first to identify and examine the fundamental implications of these cases for corporate law generally. While we previously argued that the Delaware Supreme Court's mistakes had caused it to *misapply* Delaware law's conception of a stockholder's entitlement, we have now concluded that the Court has actually *departed* from it. In a real sense, the supreme court in the appraisal cases has simply altered its conception of the public corporation as a form of property.

What a stockholder is entitled to receive in a merger depends on what claims the stockholder has as an owner of property in the first place. The longstanding paradigm in Delaware has been that the stockholder's entitlement is to a *pro rata* equitable claim on the value of the entire corporate estate.[23] The focus, as a result, was "on the determination of the intrinsic worth of the merged corporation, not on the distribution of shares among shareholders."[24]

In the new paradigm, the stockholder's equitable claim to the corporate estate has been replaced with an interest in the share of stock as an ordinary chattel, like a gold nugget or a toaster, where the trading price is perfectly appropriate as the beginning and the end of any inquiry into value. There are thus no grounds for a stockholder to make a claim on

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17. Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 23–24 (Del. 2017).

18. *Id.* at 6 (noting that the market for Dell stock was "efficient and, therefore, likely a possible proxy for fair value").

19. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 138 (Del. 2019).

20. *In re* Appraisal of Jarden Corp., C.A. No. 12456-VCS, 2019 Del. Ch. LEXIS 1446, at *86 (Del. Ch. Jul. 19, 2019) ("[T]he Company's high trading volume and the intense scrutiny paid it by market analysts has convinced me that the market understood Jarden's holding company structure as an operative reality, considered the high overhead costs associated with decentralized management and imputed those factors into Jarden's Unaffected Market Price.").

21. Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313, 313 (Del. 2020).

22. *In re* Appraisal of Jarden Corp., C.A. No. 12456-VCS, 2019 Del. Ch. LEXIS 1446, at *3 (Del. Ch. Jul. 19, 2019).

23. *E.g.*, Global GT LP v. Golden Telecom, Inc., 993 A.2d 497, 507 (Del. Ch. 2010) (noting that, in appraisal, the Court's job is "to value the corporation itself, as distinguished from a specific fraction of its shares as they may exist in the hands of a particular shareholder"); Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989).

24. *Harnett*, 564 A.2d at 1146.

the corporation that exceeds the value the market assigns to that chattel. Expressed in the conventional analytical framework,[25] Delaware now protects the stockholder's entitlement in a public corporation with a liability rule, where the stockholder's entitlement may be taken in a non-consensual exchange like a merger at any price exceeding the prevailing trading price.

This paradigm shift augurs dramatic change not simply in appraisal, but in all of merger law. Most obviously, the shift will necessarily affect the basic measure of damages in other contexts. Indeed, the Court of Chancery has already confronted this scenario: a breach of fiduciary duty that gave rise to no damages because the transaction was at a premium to the market price. But perhaps the most notable doctrinal reckoning involves *Unocal* and its progeny, which afford directors the power to defend against the threat of acquisitions where the price is "too low."[26] That power reached is fullest expression in the 2011 *Air Products v. Airgas* decision,[27] a ruling that remains controversial.[28] The board of Airgas blocked a $70 acquisition offer from Air Products, even though Airgas stock had previously been trading between $40 and $50 per share.[29] The Court of Chancery held that the "inadequate price" justified the continuing defenses by Airgas,[30] bringing the control fight to an end.

The continuing force of the reasoning behind *Airgas* is now in serious doubt. If the best evidence of the value of the corporation is the market price, as the supreme court held in *Aruba*, and the absence of higher bidders is sufficient demonstration of the attractiveness of the bid, as the supreme court held in *DFC Global*, and the opinion of informed insiders is insufficient to call into question the fairness of a market-tested bid, as the supreme court held in *Dell*, on what ground can *Airgas* still stand?

It could, of course, be argued that the recent decisions are simply a tempest in the appraisal rights teapot and may not reflect a broader paradigm shift in Delaware's law. For its part, the Delaware Supreme Court itself disclaimed any novelty, even in the narrow context of appraisal.[31] The breadth of the language used in the opinions, however, is undeniable, and their implications—if taken seriously—are crystal clear. Market participants, for their part, have recognized the changes to appraisal doctrine and responded with a sharp drop in the filing of appraisal petitions.[32] This would not be the first time the Delaware Supreme Court has recently tried to hide sweeping doctrinal change beneath a

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25. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

26. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985).

27. Air Prod. & Chem., Inc. v. Airgas, Inc., 16 A.3d 48, 57 (Del. Ch. 2011).

28. *See* Leslie Picker, *Why Airgas Was Finally Sold, for $10 Billion Instead of $5 billion*, N.Y. TIMES (Sept. 5, 2016), https://www.nytimes.com/2016/09/06/business/dealbook/why-airgas-was-finally-sold-for-10-billion-instead-of-5-billion.html [https://perma.cc/2JS9-RVY6] (noting that the court outcome "was—and remains—controversial").

29. *Air Prod. & Chemicals, Inc*., 16 A.3d, at 57 (Del. Ch. 2011) ("The Delaware Supreme Court has recognized inadequate price as a valid threat to corporate policy and effectiveness.").

30. *Id.*

31. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., 210 A.3d 128, 135 (Del. 2019) (expressing surprise at the "apparent novelty the trial judge perceived" in *Dell* and *DFC Global* and citing cases purportedly showing a "long history of giving important weight to market-tested deal prices in the Court of Chancery and this Court").

32. Wei Jiang et al., *The Long Rise and Quick Fall of Appraisal Arbitrage*, 100 B.U. L. REV. 2133, 2173 (2020).

veneer of "nothing-to-see-here" consistency.[33]

Still, it may seem unlikely that the recent decisions mark a fundamental shift. Delaware's historic indifference to trading prices in intracorporate disputes has been the object of sustained academic criticism for more than a generation, yet the Delaware Supreme Court has doggedly rejected these criticisms. Although a mainstream view has always accepted Delaware's approach,[34] a group of influential law and economics scholars has long argued that Delaware should adopt a benchmark of corporate value tied to stock market prices. In its extreme form, this view argues that it is a matter of "economic fact" that the value of a corporation is nothing but the trading price of its shares, and that Delaware's approach must be based on "a deep suspicion of the fairness and rationality of even highly developed and well-informed markets."[35] This line of criticism has been repeatedly and unequivocally rejected in Delaware, and the appraisal cases might seem to be a peculiar vehicle for such a major reversal of course.

We think it unlikely, however, that the justices either (1) did not understand the broader implications of their holdings; or (2) understood them but intended to restrict them to appraisal, thus injecting a new and deep inconsistency into Delaware's merger law. The same critics who have long urged fundamental changes in Delaware's broader merger law also advocated for precisely what the Delaware Supreme Court did in the appraisal cases, and on the same grounds as their broader objections.[36] Furthermore, the appraisal opinions deliberately echoed the language of critics of Delaware's traditional rejection of market price, declaring the identity of market prices and fair value as "economic fact."[37] Moreover, appraisal law is a natural site for initiating such a change. Just as a century ago it was in the crucible of appraisal that Delaware forged its original conception of the stockholder's entitlement. It is altogether natural that appraisal would be the vehicle for the Supreme Court to articulate its replacement.

The new paradigm is, on the whole, a negative development for Delaware's corporate law and for American capital markets more generally. The new approach renders appraisal essentially nugatory, functionally eliminating a remedy with beneficial corporate governance effects. More broadly, however, it puts the public Delaware corporation at a systematic disadvantage to other forms of property as a vehicle for organizing enterprise. If the stockholder's entitlement is based on the trading price of a marginal share, rather than the value to an owner of the unified equity interests, would-be entrepreneurs or suppliers of equity capital have a diminished incentive to invest through the public corporation, with consequences for the market, for corporate control, and for the continued

33. *See* Charles R. Korsmo, *Delaware's Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 59 (2019) (noting that "the Chief Justice has argued that *Corwin* [*v. KKR*] is simply a straightforward application of long-standing Delaware doctrine" but that "[g]iven the amount of commentary *Corwin* has provoked, the claim that it is nothing new is, on its face, difficult to credit").

34. *See* WILLIAM T. ALLEN ET AL., COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 157–58 (5th ed. 2016) ("[P]rices in a large, liquid, informed market for shares should be regarded as prima facie evidence of the true value *of the traded shares*. Whether the market price of a company's shares also reflects, in a straightforward way, the value of the entire company (or all of its equity in aggregate) is a more complicated question. . . .").

35. William J. Carney & Keith Sharfman, *The Death of Appraisal Arbitrage: Ending Windfalls for Deal Dissenters*, 43 DEL. J. CORP. L. 61, 65 (2018).

36. *See generally* Brief of Law and Corporate Finance Professors as Amici Curiae in Support of Reversal, DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346 (2017) (No. 10107).

37. *See infra*, Part IV.

vitality of public equity markets in the United States. Delaware should recommit to its historic approach that afforded a stockholder a *pro rata* claim on the same basket of rights in a corporation as a sole owner.[38] In the context of the corporate form, as in any other, "[i]t would be astounding if weakening well-defined property rights increased welfare."[39]

The paper proceeds as follows. In Part I, we set out the historic conception of stockholder entitlements in Delaware corporate law, where the trading price was largely ignored as a measure of the stockholder's interest. In Part II we describe the series of appraisal cases in which the Supreme Court articulates a new role for trading prices in intracorporate disputes and, consequently, a distinctly new paradigm for determining the stockholder's entitlements. Part III explores the notable implications of this new paradigm for Delaware's corporate law—for fiduciary enforcement and for defensive tactics—and also offers a normative critique of the new paradigm.

II. THE LONGSTANDING CONCEPTION OF THE STOCKHOLDER'S ENTITLEMENT

For nearly a century, Delaware's corporate law has embraced a distinct conception of the stockholder's entitlement when resolving intracorporate disputes. The focus is on the value of the juridical entity—the corporation—and stockholders are entitled to share *pro rata* in that value. The value of the corporate enterprise determines the value of any shares of stock, not the other way around—even where the shares of stock are traded publicly and have an observable trading price. This Part articulates this long-prevailing conception of the stockholder's entitlements and details the ways it suffuses Delaware corporate doctrine.

A. The Necessity of Defining Stockholder Entitlements at Merger

What, precisely, do stockholders own? Despite its roots in the law of property,[40] corporate law struggles with the rhetoric of ownership.[41] The corporation's power as an entity to own assets in its own name is among its defining features,[42] bundling together ownership claims in a tidy and easily-transferred package.[43] But who owns the

38. *E.g.*, Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) ("More important, to fail to accord a minority shareholder the full proportionate value of [the petitioner's] shares imposes a penalty for lack of control, and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder, a clearly undesirable result.").

39. David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 740 (1987).

40. *See* KRAAKMAN ET AL., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 6 (2d ed. 2009) ("The first and most important contribution of corporate law, as of other forms of organizational law, is to permit a firm . . . to serve as a single contracting party that is distinct from the various individuals who own or manage the firm.").

41. *E.g.*, Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT L. REV. 147, 177 (2001) ("The theory that a corporation is owned by its stockholders is fine for many purposes but it is too simple for others.").

42. *E.g.,* ROBERT CLARK, CORPORATE LAW 15 (2nd ed. 1986) ("One of the law's most economically significant contributions to business life, and one often ignored by lawyers because it generates less litigation than many other contributions, has been the creation of fictional but legally recognized entities or 'persons' that are treated as having some of the attributes of natural persons."); *see also* Morgan Ricks, *Organizational Law as Commitment Device*, 70 VAND. L. REV. 1303, 1322 (2017) (noting that corporate law "allows the individual co-venturers to divest themselves of all direct property interests in specific business assets").

43. As Kenneth Ayotte and Henry Hansmann have observed, the corporation provides "a low-cost means of assembling complementary contracts into discrete bundles that can be freely transferred to a new owner, but

corporation? A prominent strain of scholarly discourse regards this as a trick question. After all, nobody owns the corporation the way a person owns, say, a pair of trousers. Thus, while stockholders may own *their shares*, some commentators argue that this should not be confused with owning *the corporation*. As Leo Strine and Jonathan Macey have asserted, "[s]hareholders simply are owners of investment interests with certain contractual rights" and "are not 'owners' of the corporation in any sense of the word."[44] The stockholder's relationship to the corporation, on this view, is "purely statutory and contractual."[45]

As a descriptive matter, this claim is difficult to square with judicial practice. Whether or not the colloquial understanding of the term "ownership" is useful in understanding the entitlements of stockholders,[46] Delaware's corporate law has long treated the stockholders as equitable owners of the corporation and its assets.[47] To be sure, the holder of a share of stock does not have the same set of rights over the corporation as does the owner of land held in fee simple absolute.[48] A stockholder, for example, has no power to act for the corporation,[49] and even a sole stockholder cannot exercise dominion over the property of the corporation.[50] Additionally, the stock of a corporation is fractionalized to accommodate multiple co-venturers, and at public companies the ownership stake—the stock—can be divided into billions of shares to facilitate trading and diversification.[51]

Nevertheless, the stockholder plainly has some set of entitlements in the corporation. "Ownership" in this context, as in so many others, means something distinct.[52] In particular, stockholders are commonly said to have three basic entitlements: (1) a right to a *pro rata* share of distributions by the corporation; (2) the right to vote to elect directors

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only if the contracts are transferred together as a bundle." Kenneth Ayotte & Henry Hansmann, *Legal Entities as Transferable Bundles of Contracts*, 111 MICH. L. REV. 715, 717–18 (2013)*; see also* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 14 (1986) ("[A] collection of assets is sometimes more valuable together than the same assets would be if spread to the winds. It is often referred to as the surplus of a going-concern value over a liquidation value."); Ricks, *supra* note 42, at 1306 (arguing that the corporation and other organizations "provides a mechanism for business co-owners to relinquish their legally cognizable property interests in specific business assets" such that no future co-owner may "defect with individual business assets, thereby allowing the creation of durable asset configurations and, hence, going-concern value").

44. Jonathan Macey & Leo E. Strine, Jr., *Citizens United as Bad Corporate Law*, 2019 WIS. L. REV. 451, 454.

45. *Id.*

46. In other contexts where the full connotations of "property" are inapt, the U.S. Supreme Court has used the term "quasi property." Int'l News Serv. v. Associated Press, 248 U.S. 215, 236 (1918) (treating "the news"—as between competing newspapers—as "quasi property, irrespective of the rights of either as against the public").

47. Harden v. E. States Pub. Serv. Co., 122 A. 705, 706–07 (Del. Ch. 1923) ("The stockholders, however, who are to be regarded as the ultimate beneficial owners of the corporate assets, have an interest therein which equity in a proper case will protect. It is the duty of the corporation itself to proceed to redress the wrongs done to it and thus mediately to safeguard the interests of its stockholders.").

48. WILLIAM BLACKSTONE, BLACKSTONE ON PROPERTY 2 (1753) (famously describing the conventional set of powers associated with ownership as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe").

49. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (1953).

50. Green v. Victor Talking Mach. Co., 24 F.2d 378, 380 (2d Cir. 1928) ("[E]ven a sole shareholder has no independent right which is violated by trespass upon or conversion of the corporation's property.").

51. General Motors, for example, has 1.4 billion shares of common stock outstanding. General Motors, Inc., Annual Report, (Form 10-K) (Dec. 31, 2019).

52. KRAAKMAN ET AL., *supra* note 40 at 6, n.11 ("We use the term 'owners' simply to refer to the group who have the entitlement to control the firm's assets.").

and certain other matters, such as mergers; and (3) the right to compel directors to live up to their fidelity obligations.[53] Stockholders, in other words, are owners in the sense that they hold the beneficial interest in the corporate estate and also a discrete set of powers to select those who manage the corporation's affairs. As the trust beneficiary is said to "own" an equitable interest in the trust corpus,[54] the stockholder is the owner in equity of the corporation and its assets.[55]

Delaware's corporate law is perfectly clear on this bedrock proposition: "The stockholders of a corporation are the equitable owners of its assets. They have a well-defined interest in its present and future welfare, including its entire policy of operation."[56] Precisely because they are equitable owners, stockholders have the power to bring a derivative action on the corporation's behalf.[57] For the same reason, they have the power to access corporate books and records.[58]

While corporate doctrine thus routinely *recognizes* the stockholder's equitable interest in the corporation, it is rare that a court must *define* that interest in any detail. In some circumstances, however, courts must unavoidably confront hotly contested claims about what stockholders are entitled to receive. The most consequential is that existential event for the stockholder: the merger.[59] A merger invites, in multiple ways, the question of whether stockholders "will receive the substantial equivalent in value of the shares [they] held before the merger."[60] The doctrines surrounding mergers thus involve some of the knottiest and most contentious questions in corporate law, for they require delineation of the stockholder's entitlement—and often require it to be assigned some precise value in dollars and cents. This question arises in statutory appraisal actions,[61] of course, but is also

53. *Id.* at 146 ("We associate 'ownership' with rights to control an asset and the right to residual cash flows the asset produces. Common stock holds both control rights, through its powers to designate the board, and the residual claim on the corporation's assets and income."); *see also* Clark, *supra* note 42, at 13.

54. *See* RESTATEMENT (THIRD) OF TRUSTS § 3 (AM. L. INST. 2003); *see also* Taliaferro v. Taliaferro, 921 P.2d 803, 809 (1996) ("[T]he backbone of trust law is the concept of separate ownership of equitable and legal interests.").

55. *See* J. D. P. v. F. J. H., 399 A.2d 207, 210 n.1 (Del. 1979) ("The stockholders are the equitable owners of the property and assets of the corporation . . ."); *see also* Paladini v. Flink, 26 F.2d 21, 23 (9th Cir. 1928), *aff'd*, 279 U.S. 59 (1929) ("[T]echnically speaking, stockholders are not owners; but, in a broad popular sense, and for certain purposes in a legal sense, they are sometimes so regarded."); Lynch v. Turrish, 236 F. 653, 656 (8th Cir. 1916), *aff'd*, 247 U.S. 221, (1918) stating:

> It is true that a corporation holds the legal title of, and the right to manage, control, and convey, its property, and that a stockholder is without that title and right. But, after all, the corporation is nothing but the hand or tool of the stockholders, in which they hold its property for their benefit. They are the equitable and beneficial owners of all its property, and it is the mere holder and manager of it for them.

56. State ex rel. Waldman v. Miller-Wohl Co., 28 A.2d 148, 153 (Del. Super. Ct. 1942).

57. *See, e.g.*, Quadrant Structured Prod. Co. v. Vertin, 115 A.3d 535, 550 (Del. Ch. 2015) ("In Delaware, the Court of Chancery permitted stockholders to assert corporate claims derivatively because the stockholders were the ultimate beneficiaries of the directors' fiduciary duties and the equitable owners of the corporation.").

58. *E.g.*, State ex rel. Miller v. Loft, Inc., 156 A. 170, 172 (Del. Super. Ct. 1931) ("The stockholders of a corporation are the equitable owners of its assets and in an application to inspect its books their rights and interests must be considered . . .").

59. *Munds*, 20 Del. Ch. at 151–52.

60. Sterling v. Mayflower Hotel Corp., 33 Del. Ch. 293, 299 (1952).

61. In certain circumstances, stockholders have the right to withdraw their pro rata share on terms set by a court—the appraisal right. DEL. CODE ANN., TITLE 8, 262 (WEST 2020).

implicated in the full suite of equitable remedies available to stockholders.[62] Where corporate managers have engaged in "fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching," the Court of Chancery's "powers are complete to fashion any form of equitable and monetary relief as may be appropriate."[63] The claim that stockholders are not "owners," but instead have only statutory and contractual rights as security-holders, ignores the equitable stake stockholders have in the corporation.

B. The Irrelevance of Trading Prices to Stockholder Entitlements

Whether at law or in equity, the question at the heart of any merger dispute often boils down to the value that can be ascribed to the stockholder's entitlement.[64] Delaware's methodology for determining that value has developed over the course of a century, but the fundamental approach has remained remarkably consistent. In valuing the stockholder's entitlement at merger, the object of the inquiry in Delaware is the *pro rata* value of *the corporation*—distinct from market value of the stock, the summed value of its assets, or the summed value of the individual shares.[65]

First developed in the context of statutory appraisal, this approach has been firmly incorporated into other doctrines and serves as the organizing principle of Delaware's corporate law. In fiduciary analysis—both the substantive standard of review for fiduciary behavior and also the calculation of damages arising from any breach—Delaware has firmly embraced the distinction between the price of a share and the value of the enterprise. Another significant body of Delaware law animated by this distinction is Delaware's permissive approach to defensive tactics by target boards. The entire premise for allowing directors to exercise discretion in fighting off hostile bids at a premium to the stock price is that the enterprise can command some value at sale that is distinct from the price of a single share.

1. The Statutory Right to Dissent

Delaware first articulated its approach to the basic valuation inquiry in the appraisal rights context. Throughout the 1920s, the Court of Chancery consistently rejected the use of trading prices as a measure of value in intra-corporate disputes,[66] but it was in the 1934

62. *See In re* Dole Food Co., Inc. S'holder Litig., No. CV 8703-VCL, 2015 WL 5052214, at *44 (Del. Ch. Aug. 27, 2015) *see also* Cole v. Nat'l Cash Credit Ass'n, 18 Del. Ch. 47, 56 (1931) ("As a general proposition dissenting stockholders are thus put to an election by the statute. There may be circumstances, however, under which a court of equity will say that the duty to make the election does not arise.").

63. Weinberger v. UOP, Inc., 457 A.2d 701, 714 (Del. 1983).

64. *E.g.*, *Cole*, 18 Del. at 55 ("The crucial point on which [the stockholders'] complaint turns is one of value—whether or not they as stockholders in one of the constituents are to receive in exchange for their present holdings, stock which has a value commensurate with the asset contribution which their company is making to the common pool.").

65. Matter of Shell Oil Co., 607 A.2d 1213, 1218 (Del. 1992) ("In the appraisal process the corporation is valued 'as an entity,' Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989), not merely as a collection of assets, Bell v. Kirby Lumber Corp., 413 A.2d 137 (Del. 1980), or by the sum of the market price of each share of its stock, Chicago Corp. v. Munds, 172 A. 452 (Del. Ch. 1934).").

66. Allaun v. Consol. Oil Co., 16 Del. Ch. 318, 329 (1929) ("The worth of any testimony concerning the selling price of shares of stock as a safe reflection of the net value of the corporate assets underlying the stock is of extreme dubiousness."); Bodell v. Gen. Gas & Elec. Corp., 15 Del. Ch. 119, 137 (1926), *aff'd*, 15 Del. Ch. 420

case of *Chicago Corp. v. Munds* that the Delaware courts first squarely confronted this basic question of how, if at all, a trading price should bear on the stockholder's entitlement.[67]

In *Munds*, the respondent corporation argued that Delaware's appraisal statute entitled the stockholder to an amount "determined exclusively by market transactions when such are available."[68] For support, the corporation relied on a New Jersey case holding that "the market value of the stock was the true criterion of the damages resulting to the stockholders" from the merger.[69]

The Court of Chancery rejected this approach, despite the general reliance of Delaware courts in that era on New Jersey's judicial interpretations.[70] In the language at the heart of the appraisal statute, Delaware had departed from New Jersey's statutory text, which the Delaware legislature had otherwise copied wholesale in 1899.[71] While New Jersey's statute called for a determination of the "full market value," Delaware's called simply for an appraisal of the "value." The *Munds* court attached "[s]pecial interpretive significance" to this change,[72] as it represented a "material variance" in Delaware's statute.[73] "The difference in language," the court said, "persuasively demonstrates that 'value' as used in . . . our act is not synonymous with market value."[74]

Having foresworn market value, the Court of Chancery set out in *Munds* some basic principles about the "value" due to dissenters that have endured into the present century. First, the court noted that a stockholder "buys into a corporation as a going concern."[75] Investors take "an aliquot share of a business," and in determining the value of their investment what mattered was "not alone its present asset condition and earning power but as well its future prospects as a continuing enterprise."[76] A dissenting stockholder, the Court said, should be paid for "what he is deprived of," and that was "his proportional share of an active enterprise which but for the compulsion of others he could continue to be associated with in the indefinite future."[77]

In addition, the *Munds* court evinced a more straightforward skepticism of market values.[78] The court noted:

(1927) ("[T]here is no reliability to be placed in market quotations as showing true value."); Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am., 120 A. 486, 493 (Del. Ch. 1923) (rejecting the "unsound premise" that a sales price of a share of stock was "a reliable indication of the market value of the assets").

67. *Munds*, 20 Del. Ch. at 146.

68. *Id.*

69. *In re* Capital Stock of Morris Canal & Banking Co., 104 N.J.L. 526, 527 (1928). This holding was embraced by Prall v. U.S. Leather Co., 143 A. 382, 382 (N.J. Sup. Ct. 1928), *aff'd*, 105 N.J.L. 646 (1929).

70. Wilmington City Ry. Co. v. People's Ry. Co., 38 Del. Ch. 1, 23 (1900) ("[O]ur general incorporation law as a whole and the general policy of our legislation favor, rather than rebut, the presumption that the legislature, in adopting the language of the New Jersey statute, had in mind the construction given to it by the New Jersey courts, and intended to incorporate it into the statute . . .").

71. *Munds*, 20 Del. Ch. at 146–47.

72. *Id.*

73. *Id.* ("[T]he Delaware act in its original form in the matter of valuation of stock in cases of merger con-stituted a material variance from the language of the then existing general act of New Jersey. Instead of "the full market value" prescribed by New Jersey, the Delaware Legislature prescribed simply "value").

74. *Id.* at 148.

75. *Id.* at 149.

76. *Munds*, 20 Del. Ch. at 455.

77. *Id.*

78. *Id.* (noting market quotations are safe to accept as unerring expressions of value).

> When it is said that the appraisal which the market puts upon the value of the stock of an active corporation as evidenced by its daily quotations, is an accurate, fair reflection of its intrinsic value, no more than a moment's reflection is needed to refute it. There are too many accidental circumstances entering into the making of market prices to admit them as sure and exclusive reflectors of fair value.[79]

The still-recent experience of the 1929 stock market crash and subsequent gyrations clearly informed the court's thinking.[80] Other early opinions likewise suggested that market prices might reflect too many variables that ought not to bear on the judicial inquiry.[81]

Even in more typical market conditions, however, the *Munds* court insisted that a dissenting stockholder should not be bound to receive a value that is "affected by numerous circumstances which are wholly disconnected from considerations having to do with the stock's inherent worth."[82] The court acknowledged that "[m]arket value undoubtedly is a pertinent consideration," but it should not be treated as exclusive in the statutory inquiry.[83]

For fifty years following *Munds*, until the landmark *Weinberger* decision, Delaware courts applied the so-called Delaware block method in appraisal proceedings, in which the trading price of stock typically played a modest role.[84] Under the block method, corporate earnings were the primary consideration,[85] but where trading prices existed for a corporation's stock and the trading was "uninfluenced by the merger," that figure had to be at least considered in the statutory valuation.[86] The weighting of the trading price

79. *Id.*

80. *Id.* at 455 ("The experience of recent years is enough to convince the most casual observer that the market in its appraisal of values must have been woefully wrong in its estimates at one time or another within the interval of a space of time so brief that fundamental conditions could not possibly have become so altered as to affect true worth. Markets are known to gyrate in a single day. The numerous causes that contribute to their nervous leaps from dejected melancholy to exhilarated enthusiasm and then back again from joy to grief, need not be reviewed.").

81. Allaun v. Consol. Oil Co., 147 A. 257, 262 (Del. Ch. 1929) ("Too many adventitious circumstances having no connection with ultimate underlying values are apt to enter into the sale and purchase of stock to allow much weight to be given to the sale price of stock as a reflection of the sales value of the assets represented by it.").

82. *Munds*, 20 Del. Ch. at 455.

83. *Id.*

84. ERNEST L. FOLK III, FOLK ON THE DELAWARE GENERAL CORPORATION LAW 380 (1972) ("[M]arket value of stock is not controlling, although it may be, of course, an important factor in appraised value."). The Delaware block method assigned weights to figures for earnings value, market value, and asset value to derive a composite statutory value.

85. Levin v. Midland-Ross Corp., 194 A.2d 50, 57 (Del. Ch. 1963) ("earnings value should ordinarily receive primary consideration").

86. Tri-Cont'l Corp. v. Battye, 74 A.2d 71, 74 (Del. 1950) ("Had there been an actual market value uninfluenced by the merger in existence, it would have been error to disregard it, but the absence of such an element does not require the construction of a hypothetical market value to be given effect in the final determination of value."); *see also* Application of Delaware Racing Ass'n, 213 A.2d 203, 211 (Del. 1965) ("It is, of course, axiomatic that if there is an established market for shares of a corporation the market value of such shares must be taken into consideration in an appraisal of their intrinsic value.").

varied.[87] If the court was less confident in the market price, it would afford it less weight.[88] For example, the court weighted market value at 10% where a market existed but was "influenced somewhat by the company's buying of its own stock."[89] Where a controlling stockholder was responsible for nearly all transactions in the stock, the Court concluded that the trading prices should receive no weight.[90] By the 1970s, the Court of Chancery noted "a trend which gives market value a significant role" in appraisal proceedings.[91] The thrust was not wholesale deference to market prices but instead simply a choice to afford market prices "greater weight to such value than was customarily allotted" in earlier cases.[92] The court gave the impression it was simply adding some flexibility to the "strict rule" of *Munds*, which was dismissed as a "depression days ruling."[93] By the time the block method was abandoned in *Weinberger*, the court typically considered the market price but continued to decline to treat it as "the overriding consideration."[94]

While market skepticism undoubtedly played a role at various times,[95] the enduring reason for refusing to rely too heavily on market prices is that doing so would get the inquiry backwards. The cornerstone of Delaware appraisal law, laid in *Munds*, is that the valuation of the individual shares must be derived from a valuation of the entire corporate estate, not the other way around.[96] As the supreme court explained in *Cavalier Oil*, "[t]he objective . . . is to value the corporation itself, as distinguished from a specific fraction of its shares as they may exist in the hands of a particular shareholder."[97] The ownership stake of the dissenting stockholder is, naturally, "irrelevant" to this inquiry.[98] In fulfilling its statutory mandate, then, the court first determines the value of the entity and then determines the stockholders proportionate interest.[99] The supreme court has made clear

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87. *In re* Olivetti Underwood Corp., 246 A.2d 800, 809 (Del. Ch. 1968) (giving a 50% weight to market price and noting that "market-pricing is not controlling here, but I think it is worthy of high weight because, in the long run as in *Delaware Racing*, market would be the most likely way in which an investor in Underwood stock (had he been permitted to hold shares) would have realized something on his investment."); *see also* Jacques Coe & Co. v. Minneapolis-Moline Co., 75 A.2d 244, 246 (Del. Ch. 1950) (30% weighting of market value); *In re* Gen. Realty & Utilities Corp., 52 A.2d 6, 15 (Del. Ch. 1947) (25% weighting of market value).

88. Adams v. R.C. Williams & Co., 158 A.2d 797, 802 (Del. Ch. 1960) ("[T]he question of the unreliability of the market price can be considered when market value is weighted in arriving at appraised value.").

89. Swanton v. State Guar. Corp., 215 A.2d 242, 246 (Del. Ch. 1965).

90. Sporborg v. City Specialty Stores, Inc., 123 A.2d 121, 124–25 (Del. Ch. 1956) (noting the "absence of a market other than that made by one party in interest").

91. Gibbons v. Schenley Indus., Inc., 339 A.2d 460, 474 (Del. Ch. 1975).

92. *Id.*

93. *Id.*

94. M.P.M. Enterprises, Inc. v. Gilbert, 731 A.2d 790, 797 (Del. 1999).

95. *See, e.g.*, Rapid-Am. Corp. v. Harris, 603 A.2d 796, 806 (Del. 1992) ("Recent price changes in the stock market dramatically illustrate the defects of an overstated reliance on market price to determine a corporation's intrinsic value in an appraisal proceeding."); Glassman v. Unocal Exploration Corp., 777 A.2d 242, 248 (Del. 2001) ("[I]f the merger was timed to take advantage of a depressed market, or a low point in the company's cyclical earnings, . . . the appraised value may be adjusted to account for those factors.").

96. Cede & Co. v. Technicolor, Inc., 684 A.2d 289, 298 (Del. 1996) (noting a corporation must be valued as an operating entity). See Asaf Raz, *Share Law: Toward A New Understanding of Corporate Law*, 40 U. PA. J. INT'L L. 255, 313 (2018) (noting that the law surrounding appraisal rights in Delaware is "rooted in equitable considerations" and that "a determination of [shares'] true value, when they are taken from their owners, involve[s] more than looking at their market price, if they have one at all").

97. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989).

98. *See* Hintmann v. Fred Weber, Inc., No. 12839, 1998 WL 83052, at *8 (Del. Ch. Feb. 17, 1998).

99. *Cavalier Oil*, 564 A.2d, at 1144 ("The dissenting shareholder's proportionate interest is determined

that adhering to this approach avoids imposing "a penalty for lack of control and unfairly enriches the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting stockholder, clearly an undesirable result."[100]

Dissenting stockholders thus share *pro rata* in the value of control rights over the corporation[101]—an asset that commands a substantial premium to the market price.[102] Control is vested in the board of directors, which has the exclusive authority to agree to the terms of a merger on behalf of all stockholders. Under normal conditions, the considerable value of that control will not be reflected in trading prices. Thus, the trading price will reflect a "minority discount" relative to the full value of the stockholder's interest in the corporation. As the supreme court has recognized in a related context, the "publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price reflects only the value of a single share."[103] Delaware has always recognized that the inchoate value of the control rights and the associated premium to the value of the minority stake are nevertheless part of the stockholder's entitlement.

These two related concepts—the minority discount and the control premium—are central to Delaware's historic conception of stockholder entitlements. As then-Vice Chancellor Strine noted:

> As a practical matter, correction of a minority discount requires the court to add back a control premium to the value of the enterprise, and to spread that premium equally across all the enterprise's shares. The resulting value for a minority share is thus not what would be considered "fair market value" in valuation terms, but an artificial value that reflects policy values unique to the appraisal remedy. In simple terms, those values may be said to consist in this proposition: if a majority stockholder wishes to involuntarily squeeze-out the minority, it must share the value of the enterprise with the minority on a pro rata basis.[104]

The control premium issue arises for the Court of Chancery most directly when it values a company by reference to trading prices of stock of comparable companies.[105] This methodology is problematic because these trading prices will reflect only the value of a minority stake.[106] The Court of Chancery has observed that "[b]ecause that value is not fully reflective of the intrinsic worth of the corporation on a going concern basis, this court has applied an explicit control premium in calculating the fair value of the equity in an

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only after the company as an entity has been valued.").

100. *Id*. at 1145.

101. Application of Vision Hardware Grp., Inc., 669 A.2d 671, 677 (Del. Ch. 1995), *aff'd sub nom*. Young v. Vision Hardware Grp., Inc., 676 A.2d 909 (Del. 1996).

102. *Gibbons*, 339 A.2d at 468 (noting that "the fact that more than the market price for stock is often paid for control being [is] recognized in the corporate world").

103. *See* Smith v. Van Gorkom, 488 A.2d 858, 876 (Del. 1985) (stating that the publicly traded stock price is solely a measure of a minority position and market price represents only the value of a single share).

104. Agranoff v. Miller, 791 A.2d 880, 888 (Del. Ch. 2001).

105. Borruso v. Commc'ns Telesystems Int'l, 753 A.2d 451, 457 (Del. Ch. 1999) ("There is no dispute between them that the comparable company method produces a minority valuation of the shares subject to appraisal, as has been recognized in decisions of this court.").

106. *Id.* at 458 (Del. Ch. 1999) ("The problem that both Huck and Kern sought to address is, as I have said, that the comparable company method of analysis produces an equity valuation that inherently reflects a minority discount, as the data used for purposes of comparison is all derived from minority trading values of the comparable companies.").

appraisal proceeding."[107] Notwithstanding some variation,[108] the court has reported "consistently" using "a 30% adjustment" to the prevailing market price.[109] This approach comports with the empirical reality of merger transactions, in which the median transaction price is at a level substantially above the trading price.[110]

Even when the Court of Chancery first began to rely on the *transaction* price in appraisal proceedings, as opposed to the market price, it hewed to this approach of inquiring after the value of the corporate enterprise. In *Union Illinois*, for example, the court articulated its obligation requiring a determination of "the fair value of [the company in question] *as an entity*."[111] And when relying on the price negotiated by the target board, the court emphasized that it felt comfortable doing so because the transactional process that gave rise to that price represented "the market's opportunity to price [the subject company] *directly as an entity*."[112] Under the right conditions, the merger sales process can deliver what the court has always sought: the value of the unified entity.

2. *The Fair Price Analysis When Evaluating the Conduct of Fiduciaries*

The approach Delaware developed in the law of appraisal long ago transcended that specific context and now unifies all aspects of Delaware's merger-related doctrines. Notably, Delaware has drawn on the same valuation principles (1) when evaluating the fair price prong of the entire fairness challenge to a merger and (2) when computing damages to stockholders arising from a merger-related fiduciary breach. In these contexts, as in appraisal, the criterion that Delaware law relies upon is the value of the enterprise.

When evaluating the fairness of a transaction, the Delaware Supreme Court made clear in the landmark *Weinberger* decision that the "concept of fairness has two basic aspects: fair dealing and fair price."[113] In evaluating the fairness of price, the *Weinberger* court expressly embraced the appraisal standard. Subsequent decisions have reinforced that "the economic inquiry called for by the fair price aspect [of the entire fairness test] is the same as the fair value standard under the appraisal statute."[114]

By calling for an inquiry into the "value of *a company*,"[115] the *Weinberger* court rejected any suggestion that a comparison to the trading price can determine the fairness of a merger.[116] The value *of the company* could not be determined by reference to the trading

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107. *Id.; see also* Doft & Co. v. Travelocity.com Inc., No. CIV.A. 19734, 2004 WL 1152338, at *10 (Del. Ch. May 20, 2004) ("The equity valuation produced in a comparable company analysis does not accurately reflect the intrinsic worth of a corporation on a going concern basis. Therefore, the court, in appraising the fair value of the equity, 'must correct this minority trading discount by adding back a premium designed to correct it.'").

108. Kleinwort Benson Ltd. v. Silgan Corp., No. CIV. A. 11107, 1995 WL 376911, at *3 (Del. Ch. June 15, 1995) ("In prior appraisal actions, this Court has rejected the use of a control premium derived from merger and acquisition data because the control premium incorporates post-merger value.").

109. *Doft*, 2004 WL 1152338, at *11.

110. *See infra* note 161.

111. Union Illinois 1995 Inv. Ltd. P'ship v. Union Fin. Grp., Ltd., 847 A.2d 340, 357 (Del. Ch. 2004).

112. *Id.* at 359 (emphasis added).

113. Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983).

114. ACP Master, Ltd. v. Sprint Corp., No. CV 8508-VCL, 2017 WL 3105858, at *18 (Del. Ch. July 21, 2017), *opinion corrected and superseded*, No. CV 8508-VCL, 2017 WL 3421142 (Del. Ch. July 21, 2017), *aff'd*, 184 A.3d 1291 (Del. 2018).

115. *Weinberger* 457 A.2d at 713 (*emphasis added*).

116. For example, in the early 1970s, Vice Chancellor Marvell expressed support for the idea of evaluating the fairness of a merger based in part on the trading price. *See* Greene v. Schenley Indus., Inc., 281 A.2d 30, 34

price for a share but instead required an inquiry into the "intrinsic or inherent value of a company's stock."[117] In this regard, the *Weinberger* opinion went further by eliminating the trading price from the fairness analysis and calling for a modernization of proof in appraisal proceedings. Gone was the old "Delaware block" approach, which to a limited extent called for the trial court to consider trading value,[118] as the court emphasized its desire to "obviate the very structured and mechanistic procedure that has heretofore governed such matters."[119]

Two years later, the Delaware Supreme Court in *Smith v. Van Gorkom* delivered a vivid illustration of the irrelevance of trading price in the fiduciary analysis. The *Van Gorkom* defendants had attempted to demonstrate the informed nature of their decision to sell the company for $55 per share based on the raw premium over the earlier-prevailing $38 trading price.[120] The court acknowledged that a premium to the market price might be one factor bearing on a board's recommendation, but noted that a premium alone is not enough to judge the fairness of a transaction.[121] As the court pointed out, the directors had made clear their view that the trading price "consistently undervalued" the stock and failed to reflect the "inherent" worth of the company.[122]

Notably, the *Van Gorkom* court reiterated the core distinction between the value of a single share and the value of the entire entity. The court emphasized that "a publicly-traded stock price is solely a measure of the value of a minority position and, thus, market price represents only the value of a single share."[123] For this reason, the director defendants made a category error when they "assessed the adequacy of the premium over market" by comparing it to the "current and historical stock price."[124]

In contrast with the trading price, the *transaction* price has sometimes played a larger role in evaluating fiduciary conduct, depending on the adequacy of the transactional process giving rise to the transaction. In the context of evaluating the fairness of a transaction, for example, then-Vice Chancellor Jacobs relied on his finding of *fair dealing* to conclude that the resulting transactional *price* was fair.[125] Where "a transaction price was forged in the crucible of objective market reality," the court could regard such a market test as "strong evidence that the [negotiated transaction] price is fair."[126] The court carefully specified the precise asset that was being priced in such a transaction: "corporate control (or the corporation itself),"[127] which would not be reflected in the prior trading

(Del. Ch. 1971), stating:

> [M]arket price, when it can be established by free trading in an open forum, is, in my opinion, the most significant element to be taken into consideration in reaching a judgment on the overall fairness of a corporate merger. It is the element which, on the whole, most attracts the attention and interest of the average investor, and is a reality of the financial world which has recently been taken into consideration by the Delaware Legislature.

117. *Weinberger*, 457 A.2d at 711.
118. *See supra* notes 79–89 and accompanying text.
119. *Weinberger*, 457 A.2d at 713.
120. Smith v. Van Gorkom, 488 A.2d 858, 875 (Del. 1985), *overruled by* Gantler v. Stephens, 965 A.2d 695 (Del. 2009).
121. *Id.* at 875.
122. *Id.* at 876.
123. *Id.*
124. *Id.*
125. Van de Walle v. Unimation, Inc., Civ. A. No. 7046, 1991 WL 29303, at *17 (Del. Ch. Mar. 7, 1991).
126. *Id.*
127. *Id.* at *18.

price of the stock. Indeed, the only hesitation the court had in assessing the fairness of the transaction price in this way was the paltry premium it reflected over the pre-announcement trading price.[128] The court concluded that the pre-announcement price was, however, influenced by rumors of the transaction, and, as a result, the premium over the "uninfluenced" price was larger, consistent with the fairness conclusion.[129]

3. *Measuring Damages in the Fiduciary Context*

In setting damages arising from a fiduciary breach, Delaware doctrine has also embraced the conception of the stockholder's entitlement from the appraisal context.[130] When a transaction fails the fairness test, "the remedy could well be a damages award equal to the fair value that would have been awarded in an appraisal."[131] The damage award might exceed the appraisal standard, however, because the judicial task in the fiduciary context exceeds the charge in an appraisal.[132] The remedial goal in a fiduciary case is to "discourage disloyalty"[133] instead of merely delivering "fair value."[134] When necessary to vindicate that goal, the court will often note that its damage calculations produce outcomes that exceed what an appraisal would generate.[135] But in the absence of special aggravating factors, Delaware courts look to the appraisal inquiry to establish a baseline measure of damages in the fiduciary context.[136]

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128. *Id.* at *19 ("The only arguably problematic value criterion was the premium over market price.").

129. *Id.* at *20 ("What is clear, however, is that the merger price represented an above-market premium of some magnitude. In terms of a "fair price" analysis, that market premium was at worst a neutral factor, but most likely the premium was at least 17% or higher, which would evidence that the $21 merger price was fair.").

130. The fair price prong, where Delaware has embraced the principles from appraisal, is part of a standard of review for the conduct of fiduciaries. That fair price analysis "is not itself a remedial calculation." Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 465 (Del. Ch. 2011).

131. *Id.* at 466.

132. Int'l Telecharge, Inc. v. Bomarko, Inc., 766 A.2d 437, 440–41 (Del. 2000) ("In an appraisal action, a court must determine the fair value of the stockholders' shares at the time of the merger. The question faced by the trial court in the instant action was determining what ITI's stockholders' 'shares would have been worth at the time of the Merger if Haan had not breached his fiduciary duties.'").

133. Thorpe by Castleman v. CERBCO, Inc., 676 A.2d 436, 445 (Del. 1996) ("The strict imposition of penalties under Delaware law are designed to discourage disloyalty."); Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939)

> The rule, inveterate and uncompromising in its rigidity, does not rest upon the narrow ground of injury or damage to the corporation resulting from a betrayal of confidence, but upon a broader foundation of a wise public policy that, for the purpose of removing all temptation, extinguishes all possibility of profit flowing from a breach of the confidence imposed by the fiduciary relation.

134. DEL. CODE ANN. tit. 8, § 262 (2020).

135. Gesoff v. IIC Indus., Inc., 902 A.2d 1130, 1155 (Del. Ch. 2006) ("Because the court is convinced [that its remedial analysis] yields a value at least as high as a formal appraisal, the court will not perform a separate statutory appraisal, but instead, uses the value ascertained as a basis on which to compensate all individual and class plaintiffs."); Bomarko, Inc. v. Int'l Telecharge, Inc., 794 A.2d 1161, 1185 n.9 (Del. Ch. 1999), as revised (Nov. 16, 1999), *aff'd*, 766 A.2d 437 (Del. 2000) "([B]ecause [the defendant's] misconduct in the May–June 1992 timeframe injured ITI and devalued its shares, it is insufficient, as a remedy, to award only out-of-pocket damages measured by the actual value of ITI's shares at the time of the Merger").

136. Reis v. Hazelett Strip-Casting Corp., 28 A.3d 442, 468 (Del. Ch. 2011) ("This case does not call for a remedy other than an award of fair value."); *In re* PNB Holding Co. S'holders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *32 (Del. Ch. Aug. 18, 2006) (finding that "the damages award to the Plaintiff Class is identical to the difference between the fair value of a PNB share and the merger consideration").

The appraisal inquiry serves as "a proxy for the damages that would be awarded to any of the plaintiffs if they succeed in their equitable action for breach of fiduciary duty."[137] In a fairness case, the standard remedy is keyed to any harm arising from the breach, which as then-Vice Chancellor Strine noted is simply "any deficiency between the Merger price and my assessment of fair value."[138] In this way, the "appraisal of [the target company's] shares as of the merger date . . . determine[s] the damages award for the Plaintiff Class."[139] As a matter of judicial economy, the court will often analyze the value only in circumstances "where the fair price analysis and remedial determination coincide."[140] The entire fairness inquiry is thus "the same essential inquiry as in an appraisal, albeit with more leeway to consider fairness as a range and to consider the remedial objectives of equity."[141]

In some of most notable merger-related liability cases of the past decade, Delaware has looked to this appraisal-based conception of stockholder entitlements in fashioning the damages remedy. In the *Rural/Metro* decision, the supreme court affirmed the lower court's approach to damages that relied on "discover[ing] the 'fair value' or 'intrinsic value' of the shares held by the Class 'using the same methodologies employed in an appraisal [proceeding] . . . .'"[142] Likewise, in fashioning damages in the *Southern Peru* derivative case, then-Chancellor Strine sought to estimate what the buyer "should have paid" in the transaction, and looked to approaches that were customary in appraisal.[143]

4. Justifying Defensive Tactics in M&A

The core precept of the appraisal inquiry—that the value of the corporation is distinct from the trading price of a single share—also forms the conceptual foundation for Delaware's approach to defensive tactics by target boards. This issue is still among the most consequential in Delaware law, governing the outcome of high-stakes contests for corporate control.

In the face of the rising onslaught of hostile acquisitions in the 1970s and 1980s, defense lawyers developed a set of tactics—most famously, the poison pill—with which corporate boards could fend off suitors. The tactics were defended by corporate insiders on the grounds that a company's stock price is an unreliable guide to the value of the entire enterprise. Martin Lipton, the inventor of the poison pill, argued at the time that "directors are not required to accept a takeover bid simply because it represents a premium to market."[144]

In the famous *Unocal* case, the Delaware Supreme Court made clear that boards possessed the discretion to deploy defensive tactics of this sort, subject to an intermediate

137. Andaloro v. PFPC Worldwide, Inc., No. Civ.A. 20289, 2005 WL 2045640, at *8 (Del. Ch. Aug. 19, 2005).

138. *In re* PNB Holding Co. Shareholders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *22 (Del. Ch. Aug. 18, 2006).

139. *Id.*

140. *Reis*, 28 A.3d at 468.

141. *PNB Hldg.*, 2006 WL 2403999, at *22.

142. RBC Capital Markets, LLC v. Jervis, 129 A.3d 816, 867 (Del. 2015).

143. *In re* Southern Peru Copper Corp. S'holder Derivative Litig., 52 A.3d 761, 816–19 (Del. Ch. 2011), *aff'd sub nom*. Americas Mining Corp. v. Theriault, 51 A.3d 1213 (Del. 2012).

144. Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target's Boardroom*, 60 BUS. LAW. 1369, 1370 (2005).

level of judicial scrutiny.[145] At the time, a strain of academic work advocated for a very different approach: board passivity in the face of a takeover attempt.[146] Under this view, any takeover bid above the prevailing market price was *per se* desirable, and any actions by a board to thwart an acquisition should receive the most searching judicial scrutiny. The Delaware Supreme Court decisively rejected this view in *Unocal*, deferring instead to the directors' determination that "the value of Unocal was substantially above the $54 per share offered,"[147] despite the yawning gap between that offer and the prior trading price of the stock.[148]

In *Unocal*, the supreme court afforded directors the discretion to deploy takeover defenses in response to any "threat" that faces the corporation. And in case after case Delaware courts have recognized that an offer to acquire the corporation can constitute a "threat" based on the board's opinion that the offered price is inadequate—even where that offer exceeds the prior trading price. In *Paramount v. Time*, for example, the court deferred to the Time board's conclusion that the Paramount offer constituted a threat to Time by comparison to "what a target board in good faith deems to be the present value of its shares."[149] Likewise, in *Unitrin*, the court noted that the target board had determined "that Unitrin's stock was undervalued by the market at current levels,"[150] and that, in light of that estimate, the offer posed a "threat," despite being at a large premium to the market price.[151]

Borrowing a term from the academic literature, the supreme court in *Unitrin* used the term "substantive coercion" to describe the threat posed by an inadequate offer.[152] As Ronald Gilson has observed, "the mere incantation of substantive coercion now seems sufficient to establish a threat under *Unocal* without any inquiry into the facts or management's explanation for the market's underpricing of the company's shares."[153] In light of the extraordinary deference, Delaware law affords boards in selecting a non-market benchmark for evaluating merger proposals, the nominally "intermediate" standard of review under *Unocal* amounts to something more akin to the business judgment rule.[154]

145. *Unocal*, 493 A.2d at 956.

146. *See* discussion accompanying notes 279–81 and 339–43.

147. Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 956 (Del. 1985).

148. Mesa Petroleum Co. v. Unocal Corp., No. Civ. A. 7997, 1985 WL 44691, at *1 (Del. Ch. May 13, 1985), *rev'd*, 493 A.2d 946 (Del. 1985) ("During the year and a half prior to the events described hereafter, Unocal stock traded between $29.87 and $43.75 per share.").

149. Paramount Commc'ns, Inc. v. Time, Inc., 571 A.2d at 1152–53; *see also* Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361, 1384 (Del. 1995).

150. *Id.* at 1384.

151. *Id.* at 1385 (describing the threat in light of "the Board's assessment of the long-term value of Unitrin's stock").

152. *Id.* The term was coined first by Gilson and Kraakman, who had suggested that Delaware apply a demanding proportionality test when an incumbent board perceives a threat arising from the inadequacy of the offer, requiring the board to produce "a coherent statement of management's expectations about the future value of the company" and "a showing of how—and when—management expects a target's stockholders to do better" than the allegedly inadequate offer. *See* Gilson & Kraakman, *Delaware's Intermediate Standard: Is There Substance to Proportionality Review?,* 44 BUS. LAW. 247, 266–68 (1989). The Delaware Supreme Court embraced the Gilson and Kraakman's terminology but not their test. *See also* Chesapeake Corp. v. Shore, 771 A.2d 293, 329 (Del. Ch. 2000).

153. Ronald J. Gilson, *Unocal Fifteen Years Later (And What We Can Do About It)*, 26 DEL. J. CORP. L. 491, 498 n.23 (2001).

154. WILLIAM T. ALLEN ET AL., *supra* note 34, at 541 ("*Unitrin* makes clear how limited an 'enhancement'

The *Unocal* line of cases reached its apogee in the Court of Chancery's 2011 *Airgas* decision, involving perhaps the most high-profile merger battle of the last twenty years. Air Products had offered a $70 per share for Airgas, whose stock had earlier been trading in the $40-50 range, and Air Products had successfully elected three directors to the Airgas board. The Airgas board, however, repeatedly rejected overtures from Air Products, whose offer was "clearly inadequate" in view of the Airgas board. Airgas maintained a poison pill to fend off Air Products, and Air Products filed suit challenging the continued use of the pill. The Court of Chancery upheld the Airgas board's tactics, reiterating the foundational proposition that "[t]he directors of a Delaware corporation have the prerogative to determine that the market undervalues its stock and to protect its stockholders from offers that do not reflect the long-term value of the corporation under its present management plan."[155]

At bottom, the board has the discretion to fight off unwanted takeovers precisely because Delaware's jurisprudence has embraced the same bedrock principle from the state's appraisal regime, its fiduciary review, and its computation of damages: that the corporation has a value distinct from the trading price of a single share.

C. The Empirical Reality of the Distinction Between Entity Value and Trading Prices

Delaware's refusal to defer to trading prices has been a lightning rod for critics. The most facile version of the criticism is that Delaware courts believe "markets must be wrong,"[156] and relatedly that the doctrine fails to appreciate the academic literature on market efficiency.[157] This critique of Delaware is unpersuasive, given the global renown of the state's law and judiciary.[158] Delaware's corporate law is based not on any misunderstanding of markets but instead on its definition of the stockholder's entitlement.[159] As Daniel Fischel has noted, the "most charitable interpretation" of Delaware's corporate law is that the object of the inquiry should be "the value of the company sold as a whole rather than focusing on the trading price of a single share."[160]

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to the business judgment rule *Unocal* can be.").

155. Air Prod. & Chemicals, Inc. v. Airgas, Inc., 16 A.3d 48, 112 (Del. Ch. 2011) (quoting *Unitrin*, 651 A.2d at 1376).

156. Carney & Sharfman, *supra* note 35, at 75 ("The notion that markets must be wrong on any given day is a common one, often held by such 'casual observers.'"); *id.* at 65 (arguing that Delaware law embodies "a deep suspicion of the fairness and rationality of even highly developed and well-informed markets").

157. Carney & Sharfman, *supra* note 35, at 75 (noting that "generations of careful theory and evidence of markets and valuation by brilliant, and in some cases, Nobel Laureate financial economists, [have] validat[ed] efficient capital markets in the scientific literature, but not in the courts"); *id.* at 76 ("Delaware courts have rarely seen a market that they liked or trusted.").

158. Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. CHI. L. REV. 941, 961 (2002) ("[I]t is worth speculating why so many courts have been hostile to market evidence. One possibility is ignorance, although the points are so simple that this is hard to believe.").

159. FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 206 (1991) (noting that "an old theme in the Delaware cases" is the "difference between market and 'intrinsic value'"); Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 167 nn.4–5.

160. Fischel, *supra* note 158, at 952. Fischel offers a more sophisticated criticism, arguing that the distinction between the shares of the corporation and the entity itself is itself "specious." *Id.* Fischel raises two objections. The first is that "[m]inority status is just as much a characteristic of an investment as the firm's management or its business strategy, and is equally factored into the price the investor paid in the first place." *Id.* at 946. As we explain elsewhere, this may not be a problem for the minority stockholder who both buys her shares at a discount

And, indeed, the empirical evidence on mergers makes clear that the market for entire firms is very different from the market for individual shares, with buyers in mergers consistently paying a substantial premium to the prevailing trading price. Roughly speaking, aggregated ownership of a corporation sells for around 30% more than the trading price of the marginal share.[161]

The source of this premium has been described as a "continuing puzzle."[162] And it is puzzling if you assume that the trading price reflects the full value of the equity in a firm.[163] For those who hold such a belief, the most common explanation is that the premium reflects not anything latent in the firm itself, but expected efficiency gains from the merger.[164] This was the view of Easterbrook and Fischel, for example, who posited that "the gains (if any) come from the subsequent changes in the corporate structure and operations" at the target firm.[165] The historic difficulty for this view is that accounting data has not really supported it, as the premiums paid are consistently too large to be justified by efficiency gains.[166] Others have advanced alternative explanations, with varying degrees of plausibility.[167]

The most natural way to understand the observed premium, however, is as a product of the fact that a merger involves, as the Delaware courts have historically recognized, an asset that is different than the fractionalized ownership claim that can be purchased on the

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and has them confiscated at the same discount. But it is a serious problem for the original owners of the company who can only sell the shares to minority stockholders in the first place at this discount. *See* Charles Korsmo & Minor Myers, *Single-Owner Standard*, 47 J. CORP. L. (forthcoming Spring 2022). Second, Fischel suggests that trading prices incorporate the possibility of a change-of-control transaction. Fischel, *supra* note 158, at 953. As we point out elsewhere, however, this argument is circular, in that the market will only value the ability to share in the gains from a merger if the stockholders have an enforceable right to share in the gains from a merger, which is precisely what Fischel is arguing they should not have. *See* Korsmo & Myers, *supra* note 160.

161. The average one-week acquisition premium between 1990 and 2015 was 36%. *See* Benjamin Bennett & Robert Dam, *Merger Activity, Stock Prices, and Measuring Gains from M&A*, Table 1 (Feb. 20, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000574 [https://perma.cc/HC4V-JM2Z]. Earlier periods were no different: The median bid premium was approximately 38% during the 1990s was approximately and 35% during the 1980s. K. J. Martijn Cremers et al., *Takeovers and the Cross-Section of Returns*, 22 REV. FIN. STUD. 1409, 1410 n.1 (2009).

162. Bernard S. Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 598 (1989).

163. *E.g.*, William J. Carney & Mark Heimendinger, *Appraising the Nonexistent: The Delaware Court's Struggle with Control Premiums*, 152 U. PA. L. REV. 845, 858 (2003) ("The basic conclusion of the Efficient Capital Markets Hypothesis (ECMH) is that market values of companies shares traded in competitive and open markets are unbiased estimates of the value of the equity of such firms."); Easterbrook & Fischel, *supra* note 158, at 207 (arguing that "neither logic nor data supports the belief that there is a difference between the current price and intrinsic value").

164. *See generally* Michael Bradley et al., *Synergistic Gains from Corporate Acquisitions and Their Division Between the Stockholders of Target and Acquiring Firms*, 21 J. FIN. ECON. 3 (1988); Jensen, *The Takeover Controversy: Analysis & Evidence*, 4 MIDLAND CORP. FIN. J. 6 (1986).

165. EASTERBROOK & FISCHEL, *supra* note 159, at 163.

166. *See* Richard E. Caves, *Effects of Mergers and Acquisitions on the Economy: An Industrial Organization Perspective*, *in* THE MERGER BOOM 149, 150 (L. Browne & E. Rosengren eds., Fed. Rsrv. Bank of Bos. 1987).

167. Black, *supra* note 162, at 599 (arguing that the premium, which exists due to bidders overpaying for targets, does not ultimately affect the bidders' market price because "investors already expect the bidder to waste the money, one way or another."). Lynn Stout has suggested that the premium paid in a merger simply reflects a downward-sloping demand curve for the target's stock. Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235, 1295–96 (1990). In particular "[i]f the bidder who buys a controlling block of shares in a target firm is 'cornering the market' in a unique good with limited supply, it seems natural that buying larger and larger quantities of stock should inevitably bid up the market price." *Id.* at 1236.

stock market. A merger delivers an aggregated ownership interest in a corporation, while open-market purchases of shares can only, as a practical matter, involve fractionalized claims.[168] This assembled ownership interest is valuable, and the trading price of single shares will not typically reflect this value.[169] Purchasing shares, or even blocks of shares will never result in a change in corporate control. As a result, the buyer in a merger acquires and pays for the assembled entity, something different than what an investor buys through a stock market. In this sense, the premium is not a premium at all; it is simply the market-clearing price for a different asset than what trades over stock exchanges.[170]

By giving the board the power to block a transaction under *Unocal* and its progeny, and an obligation to seek the highest price reasonably available under *Revlon* and its progeny, Delaware law puts the board in the traditional position of a sole owner of an asset—who has the right to say no to any sale, and the incentive to get the highest price available.[171] As the Delaware Court of Chancery acknowledged in the landmark case of *Moran v. Household International*, corporate law empowers boards of directors to "to extract concessions from an acquiror which it otherwise would not secure, or to deter the acquisition effort entirely."[172]

These powers are utterly conventional in the American law of property.[173] Corporate law simply replicates in the board the power of any traditional owner of a conventional asset to negotiate over control of that asset—a power no individual shareholder possesses. As a result, the price should approximate what a single owner of the whole corporation would receive.[174]

This, of course, is a choice on Delaware's part. The distinction between the deal market and the market for single shares would not exist (at least in the same way) if Delaware denied boards the powers it currently gives them.[175] Likewise, the observed

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168. *See* Jeffrey N. Gordon & Lewis A. Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 825 n.173 (1985) ("Where the asset in question—control—is not readily divisible and trading is 'lumpy' (a firm makes an acquisition or does not), the prevailing share price will not necessarily perform the clearing function.").

169. Ann Lipton, *Shareholder Divorce Court*, 44 J. CORP. L. 297, 337 (2018)

> If one assumes that open and developed markets efficiently price stocks at their true value, the premium is likely to represent the fact that stock aggregated into a single controlling block, without the need to cater to a minority shareholder base, is more valuable than dispersed stock, for a variety of reasons (including synergies from the combination of complementary businesses, elimination of the transaction costs of dealing with minority shareholders, reduction of agency costs associated with a lack of control, and the benefits a controlling shareholder can extract when implementing new business plans).

170. *See, e.g.*, Jeffrey N. Gordon & Lewis Kornhauser, *Efficient Markets, Costly Information, and Securities Research*, 60 N.Y.U. L. REV. 761, 825 (1985) ("[T]he market in shares generally and the market in all (or substantially all) of the shares of a specific firm may be very different markets.").

171. *E.g.*, THOMAS MERRILL & HENRY SMITH, PROPERTY: PRINCIPLES AND POLICIES 32 (3d ed. 2017) (noting as a general matter that "the law allows the owner of the resource to repel any and all intrusions that do not have the owner's consent"); *see generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

172. Moran v. Household Int'l, Inc., 490 A.2d 1059, 1083 (Del. Ch. 1984), *aff'd*, 500 A.2d 1346 (Del. 1985) (disapproved of by Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031 (Del. 2004)).

173. *E.g.*, MERRILL & SMITH, *supra* note 171, at 961 ("[P]roperty rights are strongly associated with 'property rule' protection.").

174. Korsmo & Myers, *supra* note 160.

175. Jonathan Macey, *Displacing Delaware: Can the Feds Do a Better Job Than the States in Regulating Takeovers?,* 57 BUS. LAW. 1025, 1039 (2002) (noting "the common sense intuition that, despite the fact that

takeover premium would surely be lower and perhaps might not exist at all.[176] But the regime Delaware has long embraced vests the board with the power to aggregate the interests in the corporation into a single sale and negotiate such that the target stockholders share in the gains from selling that unified interest.

D. The Use of Trading Prices When Not Fixing Stockholder Entitlements

As further evidence that the Delaware courts do not simply misunderstand the notion of market efficiency, Delaware courts have been far more willing to defer on the trading price when valuing a share of stock in contexts—unlike the merger context—that do not simultaneously involve the definition of the stockholders' entitlements. The use of trading prices in corporate disputes is context-dependent,[177] a hallmark of Delaware law generally.[178]

As far back as *Munds*, Delaware courts observed that "for many purposes market values when they exist are accepted by the courts as the values to be taken for the admeasurement of damages."[179] The trading price of a share of stock might be the appropriate yardstick of damages in a conversion action, for example.[180] A plaintiff would not suffer under that standard because "the plaintiff can easily step into the market and replace presumably at the quoted prices the chattels or stock which the defendant converted" and so "[p]aying him the market price puts him as a rule in position to restore what was taken from him."[181] The same logic does not apply in an end-period transaction like a merger that cancels the dissenter's stock by operation of law. As the *Munds* court observed:

> [H]ow can the payment to the holder of stock of its market value put him in the way of restoring his position as a continuing part owner of a going corporation, when a merger has destroyed its individual identity and wiped out of existence all the stock of the kind he owned? As there is none in existence, none is available to be bought. The only restoration that can be made to him is to substitute for the vanished stock its intrinsic worth, and if the market quotations are lower than what all the relevant facts that bear on value show it to have been worth, he should not be compensated according to the market's estimate.[182]

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poison pills and other anti-takeover devices are subject to abuse, such devices provide incumbent managers with greater power to negotiate with outside bidders, and this greater negotiating power results in higher premiums for target firm shareholders").

176. EASTERBROOK & FISCHEL, *supra* note 159*,* at 204 (noting that the existing "legal rules and private devices that facilitate auctioneering" at the board level "lead to higher premiums when offers occur").

177. Bodell v. Gen. Gas & Elec. Corp., 15 Del. Ch. 119, 137 (1926), *aff'd*, 15 Del. Ch. 420, (1927) ("The case of Hodgman v. Atlantic Refining Co. is cited in support of the proposition that the market value of stock is a proper criterion to accept as the price at which directors ought to issue similar stock. The case does not so hold. Market value was referred to in that case for the purpose of measuring damages and no more. That is an entirely different proposition from that with which we are here concerned.").

178. *E.g.*, McMullin v. Beran, 765 A.2d 910, 918 (Del. 2000) ("The statutory duties and common law fiduciary responsibilities that directors of a Delaware corporation are required to discharge depends upon the specific context that gives occasion to the board's exercise of its business judgment.").

179. *Munds*, 20 Del. Ch. at 152.

180. *Id.*

181. *Id.*

182. *Id.* at 151–52.

This contextual sensitivity is characteristic of Delaware law. In *Applebaum v. Avaya*, for example, the court was comfortable relying on market prices in valuing fractional shares canceled in a reverse stock split.[183] Section 155(2) entitles holders cashed out in such fashion to the "fair value of fractions of a share," and the plaintiff argued that the meaning of "fair value" should mirror the meaning in the appraisal context. The court found the analogy inapt. While leaving open the possibility of insisting on an appraisal-informed inquiry of opportunism,[184] the court noted that stockholders who were cashed out could reinvest the proceeds directly back into the company on the same terms if they desired. In short, "[a] payment based on market price is appropriate because it will permit the stockholders to reinvest in Avaya, should they wish to do so."[185]

III. The Emergence of a New Paradigm

In a recent series of opinions, the Delaware Supreme Court has reoriented the stockholder's appraisal right, and in doing so it has also articulated a new conception of stockholder entitlements, one that is far more tied to trading prices than Delaware's historic practice. These cases constitute a shift in the basic paradigm through which Delaware conceives of the stockholder's entitlement in the public corporation.

A. The First Signs of a Shift: DFC Global *and* Dell

The first indication of a new paradigm came in 2017 with *DFC Global* and *Dell*. In both cases, the lower court had found a statutory fair value in excess of the negotiated transaction price. In both cases, the Delaware Supreme Court vacated the trial court's determination and faulted the lower court for failing to afford sufficient weight to the price negotiated by the target company board.

In *DFC Global*, the Delaware Supreme Court held that, in light of the attributes of the sales process leading to the deal, the trial court had abused its discretion by giving only a one-third weighting to the deal price.[186] The underlying transaction, the supreme court emphasized, exhibited three important characteristics: (1) it was the product of an extended sales process involving strategic and financial buyers, (2) it involved an arm's length sale to a third-party buyer, and (3) it carried "no hint" of self-interest that undermined the process.[187] In light of these findings, the supreme court noted that "economic principles suggest that the best evidence of fair value was the deal price."[188] The supreme court remanded the case with a not-so-subtle suggestion that it adopt the deal price as the statutory fair value.[189]

The *DFC Global* opinion, while involving deference to a negotiated transaction price rather than a stock market price, evinced an enthusiasm for market mechanisms generally that was strikingly new for Delaware. The court bristled at the idea that it might be

183. Applebaum v. Avaya, Inc. 812 A.2d 880, 893 (Del. 2002).
184. *Id.* at 891.
185. *Id.* at 892.
186. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 351 (Del. 2017).
187. *Id.* at 349.
188. *Id.*
189. *Id.* at 351 ("On remand, the Chancellor should reassess the weight he chooses to afford various factors potentially relevant to fair value, and he may conclude that his findings regarding the competitive process leading to the transaction . . . suggest that the deal price was the most reliable indication of fair value.").

"ignoran[t] to the economic reality that the sale value resulting from a robust market check will often be the most reliable evidence of fair value."[190] This was not exactly novel, of course, as the Court of Chancery had in the past looked to the transaction price as evidence of the fair value of the company.[191]

The supreme court went beyond this context-specific proposition, however, to give a sweeping endorsement of market pricing. The court emphasized the general hazards of ever doubting trading prices: "[S]econd-guessing the value arrived upon by the collective views of many sophisticated parties with a real stake in the matter is hazardous."[192] It would be "unlikely" for any party to "have a judgment about an asset's value that is likely to be more reliable than the collective judgment of value embodied in a market price."[193] The supreme court noted that common sense and empirical evidence supported the view that "the most reliable evidence of value is that produced by a competitive market, so long as interested buyers are given a fair opportunity to price and bid on the something in question."[194] While avoiding categorical claims, the supreme court generally left the impression that it was folly to suspect that a market price might be biased or faulty.[195]

At the same time, the court enunciated a significant shift in the central object of the appraisal remedy. The court first acknowledged that Delaware law had long resolved to ignore the trading price, and the focus of an appraisal proceeding instead is on "the fair market value *of the company* being appraised."[196] But it then blurred that focus by announcing that the "purpose of an appraisal" is to deliver stockholders "fair compensation *for their shares* in the sense that it reflects what they deserve to receive based on what would fairly be given to them in an arm's-length transaction"[197]—a novel formulation in Delaware. The court insisted that the value of an asset "is what it will fetch in the market."[198] But it is difficult to discern from the opinion precisely what kind of "market" prices the court believed to be relevant. For example, when it said "real world transaction prices can be the most probative evidence of fair value even through appraisal's particular lens,"[199] did the court mean negotiated merger prices or stock market trading prices, or both? If referring to transaction prices, the observation would not be particularly problematic, but elsewhere the court mused about how to assign a value to "an asset . . . such as the value of a company as reflected in the trading value of its stock."[200] Throughout the opinion, the traditionally sharp distinction between share price and corporate value was hazy at best.

At times, however, the fog lifts, revealing an unmistakable belief that the pre-

190. *Id.* at 366.
191. *E.g.*, Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985).
192. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 366 (Del. 2017).
193. *Id.* at 367.
194. *Id.*
195. *Id.* at 367.

> This, of course, is not to say that the market price is always right, but that one should have little confidence she can be the special one able to outwit the larger universe of equally avid capitalists with an incentive to reap rewards by buying the asset if it is too cheaply priced.

196. *DFC Glob.*, 172 A.3d at 368 (emphasis added).
197. *Id.* at 371(emphasis added).
198. *Id.* at 368–69.
199. *Id.* at 370.
200. *Id.*

transaction trading price offers useful insight into the statutory fair value.[201] The court notes, for example, that the old Delaware block method used as one of its inputs "the market prices of securities when there was an active market and where no special circumstances existed to render the price unreliable."[202] Despite the disavowal of the Delaware block method in *Weinberger*, the *DFC* court believed this past practice represented a judicious commitment to the view that "[w]here there is a free and active market, averaging of market prices on the last trading day before the announcement of a merger will reflect the fair market price."[203] Ultimately, the Court was explicit in its reference to trading prices:

> When, as here, the company had no conflicts related to the transaction, a deep base of public shareholders, and highly active trading, the price at which its shares trade is informative of fair value, as that value reflects the judgments of many stockholders about the company's future prospects, based on public filings, industry information, and research conducted by equity analysts.[204]

While the holding itself ultimately involved deference only to the transaction price, the language used by the court placed little daylight between the value of the corporation and the value of a single share.

The *Dell* opinion, issued only months later, revisited many of these issues. Again, the supreme court concluded that the trial court had abused its discretion by disregarding the transaction price where the "record as distilled by the trial court suggests that the deal price deserved heavy, if not dispositive, weight."[205] As in *DFC Global*, the holding itself commanded deference to the *transaction* price. And again, the supreme court invoked the familiar standard about what the trial court is valuing—"the *corporation* itself, as distinguished from a specific fraction of its *shares* as they may exist in the hands of a particular shareholder . . . ."[206] But as in *DFC*, the opinion consistently blurred the distinction between the transaction price—paid for the entire company—and the trading price of individual shares.[207] In particular, the supreme court explicitly faulted the trial court for its decision "to give no weight to Dell's stock market price or the deal price . . . ."[208]

For its part, the Court of Chancery had detailed what it regarded as "widespread and compelling evidence of a valuation gap between the market's perception and the Company's operative reality."[209] For example, informed insiders like Michael Dell and other managers thought the stock price failed to reflect the value of the company.[210] Indeed, the company's management team prepared internal valuations showing that the firm was

201. *DFC Glob*., 172 A.3d at 373 ("That Weinberger got rid of the Delaware Block Method does not mean that the pre-transaction trading price of a public company's shares is not relevant to its fair value in appraisal, particularly given the focus on going concern value.").

202. *Id.* at 365.

203. *Id.* at 365 (quoting Folk, *supra* note 84, at § 262.10).

204. *Id.* at 373.

205. *In re* Appraisal of Dell Inc., No. CV 9322-VCL, 2016 WL 3186538, at *23 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part sub nom.* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017).

206. *Id.* at 20 (quoting *Cavalier Oil*, 564 A.2d at 1144).

207. *Id.* at 36.

208. *Id.* at 36.

209. *Dell*, 177 A.3d at 32.

210. *Id.* at *2.

worth roughly double its trading price,[211] as did the financial advisors to the Dell special committee.[212] Another advisor—Goldman Sachs—advised the company that its analyses showed standalone values for Dell "significantly higher than the current share price."[213] The evidence that the lower court had relied on was especially striking because it included testimony and other evidence from sophisticated, knowledgeable corporate insiders.[214]

The supreme court waved away these doubts about the probative nature of Dell's stock price. Because the market for Dell stock exhibited the "hallmarks of an efficient market"—in particular, active trading and diffuse holdings[215]—the supreme court was comfortable declaring that the market price was "efficient and, therefore, likely a possible proxy for fair value."[216] The court made clear its belief that the market price was reliable, not only as to the value of individual shares, but also for the company as a whole, expressing skepticism that any gap could exist "between Dell's stock price and the Company's intrinsic value" and claiming that such a conclusion would be "contrary to the efficient market hypothesis . . . ."[217]

B. *The Elevation of Trading Prices:* Aruba *and* Jarden

Dell and *DFC Global,* while nominally involving deference to transaction prices, left behind a tangle of dicta on the probative nature of trading prices that the Supreme Court would soon be called upon to revisit in *Aruba* and *Jarden*. The court's 2019 *Aruba* decision further deepened the court's reinterpretation of stockholder entitlements, while the *Jarden* opinion in 2020 revealed the new paradigm in full flower, explicitly equating the stockholder's entitlement and the trading price of the stock.[218]

The *Aruba* trial in the lower court had occurred prior to the supreme court's *Dell* and *DFC Global* decisions, but the trial court requested supplemental briefing from the parties to address the opinions.[219] In particular, the trial court asked for the parties' views on "the extent to which attributes of the market for Aruba's stock resembled the attributes that the Delaware Supreme Court emphasized in *Dell*."[220]

Following this supplemental briefing, the trial court found that the unaffected trading price of Aruba Networks provided "persuasive evidence of fair value."[221] The trial court read *DFC Global* and *Dell* as embracing a view that "the unaffected trading price provides evidence of the fair value of a proportionate interest in the company as a going concern" and that such evidence is "more reliable than the single estimate of any one individual, be he a knowledgeable market participant, corporate insider, valuation professional, or trial

211. *Id.* at *34.

212. *Id.* at *35.

213. *Id.* at *34.

214. *In re* Appraisal of Dell Inc., No. CV 9322-VCL, 2016 WL 3186538, at *32 (Del. Ch. May 31, 2016), *aff'd in part, rev'd in part sub nom.* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd, 177 A.3d 1 (Del. 2017).

215. *Dell*, 177 A.3d at 25.

216. *Id.* at 6; *see also id.* at 34–35 (claiming that the trading price had "substantial probative value").

217. *Id.* at 23–24.

218. Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313, 323–25 (Del. 2020).

219. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. CV 11448-VCL, 2018 WL 922139, at *23 (Del. Ch. Jan. 26, 2018).

220. *Id.*

221. *Id.* at *24.

judge."[222] The trial court noted that in both opinions, the supreme court had said that the trading price was "informative of fair value,"[223] and "[t]he forceful discussion of the efficient capital markets hypothesis in *Dell* and *DFC* indicates that Aruba's unaffected market price is entitled to substantial weight."[224]

Ultimately, the trial court placed exclusive weight on the unaffected market price, declining to give any weight to the transaction price on the grounds that it would include synergies and other gains from the merger, in which the dissenting stock holders were not entitled to share under the logic of the supreme court's new opinions.[225] In taking this approach, the trial court noted:

> Delaware Supreme Court decisions on appraisal that pre-dated Dell and DFC expressed skepticism about the reliability of the market price as an indicator of fair value. In my view, Dell and DFC changed things. I regarded the Delaware Supreme Court's endorsement of the efficient capital markets hypothesis and its emphasis on market indicators over the subjective views of knowledgeable insiders as altering the decisional landscape and authorizing greater reliance on market value.[226]

As the trial court reasoned, compared to trying to calculate and deduct such gains from the transaction price, "using its unaffected market price provides the more straightforward and reliable method for estimating the value of the entity as a going concern."[227] The trial court thus awarded the dissenters the thirty-day average of unaffected market price, which was $17.13 per share, approximately a 30% discount to the $24.67 value of the merger consideration.

The appeal offered the supreme court an opportunity to deliver some broader coherence in the wake of *DFC* and *Dell*, but it declined to do so. The *Aruba* opinion insisted that its recent decisions did not imply "that the market price of a stock was necessarily the best estimate of the stock's so-called fundamental value at any particular time."[228] The supreme court was especially irked by the trial court's suggestion that *Dell* and *DFC* represented a break from past Delaware precedent, expressing surprise at the "apparent novelty the trial judge perceived."[229] To demonstrate the alleged continuity, the supreme court pointed to "our historic reliance on the deal price as a market indicator of fair value," citing a number of appraisal cases endorsing the uncontroversial proposition that the negotiated merger price, under the right conditions, can be informative of the value of the target company.[230]

At the same time, however, the *Aruba* court also continued to insist that the trading price is "an important indicator of its economic value that should be given weight."[231]

222. *Id.*

223. *Id.* at *51 (quoting *DFC Global*, 172 A.3d at 373).

224. *Aruba*, 2018 WL 922139, at *51.

225. *Id.* at *35–45, *51–55.

226. Verition Partners Master Fund Ltd. v. Aruba Networks, Inc., No. CV 11448-VCL, 2018 WL 2315943, *13 (Del. Ch. May 21, 2018).

227. *Aruba*, 2018 WL 922139, at *54.

228. *Id.* at 137.

229. *Aruba*, 210 A.3d at 135.

230. *Id.* at 135 n.41. The supreme court found, in conclusory fashion, that those conditions were satisfied in *Aruba*, despite the presence of only a single bidder and significant obstacles to any additional bidders. *Id.* at 136.

231. *Id.* at 138.

Though the court suggested that this was a longstanding principle of Delaware law, the cases it cited in support merely embraced a trading market value for setting damages in contexts where the definition of the stockholder's entitlement was not at stake.[232] Indeed, the most recent case the supreme court cited—*Applebaum v. Avaya*—acknowledged, as described earlier,[233] that "in many circumstances a property interest is best valued by the amount a buyer will pay for it" but expressly noted that this standard was not "employed in all valuation contexts," singling out appraisal as a context where it is *not* appropriate. The supreme court in *Aruba* continued to elide the fact that Delaware had never relied seriously on trading prices in determining the entitlements of stockholders.

In *Aruba*, the supreme court reversed the lower court decision and purported to reaffirm the high court's preference for the deal-price-minus-synergies approach to the fair value inquiry.[234] Instead of remanding the case, the supreme court performed the analysis itself. After deducting the buyer's estimates of anticipated cost savings from the value of the merger consideration, the supreme court awarded the dissenters $19.10 per share, higher than the trial court's award but still 23% below the merger value.[235] The court's treatment of "synergies" was perhaps the most striking aspect of the *Aruba* decision and the most indicative of a break with past conceptions of the stockholder's entitlement in a merger. In the supreme court's view, *all* of the gains and cost reductions that the buyer anticipated could be captured by the concept of "synergies."[236] While Delaware law had traditionally attempted to place stockholders in the position of a single owner—who would share in such "synergies" in a negotiated sale—*Aruba* suggested that dissenting stockholders had no entitlement to share in such gains.

The supreme court reached the logical conclusion of this shift in its 2020 *Jarden* decision, embracing much of the reasoning of the trial court in *Aruba*.[237] In *Jarden*, the Court of Chancery accepted the acquirer's argument that the unaffected stock price represented the company's statutory fair value.[238] So long as the company's stock traded in a sufficient deep market with coverage by enough analysts, no further inquiry was necessary: the stock price represented the value of the entity.[239] The closest the court came to acknowledging the distinction between the price of a single share and the value of the entity was when it brushed aside the idea of adjusting the market price to reflect a minority

232. *Id.* (citing Poole v. N. V. Deli Maatschappij, 243 A.2d 67, 70 n.1 (Del. 1968) (defining "[f]air market value . . . as the price which would be agreed upon by a willing seller and a willing buyer under usual and ordinary circumstances, after consideration of all available uses and purposes, without any compulsion upon the seller to sell or upon the buyer to buy").

233. *See supra* notes 183–85 and accompanying text.

234. *Aruba*, 210 A.3d at 130 ("On remand, the Court of Chancery shall enter a final judgment for the petitioners awarding them $19.10 per share, which reflects the deal price minus the portion of synergies left with the seller as estimated by the respondent in this case, Aruba.").

235. *Id.* at 141.

236. *Id.* at 134 ("[A]ll the cost reductions HP expected as a widely held, strategic buyer were likely to be fully accounted for by its expected synergies.").

237. Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313, 315 (Del. 2020).

238. *In re* Appraisal of Jarden Corp., No. CV 12456-VCS, 2019 WL 3244085, at *1 (Del. Ch. July 19, 2019), *on reargument in part sub nom*. *In re* Jarden Corp., No. CV 12456-VCS, 2019 WL 4464636 (Del. Ch. Sept. 16, 2019), and *aff'd sub nom*. Fir Tree Value Master Fund, LP v. Jarden Corp., 236 A.3d 313 (Del. 2020).

239. *Id.* at *31 ("[T]he Company's high trading volume and the intense scrutiny paid it by market analysts has convinced me that the market understood Jarden's holding company structure as an operative reality, considered the high overhead costs associated with decentralized management and imputed those factors into Jarden's Unaffected Market Price.").

discount.[240] Doing so was only appropriate, the court suggested, in the presence of a controlling stockholder. The court's reasoning was somewhat cryptic, as it suggested that the "the premise [for a minority discount] is that the appraiser must consider the conflict of interest between Company management and a diffuse stockholder base and account for minority trading multiples."[241] Without a controller, the court saw no cause for adjusting the trading price.[242] The stockholders' minority status, and the resulting "agency costs were embedded in [Jarden's] operative reality and reflected in its Unaffected Market Price."[243] This reasoning appears to endorse Daniel Fischel's decades-old argument that if minority stockholders received a minority discount in purchasing their shares, they should also face a minority discount in determining fair value.[244]

The trial court's approach in *Jarden* makes explicit the stark departure from Delaware's historic approach, and it was affirmed in the Supreme Court. While the earlier supreme court opinions only hinted at a break with precedent[245]—and *Aruba* explicitly denied it—the supreme court's *Jarden* opinion brought the tectonic shift into sharp relief. The supreme court squarely rejected the argument offered by petitioners that the lower court had "ignored . . . a 'long-recognized principle of Delaware law' that a corporation's stock price does not equal its fair value."[246] In the court's view, "[t]here is no 'long-recognized principle' that a corporation's unaffected stock price cannot equate to fair value."[247]

The supreme court held that it was entirely natural and appropriate for the lower court to look to the unaffected price, approvingly quoting language from *Dell* that made clear that "the price at which [a company's] shares trade is informative of fair value."[248] Likewise, it drew support from its *Aruba* decision for the proposition that "it is a 'traditional Delaware view' that in some cases 'the price a stock trades at in an efficient market is an important indicator of its economic value' and 'should be given weight.'"[249] The court also invoked its observation in *Aruba* that "when a market was informationally efficient . . . the market price is likely to be more informative of fundamental value.'"[250]

C. The Articulation of a New Paradigm

The recent appraisal opinions are messy, and they contain multitudes, but taken together, they unmistakably embrace a new paradigm in corporate law: Where public markets are sufficiently deep and liquid, the trading price of a share of stock represents the measure of the stockholder's entitlement in the corporation, full stop. When the supreme

240. *Id.* ("The minority discount, likewise, does not fit here.").

241. *Id.*

242. *Id.* ("Setting aside that Petitioners have offered no credible evidentiary basis to quantify any minority discount here, I see no basis to even try given that the foundation for applying the discount has not been laid.").

243. *Id.* at *31–32.

244. *See supra* at n. 160.

245. Charles Korsmo & Minor Myers, *Flawed Corporate Finance of DFC Global and Dell*, 68 EMORY L. J. 221, 246 (2018) (arguing that the Supreme Court "put forth a novel conception of the purpose of appraisal, one that dramatically reformulated the historic fair value inquiry").

246. *Jarden*, 236 A.3d at 316.

247. *Id*.

248. *Id.* at 324.

249. *Id.* at 325 (quoting *Aruba*, 210 A.3d at 138).

250. *Id.* (quoting *Dell*, 177 A.3d at 7).

court in *DFC Global* looked toward market evidence, it looked to the market for exchange-traded shares, not the market for entire firms.[251] In *Dell*, the supreme court insisted that the trading price of shares of company stock was categorically stronger evidence of the value of the corporation than the views of sophisticated, knowledgeable insiders.[252] The old distinction between the value of the individual share and the value of the whole enterprise—and the conviction that the stockholder is entitled to share in the value of the whole—has been washed away.

In declaring a sea change in Delaware law, a note of caution is perhaps appropriate. The Delaware Supreme Court, for its part, has yet to acknowledge that the appraisal cases represent a doctrinal change *at all*—even in that discrete domain of appraisal rights, let alone in the wider universe of corporate law. This position, however, is difficult to credit. The stark change in appraisal doctrine has been noted by practitioners, scholars, and, of course, the Court of Chancery in attempting to apply the new doctrine. The trial court in *Aruba* thought the change was obvious, noting that "trial courts now can (and often should) place heavier reliance on the unaffected market price."[253] It further indicated that "this aspect of the *Dell* and *DFC* decisions represented a change in direction for Delaware appraisal law,"[254] and that the new decisions carried "doctrinal heft as a means of altering the traditional skepticism with which Delaware decisions have approached the stock market price when determining fair value."[255]

While the supreme court bristled at these suggestions when reversing on appeal in *Aruba*,[256] in *Jarden* it ultimately endorsed precisely such a view: that "in some cases 'the price at which a stock trades at in an efficient market is an important indicator of its economic value' and 'should be given weight'" in intra-corporate disputes.[257] In the subsequent *Stillwater Mining* case, the supreme court cemented the change in appraisal doctrine, leaving undisturbed the Court of Chancery's framing of the fair value inquiry as asking whether awarding the deal price "would result in the petitioners being exploited,"[258] rather than seeking to calculate their *pro rata* share of the company as a whole.[259]

That the paradigm shift is not a mirage is further evidenced by the fact that it was not merely invented by the Delaware Supreme Court, but instead closely mirrors a conception of the appraisal remedy advocated for many years by Lawrence A. Hamermesh and Michael L. Wachter, prominent commentators on Delaware law.[260] Like the supreme

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251. DFC Glob. Corp. v. Muirfield Value Partners, 172 A.3d 346, 369 (Del. 2017) ("[O]utside of the appraisal context, this Court has often embraced these concepts of value: '[I]n many circumstances a property interest is best valued by the amount a buyer will pay for it . . . well-informed, liquid trading market will provide a measure of fair value superior to any estimate the court could impose.'" (quoting Applebaum v. Avaya, Inc., 812 A.2d 880, 890 (Del. 2002))).

252. *See* Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd., 177 A.3d 1, 27–28 (Del. 2017).

253. *Aruba*, 2018 WL 2315943, at *7 (Del. Ch. May 21, 2018).

254. *Id.* at *8.

255. *Id.* at *13.

256. *Aruba*, 210 A.3d, at 135 (claiming the trial court's reading of *Dell* and *DFC Global* were "not supported by any reasonable reading of those decisions or grounded in any direct citation to them").

257. *Jarden*, 236 A.3d at 324 (quoting *Aruba*, 210 A.3d at 138).

258. *In re* Appraisal of Stillwater Mining Co., C.A. No. 2017-0385-JTL, 2019 WL 3943851, at *44 (Del. Ch. Aug. 21, 2019).

259. Brigade Leveraged Capital Structures Fund Ltd. v. Stillwater Mining Co., No. 427, 2019, 2020 WL 6038341, at *5 (Del. Oct. 12, 2020).

260. *See* Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C. L. REV. 1021, 1023–24, 1034–35, 1044, 1046–54, 1067 (2009) [hereinafter *Rationalizing*

court, their argument embraces the view that shares of widely-held corporations "trade at the pro rata value of the corporation as a going concern."[261] In a judicial appraisal involving such a firm, they argue that "because financial markets are efficient, one can simply use the market price" to determine the dissenter's entitlement.[262] The recent cases make this the law of appraisal in Delaware. The only real question issue is to what extent this new paradigm will spread to other areas of corporate law.

D. The Breadth of the New Paradigm

It is possible that the new paradigm may remain confined to appraisal, despite the resulting intellectual incoherence. Appraisal is, after all, a distinct body of law.[263] For one thing, the appraisal right is constrained by its statutory roots,[264] while the remedial possibilities in fiduciary actions are "plastic, limited only by the particular facts, broad principles governing equitable remedies and the imagination of court and counsel."[265] The fact that the appraisal statute commands that dissenters receive "the fair value of the shares *exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation*"[266] may provide a basis for cabining the recent appraisal cases. This so-called "synergies exclusion" could be argued to mandate the exclusion of gains from a merger from the stockholder's entitlement in appraisal, while leaving the traditional understanding of the stockholder's entitlement unchanged in other contexts, given the lack of any similar statutory provision governing other facets of Delaware's corporate law.[267]

In addition, the practitioner-led effort to impose the new paradigm was driven by a specific desire to reduce appraisal activity. During the early part of the 2010s, stockholders

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Appraisal Standards]; Lawrence A. Hamermesh & Michael L. Wachter, *The Short and Puzzling Life of the "Implicit Minority Discount" in Delaware Appraisal Law*, 156 U. PENN. L. REV. 1, 30–36, 49, 52, 60 (2007) [hereinafter *"Implicit Minority Discount"*]; Lawrence A. Hamermesh & Michael L. Wachter, *The Fair Value of Cornfields in Delaware Appraisal Law*, 31 J. CORP. L. 119, 128, 132–33, 139–42 (2005) [hereinafter *Cornfields*].

261. *"Implicit Minority Discount*," *supra* note 260, at 52; *id.* at 60 ("As a matter of generally accepted financial theory . . . share prices in liquid and informed markets do generally represent th[e] going concern value . . . .").

262. *Rationalizing Appraisal Standards*, *supra* note 260, at 1033–34.

263. *E.g.*, *Cornfields*, *supra* note 260, at 127.

> Appraisal is therefore generally understood as entirely a valuation exercise, in which evidence of breach of fiduciary duty is irrelevant. It is true, of course, that many appraisal claims proceed concurrently—and sometimes in a consolidated proceeding—with allegations of breach of fiduciary duty. This is a judicially economical approach, where the appraisal analysis would overlap with the determination of fair value as part of entire fairness scrutiny.

264. DEL. CODE ANN. tit. 8, § 262 (West 2020).

265. Cede & Co. v. Technicolor, Inc., 1987 WL 4768, at *7 (Del. Ch. Jan. 13, 1987)*; see also* Ams. Mining Corp. v. Theriault, 51 A.3d 1213, 1252 (Del. 2012) (noting that it is "undisputed that the Court of Chancery has greater discretion when making an award of damages in an action for breach of duty of loyalty than it would when assessing fair value in an appraisal action."); M.P.M. Enterprises, Inc. v. Gilbert, 731 A.2d 790, 797 (Del. 1999) ("A fair merger price in the context of a breach of fiduciary duty claim will not always be a fair value in the context of determining going concern value."); Thorpe v. CERBCO, Inc., 676 A.2d 436, 445 (Del. 1996) ("While there are no transactional damages in this case, we find the Eriksons liable for damages incidental to their breach of duty.").

266. DEL. CODE ANN. tit. 8, § 262(h) (West 2006 & Supp. 2016) (emphasis added).

267. *See* Rutherford B. Campbell, Jr., *Fair Value and Fair Price in Corporate Acquisitions*, 78 N.C. L. REV. 101, 127 (1999) (suggesting that the "rhetoric of [fiduciary] fair price cases, unlike the rhetoric in [appraisal] fair value cases, seems to require the inclusion of some measure of synergy generated by the challenged transaction").

began to take more frequent recourse to their appraisal rights at merger.[268] This rise in appraisal activity provoked serious consternation among transactional advisors, who first sought legislative changes to limit the ability of stockholders to dissent.[269] After careful study, however, the blue-ribbon committee that evaluates proposed amendments to Delaware's corporate statute refused to endorse the dramatic limits on appraisal rights that deal advisors advocated.[270] Having failed to obtain legislative change, the deal advisors shifted their lobbying efforts to the Delaware Supreme Court, with the decisions discussed above soon following. The opinions have had precisely the effect that the transactional advisors desired: appraisal activity dropped precipitously in their wake.[271] The supreme court's appraisal cases, then, did not arise by accident or by the slow evolution attendant upon common law judging. As such, they may represent more legislative-style policy tinkering, which can be applied only in appraisal, rather than judicial-style reasoning from principles that are applied consistently across corporate law.

A recent Court of Chancery decision indicates that the statutory fair value determination indeed may have limited application on the core questions in a fiduciary case. Following a 2016 merger that cashed out the stockholders of Columbia Pipeline Group, Inc. at $25.50 per share, dissenting stockholders initiated a statutory appraisal proceeding, and the Court of Chancery, embracing the reasoning behind the new paradigm, determined that the merger price was the best evidence of the statutory fair value.[272] Other stockholders, after reviewing the evidence presented in the appraisal case, thereafter used that public evidence in a new complaint alleging fiduciary breaches by the Columbia Pipeline's top excutives and also an aiding and abetting breach by the acquiror.[273]

The defendants sought to dismiss the case, arguing that "the Appraisal Decision . . . already decided each issue adversely to the plaintiffs."[274] In particular, the defendants argued that the Court's earlier appraisal decision required dismissal of the plaintiffs' claims about the inadequacy of the sales process, contending that the fair value finding "necessarily means that the sale process could not have been inadequate."[275] The court noted that the "defect in this argument is that the Appraisal Decision focused exclusively on whether the sale process 'was sufficiently reliable to make the deal price a persuasive indicator of fair value.'" The court emphasized that the appraisal decision "did not examine

268. Charles Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1552 (2015).

269. *See generally* Charles Korsmo & Minor Myers, *Reforming Modern Appraisal Litigation*, 41 DEL. J. CORP. L. 279 (2017) (discussing the various reforms proposed by transactional advisors).

270. *Id.*

271. *See* Jiang et al., *supra* note 32 (registering the fall in appraisal activity following relevant opinions issued by the Delaware Supreme Court).

272. In re Appraisal of Columbia Pipeline Grp., Inc., No. CV 12736-VCL, 2019 WL 3778370, at *47 (Del. Ch. Aug. 12, 2019), judgment entered, (Del. Ch. 2019) (concluding that "the deal price is a reliable indicator of fair value").

273. In re Columbia Pipeline Grp., Inc., No. CV 2018-0484-JTL, 2021 WL 772562, at *13 (Del. Ch. Mar. 1, 2021), cert. denied sub nom. In re Columbia Pipeline Grp. Inc. (Del. Ch. 2021), and appeal refused sub nom. In re Columbia Pipeline Grp., Inc. Merger Litig., 249 A.3d 801 (Del. 2021) ("Among other things, Mississippi PERS relied on evidence developed in the Appraisal Proceeding that had become public during the course of that litigation. In July 2018, Mississippi PERS moved to modify the confidentiality order in the Appraisal Proceeding so that Mississippi PERS could gain access to the full, unredacted discovery record.").

274. In re Columbia Pipeline Grp., Inc., No. CV 2018-0484-JTL, 2021 WL 772562, at *16 (Del. Ch. Mar. 1, 2021), cert. denied sub nom. In re Columbia Pipeline Grp. Inc. (Del. Ch. 2021), and appeal refused sub nom. In re Columbia Pipeline Grp., Inc. Merger Litig., 249 A.3d 801 (Del. 2021).

275. *Id.* at 91.

whether the sale process resulted in the best value reasonably available for the stockholders,'" the key question in a *Revlon* claim. The limited finding in the appraisal case did not "determine whether management's conduct undermined the Board's ability to obtain a higher price from TransCanada or a different bidder."[276]

Despite the care with which the *Columbia Pipelines* court circumscribed the reach of the new paradigm, we think it unlikely that the new paradigm will remain confined to the appraisal context in the long term. This is for three main reasons. First, Delaware law has always adopted a coherent trans-doctrinal conception of stockholder entitlements.[277] Even in its recent appraisal decisions, the supreme court emphasized that the appraisal rules are a component part of the cohesive corporate law delineation of stockholder entitlements.[278] Likewise, the supreme court has suggested that the appraisal remedy, like the fiduciary duty action, encompasses broader equitable ends such as ensuring that a transaction does not "unfairly enrich[] the majority shareholders who may reap a windfall from the appraisal process by cashing out a dissenting shareholder."[279] No clear dividing line exists between the policy goals of the two forms of relief, and both can fairly be said to contribute to Delaware's substantive definition of stockholder entitlements at merger. Furthermore, even though the statutory "synergies exclusion" applies only to appraisal, the supreme court had always, prior to *Jarden*, minimized the exclusion's importance in its articulation of the stockholder's entitlements. The landmark *Weinberger* case, for example, called this clause a "very narrow exception," and said its sole consequence was "that one cannot take the speculative effects of the merger into account."[280]

Second, in its recent decisions, the supreme court embraced arguments advanced not only by critics of its prior appraisal jurisprudence but also by critics of Delaware's broader historic conception of stockholder entitlements—well beyond the context of appraisal. For example, Daniel Fischel has argued for greater reliance on market prices in valuation disputes not only in appraisal but also in fiduciary duty cases,[281] which he suggests could be dismissed summarily "based on the premium paid over the preexisting market price."[282] Likewise, Fischel and Easterbrook rejected wholesale the proposition that "there is a difference between the current price and intrinsic value."[283] They would reform not just appraisal but also defensive tactics, for "*[e]very* device giving managers the power to delay or prevent an acquisition makes shareholders worse off."[284] Viewed in light of this well-known critique, the supreme court's appraisal cases are not a completed set of policy changes but instead an opening salvo that constitutes "a major step in the right direction."[285]

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276. *Id.* at 96.

277. *See supra* Section I.B.1 (describing the history of Delaware law in relation to stockholder entitlements).

278. DFC Glob. Corp. v. Muirfield Value Partners, L.P., 172 A.3d 346, 371 (Del. 2017) (noting the combined effect of "Delaware's own legal doctrines such as sell-side voting rights, Revlon, Unocal, the entire fairness doctrine, and the pro rata rule in appraisals").

279. Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989).

280. Weinberger v. UOP, Inc., 457 A.2d 701, 713–14 (Del. 1983).

281. Fischel, *supra* note 158, at 941 (suggesting that "courts should rely more heavily on market prices when resolving valuation disputes than has occurred to date").

282. *Id.* at 952.

283. EASTERBROOK & FISCHEL, *supra* note 159, at 207.

284. *Id.* at 204 (emphasis in original).

285. Carney & Sharfman, *supra* note 35, at 64 (suggesting that modern investors have no use for the "fair value" remedy—and fair "is a word they would not generally use"—and because determining the value of a share

Third, the policy arguments that the supreme court used to justify its holdings in the appraisal cases apply as much or more to the rest of corporate law doctrine. Notably, in *DFC,* the court emphasized the "important . . . policy concern that the specific buyer not end up losing its upside for purchase by having to pay out the expected gains from its own business plans for the company it bought to the petitioners."[286] This concern drove the court's interpretation of the appraisal statute,[287] but it applies well beyond the appraisal context.[288] As a result, by all rights, it should play a similarly prominent role where the Court is called upon to confront the nature of the stockholder's entitlement in other merger-related doctrines. If it is important to preserve the buyer's incentive when determining the entitlements of stockholders who dissent, why not when deciding whether to permit the board to negotiate for value beyond the trading price in the first place?

Indeed, the desire to maximize the buyer's incentives to pursue a merger has long been the central motivation for critics of Delaware's traditional conception of stockholder entitlements.[289] In the context of hostile bids or appraisal rights, any legal rule that increases the cost of a merger necessarily has the effect of decreasing the number of mergers,[290] leading to a potential efficiency loss.[291] The same policy considerations that supported weakening the stockholder's entitlement in appraisal will also apply to doctrines governing fiduciary claims, hostile defenses, and others.[292]

IV. THE REVOLUTIONARY IMPLICATIONS OF THE NEW PARADIGM

The new paradigm represents a direct shift of the bedrock of Delaware's appraisal jurisprudence. Given the historic centrality of appraisal doctrine in delineating the stockholder's entitlement, the new paradigm is poised to send shockwaves across some of the most high-stakes areas of Delaware law. Most obviously, if the price of a single share is the measure of what stockholders are entitled to, any transaction that occurs at a premium

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of stock "is as simple as looking at the current price of the stock").

286. *DFC Glob.*, 172 A.3d at 368, 371 (noting that buyers in public company transactions "are more likely to come out a loser than the sellers, as competitive pressures often have resulted in buyers paying prices that are not justified by their ability to generate a positive return on the high costs of acquisition and of integration").

287. *Id.* at 368 (noting that excluding "synergy gains could have also been thought of as a balance" to ensure that buyers have sufficient profits to pursue transactions); *id.* at 371 (noting that the incentive effects are "[p]art of why the synergy excision issue can be important").

288. The Court noted that the core issue was that Delaware law "caused the sell-side gains for American public stockholders in M&A transactions to be robust." *Id.*

289. Easterbrook & Fischel, *supra* note 283, at 173.

> Whether resistance drives up the price or reduces the probability of an acquisition, it makes the process of monitoring and bidding less profitable. When the price of anything goes up, the quantity demanded falls. Changes in the incentives of bidders affect the utility of monitoring by outsiders, and that affects the size of agency costs and in turn the preoffer price of all firms' stock.

290. *Id.* at 119 ("All share prices ex ante will be highest when the probability of a value-increasing transaction in the future is the greatest.").

291. *See* Lucian Arye Bebchuk, *The Sole Owner Standard for Takeover Policy*, 17 J. LEGAL STUD. 197, 203 (1988) ("The problem with the sole owner standard, and the reason why Schwartz objects to it, is that it might sometimes prevent an efficient acquisition.").

292. Easterbrook & Fischel, at 157; *see also* Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 165 (1988) (arguing that any bid above the prebid market price reflects "an increase in welfare" and ought to be treated for any legal purpose as "fair, if economic efficiency is the standard by which the fairness of a transaction is measured").

to the unaffected price necessarily does stockholders no harm, whether the stockholders' claims sound in appraisal or in fiduciary duty. This is not a hypothetical exercise, as one Delaware case has already reached that result.

Perhaps more importantly, however, the new paradigm also heralds a major change to Delaware's approach to defensive tactics. If the trading price represents the benchmark for a stockholder's entitlements, by what justification could a board of directors rebuff a suitor offering a premium to the trading price? This Part explores the implications of the new paradigm in these two contexts. It also sketches a normative critique of the new paradigm.

A. The Eclipse of Fiduciary Duties

As noted, Delaware courts have traditionally looked to appraisal for their definition of fair value in fiduciary duty actions.[293] The Delaware Supreme Court has made clear that the applicable principles in entire fairness claims "flow from the statutory provisions permitting mergers and those designed to ensure fair value by an appraisal."[294] More broadly, any harm flowing from a fiduciary breach depends entirely on how the court understands the underlying entitlements of the stockholders: As then-Vice Chancellor Strine observed, "the ultimate issue of fairness turns on my perception of the economics."[295] The appraisal cases indicate a foundational change in Delaware's "perception of the economics," one that will substantially limit the reach of fiduciary liability.[296] This of course is precisely the result that critics of Delaware's regime have hoped for.[297]

This shift has already begun in Delaware law with the Court of Chancery's 2018 decision in *In re PLX Technology*.[298] Former stockholders of PLX Technology brought a

293. *E.g.*, Kahn v. Tremont Corp., No. 12339, 1996 WL 145452, at *9 (Del. Ch. Mar. 21, 1996) (noting that in fair price analysis the Court must consider the plaintiff's "pro rata value of the entire firm as a going enterprise").

294. Bershad v. Curtiss-Wright Corp., 535 A.2d 840, 845 (Del. 1987) (citing DGCL §§ 251–53, 262)*; see also* Lawrence A. Hamermesh & Michael L. Wachter, *Rationalizing Appraisal Standards in Compulsory Buyouts*, 50 B.C.L. REV. 1021, 1029–31 (2009) ("[I]t is generally accepted in the Delaware case law and the major treatises on Delaware corporate law that in evaluating the 'entire fairness' of a squeeze-out merger, the courts generally utilize the same valuation analysis for both the fair price prong of the fiduciary duty action and the appraisal action.") (internal quotation marks omitted); Guhan Subramanian, *Fixing Freezeouts*, 115 YALE L.J. 2, 43–44 (2005) ("As a starting point, courts in entire fairness proceedings generally look to the appraisal remedy . . ."); John C. Coates IV, *"Fair Value " as an Avoidable Rule of Corporate Law: Minority Discounts in Conflict Transactions*, 147 U. PA. L. REV. 1251, 1260–62 (1999) ("In entire fairness cases, corporate fiduciaries are required to show that the terms of a proposed conflict transaction include a 'fair price,' and Delaware courts look to appraisal cases for guidance in deciding whether a given price is fair, even when a merger does not trigger appraisal rights.").

295. *In re* PNB Holding Co. Shareholders Litig., No. Civ.A. 28-N, 2006 WL 2403999, at *22 (Del. Ch. Aug. 18, 2006).

296. One sophisticated observer noted this in the wake of the *Jarden* decision. *See* CHANCERY DAILY, July 25, 2019 ("Although the [*Jarden* trial] Court expressly does not address breaches of fiduciary duty, one might speculate that flaws in the sale process found to have rendered deal price unreliable would also support a finding of "unfair process," and that fair value found to exceed the merger price could also support a finding of "fair price" in a breach of fiduciary duty context.").

297. Fischel, for example, has argued that market evidence from trading prices ought to be sufficient to defeat stockholder claims of liability. Fischel, *supra* note 158, at 942–48.

298. *In re* PLX Tech. Inc. Stockholders Litig., No. CV 9880-VCL, 2018 WL 5018535 (Del. Ch. Oct. 16,

fiduciary class action based on the company's 2014 merger. While the Court of Chancery concluded that the defendants had knowingly participated in a breach of fiduciary duties, the plaintiffs' claims still failed because they were unable to demonstrate any damages.[299] The Court noted that the stockholders are entitled to "money damages equal to the 'fair' or 'intrinsic' value of their stock at the time of the merger, less the price per share that they actually received"[300] with intrinsic value "determined using the same methodologies employed in an appraisal."[301]

Applying the new paradigm, the *PLX Technology* court determined that—despite a process so flawed as to satisfy the other elements for a breach of fiduciary duty claim—the deal price had "heavy, if not overriding, probative value."[302] Furthermore, the Court did not restrict the exclusion of synergies to appraisal. Instead, it reasoned that the deal price likely included some component of "synergies" because the transaction was between two companies in the same industry, and thus that "the deal price likely exceeded the standalone value of the Company."[303]

By applying the new paradigm from the appraisal cases to the fiduciary aiding and abetting claim, the Court's analysis was at once conventional and radical. It was conventional in that the standard for determining damages in the fiduciary context has always drawn on Delaware's approach to valuation in statutory appraisal, as the underlying inquiry—what is the stockholder's entitlement worth?—is the same. It was radical in that the Supreme Court's new paradigm itself is a radical shift from Delaware's historic approach. The sales process was, as the *PLX Technology* court concluded, "flawed from a fiduciary standpoint," but at the same time the plaintiff class was unharmed because stockholders "received consideration that exceeded the value of the Company on a stand-alone basis."[304] The Court of Chancery did not remark on the anomalous outcome, instead comforting itself in the style of the high court that its conclusions comported with "real-world market evidence."[305]

On appeal, the plaintiffs argued that the lower court's decision was built on a "fundamental error of law": the idea that when assessing "damages in a plenary action, it was bound by recent precedent from [the Supreme] Court regarding statutory appraisals."[306] The plaintiffs argued that "relying on a market-clearing price as an overriding indication of fair value is inconsistent with longstanding Delaware law."[307] They noted that the mountain of cases since *Unocal* permitting directors to fight off hostile bids for the company are built upon the idea that "the existence of a market-clearing price does not mean a company should be sold."[308] The plaintiffs further emphasized on appeal that the *Airgas* case stood for the proposition that directors could reject even a market-clearing offer for the firm and instead "follow a course designed to achieve long-term value

2018), *aff'd*, 211 A.3d 137 (Del. 2019).

299. *See* Stone v. Ritter, 911 A.2d 362, 370 (Del. 2010).
300. Strassburger v. Earley, 752 A.2d 557, 579 (Del. Ch. 2000).
301. *PLX*, 2018 WL 5018535 at *50.
302. *Id.* at *54 (quoting *Dell*, 177 A.3d at 30).
303. *Id.* at *55.
304. *Id.*
305. *PLX*, 2018 WL 5018535, at *55.
306. Opening Brief of PLX Plaintiff, at 2, *In re* PLX Tech. Inc. Stockholders Litig., 211 A.3d (Del. 2019).
307. *Id.* at 25.
308. *Id.* at 26.

even at the cost of immediate value maximization,"[309] and that *Revlon* stood for the proposition that directors had an obligation to do so.

In short, the plaintiffs' appeal perceived the implications of the trial court's ruling and drew them to the attention of the supreme court. If a passive "market check" were held to be sufficient to defeat claims targeting a disloyal fiduciary, it would "nullify decades of Delaware jurisprudence setting forth appropriate standards of conduct in a sales process."[310] As a result, "any self-dealing, bad faith conduct or aiding and abetting thereof could be cleansed" so long as the minimal conditions for deference to the deal price were satisfied.[311] That, the plaintiffs insisted, "cannot be the law."[312]

The supreme court, in a two-page unpublished order, affirmed the Court of Chancery's judgment. The order made clear that the supreme court was affirming, in particular, the trial court's finding "that the plaintiff-appellants did not prove that they suffered damages."[313]

B. The Fall of Airgas

As the plaintiffs in *PLX* recognized, perhaps the most momentous implication of the new paradigm is that it directly calls into question the justification for allowing boards to employ defensive tactics in response to hostile bids.[314] If the stockholder's entitlement is to nothing more than their shares of stock as chattel, and if—as the supreme court made clear in *Dell*—the views of sophisticated insiders are not sufficient to call into question the trading price as a measure of the value of the share,[315] what grounds could a board have for blocking a potential hostile acquisition?

Again and again through the 1980s and 1990s, the Delaware Supreme Court held that an offer to acquire the company could constitute a threat to the corporation, justifying defensive tactics even if the offer exceeds the trading price.[316] The threat arises specifically from the risk that stockholders might accept an offer that the board judged to be inadequate.[317] This doctrine reached its apotheosis in the 2011 *Airgas* case, where despite his obvious misgivings, Chancellor Chandler felt compelled to acknowledge that the threat of an "inadequately priced offer . . . has been clearly recognized by our Supreme Court as a valid threat" under *Unocal*.[318] As a result, Airgas's board was permitted to use a poison pill to ward off a hostile bid at $70 per share—well above the pre-bid market price.

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309. *Id.* (quoting *Airgas*, 16 A.3d at 124–25).
310. *Id.* at 27.
311. Opening Brief of PLX Plaintiff, at 27, *In re* PLX Tech. Inc. Stockholders Litig., 211 A.3d (Del. 2019).
312. *Id.*
313. *In re* PLX Tech. Inc. Stockholders Litig., 211 A.3d 137 (Del. 2019).
314. *See* Ronald J.Gilson & Reinier Kraakman, *Delaware's Intermediate Standard: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 260 (1989) (noting that the inquiry into what constitutes a "threat" sufficient to justify defensive tactics like a poison pill is "the single most important issue" under Delaware's intermediate standard).
315. *Dell*, 177 A.3d at 28.
316. *See Paramount*, 571 A.2d at 1153 (recognizing "inadequate value" of an all-cash, all-shares tender offer at a premium to the trading price as a "legally cognizable threat"); *Unocal*, 493 A.2d at 955 (identifying "inadequacy of the price offered" as among the possible types of threats).
317. *See, e.g.*, *Unitrin*, 651 A.2d at 1385 (finding a sufficient threat where the board worried that "shareholders might accept [an] inadequate Offer because of 'ignorance or mistaken belief' regarding the Board's assessment of the long-term value of Unitrin's stock").
318. Air Products & Chemics, Inc. v. Airgas, Inc., 16 A.3d 48, 57 (Del. Ch. 2011).

In the decade since the Court of Chancery's ruling, the tale of Airgas has been transformed into a corporate parable,[319] oft-told by boardroom advisors.[320] For after successfully fighting off the $70 per share bid in 2011, Airgas was ultimately acquired for $143 per share in 2016. According to the *New York Times*, "Wall Street law firms now hold up Airgas as one of the best arguments for management's right to defend its company."[321] Martin Lipton touted the battle and subsequent sale as "vindication of the Airgas board's judgment and confirmation of the wisdom of the Delaware case law."[322]

The case law of defensive tactics that Lipton touts, however, is built upon a commitment to the idea that there exists some "difference between a firm's short-run value, reflected in market prices, and 'intrinsic value.'"[323] The existence of some independent value is necessary to justify a board's defensive powers,[324] for only in light of such a value can it be said that the "'inadequacy of the price offered' justifies (nay, compels) resistance" by the board.[325] As Lipton himself was able to declare in 2005, the doctrinal foundations of defensive tactics were "well established" and that the idea of equating the stock price with the value of the corporation in intracompany disputes has been "rejected by both legislatures and the common law."[326]

No longer. The new paradigm sets the benchmark for a stockholder's entitlement as the trading price of the stock. The consequences of this conception are evident in *Jarden* itself, where the supreme court made clear that the merger had conferred on stockholders more than they were legally entitled to receive.[327] The new paradigm stands in irreconcilable conflict to the longstanding body of law recognizing that an offer at a premium to the trading price can constitute a threat. It is perhaps a bitter irony, that the changes wrought in appraisal law—changes urged and applauded by Lipton's firm—have washed away the conceptual foundations of the body of Delaware law permitting defensive tactics that Lipton spent a lifetime fostering. Once the stockholder's entitlement is keyed to the trading price, the doctrinal consequences are straightforward. As Alan Schwartz

319. Leslie Picker, *Why Airgas Was Finally Sold, for $10 Billion Instead of $5 billion*, N.Y. TIMES (Sept. 5, 2016) ("Business schools around the country are seeking to turn the tale into a case study.").

320. *See, e.g.*, Kai Liekefett, *The Comeback of Hostile Takeovers*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 8, 2020), https://corpgov.law.harvard.edu/2020/11/08/the-comeback-of-hostile-takeovers/ [https://perma.cc/3BHW-VN4U] (Liekefett is a Sidley Austin partner) (attributing the decline in hostile takeover bids to "the board-friendly case law on takeover defenses—particularly the decision of the Delaware courts in the Airgas case, which upheld a target company's poison pill even though the bidder's tender offer had been pending for a year").

321. Picker, *supra* note 319.

322. Martin Lipton, *The Long-Term Value of the Poison Pill*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 18, 2015), https://corpgov.law.harvard.edu/2015/12/18/the-long-term-value-of-the-poison-pill/ [https://perma.cc/LSK7-GMGP].

323. EASTERBROOK & FISCHER, *supra* note 159, at 206.

324. *E.g.*, Stout, *supra* note 167, at 1269 (suggesting that her argument supplied "theoretical support for claims by target management that a premium bid that substantially exceeds market price may nevertheless be 'inadequate'").

325. EASTERBROOK & FISCHER, *supra* note 159, at 206.

326. Lipton, *supra* note 144.

327. Alex Peña and Brian J. M. Quinn have recognized this tension. *See* Alex Peña & Brian J. M. Quinn, *Appraisal Confusion: The Intended and Unintended Consequences of Delaware's Nascent Pristine Deal Process Standard*, 103 MARQ. L. REV. 457, 461–62 (2019) (noting that the reliance on the ECMH in the appraisal cases is "at odds with past precedent" because Delaware cases have held that trading prices are "sufficiently imperfect" that boards can engage in defensive tactics and the appraisal cases "appear to throw away much of the court's previous reticence, permitting markets to dictate what is fair value to boards of directors").

observed, if the trading price represents the stockholder's entitlement, "poison pills should be illegal, and the many judicial decisions allowing target managers and directors to bargain effectively for shareholders, so as to make the takeover process 'fair,' should be reversed."[328] The appraisal cases suggest that *Airgas* is now bad law.

C. The Undesirability of the Trading Price Paradigm

The new paradigm in Delaware law is, on balance, undesirable as an organizing principle for corporate law. We critique it here along three dimensions. First, within the discrete domain of appraisal rights, the doctrinal changes represent a public policy mistake. Second, any effort to disconnect appraisal rights—and the consequences of the new paradigm—from the rest of corporate law would be ineffective and indefensible. Third, the new paradigm is a deficient foundation for the rest of Delaware's corporate law. It harms allocative efficiency, discourages socially valuable investment, and puts the public Delaware corporation at a disadvantage for organizing enterprise and for raising capital from the public.

The reform implications are straightforward: Delaware should not allow the new paradigm to metastasize from appraisal rights to the rest of Delaware's corporate law, and likewise, it should rethink its application in appraisal. Abandoning the recent changes in appraisal would preserve those areas of corporate law yet undistorted by the new paradigm and recapture the benefits of the traditional approach to appraisal rights.

1. The Immediate Error: The New Paradigm in Appraisal Rights

The recent appraisal decisions are bad substantive law even on their home turf in appraisal. In other work, we have cataloged the missteps in *Dell* and *DFC Global*,[329] mistakes that were entrenched and deepened in *Aruba* and *Jarden*.

The new trading price paradigm renders the appraisal remedy a nullity for public company stockholders. The statutory remedy has long served as a backstop for stockholders in a merger negotiation—an independent value of the unified equity interest, functioning as an exogenous reserve price.[330] Albert Choi and Eric Talley have argued that even a policy of deferring to the negotiated merger price—as the *Dell* and *DFC* courts ultimately did—"functionally vitiates the appraisal right, and whatever value enhancing implications the reserve-price effect portends."[331] The trading price paradigm put forward in *Jarden* and *Aruba* makes this conclusion inescapable. If the *merger price* represents a deficient substantive reserve price, then the pre-announcement stock price is no reserve price at all. It would supply "protection" only against merger transactions negotiated at a discount to the pre-announcement price.

328. Alan Schwartz, *Fairness of Tender Offer Prices*, 17 J. LEGAL STUD. 165, 195 (1988).

329. Charles Korsmo & Minor Myers, *The Flawed Corporate Finance of Dell and DFC Global*, 68 EMORY L.J. 221, 221 (2018).

330. On this point there is broad agreement. *See* Albert Choi & Eric Talley, *Appraising the Merger Price Appraisal Rule*, 34 J.L., ECON. & ORG. 543, 545 (2018) (stating that the appraisal remedy is a sort of "reserve price", which can protect shareholder interests better than shareholder voting or managerial incentives by themselves); EASTERBROOK & FISCHEL, ECONOMIC STRUCTURE OF CORPORATE LAW 145 (1991) (treating "appraisal as a presumptive contractual term that sets the minimum price at which the firm can be sold in situations where those in control are tempted to appropriate wealth").

331. Choi & Talley, *supra* note 330, at 548.

Indeed, while some scholars have expressed support for Delaware's recent appraisal decisions, the support typically comes from a desire to eliminate the appraisal remedy rather than improve it. If there were some empirical basis for this hostility—evidence that the appraisal remedy was being abused or produced negative consequences for the deal market—then appraisal's judicial nullification might be a welcome development, leaving aside one's view of the proper role of the judiciary vis-à-vis the legislature. But the empirical results to date on the appraisal remedy uniformly suggest the appraisal remedy plays a beneficial role in corporate governance. In particular, the evidence suggests that stockholders are not abusing appraisal rights, but rather are targeting the "right" transactions—those with markers of opportunistic behavior on the part of management.[332]

Similarly, the two empirical papers to study the issue have found evidence that meaningful appraisal rights increase stockholder welfare *ex-ante*. Boone, Broughman, and Macias find that legal developments that strengthen appraisal rights associated with a more thorough deal process and higher acquisition premiums for Delaware targets.[333] Crucially, they also found that the chances of a Delaware firm being targeted for an acquisition increased with strengthened appraisal, suggesting that these gains did not come at the expense of a vibrant deal market.[334] A meaningful appraisal remedy, in other words, helped to increase bids for targets, improved the process used by the target board, and did nothing to diminish deal activity.[335] In separate work, Callahan, Palia, and Talley—employing a different methodology—reached similar conclusions.[336]

In adopting the new paradigm, the Delaware Supreme Court has rendered appraisal largely useless to stockholders, resulting in a precipitous drop in appraisal petitions and forsaking the beneficial effects of the remedy.[337] Even in the discrete domain of appraisal rights, the change was a mistake.

2. *The Folly of Separate Rules for Appraisal*

One possibility is that the Delaware Supreme Court will simply embrace doctrinal incoherence, giving trading prices relevance in appraisal but nowhere else. Such a

332. *See, e.g.*,Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 Wash. U. L. Rev. 1551, 1553 (2014–2015) (finding appraisal activity associated with abnormally low merger premia and insider participation); Charles R. Korsmo & Minor Myers, *The Structure of Stockholder Litigation: When Do Merits Matter?*, OHIO STATE L.J. 829 (2014); Wei Jiang et al., *Appraisal: Shareholder Remedy or Litigation Arbitrage*, 59 J.L. & ECON. 697, 699–700; *Id.* at 727 ("[P]etitioners seem to target deals with characteristics that are most likely to be tainted by conflicts of interest, such as going-private deals, minority squeeze outs, and short-form M&A with low premiums."); Jonathan Kalodimos & Clark Lundberg, *Shareholder rights in mergers and acquisitions: Are appraisal rights being abused*, 22 FIN. RSCH. LETTERS 53, 56 (2017) (interpreting their findings as "consistent with petitioned acquisitions occurring at prices below fundamental value and is not consistent with appraisal rights generally functioning as an abusive channel for opportunistic investors").

333. AUDRA BOONE ET AL., MERGER NEGOTIATIONS IN THE SHADOW OF JUDICIAL APPRAISAL 1 (2017), http://www.shareholderforum.com/appraisal/Library/20170919_Boone-Broughman-Macias.pdf [https://perma.cc/SQW9-D396].

334. *Id.* at 21.

335. *Id.* at 4 ("[O]ur analysis suggests that bidders protect themselves against threat of appraisal, not through contractual terms that would allow the bidder to walk away from the deal . . . but rather by increasing their upfront bid and improving the price-setting process . . .").

336. *See generally* Scott Callahan, Darius Palia & Eric L. Talley, *Appraisal Arbitrage and Shareholder Value*, 3 J. L. Fin. & Account 147 (2018).

337. Wei Jiang et al., *supra* note 32.

development would represent a radical break, given the historic centrality of appraisal doctrine in defining the stockholder's entitlements.

The grounds for thinking such a break might occur, however, are not doctrinal logic but rather raw realpolitik. Corporate defense counsel and deal advisers are an important constituency in Delaware. The same practitioners who championed the shift in appraisal rights and celebrated the supreme court's decisions as "important and welcome rulings"[338] are also strong supporters of Delaware's ample deference to board use of defensive tactics,[339] and would not welcome the application of the new reasoning in that context. Indeed, we suspect that a phalanx of boardroom advisors would press their substantial influence into service to shield the board's defensive powers from the consequences of the court's newfound respect for trading prices—likely deploying many of the same market-skeptic arguments they ridiculed in the appraisal cases.

This development would avoid some of the worst consequences of the new paradigm, and the *Columbia Pipelines* decision illustrates how the Court of Chancery has worked to preserve the utility of private enforcement despite the new paradigm.[340] Such a cleave in Delaware's corporate law, however, would be regrettable. There would be no principled grounds for defending such a two-faced corporate doctrine: defining the entitlement of stockholders one way in appraisal but another way in all other contexts. The coherence that has long been a signal virtue of Delaware's corporate law would be shattered in a particularly unmistakable fashion.

3. The New Paradigm Disadvantages the Public Corporation as a Form of Ownership

Across the broader universe of corporate law, the new trading price paradigm would be a mistake, placing the public corporation at a serious disadvantage as a form of ownership of enterprise.[341] As we have noted, the traditional paradigm seeks to empower and incentivize a corporate board to act like a single owner in the merger context. By permitting broad use of defensive tactics, *Unocal* vests in the board power akin to that of a single owner to sell or refuse to sell the corporation, together with the ability to engage in hard-nosed negotiations that comes with this power.[342] *Revlon* and its progeny give directors the incentive to use this power as a single owner would, requiring that a board, upon deciding to sell, "seek the maximum value reasonably obtainable for the stockholders."[343] In short, the traditional paradigm permits (and may require) the board to

338. Theodore N. Mirvis et. al., *The New New Regime in Delaware Appraisal Law*, HARV. CORP. GOVERNANCE F. (Mar. 1, 2018), https://corpgov.law.harvard.edu/2018/03/01/the-new-new-regime-in-delaware-appraisal-law/ [https://perma.cc/8YJC-PV22] ("In an arm's length deal with a private equity buyer, the merger price should now be seen a reliable indicator of fair value, if not a ceiling").

339. *E.g.*, William Savitt, *The Genius of the Modern Chancery System*, 2012 COLUM. BUS. L. REV. 570, 570–71 ("The Court's approach has allowed it to supervise the market for corporate control and clarify the competing rights and obligations of corporate stakeholders with efficiency uncommon for a common law court.").

340. In re Columbia Pipeline Grp., Inc., No. CV 2018-0484-JTL, 2021 WL 772562, at *16 (Del. Ch. Mar. 1, 2021), cert. denied sub nom. In re Columbia Pipeline Grp. Inc. (Del. Ch. 2021), and appeal refused sub nom. In re Columbia Pipeline Grp., Inc. Merger Litig., 249 A.3d 801 (Del. 2021).

341. *See* Korsmo & Myers, *supra* note 160 for a more detailed development of this argument.

342. Ronald J. Gilson & Alan Schwartz, *An Efficiency Analysis of Defensive Tactics*, 11 HARV. BUS. L. REV. 2, 3 (noting that a poison pill "entirely precludes a hostile bid by making it impossible for a potential acquirer to realize value from buying target shares").

343. McGowan v. Ferro, 859 A.2d 1012, 1032 (Del. Ch. 2004) (describing *Revlon* doctrine).

negotiate with bidders to maximize the sales price in a merger, just as a single owner would.

By contrast, the new paradigm embraces the central reasoning of the rival "market standard" long advocated in a strain of law and economics scholarship, most prominently by Frank Easterbrook, Daniel Fischel, and Alan Schwartz.[344] Under this approach, the market price is the only proper measure of the value of the stockholders' entitlements in publicly traded firms.[345] As a result, any takeover bid at a premium to the market price—no matter how small—would necessarily be fair to stockholders.[346] This approach offers no justification for allowing boards to employ takeover defenses in fighting off a hostile bid or as leverage to negotiate for a better deal. The logic, in short, is that—because market prices provide a reliable benchmark for value—bargaining over gains will only serve to waste resources and prevent value-enhancing transactions.[347] As such, a market standard would, its advocates claim, facilitate the market for corporate control, reduce agency costs, and maximize economic efficiency by assuring the transfer of corporate assets to higher value uses.[348]

Those who defend Delaware's traditional approach—most prominently, Lucian Bebchuk—have typically done so on three major grounds.[349] First, they question the notion that stock prices can serve as a reliable measure of the value of the firm. Second, they doubt whether a market standard would have the effect of hampering the identification of highest valuing users of corporate assets. Third, they argue that a market standard would create inefficient incentives at target firms by denying target stockholders a share of the potential synergy gains produced by their investments.

In a separate paper, we develop another justification for the traditional single-owner standard, rooted in dynamic considerations. Whatever its other merits, a market standard—the logic of which the new paradigm embraces—would disadvantage public company stockholding as a form of ownership of enterprise. The traditional paradigm puts public stockholders on as close to an even footing with a single owner as possible, in particular by allowing them to share in the gains from a sale of corporate assets (including the entire firm) just as a single owner would. A market standard, on the other hand—again, the logic of which the new paradigm embraces—would deprive public stockholders of this ability, forcing them to discount their shares relative to what they would be worth to a single owner.

344. *See* EASTERBROOK & FISCHEL, *supra* note 159, at 154 (justifying the use of market price over the Delaware Block Method); Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 165 (1988) (comparing the standards of fairness of the market standard and the single-owner standard).

345. *See* EASTERBROOK & FISCHEL, *supra* note 159, at 157 (arguing that the benchmark for the value of the stockholder's entitlement in all domains of corporate law—appraisal, hostile defenses, and others—should be the trading price of the stock); Schwartz, *supra* note 328 (arguing that any bid above the prebid market price should be treated as "fair, if economic efficiency is the standard by which the fairness of a transaction is measured").

346. Schwartz, *supra* note 28.

347. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1175 (1981) (arguing that "even resistance that ultimately elicits a higher bid is socially wasteful").

348. *See* EASTERBROOK & FISCHEL, *supra* note 159, at 173 (discussing how the incentives of bidders affects agency costs); Schwartz, *supra* note 328, at 170 (explaining the economic efficiency in takeovers above market price).

349. *See, e.g.*, Lucian Arye Bebchuk, *The Sole Owner Standard for Takeover Policy*, 17 J. LEGAL STUD. 197, 199–210 (1988) (arguing against the use of the market standard and for the use of the single-owner standard); David D. Haddock et al., *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 707–08 (1987) (explaining the role of bargaining in markets and related asset valuations).

Not only would this increase the cost of capital for existing firms but, working backward in the life cycle of a firm, it would give entrepreneurs a disincentive to employ the classic public corporation form in the first place.

In short, if the law were to disadvantage public company stockholding as a form of ownership, entrepreneurs seeking to raise capital would pay a penalty for doing so via a public equity offering. Instead, entrepreneurs would face incentives to remain private or otherwise maintain plenary control. To the extent that public markets and dispersed ownership are socially beneficial—for reducing the cost of capital; for generating information and allocating capital efficiently; for allowing small investors to share in the wealth creation of large enterprise; and so on—penalizing this form of ownership would be a bad thing.

As a result, far more is at stake in the debate over a market versus single-owner standard—and the new paradigm emerging from appraisal—than simply how the spoils from any individual merger will be divided. The traditional paradigm plays a crucial role in preserving the viability of the publicly traded corporation as a form of enterprise.

V. Conclusion

The Delaware Supreme Court has articulated a new paradigm that relies on the trading price as a measure of the stockholder's entitlement in the corporation. This new paradigm is in direct tension with the long-standing bedrock of Delaware's various doctrines surrounding mergers, in which the corporate estate has a value distinct from the trading value of an individual share. In appraisal, the traditional approach has been to value the unified enterprise and award a *pro rata* share to the dissenter. Likewise, in the fiduciary context, both the standard of review and the measure of damages have been inextricably tied to this approach. Perhaps most importantly, in affording directors the discretion to fight off hostile transactions, Delaware law assumes that the entity can have some value—which directors are bound to protect and maximize—that is not fully reflected in the market price of fractionalized ownership claims. The new paradigm throws all these bedrock propositions of Delaware corporate law into uncertainty.