

The Single-Owner Standard and the Public-Private Choice

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A fundamental question in corporate law is the nature of the stockholders' ownership interest in the firm. Should a share of stock be viewed as a simple chattel, the value of which can be measured for all purposes by its trading price? Or should it be viewed as a partial claim on the firm as a whole, the value of which—for some purposes—cannot be determined without reference to the value of the entire firm to a single owner? This question arises in a number of contexts involving intra-corporate disputes, the most important of which is the merger. When examining whether a target board has satisfied its fiduciary duties, or when determining the “fair value” of the stockholders' shares, a court must confront this fundamental question of the shareholders' entitlement.

Delaware law has long entitled stockholders to a proportionate share of the value of the firm as a whole to a single owner and not simply the trading value of their fractionalized shares. This conception—the “single-owner” standard—was first articulated in the context of appraisal rights, and it has served for a century as the Atlas of Delaware's corporate law, providing the theoretical foundation for its entire doctrinal universe, including landmark merger decisions like Unocal, Revlon, and the long line of their offspring. The single-owner standard provides the justification for allowing target boards to employ takeover defenses to fend off bids at a premium to the stock price and for the traditional measures of fair value in appraisal and breach of fiduciary duty actions.

While the single-owner standard is of long standing, it is hardly uncontroversial. Indeed, the policy reasoning behind the standard has remained frustratingly fuzzy for such a bedrock doctrine. Influential critics have disparaged the single-owner standard as the product of judicial misunderstandings of financial markets and unwarranted skepticism over the accuracy of market pricing. An alternative “market” approach, these critics argue, would better serve economic efficiency by avoiding managerial abuse of takeover defenses and facilitating the transfer of corporate assets to higher-value uses. The Delaware Supreme Court appears to have embraced at least some aspects of this critique in its recent appraisal decisions.

In this Article, we advance a new and powerful justification for the traditional single-owner standard, rooted in dynamic considerations. Any standard that entitles dispersed stockholders to less than what a single owner would receive will force minority stockholders to discount the value of their shares relative to what their value would be to a single owner. The greater the discount, the higher the cost of capital for firms seeking to raise money in public markets, and the less efficient the financing of enterprise. In the

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absence of a single-owner standard, an entrepreneur seeking to raise capital would pay an enormous penalty for doing so through operating in a corporate form and issuing shares to minority stockholders and would face powerful incentives to remain private. Not only would this increase the cost of capital generally, but it would also imperil the information-generating and capital-allocating efficiency of public markets and the ability of small investors to participate directly in the wealth creation of large-scale enterprise. As such, any move away from the single-owner standard threatens disastrous consequences.

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I. INTRODUCTION

What is the stockholder's interest in the corporation, and how should it be valued? These related questions sit at the heart of corporate law and have been enduringly confounding and controversial. They arise any time a court is called upon to evaluate the value that directors or others attribute to a company's shares, as in a control fight. And the questions are unavoidable whenever the court itself is required to assign a value to stock, as when calculating damages or performing a statutory appraisal.

When a company's shares of stock trade in a liquid public market, the answer to this valuation question can seem tantalizingly easy. Shouldn't the measure of the share's value—no matter what rights the holder possesses—simply be what the stock trades for on the market? After all, the valuation generated by a deep and active financial market will almost certainly be more accurate than anything a judge might produce. Indeed, outside of the corporate law context, the value of a share of stock—or any other item for which an active market exists—is routinely assessed by reference to the market price. When a share

of stock is stolen, for example, or transferred as a taxable gift, the market price supplies a ready value for calculating damages or tax liability.

Delaware—the leading corporate law jurisdiction—has, however, famously refused to avail itself of this seemingly easy recourse to market prices when the question involves an internal corporate dispute. The merger context puts the issue in the sharpest relief. For a century, Delaware law has consistently drawn a distinction between the trading price of an individual share of stock and the “fair value” in a merger. In a corporate dispute at merger, whether in a statutory appraisal or a fiduciary case for damages, the court’s focus is on “the corporation itself, as distinguished from a specific fraction of its shares.”¹ The Supreme Court has explained that, in this basic 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.”²

Instead of valuing a share of stock as if it were no different from an ordinary chattel—like a lump of gold or a used car—Delaware courts have treated stock as a claim on a portion of the value of the underlying corporation itself. Thus, rather than valuing individual shares as the personal property of the individual stockholders, Delaware courts value the corporation as a whole—that is, what it would be worth to a hypothetical single owner—with each stockholder entitled to a proportionate share of that value. This value will generally be different from the value of their block of shares viewed in isolation. As a result, in deciding what a stockholder is entitled to receive as fair value in a merger, the trading price of the stock has historically had little or no bearing on a Delaware court’s determination. As the Court of Chancery noted in the landmark 1934 case *Chicago Corp. v. Munds*, “no more than a moment’s reflection is needed to refute” the idea that a stock’s trading price is “an accurate, fair reflection of its intrinsic value”³

The rejection of market prices as the measure of a stockholder’s entitlement in corporate law disputes undergirds many landmark decisions, including Delaware’s most important cases on fiduciary duties in the merger context. In the landmark *Unocal* case, for example, the Delaware Supreme Court endorsed a corporate board’s conclusion that a pending \$54 offer for the corporation was “wholly inadequate”⁴—even though the stock had never traded higher than \$44 and had been priced as low as \$29.87 during the prior eighteen months.⁵ A board is not only *empowered to reject* a bid that exceeds the prevailing trading price, but it may be *duty-bound to seek out even higher alternatives*. Indeed, in *Smith v. Van Gorkom*, the court found gross negligence and an uninformed decision—exposing the directors to personal liability—where the board assessed the adequacy of an acquisition offer for the company by comparing it to the market price for the company’s stock.⁶

Despite its long pedigree and foundational status, what we call the “single-owner standard”⁷ has remained stubbornly controversial. In the 1980s, an influential group of law

1. *Cavalier Oil Corp. v. Harnett*, 564 A.2d 1137, 1144 (Del. 1989) (citation omitted).

2. *In re Shell Oil Co.*, 607 A.2d 1213, 1218 (Del. 1992) (citations and internal quotations omitted).

3. *Chi. Corp. v. Munds*, 172 A. 452, 455 (Del. Ch. 1934).

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

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

6. *Smith v. Van Gorkom*, 488 A.2d 858, 876, 884 (Del. 1985).

7. The Delaware courts have not used this term, but we believe it fairly encapsulates the courts’ practice

and economics scholars—led by Frank Easterbrook, Daniel Fischel, and Alan Schwartz—put forward a rival “market standard,” arguing that where stock is publicly traded, the market price is the only proper measure of the value of the stockholders’ entitlements.⁸ As a result, any takeover bid at a premium to the market price—no matter how small—would be fair to stockholders. This leaves boards with no justification for employing takeover defenses to fight off a hostile bid and no leverage to negotiate for a better deal. Advocates claim such a regime would: facilitate the market for corporate control; reduce agency costs; maximize economic efficiency by assuring the transfer of corporate assets to higher-value uses; and avoid capricious judicial valuations that are bound to be less accurate than the judgment of the market.⁹ In practical terms, the primary distinction is that the single-owner standard permits (and may require) the board to negotiate with bidders to secure a portion of the gains from any merger, just as a single owner would, while the market standard would permit a bidder to capture the entirety of the gains from trade by paying only a whisker more than the market price.

While the Delaware courts have thus far refused to embrace the market standard, they have struggled to refute it definitively. Courts have largely failed to articulate a straightforward, compelling set of functional justifications for the single-owner standard. Academics have only done slightly better, often falling back on ontological-style arguments over “director primacy” and “stockholder primacy” rather than engaging directly with the teleological questions more central to a practical field like corporate law. Lucian Bebchuk has probably been the most compelling academic defender of the single-owner standard on functional grounds.¹⁰ Yet, even the justifications he provides largely turn on slippery empirical questions of market efficiency, or which standard offers fewer opportunities for managerial opportunism, or which is more likely to promote value-enhancing transactions while avoiding value-destroying transactions.

In this Article, we present a novel and compelling functional justification for the single-owner standard. The justification is rooted in dynamic considerations and the desire to avoid disincentives for raising capital through the corporate form and issuing publicly-traded stock. The debate over the single-owner standard has taken the existing world of publicly traded companies for granted, tacitly presuming that it will continue to exist in more or less the same form, whichever standard may apply. But if the law were to disadvantage public stockholding as a form of ownership, entrepreneurs seeking to raise capital would pay a penalty for raising capital by operating in a corporate form and with dispersed ownership by public stockholders. Instead, they would face powerful 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.

The key insight of our argument is that any alternative to the single-owner standard

of valuing the firm as if it had a single owner. Lucian Bebchuk has used the term “sole owner standard.” Lucian Arye Bebchuk, *The Sole Owner Standard for Takeover Policy*, 17 J. LEGAL STUD. 197, 197 (1988). We find “single-owner” to be a more mellifluous label.

8. *Id.* at 199–200.

9. See discussion *infra* Part II.A.

10. See discussion *infra* Part II.B.

would disadvantage the public corporation as a form of ownership. It can be easy to forget that a corporation is nothing but a form of joint ownership of property. In most forms of property, the owner is entitled to refuse to sell an asset for any reason or for no reason, exercising what Blackstone called the “sole and despotic dominion” over the asset.¹¹ The owner has the exclusive authority to set the price at which they are willing to sell and can bargain for a portion of any higher value the buyer may place on the property. Although this approach is not without its social costs,¹² it is generally regarded as not only tolerable but affirmatively desirable because it gives owners the *ex ante* incentive to invest in the resources they own, secure in the knowledge that they may harvest the fruits of that investment through sale at some future date. This feature of property law is so basic that legal rules against the involuntary transfer of entitlements are conventionally known as “property rules.”¹³

Stock ownership is crucially different. In the conventional analytical framework for analyzing legal entitlements,¹⁴ the stockholder’s entitlement to their shares in a public corporation is protected by a form of liability rule rather than a property rule. In a merger, unless a stockholder maintains voting control over the company, their shares can be taken away whether they like it or not, at a price not of their choosing, so long as the transaction is approved by the board and a majority vote of the shares. Absent a breach of fiduciary duties by the board, dissenting stockholders cannot prevent having their shares taken from them. They are protected only by the right to receive “fair value” in a statutory appraisal action.

The most familiar context in which property rights in assets are protected by a liability rule is where the government forcibly acquires assets through eminent domain. This context offers vital insight into analogous questions in the corporate context.¹⁵ In determining the fair value of property taken via eminent domain, courts will value the underlying estate as a whole, disregarding how that estate may have been divided. Thus, for example, when the government seizes via eminent domain a house that has been divided into four condominium units, the relevant question for a court determining fair

11. WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND *2 (1766).

12. See *infra* Part II.B (distinguishing between the potential positive aspects of the market standard and the manner in which the single-owner standard is superior to the market standard).

13. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). Calabresi and Melamed define the two types of rules: “An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from its holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.” *Id.* Conversely:

Whenever someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it, an entitlement is protected by a liability rule. This value may be what it is thought the original holder of the entitlement would have sold it for. But the holder’s complaint that he would have demanded more will not avail him once the objectively determined value is set.

Id.

14. *Id.*

15. David D. Haddock, Jonathan R. Macey & Fred S. McChesney, *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701, 702 (1987) (noting that resolving the issues in the merger context “requires a more general understanding of the functions of property and of bargaining rights for assets traded in ‘thin’ markets”).

compensation is the value of the house as a whole, not the individual units.¹⁶ This approach promotes investment efficiency by giving the condominium association the same incentive to invest in the property as any other owner. Perhaps more importantly, it also promotes efficient selection of ownership structure by not penalizing joint or otherwise fractionalized forms of ownership.

The single-owner standard in corporate law serves the same function. By empowering (or even requiring) a board to hold out for a premium to the market price—backed by an appraisal remedy entitling the stockholders to their proportionate share of the value of the firm as a whole—the single-owner standard allows stockholders to share in the gains from the sale of corporate assets just as a single owner would. A market standard, on the other hand, would deprive them of this ability, forcing minority stockholders to discount their shares relative to what they would be worth to a single owner. Not only would this increase the cost of capital for existing firms but, working backward in the lifecycle of a firm, it would give entrepreneurs a powerful disincentive against employing the classic public corporation form in the first place.

As a result, far more is at stake in the debate over the single-owner standard than simply the division of spoils from any individual merger. The single-owner standard plays a crucial role in preserving the viability of the publicly-traded corporation as a form of enterprise. Understanding its importance is particularly vital in light of recent appraisal decisions by the Delaware Supreme Court that appear to cast doubt on the Court's continuing commitment to the single-market standard.¹⁷ A move away from the traditional single-owner standard would reinforce the current trend of large firms remaining or going private, with negative effects on the economy as a whole.

This Article proceeds in four parts. Part I traces the development of the single-owner standard in Delaware law, with a focus on the merger context. Part II introduces and evaluates the traditional arguments advanced for and against the single-owner standard. Part III puts forth a new defense of the single-owner standard, arguing that a market standard would systematically disadvantage the corporate form, imperiling all the advantages that flow from that form. Part IV concludes, briefly discussing the relevance of the argument advanced here to the Delaware Supreme Court's pronouncements in recent appraisal cases and to several open doctrinal questions in the wake of these cases.

II. THE SINGLE-OWNER STANDARD IN DELAWARE LAW

When a court must determine the value due to a stockholder as compensation for their shares, what, precisely, is the stockholder entitled to? Simply to the value of their particular shares, standing alone as fractionalized interests in the underlying corporation? Or is the stockholder entitled to a proportionate share of the corporation as a whole, what it would be worth to a hypothetical single owner? Historically, Delaware courts have embraced the latter conception in intracorporate disputes, such as those surrounding a merger transaction, consistently drawn a distinction between the market price of a single share of stock and the value of the corporation as a whole. Stockholders have long been entitled to a proportionate

16. See *infra* note 177 and accompanying text.

17. We analyze the Delaware Supreme Court's recent appraisal decisions—and their significance for the single-owner standard—in a companion piece. See Charles Korsmo & Minor Myers, *What Do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 J. CORP. L. 389 (2022).

share of the latter. As a result, the value of the corporation—and thus the value of a stockholder’s entitlement in any internal corporate dispute—cannot be mechanically determined by reference to the trading price of the stock.

First developed in the context of statutory appraisal, this conception of a stockholder’s entitlement—what we will call the “single owner” standard—is foundational to Delaware’s corporate law and is the organizing principle of its merger jurisprudence. Delaware’s approach to fiduciary duties in the merger context, including its permissive approach to defensive tactics by target boards, makes sense only if stockholders are entitled to more from the sale of the overall enterprise than the market price of their individual shares. To vindicate this entitlement, Delaware gives boards of directors a suite of powers akin to that of a single owner so the board can negotiate for a portion of the transactional gains, reflected in a premium to the market price.

In this Part, we trace the development of the single-owner standard in Delaware law.

A. The Corporation as Joint Property

For most purposes, an individual share of stock functions as a piece of property that can be owned by a single person much like any other, such as a towel or a pair of trousers. Unless a single stockholder owns all the stock of a corporation, however, the corporation itself functions as one (of many) species of joint ownership of property.¹⁸ Like the rules surrounding other forms of joint ownership of property, the rules of corporate law enable individuals to better achieve the benefits of joint ownership of property while reducing the costs associated with joint ownership. These benefits and costs in the corporate context will be explored more fully in Part III. But the benefits include the efficient raising of capital to finance large-scale business, and the costs include the difficulties of coordination that accompany any joint enterprise. Because the relationships within the corporation are consensual in nature, and the optimal rules governing these relationships may vary depending on the circumstances, the bulk of corporate governance law consists of default rules that may be altered by contrary agreement.¹⁹

One defining attribute of the corporation is that it has—unlike the traditional general partnership—a legal existence separate and apart from the owners of the firm. The legal fiction of corporate personhood is powerfully useful as a mechanism for coordinating joint enterprise, allowing the firm to own assets, contract, sue, and be sued in its own name.²⁰

18. Other familiar forms of joint property include tenancy in common, co-tenancy in partnership, and community property.

19. See, e.g., Brett H. McDonnell, *Sticky Defaults and Altering Rules in Corporate Law*, 60 SMU L. REV. 383, 384 (2007) (“The idea that most of corporate law is and should be governed by default rules is a central tenet of the contractarian approach which now dominates the field.”).

20. See REINIER KRAAKMAN, JOHN ARMOUR, PAUL DAVIES, LUCA ENRIQUES, HENRY HANSMANN, GERARD HERTIG, KLAUS HOPT 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.”); WILLIAM T. ALLEN, REINIER KRAAKMAN & VIKRAMADITYA S. KHANNA, *COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION* 77 (6th ed. 2021) (noting that the treatment of the corporation as “a separate person in the eyes of the law” is “extraordinarily important”); ROBERT C. CLARK, *CORPORATE LAW* 15 (2d 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

Those who contribute resources to the corporation fully divest their ownership in those contributions, transferring that ownership to the corporation itself.²¹ Together with limited liability, this separate corporate existence serves as a “demarcation of a pool of assets that are distinct from other assets owned, singly or jointly, by the firm’s owners (the shareholders), and of which the firm in itself, acting through its designated managers, is viewed in law as being the owner.”²² The corporate entity thus serves as a central nexus for all of the contractual relationships required by the underlying business.²³ It also serves as a stable pool of assets for potential creditors.²⁴

The corporation, in other words, is a central repository for all of the ownership claims associated with a business enterprise.²⁵ 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 only if the contracts are transferred together as a bundle.”²⁶ By facilitating the assemblage of assets and the coordination of joint activity in this fashion, corporate law assists in the creation of enterprises that are more valuable than the sum of the value of the individual underlying assets taken separately.²⁷

Despite its roots in the law of property, the language of “ownership” is fraught in the corporate law context. Though stockholders are sometimes colloquially described as the corporation’s “owners,” the stockholders’ relationship with the corporation often looks quite different from conventional ownership. Indeed, many corporate law scholars bristle at the very notion of “ownership” of a corporation, regarding it as a potentially misleading distraction. Rather than focusing on the corporation as an entity to be owned, an influential branch of scholarship uses the term “nexus of contracts” to describe the corporation, eliding the separate existence of the entity.²⁸ As Frank Easterbrook and Daniel Fischel noted in their influential monograph: “More often than not, a reference to the corporation as an

as having some of the attributes of natural persons.”).

21. 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”).

22. KRAAKMAN ET AL., *supra* note 20, at 5.

23. See Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 311 (1976) (discussing corporate firms as legal fictions); KRAAKMAN ET AL., *supra* note 20, at 5 (describing the corporation “as a ‘nexus for contracts,’ in the sense that the firm serves, fundamentally, as the common counterparty in numerous contracts with suppliers, employees, and customers, coordinating the actions of these multiple persons through the exercise of its contractual rights”).

24. See Ricks, *supra* note 21, at 1306 (arguing that the corporation and other organizations “provide[] 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 for the creation of durable asset configurations and, hence, going-concern value”). A corporation may use subsidiaries to further refine the availability of particular assets to particular potential creditors. See Kenneth Ayotte & Henry Hansmann, *Legal Entities as Transferable Bundles of Contracts*, 111 MICH. L. REV. 715, 721 (2013) (“[C]orporate subsidiaries are a way of partitioning a firm’s assets into distinct pools for the sake of pledging those assets to distinct groups of creditors.”).

25. See Ricks, *supra* note 21, at 1306.

26. Ayotte & Hansmann, *supra* note 24, at 717–18.

27. 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.”).

28. E.g., Jensen & Meckling, *supra* note 23, at 310–11.

entity will hide the essence of the transaction. So we often speak of the corporation as a ‘nexus of contracts’ or a set of implicit or explicit contracts.”²⁹

This prominent strain of scholarly discourse holds that the traditional language of ownership is unhelpful in the corporate context and that, in particular, it is a “myth” that the stockholders “own” a corporation.³⁰ Together with Leo Strine, the former Chief Justice of the Delaware Supreme Court, Jonathan Macey has argued that “[s]hareholders simply are owners of investment interests with certain contractual rights,” they “are not ‘owners’ of the corporation in any sense of the word, and their relationship with the corporation is purely statutory and contractual.”³¹ Even the Business Roundtable—an influential association of CEOs of major public companies—has moved away from the language of ownership. In its recently updated “Statement on the Purpose of a Corporation,” the Roundtable eliminated old language referring to stockholders as “owners,”³² instead referring to the stockholders as “stakeholders” who “provide the capital” for operating the business.³³

It is undoubtedly true that, to the extent stockholders are owners of the corporation, it is a peculiar form of ownership. The holder of a share of stock does not have the same set of rights over resources as does the owner of land held in fee simple absolute. Any student who has passed the introductory corporations course knows that it is the board of directors that is empowered to control the corporate assets and that a stockholder has no power to act for the corporation.³⁴ A stockholder has no right to control or use corporate assets directly. A stockholder of Apple cannot waltz into an Apple store and demand to use the copier. Even a sole stockholder cannot exercise dominion over the property of the corporation.³⁵ Indeed, a sole stockholder who uses corporate resources for their own purposes without respecting the corporate formalities risks having a court disregard the existence of the corporate entity and impose personal liability on the stockholder.³⁶

Reasonable minds can disagree about whether the term “owner” is more misleading than helpful in describing the entitlements of stockholders. But by virtue of owning shares of stock, the stockholder indisputably possesses some set of entitlements over the corporate entity. To be sure, that set of entitlements differs from what a title deed would convey over real estate, but “ownership” carries entitlements that vary from context to context. Even a

29. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 12 (1991). Easterbrook and Fischer go on to note that this approach provides “a reminder that the corporation is a voluntary adventure, and that we must always examine the terms on which real people have agreed to participate.” *Id.*

30. Jonathan R. Macey, *Corporate Law as Myth*, 93 S. CAL. L. REV. 923, 931–43 (2020).

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

32. BUS. ROUNDTABLE, *STATEMENT ON CORPORATE GOVERNANCE* 1 (Sept. 1997).

33. *Business Roundtable Redefines the Purpose of a Corporation to Promote ‘An Economy That Serves All Americans’*, BUS. ROUNDTABLE (Aug. 19, 2019), <https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans> [<https://perma.cc/ML6P-YDK6>].

34. *See, e.g.*, DEL. CODE ANN. tit. 8, § 141 (2022) (providing that corporations are managed by the board of directors).

35. *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.”).

36. *See generally* *Sea-Land Servs., Inc. v. Pepper Source, Inc.*, 941 F.2d 519 (7th Cir. 1991).

trust beneficiary is said to “own” an equitable interest in the trust corpus.³⁷ The attributes of ownership in the corporate context, as in so many other contexts, are unique. Stockholders are commonly said to have three basic entitlements: (1) the right to pro rata residual distributions from the corporation; (2) the right to vote to elect directors and to pass on certain other matters like mergers; and (3) the right to enforce the directors’ obligations of fidelity.³⁸ In certain circumstances set forth in statute, stockholders also have, for example, the right to access corporate records and to withdraw their pro rata share of the value of the firm on terms set by a court—the appraisal right.³⁹

B. Mergers and the Stockholders’ Ownership Interest

The merger context throws the stockholders’ ownership interest—and Delaware’s conception of the corporation as a form of property—into the sharpest relief. It is also where the stakes are highest. Once a merger has been approved by the board and by a majority vote of the stockholders, each stockholder has their shares canceled in exchange for the merger consideration—whether they like it or not. Most forms of personal property cannot be taken from the owner except on terms the owner finds acceptable, but stockholders can have their stock taken in a merger against their will. In the well-known framework of property law theory, to the extent that the law protects an unwilling stockholders’ ownership interests in the merger context, the law does so through a liability rule—awarding damages for an involuntary transfer—rather than through a property rule.⁴⁰ Furthermore, as the Delaware courts have frequently noted, a merger represents what game theorists call a “final-period” transaction,⁴¹ where the risk of managerial opportunism is at its peak.⁴² Although the need for a majority vote of the stockholders provides some protection against such opportunism, the “take-it-or-leave-it” aspect of the vote renders this

37. 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.”).

38. ALLEN ET AL., *supra* note 20, 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.”); KRAAKMAN ET AL., *supra* note 20, 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.”); CLARK, *supra* note 20, at 13.

39. *See, e.g.*, DEL. CODE ANN. tit. 8, § 262 (2022).

40. *See* Calabresi & Melamed, *supra* note 13, at 1106–09 (discussing how liability rules compensate entitlement owners when their entitlement is taken without a willing sale, using the example of eminent domain).

41. *See* Stephen M. Bainbridge, *The Geography of Revlon-Land*, 81 FORDHAM L. REV. 3277, 3292 (2013) (“[S]tructural decisions—such as corporate takeovers—present a final period problem entailing an especially severe conflict of interest.”); Sean J. Griffith, *Deal Protection Provisions in the Last Period of Play*, 71 FORDHAM L. REV. 1899, 1945 (2003) (“Another corporate law last period problem occurs when a company is sold.”); Charles R. Korsmo, *Delaware’s Retreat from Judicial Scrutiny of Mergers*, 10 U.C. IRVINE L. REV. 55, 90 (2019) (“[W]hile most managerial decisions take place in the context of an ongoing series of repeat transactions, the decision to approve a merger is, in game theoretic terms, a ‘final period’ transaction.” (quoting Bainbridge, *supra*, at 3292)).

42. *See* Korsmo, *supra* note 41, at 90 (“For most decisions, managerial discretion is heavily constrained by a large number of legal and extra-legal constraints, including annual director elections, regular reports under securities law, product markets, capital markets, and labor markets, among others. Managers who behave foolishly or dishonestly in one period face the possibility of being found out, punished, or shamed in the next. Such constraints do not operate in the context of a final period transaction like a merger.”) (footnote omitted).

protection partial at best.⁴³

As a result, a significant role exists for judicial protection. Historically, this judicial protection at merger comes in two forms: common law fiduciary duties and statutory appraisal. In both contexts, the question of what the stockholders' entitlement entails is unavoidable. When it comes to damages, the merger context presents a straightforward question: what is the stockholder's entitlement worth? While the narrow question is one of valuation, answering it necessarily implies a conception of the nature of the stockholder's entitlement. A court cannot intelligently answer the valuation question without first determining what it is that is being valued.

In particular, is a stockholder entitled to the value of their individual shares, or to a share of the value of the entire enterprise? These values will not typically be the same due to the fractionalized nature of stock ownership. A merger involves an asset that is different from the fractionalized ownership claim reflected in the trading price. In a merger, buyers acquire the assembled entity—something different than what they would acquire if buying shares on the market. In almost all circumstances, it is not remotely realistic to acquire complete ownership of a public firm through share purchases on the open market. General Motors, for example, has 1.4 billion shares of common stock outstanding, and no stockholder owns more than a small percentage of the whole.⁴⁴ Realistically, a takeover can be accomplished only by a negotiated transaction, and the power to negotiate such a transaction is vested in the board.⁴⁵ As a result, under normal circumstances, the market price for individual shares will not reflect the incremental value of owning the entire corporation.

Just as a city block in midtown Manhattan may be worth far more as an assembled whole than the sum of the dozens of individual properties on the block, an entire business may be worth far more to a single owner than the sum of the value of the individual shares of stock. In addition, ownership of the whole corporation entails valuable control rights that minority stockholders lack—but for which purchasers are willing to pay. In addition, prospective synergies and other gains from the merger itself may also form part of the merger consideration. These propositions are evidenced by the consistent payments of large premiums above the market price of the target company's stock in merger transactions. Roughly speaking, aggregated ownership of an entire corporation typically sells for around 35% more than the trading price of a marginal share.⁴⁶ Does the stockholder have any entitlement that the law will protect to share in these gains?

The importance of these considerations can hardly be overstated. While exact figures are difficult to determine, a large portion of the overall payments received by stockholders comes in the form of merger consideration. For example, stockholders of U.S. public

43. See *In re Santa Fe*, 669 A.2d 59, 68 (Del. 1995) (noting that stockholders are “merely offered a choice between the [Board’s favored] Merger and doing nothing.”); Korsmo, *supra* note 41, at 100–02 (explaining that stockholder vote often offer little protection against managerial opportunism).

44. Gen. Motors Co., Annual Report (Form 10-K) 18 (Feb. 5, 2020).

45. *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 954 (Del. 1985).

46. See Benjamin Bennett & Robert Dam, Merger Activity, Stock Prices, and Measuring Gains from M&A 45 tbl.1 (Feb. 20, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3000574 [<https://perma.cc/MX76-6GH8>] (finding that the average one-week acquisition premium between 1990 and 2015 was 36%). Earlier periods were no different: the median bid premium was approximately 38% during the 1990s and 35% during the 1980s. See K. J. Martijn Cremers, Vinay B. Nair & Kose John, *Takeovers and the Cross-Section of Returns*, 22 REV. FIN. STUD. 1409, 1410 n.1 (2009).

company targets received approximately \$1.23 trillion in merger consideration in deals announced in 2019,⁴⁷ as compared to \$491 billion in dividends⁴⁸ and approximately \$750 billion in share repurchases.⁴⁹ While a substantial portion of this merger consideration was in the form of acquirers' stock, the fact remains that mergers are one of the most important ways—and perhaps the single most important way—for stockholders to receive realized value from the companies in which they invest. One recent study estimated that 80% of the earnings public equity holders receive over the life of their investment is attributable to the final-period merger.⁵⁰ As is discussed in Part III, to the extent the law leaves stockholders vulnerable or otherwise disadvantaged in a merger, stockholders will have to discount what they are willing to pay for their shares—potentially dramatically—in response.

1. Fair Value in Appraisal

Delaware first articulated its approach to the basic valuation inquiry in the context of appraisal rights. Nineteenth-century corporate codes required unanimity for a merger or other fundamental change to corporate structure.⁵¹ However, as public companies with large numbers of stockholders became more common, holdout problems—where a single stockholder could block a large transaction—made this approach unworkable.⁵² As a result, states eliminated unanimous consent requirements in favor of majority voting.⁵³ At the same time, states created the statutory appraisal remedy, allowing a stockholder to dissent from a merger and seek a judicial determination of the “fair value” of their shares.⁵⁴

47. DANIEL LITOWITZ, LARA ARYANI & JOON LEE, PUBLIC MERGERS AND ACQUISITIONS IN THE UNITED STATES: OVERVIEW (Westlaw Practical Law 2020).

48. Lawrence C. Strauss, *Global Dividends Hit a Record \$1.4 Trillion in 2019. Their Growth Rate Slowed, However.*, BARRON'S (Feb. 17, 2020, 8:00 AM), <https://www.barrons.com/articles/global-dividend-payouts-hit-a-record-in-2019-and-80-of-u-s-companies-increased-their-dividends-51581944402> [https://perma.cc/MLB2-WPFH].

49. S&P Dow Jones Indices, *S&P 500 Buybacks Up 3.2% in Q4 2019; Full Year 2019 Down 9.6% from Record 2018, as Companies Brace for a More Volatile 2020*, PR NEWSWIRE (Mar. 24, 2020, 8:15 AM), <https://www.prnewswire.com/news-releases/sp-500-buybacks-up-3-2-in-q4-2019-full-year-2019-down-9-6-from-record-2018--as-companies-brace-for-a-more-volatile-2020--301028874.html> [https://perma.cc/36YM-EAD8].

50. See Sanjeev Bhojraj, Ashish Ochani & Shiva Rajgopal, *Lifetime Earnings* 18 (Nov. 4, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3951530 [https://perma.cc/G724-JKNP] (“On [] average, we observe that more than 80% of the lifetime earnings [for any public equity investment] is attributable to the merger price the investor receives at the point of merger.”).

51. Robert B. Thompson, *Exit, Liquidity, and Majority Rule: Appraisal's Role in Corporate Law*, 84 GEO. L.J. 1, 11–12 (1995); Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 618–19 (1998).

52. See William J. Carney, *Fundamental Corporate Changes, Minority Shareholders, and Business Purposes*, 1980 AM. BAR FOUND. RSCH. J. 69, 81 (1980) (“It became increasingly apparent to observers that great benefits to society, to the corporation, and derivatively to the rest of the shareholders were sometimes blocked to protect interests that seemed quite minor . . . to the remaining shareholders and perhaps to most outsiders.”); Thompson, *supra* note 51, at 12–13 (discussing the limits placed on enterprise in the 1880s by laws requiring shareholder unanimity in merger transactions).

53. See Carney, *supra* note 52, at 94 (“Over the first third of the twentieth century the pattern of allowing fundamental changes in all corporations to take place on something less than a unanimous shareholder vote became the norm . . .”).

54. The Delaware Supreme Court in *Munds* put it as follows:

At common law, it was in the power of any single stockholder to prevent a merger. When the idea

In short, this move from unanimous consent requirements to majority-voting requirements plus appraisal represented a shift in the type of legal protection individual stockholders have from expropriation via merger. In place of the old property rule, which only allowed stockholders to be dispossessed of their shares with their consent, the modern regime provides only liability rule protection—the stockholders can be dispossessed against their will in exchange for compensation determined by a court.

The key question in an appraisal case—indeed, the only merits issue—is what compensation the dissenting stockholders are entitled to. In the early twentieth century, the key statutory term in an appraisal regime—describing the stockholders’ entitlement—differed from state to state. Some statutes explicitly referenced awarding dissenting stockholders “market value,” while others did not.⁵⁵ Early court decisions ascribed significance to this distinction.⁵⁶ In New Jersey, for example—then the leading corporate law jurisdiction—whose statute referred to “full market value,” courts adopted a conception of value keyed to prevailing trading prices.⁵⁷ Among states that did not invoke “market value,” the approach was different,⁵⁸ reflecting a notion that market prices were not the sole—and perhaps not even a relevant—criterion of value in the context of an appraisal.⁵⁹

became generally accepted that, in the interest of adjusting corporate mechanisms to the requirements of business and commercial growth, mergers should be permitted in spite of the opposition of minorities, statutes were enacted in state after state which took from the individual stockholder the right theretofore existing to defeat the welding of his corporation with another. In compensation for the lost right a provision was written into the modern statutes giving the dissenting stockholder the option completely to retire from the enterprise and receive the value of his stock in money.

Chi. Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934). *See also* George G. Geis, *An Appraisal Puzzle*, 105 NW. U. L. REV. 1635, 1643 (“[A]ppraisal rights were therefore enacted in most jurisdictions as an emergency exit from majority rule. A merger could move forward with less-than-unanimous approvals, but minority owners had an escape if they disliked the shift in direction.”); Thompson, *supra* note 51, at 25–26 (discussing the increase in appraisal litigation as majority shareholders increasingly attempted to kick out minority shareholders). For a fuller explanation of the appraisal remedy, see Charles R. Korsmo & Minor Myers, *Appraisal Arbitrage and the Future of Public Company M&A*, 92 WASH. U. L. REV. 1551, 1558–59 (2015).

55. For example: Connecticut said stockholders could demand the “value” of the stock, while Rhode Island said “fair value,” and Tennessee the “full and fair value.” In contrast, Pennsylvania, the statute specified “market value,” and in New Jersey the “full market value.” Benjamin M. Robinson, *Dissenting Shareholders: Their Right to Dividends and the Valuation of Their Shares*, 32 COLUM. L. REV. 60, 67 (1932); *see also* Joseph L. Weiner, *Payment of Dissenting Stockholders*, 27 COLUM. L. REV. 547, 560 (1927) (“The amount of the award would seem to be the most interesting problem of all but has received perhaps the least attention in the decisions.”).

56. Norman D. Lattin, *Remedies of Dissenting Stockholders Under Appraisal Statutes*, 45 HARV. L. REV. 233, 258–59 (1931) (For those that referenced “market value,” commentators suggested that “the intention was to have the shares appraised on a market value basis if there was a market value.”).

57. *See* Prall v. U.S. Leather Co., 143 A. 382, 382 (N.J. 1928), *aff’d*, 146 A. 916 (N.J. 1929) (embracing a reading of “fair market value” in the state’s appraisal statute that accords with the reading of the same phrase in the condemnation statute that “the market value of the stock was the true criterion” of the value of stock).

58. Robinson, *supra* note 55, at 66 (“It is highly questionable whether this difference in terminology [among states that do not reference market value] should or will make a difference in the basis of payment to dissenters.”); Lattin, *supra* note 56, at 260 (“Except where the statute calls for payment of the market value to dissenting stockholders and where the stock in question has a market value, it is necessary to consider those factors that enter into the value of the stock.”); Irving J. Levy, *Rights of Dissenting Shareholders to Appraisal and Payment*, 15 CORNELL L.Q. 420, 436 (1930) (“Except possibly where the market value is set as the guide, the wording of the statutes will have little effect on the determination of the price.”).

59. *E.g.*, Republic Fin. & Inv. Co. v. Fenstermaker, 6 N.E.2d 541, 542 (1937) (“Stock market value is not

The headwaters of Delaware's thinking on the appraisal remedy is the 1934 case of *Chicago Corp. v. Munds*, which first addressed the relevance of market prices to the "fair value" of stock in an intra-corporate dispute. The defendant corporation drew on New Jersey case law in arguing that "when the statute speaks of value the measure thereof is determined exclusively by market transactions when such are available."⁶⁰ In particular, the corporation relied upon the conclusion of the Supreme Court of New Jersey that "the market value of the stock was the true criterion of the damages resulting to the stockholders."⁶¹ The Court of Chancery categorically rejected this approach, despite the general policy at the time of relying on New Jersey's judicial corporate law interpretations.⁶² In 1899, Delaware adopted a new corporate statute that followed New Jersey's statute almost verbatim, but in the language at the heart of the appraisal statute, Delaware had departed from the New Jersey's language.⁶³ While New Jersey's statute called for a determination of the "full market value," Delaware's called simply for an appraisal of the "value."⁶⁴ In *Munds*, the Court attached "[s]pecial interpretive significance" to this change,⁶⁵ as it represented a "material variance" by Delaware, indicative of a difference in intent.⁶⁶ "The difference in language," the Court said, "persuasively demonstrates that 'value' as used in . . . our act is not synonymous with market value."⁶⁷

Having eschewed a default reliance on market value, the *Munds* Court considered how "value" in appraisal should be determined in light of "the purpose of provisions of statutes which provide for the appraisal of stock of a person who objects to the merger of his

necessarily a true criterion, since fluctuations are sometimes attributable to causes other than changes in the value of the shares, but it may be of some assistance in determining values."); *Ahlenius v. Bunn & Humphreys, Inc.*, 192 N.E. 824, 829 (1934) ("The value of shares of corporate stock has been held to mean not merely the market price, if the stock is traded in by the public, but its intrinsic value, to determine which all the assets and liabilities of the corporation must be ascertained."); *In re Clark's Will*, 178 N.E. 766, 768 (1931) ("[M]arket quotations should be considered, but not accepted as decisive of a fair market price."); *Ervin v. Or. Ry. & Nav. Co.*, 27 F. 625, 634 (C.C.S.D.N.Y. 1886) ("The market price of its shares on the stock exchange is not a reliable criterion of the true value of its property.").

60. *Chi. Corp. v. Munds*, 172 A. 452, 454 (Del. Ch. 1934).

61. *In re Cap. Stock of Morris Canal & Banking Co.*, 141 A. 784, 785 (N.J. 1928). This holding was embraced by *Prall*, 143 A. at 382.

62. *Wilmington City Ry. Co. v. People's Ry. Co.*, 47 A. 245, 254 (Del. Ch. 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. . . .").

63. *Munds*, 172 A. at 453–54.

64. The current version of the appraisal statute in Delaware continues to omit any reference to market values, instructing courts to award dissenters the "fair value of the shares exclusive of any element of value arising from the accomplishment or expectation of the merger[.]" DEL. CODE ANN. tit. 8, § 262 (2022).

65. *Munds*, 172 A. at 453–54.

66. *Id.* at 454 ("[T]he Delaware act in its original form in the matter of valuation of stock in cases of merger constituted a material variance from the language of the then existing general act of New Jersey. Instead of 'full market value' prescribed by New Jersey, the Delaware Legislature prescribed simply 'value.'"); *see also id.* ("When, therefore, the legislature of this State, having before it the New Jersey act with its yard stick of 'full market value,' rejected that standard of measurement and used the simple one of 'value,' the inference is strong that as there was a design in the varying of the manner of expression there was a like design in the varying of the intent or meaning.").

67. *Id.*

corporation with another.”⁶⁸ The basic principles enunciated by the Court continue to endure as judicial landmarks. The starting point for the Court was that the stockholder should be compensated for what has been taken from them in a merger.⁶⁹ And, to the Court, what was taken was not simply the right to sell individual shares of stock but rather the right to share in the future success of the firm. The Court noted that “[w]hen a stockholder buys stock it is to be supposed that he buys into a corporation as a going concern.”⁷⁰ 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 . . . its future prospects as a continuing enterprise.”⁷¹ In language that expressed the core of the single-owner standard—and that is frequently echoed in modern appraisal decisions—a dissenting stockholder should be awarded the value of “his proportional share of an active enterprise which but for the compulsion of others he could continue to be associated within the indefinite future.”⁷²

If the market price of individual shares invariably gave an accurate estimate of this value, the two inquiries would, of course, lead to the same place. As is discussed more fully below, there are good reasons to doubt this, even if one embraces modern understandings of market efficiency.⁷³ The *Munds* Court, however, was writing amid the Great Depression, not long after the 1929 stock market crash and subsequent market gyrations. In light of these recent experiences, the Court confidently dismissed the accuracy of market prices, expressing in memorable terms what became an enduring skepticism of Delaware courts regarding market efficiency.⁷⁴ The Court noted:

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.⁷⁵

Even outside of times of unusual market turbulence, however, the 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.”⁷⁶ The Court acknowledged that “[m]arket value

68. *Id.* at 455.

69. *Munds*, 172 A. at 455 (What [the stockholder] is deprived of is what he should be paid for.”).

70. *Id.*

71. *Id.*

72. *Id.*

73. See discussion *infra* Part III.

74. *Munds*, 172 A. 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.”); see also *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.”)

75. *Munds*, 172 A. at 455.

76. *Id.*

undoubtedly is a pertinent consideration,” but it should not be treated as exclusive in the statutory inquiry.⁷⁷

The *Munds* case laid the foundations for nearly a century of Delaware appraisal jurisprudence. In doing so, it introduced both of the main grounds for Delaware’s reluctance to rely overmuch on market prices as a measure of fair value. The first is the most obvious: a straightforward skepticism as to market accuracy that endured as a theme in appraisal decisions, waxing and waning in response to prominent episodes calling into question the reliability of market prices. In 1992, for example, the Delaware Supreme Court noted that “[r]ecent 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.”⁷⁸ Similarly, in 2001, in the immediate wake of the dot-com boom and bust, the Delaware Supreme Court emphasized that the appraisal remedy can counteract efforts to exploit market mispricings, noting that “if 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.”⁷⁹

This traditional skepticism about the informational content of market prices is somewhat in tension with modern academic teachings on market efficiency—though not as much tension as Delaware’s critics sometimes suggest. As early as the 1970s, the Court of Chancery downplayed the significance of the strongly skeptical language of *Munds*, describing it as a “depression days ruling.”⁸⁰ And the Supreme Court has explicitly embraced modern notions of market efficiency in its recent appraisal decisions in *Dell* and *DFC Global*.⁸¹ Nonetheless, some degree of skepticism undoubtedly persists—one can imagine, for example, how a court would consider the market price of GameStop stock as evidence of fair value had it agreed to a merger in February of 2021.

The less obvious—but more fundamental—grounds for not relying exclusively on market price is that the market price simply is not measuring the correct asset. If the goal is to give stockholders their share of the value a single owner would place on the company—their “proportional share of an active enterprise,” as the *Munds* Court phrased it—the share’s market price is not the appropriate measuring stick. 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.”⁸² The appraisal inquiry is different 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.”⁸³ The size of the dissenter’s ownership stake is “irrelevant” to the court’s determination of the value of the corporation.⁸⁴ As a result, Delaware’s courts first determine the value of the entity and then determine the stockholder’s proportionate

77. *Id.* at 457.

78. *Rapid-Am. Corp. v. Harris*, 603 A.2d 796, 806 (Del. 1992).

79. *Glassman v. Unocal Expl. Corp.*, 777 A.2d 242, 248 (Del. 2001).

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

81. *See infra* notes 218–22 and accompanying text.

82. *See Smith v. Van Gorkom*, 488 A.2d 858, 876 (Del. 1985); *Robinson*, *supra* note 55, at 74 (noting that trading price does not indicate what would be paid for “other than the quantity in fact traded”).

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

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

interest.⁸⁵

The value of a minority stake can differ from the value of a proportional share of the whole to a single owner for several reasons, but the most universal is that no minority stockholder possesses control over the corporation, and control is a valuable asset. Control is instead 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—the trading price reflects a “minority discount” to the value the corporation would have to a single owner. The inchoate value of control typically results in the payment of a substantial premium to the market price—known as a control premium—when control is being transferred in a merger.⁸⁶ Delaware has embraced these related concepts—the minority discount and the control premium—in appraisal law, holding that, just as a single owner would capture the value of control in selling the company, stockholders in appraisal are also entitled to a pro rata share of the value of control.⁸⁷ 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.⁸⁸

As detailed below, the single-owner standard—this judicial policy of entitling minority stockholders to share in the value of control—has often been attacked. And unfortunately, the Delaware courts have sometimes not been as clear as one might hope about the reasons behind this policy. We intend to remedy this shortcoming in Part III. To the limited extent the Delaware Supreme Court has attempted to defend its approach, it has fallen back on conclusory claims of unfairness, asserting that “a penalty for lack of control [would] unfairly enrich[] the majority stockholders who may reap a windfall from the appraisal process by cashing out a dissenting stockholder, clearly an undesirable result.”⁸⁹

85. *Cavalier Oil Corp.*, 564 A.2d at 1144 (“The dissenting shareholder’s proportionate interest is determined only after the company as an entity has been valued.”).

86. *Gibbons v. Schenley Indus., Inc.*, 339 A.2d 460, 468 (Del. Ch. 1975) (“[T]he fact that more than the market price for stock is often paid for control [is] being recognized in the corporate world.”).

87. *See In re 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) (noting that dissenting stockholders are entitled to “their pro-rata portion free of any ‘minority discount’”).

88. *Agranoff v. Miller*, 791 A.2d 880, 888 (Del. Ch. 2001) (citing *Cavalier Oil Corp.*, 564 A.2d 1037); *see also Borruso v. Commc’ns Telesystems Int’l*, 753 A.2d 451, 458 (Del. Ch. 1999) (noting that “this court has applied an explicit control premium in calculating the fair value of the equity in an appraisal proceeding”). While judicial practice has varied over the years, at one point, the Delaware Court of Chancery reported that it “consistently” applied a 30% control premium “adjustment” to market prices. *See Doft & Co. v. Travelocity.com Inc.*, No. CIV.A. 19734, 2004 WL 1152338, at *11 (Del. Ch. May 20, 2004). This approach comports roughly with the empirical reality that the median transaction price in public company mergers is substantially above the prevailing trading price.

89. *Cavalier Oil Corp.*, 564 A.2d at 1145.

2. Fiduciary Duty Actions

Fiduciary duties in merger actions protect the same general stockholder entitlements that are at issue in appraisal.⁹⁰ Delaware has thus applied the single-owner standard developed in the appraisal context in fiduciary duty class actions: (1) when evaluating the fair price prong of the entire fairness challenge to a merger; (2) when computing damages to stockholders arising from a merger-related breach of fiduciary duties; (3) when considering the appropriateness of defensive tactics in response to a potential hostile bid; (4) when defining the nature of the directors' duties in deciding to sell the company. Some of the most contentious policy disagreements surrounding the single-owner standard grow out of the last two of these contexts.

In a conflict-of-interest situation such as a management buyout or controlling stockholder squeeze-out, the Delaware courts evaluate the "entire fairness" of the merger. In the landmark *Weinberger* decision, the Delaware Supreme Court noted that the "concept of fairness has two basic aspects: fair dealing and fair price."⁹¹ In evaluating the fairness of price, the *Weinberger* court expressly embraced the approach taken in appraisal, with its single-owner standard.⁹² Since *Weinberger*, the Delaware courts have consistently held 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."⁹³ As such, just as in appraisal, the issue in the fair price inquiry is the "value of a corporation," rather than the value of individual shares.⁹⁴

Two years after *Weinberger*, the single-owner standard played an important role in the famous case of *Smith v. Van Gorkom*.⁹⁵ The *Van Gorkom* court reiterated the core distinction between the value of a single share and the value of the entire entity, implying that it was the latter that directors are duty-bound to secure for stockholders in a merger. 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."⁹⁶

90. Rutherford B. Campbell, Jr., *Fair Value and Fair Price in Corporate Acquisitions*, 78 N.C. L. REV. 101, 108 (1999) ("Both appraisal statutes and fiduciary duty rules protect the right of an acquired corporation's shareholders to receive some fair measure of corporate value in a statutory acquisition."); *see generally* Korsmo & Myers, *supra* note 17.

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

92. *Id.* at 714 (noting that "a plaintiff's monetary remedy ordinarily should be confined to the more liberalized appraisal proceeding herein established").

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

94. *See generally* Cede & Co. v. Technicolor, No. Civ.A. 7129, 2003 WL 23700128 (Del. Ch. Dec. 31, 2003). This result was not a foregone conclusion, as the Delaware courts had flirted with something more akin to a market standard in the early 1970s. Vice Chancellor Marvell, for example, expressed support for the idea of evaluating the fairness of a merger based in part on the trading price of individual shares. *See* *David J. Greene & Co. v. Schenley Indus., Inc.*, 281 A.2d 30, 34 (Del. Ch. 1971) ("[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.").

95. *Smith v. Van Gorkom*, 488 A.2d 858, 875 (Del. 1985), *overruled by* *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009).

96. *Van Gorkom*, 488 A.2d at 876.

For this reason, the director defendants made an uninformed decision when they “assessed the adequacy of the premium over market” by comparing it with “current and historical stock price.”⁹⁷

Delaware has also looked to the single-owner standard developed in the appraisal context in determining the appropriate measure of damages arising from a fiduciary breach. For example, in the *Rural/Metro* decision, the Supreme Court upheld a damages methodology that sought to “discover the ‘fair value’ or ‘intrinsic value’ of the shares held by the Class ‘using the same methodologies employed in an appraisal [proceeding]’”⁹⁸ Similarly, in calculating damages in the *Southern Peru* derivative action, then-Chancellor Strine estimated what the buyer “should have paid” in the contested transaction, using methods typically used in appraisal proceedings.⁹⁹

The single-owner standard finds its fullest expression in the doctrines growing out of *Unocal* and *Revlon*—the twin pillars of Delaware merger law. *Revlon* and its progeny set forth the duties of directors once the board has determined to sell control of the corporation. If the stockholders had no entitlement to anything other than the market value of their shares, any transaction above the prevailing market price would necessarily be fair to the stockholders, and the directors’ intercession would be superfluous. Under a single-owner standard, however, the stockholders would be entitled to something more. A single owner of the entire corporation—like with any other type of asset—would undoubtedly negotiate for a share of the value of control and any incremental value created by the merger. A single-owner standard would require the board, in some rough sense, to do the same, seeking a price akin to what a single owner of the corporation as a whole would obtain when selling.

Revlon imposes just such an obligation on the board. Subject to nominally enhanced scrutiny, directors are required to “seek the maximum value reasonably obtainable for the stockholders.”¹⁰⁰ If the stockholders had no entitlement to anything other than the market value of their shares, this judicial command would make little sense. Tellingly, so-called *Revlon* duties only apply when control over the target company’s assets is being assembled—that is, when the target company is either being broken up or going from being held by dispersed minority stockholders to having a controlling stockholder.¹⁰¹ If an uncontrolled public company is purchased in a stock-for-stock merger by another uncontrolled public company, for example, *Revlon* duties do not apply.¹⁰² This result makes sense under a single-owner standard. If an aggregation of ownership has not yet

97. *Id.*

98. *RBC Cap. Mkts., LLC v. Jervis*, 129 A.3d 816, 867 (Del. 2015) (quoting *In re Rural/Metro Corp. S’holders Litig.*, 102 A.2d 205, 224–25 (Del. Ch. 2014)).

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

100. *McGowan v. Ferro*, 859 A.2d 1012, 1032 (Del. Ch. 2005) (describing *Revlon* doctrine).

101. *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140, 1150 (Del. 1989).

102. In *Paramount*, the Court of Chancery had declined to apply *Revlon* scrutiny on the grounds that:

There was no control block of [the target company’s] shares before the agreement and there would be none after it Before the merger agreement was signed, control of the corporation existed in a fluid aggregation of unaffiliated shareholders representing a voting majority—in other words, in the market. After the effectuation of the merger it contemplated, control would have remained in the market, so to speak.

Paramount Commc’ns, Inc. v. Time Inc., No. 10866, 1989 WL 79880, at *21 (Del. Ch. 1989).

occurred, the incremental value of such an aggregation remains available for the stockholders to capture in the future.

Unocal and its progeny govern directors' use of defensive tactics—most famously, the poison pill—to either ward off a hostile bid or provide leverage for negotiating a better deal.¹⁰³ Again, if the market price of individual shares were the full measure of the stockholders' entitlement, there would be little justification for employing such measures.¹⁰⁴ Stockholders would presumably reject any deal that offered less than what they could get for their shares in the market, and anything above the market price would represent a windfall—and perhaps, as discussed in Part II, a disincentive to value-enhancing mergers.

Again, however, a single owner of the entire corporation would undoubtedly use their absolute power to say no and walk away to negotiate for a share of the value of control and any surplus value created by the merger. In the absence of a controlling stockholder, the stockholders lack the ability to replicate this negotiating power themselves.¹⁰⁵ A tender offer to the stockholders that is superior to the alternative of selling on the market may well succeed in securing the necessary majority of the shares, and the stockholders would have little practical ability to hold out for more.¹⁰⁶ The negotiating power possessed by a single owner can only be replicated by empowering the board to employ defensive tactics to block a hostile tender offer and engage in hard-nosed negotiations backed by the right to say no.

The *Unocal* line of cases does precisely that. In *Unocal* itself, the Delaware Supreme Court held that boards have broad power to deploy defensive tactics, despite the manifest possibility that directors might use these powers for their own benefit—to entrench themselves, for example—instead of for the benefit of stockholders.¹⁰⁷ In subsequent cases, the Delaware Supreme Court made clear that the use of defensive tactics could be justified by the “threat” of stockholders agreeing to an inadequate price, even where the proposed price is substantially above the prevailing trading price.¹⁰⁸ As Martin Lipton—the architect of the poison pill—argued at the time, “directors are not required to accept a

103. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985).

104. See *infra* Part III.A.

105. See, e.g., Bebchuk, *supra* note 7, at 220–21 (noting that “the bargaining position of target shareholders is very weak relative to that of a sole owner”); William J. Carney, *Shareholder Coordination Costs: Shark Repellents and Takeout Mergers: The Case Against Fiduciary Duties*, 8 AM. BAR FOUND. RSCH. J. 341, 345 (1983) (“Coordination problems arise because tender offers are addressed to each target shareholder who must make a personal investment decision without knowing the reactions of fellow shareholders and without communicating with them to coordinate their responses to the bidder.”); see also Alan Schwartz, *The Fairness of Tender Offer Prices in Utilitarian Theory*, 17 J. LEGAL STUD. 165, 174–84 (1988) (exploring factors that disadvantage shareholders in takeovers).

106. See Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 808 (2002) (“If the bidder can easily bypass the board by making a tender offer, hard bargaining by the target board becomes counterproductive. It will simply lead to the bidder making a lowball tender offer to the shareholders, which they probably will accept due to the collective action problems that preclude meaningful shareholder resistance.”).

107. See *Unocal*, 493 A.2d at 954 (noting “the omnipresent specter that a board may be acting primarily in its own interests” in opposing a takeover attempt); Schwartz, *supra* note 105, at 185 (“[T]he obvious way to make takeover prices more like single-owner prices is to empower managers to bargain on their shareholders’ behalf, but this reform has the equally obvious disadvantage that the managers may frustrate transfers that benefit shareholders in order to preserve their own positions.”).

108. *Unitrin, Inc. v. Am. Gen. Corp.*, 651 A.2d 1361, 1388–89 (Del. 1995).

takeover bid simply because it represents a premium to market.”¹⁰⁹

While the use of defensive tactics is nominally subject to an intermediate level of scrutiny, as others have noted, the standard of review actually applied in the cases often looks more like traditional business judgment rule deference.¹¹⁰ This deference is exemplified by the Court of Chancery’s 2011 *Airgas* decision. Air Products had offered a \$70 per share for rival Airgas, a stock that had earlier been trading in the \$40-50 range. Stockholders were clearly receptive to the deal, electing three Air Products-nominated directors to the staggered nine-person Airgas board. The Airgas board, however, continued to reject the offer, which it said was “clearly inadequate,” and it kept a poison pill in place to fend off a tender offer. The Court of Chancery upheld the board’s tactics, reiterating 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.”¹¹¹

The set of board powers protected by *Unocal* vests the board with the powers of a single owner to sell the unified corporate estate—and, as such, to capture for stockholders a portion of the value inherent in the assembly of the fractionalized shares. In this sense, corporate law vests in the board of directors that basic attribute of ownership—the exclusive right to transfer ownership or refuse to do so.¹¹² Although these powers come with a cost and, as a result, are sometimes controversial in corporate law scholarship,¹¹³ they are utterly conventional in the American law of property.¹¹⁴ Corporate law simply allows the board to negotiate over control of the corporation, as can the owner of any conventional legal entitlement. Granting the board this power would make little sense if the trading price of a single share were the full measure of the stockholders’ entitlement, but it is perfectly natural under a single-owner standard that charges the board with securing for the stockholders what a single owner would secure for themselves.¹¹⁵ As the Delaware Court of Chancery noted in the landmark case of *Moran v. Household International*, Delaware’s law empowers boards “to extract concessions from an acquiror which it otherwise would not secure, or to deter the acquisition effort entirely.”¹¹⁶ Viewed

109. Martin Lipton, *Twenty-Five Years After Takeover Bids in the Target’s Boardroom: Old Battles, New Attacks and the Continuing War*, 60 BUS. LAW. 1369, 1370 (2005).

110. WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 541 (5th ed. 2016).

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

112. *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* Calabresi & Melamed, *supra* note 13.

113. *See supra* Part II.A.

114. MERRILL & SMITH, *supra* note 112, at 961 (“[P]roperty rights are strongly associated with ‘property rule’ protection.”).

115. *See* Schwartz, *supra* note 105, at 195 (describing the Delaware standard as one that “ensure[s] to shareholders the prices [in mergers] that single owners of the same corporate assets would receive” and critiquing that standard).

116. *Moran v. Household Int’l, Inc.*, 490 A.2d 1059, 1083 (Del. Ch. 1985), *aff’d*, 500 A.2d 1346 (Del. 1985), and disapproved of by *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004); *see also* Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1050–51 (2002) (“Secure in their ability to resist hostile bids, directors have used this authority to enhance shareholder value. And directors can use this same power to resist a transaction they reasonably believe to be insufficient or unduly speculative—a power of no mean

in this light, a merger “premium” is not really a premium at all. It is simply the market-clearing price for a different asset—the corporation as a whole—than what trades on stock exchanges.¹¹⁷ In sum, although the stockholders’ entitlement to their shares is ultimately protected only by a liability rule, Delaware’s merger law attempts to recreate one of the key features of property rules by vesting in the board the power of an owner to bargain effectively over the price at which control of the firm will be sold.¹¹⁸

III. CRITICISMS AND DEFENSES OF THE SINGLE-OWNER STANDARD

The single-owner standard described in Part I has long been controversial. Academic critics of the standard have proposed an alternative “market” standard that has been highly influential in academic debate, though not until recently,¹¹⁹ in shaping Delaware’s merger jurisprudence. In this Part, we introduce the most prominent critiques, as well as the traditional academic responses to them.

A. The Rival “Market Standard”

Even before the single-owner standard was clearly embraced by *Unocal* and *Revlon*, the invention of the poison pill stimulated a lively academic debate on defensive tactics. Most famously, in a pair of influential papers, Frank Easterbrook and Daniel Fischel argued that target boards should be forbidden from using defensive tactics or offering other resistance to takeover bids.¹²⁰ The arguments they developed laid the groundwork for Alan Schwartz’s later work promoting a “market standard” in place of the single-owner standard embraced by Delaware,¹²¹ and Easterbrook and Fischel subsequently distilled the argument in their 1991 magnum opus *The Economic Structure of Corporate Law*.¹²²

Under the market standard, the market price would be treated as the proper measure of the stockholders’ entitlement. Any takeover offer at or above the prevailing market price

significance, wielded for the protection of the interests of shareholders and, indeed, every corporate constituency.”).

117. See 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.”).

118. See Calabresi & Melamed, *supra* note 13, at 1092 (discussing the three types of entitlements: those protected by property rules, liability rules, and inalienable entitlements). Of course, even absent bargaining by the board, shareholders may refuse a tender offer, and consequently seem to have property protection for their shares. But the “majority vote” aspect of a merger can create a prisoner’s dilemma among shareholders, making it desirable individually for shareholders to tender at a price the shareholders as a whole would be better off not taking. See Jonathan R. Macey & Fred S. McChesney, *A Theoretical Analysis of Corporate Greenmail*, 95 YALE L.J. 13, 19–27 (1985). If defensive tactics are barred, stockholders are only protected by the appraisal remedy, effectively converting property protection into liability protection.

119. See Korsmo & Myers, *supra* note 17, at 223 (exploring how the “market” standard is reflected in the Delaware Supreme Court’s recent appraisal decisions).

120. See 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 by a target’s management that results in a higher is socially wasteful); see also Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1, 21 (1982) (arguing that managers of the target should not be presumed to always look out for the best interests of the shareholders).

121. See generally Schwartz, *supra* note 105.

122. See generally EASTERBROOK & FISCHEL, *supra* note 29.

would *per se* be fair to the stockholders and should be taken. In addition to Easterbrook and Fischel's prescription of target management passivity, the market standard would suggest that the market price is the proper measure of fair value in both the fiduciary and appraisal context. The practical effect would be to nullify fiduciary duties and the appraisal remedy in the public company merger context, except in the unusual circumstance of a "take-under" where the board has agreed to a merger at below the prevailing market price.¹²³ By facilitating any transaction at or above the market price, the market standard would, in essence, protect minority stockholders' entitlements with only a liability rule—their shares could be taken away in a merger at any time at the market price.

The basic intuition behind the market standard is simple—bargaining is wasteful. In particular, dickering over the division of gains from a merger—while potentially desirable for target stockholders—is socially wasteful. It consumes real resources without producing any offsetting benefits.¹²⁴ In addition, the costs entailed by bargaining may outweigh the gains from trade, preventing Pareto-efficient transactions altogether.¹²⁵ Of course, bargaining over sale is costly not just for public companies but also for virtually any kind of property.¹²⁶ Yet, the right to refuse to sell and to use this power to bargain for a share of gains from sale is a bedrock feature of most ordinary property rights.¹²⁷ Bargaining is valuable in most contexts because it "assures that the traded items are worth more in other hands."¹²⁸ When the value of an asset is difficult to observe—and particularly when subjective valuations are involved—bargaining serves to ensure that only Pareto-efficient transactions occur.¹²⁹ As Schwartz put it, conventional property law gives owners the power to reject offers only because "external decision-makers cannot make the interpersonal utility comparisons requisite to deciding when particular sales will maximize welfare."¹³⁰

Advocates of a market standard point out several important ways that the merger context differs from ordinary property contexts where bargaining may be regrettable but

123. See Albert Choi & Eric Talley, *Appraising the Merger Price Appraisal Rule*, 34 J.L. ECON. & ORG. 543, 543 (2018) (noting how deference to the merger price effectively nullifies appraisal's role in establishing a de facto reserve price).

124. Easterbrook & Fischel, *supra* note 120, at 1175 ("Even resistance that ultimately elicits a higher bid is socially wasteful. Although the target's shareholders may receive a higher price, these gains are exactly offset by the bidder's payment and thus by a loss to the bidder's shareholders. Shareholders as a group gain nothing; the increase in the price is simply a transfer payment from the bidder's shareholders to the target's shareholders. Indeed, because the process of resistance consumes real resources, shareholders as a whole lose by the amount targets spend in resistance plus the amount bidders and any rivals spend in overcoming resistance. These additional costs can be substantial."); Schwartz, *supra* note 105, at 187 ("[B]argaining costs are a dead-weight loss; society would be better off were these costs never incurred and the assets just transferred to the buyer.").

125. See Bebchuk, *supra* note 7, at 203 ("The problem with the sole owner standard, and the reason why Schwartz objects to it, is that it might sometimes prevent an efficient acquisition.").

126. See Haddock et al., *supra* note 15, at 706 ("Bargaining consumes resources, and would be socially inefficient if it accomplished nothing but this short-run division of gains from any given trade.").

127. *Id.* at 702 (noting that in conventional markets "sellers (or their agents) are permitted to reject initial offers and bargain for higher ones").

128. *Id.* at 707.

129. *Id.* ("Liability rules cannot ensure the Pareto efficiency of exchanges because subjective values are hard to measure and so may not be fully compensated. Bargaining guarantees that no exchange occurs unless subjective values are recognized.").

130. Schwartz, *supra* note 105, at 195.

necessary. First, because the board of directors controls the firm and any bargaining, the merger context is beset by an agency problem absent in other contexts. Rather than behaving as a single owner would, managers may use any power to bargain to enrich or entrench themselves.¹³¹ As a result, boards will be more likely than a single owner to block Pareto-efficient transactions.¹³² In addition, by entrenching themselves, managers will escape the disciplining effect of the market for corporate control, increasing agency costs at the target firm.¹³³

Second, advocates of a market standard argue that bargaining—even where it might benefit the target firm’s stockholders—imposes substantial negative externalities on other public companies. An important constraint on agency costs and mismanagement in the public company context is the market for corporate control.¹³⁴ Potential acquirers serve an important efficiency function by monitoring public firms, looking for potential targets that would be more valuable under more competent or faithful management, and taking them over. The amount of this monitoring would be optimized by maximizing the gains to acquirers from transactions, allowing them to capture all of the surplus. By consuming resources and diverting a portion of the gains away from acquirers and to the target stockholders (and managers), bargaining reduces the level of monitoring and the number of takeovers below the optimal level.¹³⁵

Third, and most importantly, advocates of a market standard argue that the merger market is different in that we have a ready measure of value—the market price. Alan Schwartz put it most succinctly, saying that “[t]he valuation problem that generally justifies delegating the decision as to when assets should sell to their owners is trivial in the takeover context.”¹³⁶ This is so, Schwartz argues, because stockholders typically hold stock for a stream of income, and thus, they do not place significant subjective or aesthetic valuations on shares of stock as they might with other assets like a house or car.¹³⁷ Furthermore,

131. See Easterbrook & Fischel, *supra* note 120, at 1175 (arguing that managers will resist takeovers not merely to benefit stockholders but also to wrongfully preserve their own jobs); Schwartz, *supra* note 105, at 195 (“[T]he desire of some target managers to preserve their jobs suggests that these managers may not be as zealous as single owners in finding highest-valuing users.”).

132. *Id.* at 184–85 (“[T]he obvious way to make takeover prices more like single-owner prices is to empower managers to bargain on their shareholders behalf, but this reform has the equally obvious disadvantage that the managers may frustrate transfers that benefit shareholders in order to preserve their own positions.”); see Haddock et al., *supra* note 15, at 737 (“Easterbrook and Fischel believe resistance is undesirable because managers will resist to save their jobs, not to benefit stockholders.”).

133. See Haddock et al., *supra* note 15, at 720 (noting that resistance to takeovers may “increase[] managerial agency costs to the target itself”).

134. See, e.g., Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965) (introducing a study of the market for corporation control).

135. See Easterbrook & Fischel, *supra* note 120, at 1176–77 (“[The] ‘externality’ arises when a target’s management resists a tender offer. The resulting increase in the prices paid for target firms will generally discourage prospective bidders for other targets; 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 [other firms’] agency costs and in turn the pre-offer price of potential targets’ stock.”); EASTERBROOK & FISCHEL, *supra* note 27, at 174 (“If the target’s shareholders obtain *all* the gains from the transaction, no one has an incentive to monitor and make offers. Stock prices of all firms will fall to reflect this.”).

136. Schwartz, *supra* note 105, at 188.

137. See *id.* at 188–89 (“The value a shareholder derives from possessing a share of stock thus is identical to the value he would derive from possessing its cash equivalent. Simply, no one obtains aesthetic, sentimental, or any other noneconomic value from owning stock.”).

efficient trading markets provide a ready estimate of the expected value of the future stream of income associated with a share of stock.¹³⁸ Similarly, Easterbrook and Fischel look to the efficient capital market hypothesis in concluding that “the price of shares reflects the collective wisdom of all traders about the value of the stock,” superior to any other guess as to value.¹³⁹ They argue that “[i]f capital markets are efficient, as the evidence shows them to be, then any statement that a given stock is really worth more than its price is not believable.”¹⁴⁰

As a result, advocates of a market standard conclude that any transaction where the price exceeds the market price is necessarily efficient in that it moves assets to owners who value them more highly.¹⁴¹ Correspondingly, anything that might interfere with the success of an above-market bid—such as defensive tactics or judicial protection of stockholder entitlement to something more than the market price—would imperil efficient transactions.¹⁴² Indeed, the logic of the market standard goes well beyond a simple bar on defensive tactics to suggest that the stockholders, too, should have no ability to block a transaction at a premium to the market price. If a premium to the market price sufficiently demonstrates the efficiency bona fides of the transaction, why would more—such as a stockholder vote—be required? As Schwartz has argued, “[t]hat society allows single owners to decide when to sell—that is, to charge what the traffic will bear—is a prudential response to the inability of external decision-makers to know just what transfers would be value increasing.”¹⁴³ This is “not a problem [in mergers] because stocks are financial assets whose values are reflected in market prices.”¹⁴⁴

The logical conclusion of this view is, in effect, a system of corporate “takings.”¹⁴⁵ If every potential transaction at a price meaningfully above the prevailing market price is utility-enhancing, then any negotiation mechanism is wasteful. In the familiar terminology of property law, the stockholder’s entitlement under the market standard would be protected exclusively with a liability rule. Under such a system, the optimal approach would be that “a buyer could at any given time ‘take’ the assets (or shares) of a given corporation by paying a price containing a specified, minimal premium above the preceding market price of the target’s shares.”¹⁴⁶ The requisite premium must, in theory, be positive, but the commitment among adherents to minimize the premium necessary to seize control of a firm led John Coffee to term the market standard the “zero premium

138. *Id.* at 189 (noting that “the prebid price of a target’s shares reflects the target’s earnings prospects under current management”).

139. Easterbrook & Fischel, *supra* note 120, at 1166–67.

140. *Id.*

141. See Schwartz, *supra* note 105, at 195 (arguing that any transfer of ownership “above prebid prices . . . very probably move[s] assets to higher-valuing users”). As Bebchuk characterizes his argument, given “Schwartz’s claim that [firm value] is best represented by the prebid market price of the target’s shares . . . whenever the offered acquisition price exceeds the prebid market price . . . the acquisition would be efficient.” Bebchuk, *supra* note 7, at 204.

142. See Bebchuk, *supra* note 7, at 203 (“The problem with the sole owner standard, and the reason why Schwartz objects to it, is that it might sometimes prevent an efficient acquisition.”).

143. Schwartz, *supra* note 105, at 170.

144. *Id.*

145. See Bebchuk, *supra* note 7, at 200.

146. *Id.*

policy.”¹⁴⁷

B. Existing Defenses of the Single-Owner Standard

While there is no shortage of prominent defenders of Delaware’s merger jurisprudence in general, explicit academic defenses of a single owner standard are somewhat thinner on the ground. The major defenses of the single owner standard fall under three headings.¹⁴⁸ Defenders (1) contest the notion that stock market prices can be treated as an infallible measure of the value of the firm; (2) argue that even if a market rule would facilitate transfers to higher valuing owners, it may obstruct transfers to *highest* valuing owners; and (3) argue that a market standard would create inefficient investment incentives at target firms.

Skepticism of the reliability of market prices comes in varying strengths. Bebchuk notes that, at a minimum, prices can change rapidly in light of new information and that even an accurate pre-bid price may no longer be a good measure of value by the time a takeover is actually consummated.¹⁴⁹ Furthermore, he points out that even if capital markets are efficient at most times for most firms, takeovers are likely to occur disproportionately when markets are at their least efficient.¹⁵⁰ In addition, as we have noted elsewhere, modern economic understanding of market efficiency draws a sharp distinction between informational efficiency—which is well-supported—and value efficiency, which is highly contested.¹⁵¹ As a result, many well-known economists have quite modest expectations for value efficiency. Nobel Prize winner Fischer Black, for example, defined “an efficient market as one in which price is within a factor of 2 of value, i.e., the price is more than half of value and less than twice value.”¹⁵² Delaware judges have, on occasion,

147. John C. Coffee, Jr., *Regulation the Market for Corporate Control: A Critical Assessment of the Tender Offer’s Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1155 (1984).

148. Other arguments, of course, have also been made. For example, the diversity of firm policies regarding takeover defenses has been argued to suggest that a one-size-fits-all mandatory “no takeover defenses” rule would be inefficient. *See generally* Haddock et al., *supra* note 15, at 734–37. Of necessity, we focus here on the most important strains of argument.

149. *See* Bebchuk, *supra* note 7, at 205 (noting that “it is quite possible that, at the time investors make their tender decisions, the best estimate of [firm value] available to them might significantly differ from the prebid market price; for a lot of new information might be revealed between the last prebid trading time and the time of shareholders’ tender decisions”).

150. *See id.* at 208 (arguing that even if stock prices “fully reflect all public information” 99 percent of the time, “it would be reasonable to presume that, among takeover targets, there is a disproportionate representation to the 1 percent of companies whose stock prices do not fully reflect all public information”).

151. *See* Charles R. Korsmo & Minor Myers, *The Flawed Corporate Finance of Dell and DFC Global*, 68 EMORY L.J. 221, 261–65 (2018) (criticizing recent appraisal decisions for “conflating well-supported notions of semi-strong market efficiency, often known as informational efficiency, with an unfounded and widely discredited notion of value efficiency”).

152. Fischer Black, *Noise*, 41 J. FIN. 529, 533 (1986). Even Eugene Fama, the intellectual father of the efficient capital markets hypothesis, has written that investor disagreement can cause market prices to depart substantially from fundamental value. Eugene F. Fama & Kenneth R. French, *Disagreement, Tastes, and Asset Prices*, 83 J. FIN. ECON. 667, 683 (2007). The creators of the first capital asset pricing models (CAPM) have published similar conclusions. *See* WILLIAM F. SHARPE, PORTFOLIO THEORY AND CAPITAL MARKETS 104–13 (1970); John Lintner, *The Aggregation of Investor’s Diverse Judgments and Preferences in Purely Competitive Security Markets*, 4 J. FIN. & QUANTITATIVE ANALYSIS 347, 347 (1969); Jack Treynor, *Bulls, Bears, and Market Bubbles*, 54 FIN. ANALYSTS J. 69, 74 (1998); *see also Are Markets Efficient?*, CHI. BOOTH REV. (June 30, 2016), <https://www.chicagobooth.edu/review/are-markets-efficient> [https://perma.cc/E9FR-T6RV] (interviewing

defended their merger jurisprudence on this ground.¹⁵³ Less aggressively, even if the market price is a sufficiently reliable measure of the value of a minority share, that does not necessarily supply a valid measure of the firm as a whole, including the value of control. Indeed, this belief—rather than any generalized skepticism of market efficiency—appears to underlie the Delaware courts’ traditional reluctance to rely on market prices.¹⁵⁴

The second concern relates to the possibility that the market standard may facilitate transactions that are socially beneficial in themselves but that might inhibit other transactions that would be even more beneficial. The primary advantage supposed for a market standard is that it would facilitate easy transfer of corporate assets to higher-valuing owners. Any buyer who values the firm higher than the existing price would be able to engineer a takeover at a modest premium with little time or money wasted in bargaining and without having to share a substantial portion of the gains with the target stockholders. An advantage of the single owner standard, however, is that it gives target management an incentive to find not just a higher-valuing owner but the *highest*-valuing owner willing to pay the most. To the extent that any takeover requires some expenditure of time and money, a transaction that is value-enhancing may still be inefficient if it makes more expensive another transaction that would be value-maximizing. Therefore, bargaining by target management—although it consumes resources—“also avoids the transaction costs of subsequent transfers if the first bidder is not the highest-valuing user of the target firm’s resources.”¹⁵⁵

Most prominent, however, is the concern that a market standard would undercut the incentives of existing owners of a potential target company to invest efficiently in the firm. In seeking to allow the buyer to capture all, or almost all, of the gains from a merger, the market standard tacitly assumes that the buyer is the only party contributing to that increased value.¹⁵⁶ If target firms, too, can also make value-increasing investments in pursuing a merger, they must be able to negotiate for a share of the gains in order to give them an incentive to do so.¹⁵⁷ While potential acquirers often invest in searching for undervalued targets, the targets too can identify themselves as undervalued and invest in searching for a potential buyer. Taking a broader view, if target stockholders cannot expect

Eugene Fama, who states that “[t]he point is not that markets are efficient. They’re not. It’s just a model”).

153. *In re Dollar Thrifty S’holder Litig.*, 14 A.3d 573, 611 (Del. Ch. 2010) (Strine, V.C.) (criticizing plaintiffs for asking him to follow “blindly some crude rendition of the semi-strong form of the efficient capital markets hypothesis, one in which any board should treat the current market price as a reliable guidepost to decisionmaking. My understanding of ECMH is that it makes much less drastic claims”); see also Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Strange Corporate Governance System*, 126 YALE L.J. 1870, 1930 (2017) (“[T]he claim of the efficient market hypothesis is not that a corporation’s stock price at any time is a reliable estimate of fundamental value, but rather that it is not possible to design a trading strategy that will outguess the guesses of the market as a whole.”).

154. See *supra* Part I.

155. Haddock et al., *supra* note 15, at 722; see also Lucian A. Bebchuk, Comment, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1029–30 (1982).

156. See Haddock et al., *supra* note 15, at 709 (noting that “the theoretical takeover literature has focused almost exclusively on the value-increasing contributions of acquirers” and that a market standard “would provide bidders with the maximum incentive to make value-increasing investments by giving them, rather than targets, the largest feasible portion of the gains”); Bebchuk, *supra* note 7, at 198.

157. See Haddock et al., *supra* note 15, at 709 (noting that “[a] no-resistance rule would be efficient, however, only if bidders created all the gains in takeovers, and targets none” but that “it is clear that bidders do not create all the gains”).

to share in the gains produced by a merger, they will underinvest in projects that offer the prospect of producing value in a merger rather than purely as a standalone entity. Haddock, Macey, and McChesney noted that “[t]he opportunity arises every day for a firm to make value-creating investments, the full returns from which may only be realized through a possible future takeover.”¹⁵⁸ And Bebchuk has emphasized that “[t]he gains that result from an acquisition are attributable not only to the bidder’s actions; they are also attributable to individuals decision to establish, and invest in, the target.”¹⁵⁹ In short, if a target firm’s shareholders are unable to share in gains produced by a merger, they will not only have no incentive to seek out value-enhancing merger opportunities, but they will also have an incentive to invest only in projects that can be exploited as a standalone entity.¹⁶⁰

C. The Uncertain State of the Debate

It is unnecessary here to rehash every charge and counter-charge in the decades-long battle over the single-owner standard. It will suffice to say that firm conclusions have been elusive, and no consensus has emerged. This is true even for the narrower debate over whether the use of takeover defenses—as justified by the single-owner standard—is wealth-enhancing for target stockholders themselves, let alone the larger and less tractable question of whether takeover defenses promote efficiency for the economy as a whole.¹⁶¹

158. *Id.* at 710–11. As they go on to point out, “[f]irms sometimes can create value by making initial investments that others are better able to develop, and so plan from the start to be acquired by another.” *Id.* at 711. They give the example of a computer software start-up that may “plan to be taken over if they successfully innovate even one important software package.” *Id.* This business model is, in fact, common in several industries. In the pharmaceutical industry, for example, a large number of start-ups are dedicated to producing a single development stage drug or a handful of related drugs. If they succeed in developing the drug to a certain stage, they seek to be bought by one of the major pharmaceutical companies, such as Pfizer or Merck, to leverage their expertise in marketing, manufacturing, and obtaining regulatory approvals. As Haddock et al. note, this plan “enables [the start-up] to concentrate on technical innovation and to ignore subsequent marketing, which is of no value until a technical advance has been completed.” *Id.* See also Bebchuk, *supra* note 7, at 210 (considering the example “of a high-tech company that is developing a new product and, if successful, is likely to be acquired by a larger concern because of the synergistic benefits of such a combination”).

159. See Bebchuk, *supra* note 7, at 210; Haddock et al., *supra* note 15, at 711 (“In other words, takeovers are not discrete events that begin at the moment the first bid materializes. All firms are ‘in play’ from the day they are created, and the possibility of a later takeover only spurs greater innovation now.”).

160. See Bebchuk, *supra* note 7, at 210 (noting that for a target firm’s investment “decisions to be socially optimal, the target’s shareholders must capture the social benefits produced by their investment”). For general discussions of the effects of a market versus a single-owner standard on target firms’ investment incentives, see Bebchuk, *supra* note 155, at 1049; Lucian A. Bebchuk, *The Case for Facilitating Competing Tender Offers: A Reply and Extension*, 35 STAN. L. REV. 23, 42–44 (1982); Lucian A. Bebchuk, *The Case for Facilitating Tender Offers: A Last(?) Reply*, 2 J.L. ECON. & ORG. 253, 268–69 (1986); Lucian A. Bebchuk, *Toward Undistorted Choice and Equal Treatment in Corporate Takeovers*, 98 HARV. L. REV. 1693, 1766 (1985).

161. See, e.g., Emiliano M. Catan & Marcel Kahan, *The Law and Finance of Antitakeover Statutes*, 68 STAN. L. REV. 629, 629–30 (2016) (concluding that “decades of empirical studies” of the economic effects of antitakeover measures “have yielded little empirical knowledge”); Yakov Amihud, Markus Schmid & Steven Davidoff Solomon, *Settling the Staggered Board Debate*, 166 U. PA. L. REV. 1475, 1475 (2018) (finding that “[t]he effect of a staggered board is idiosyncratic; for some firms it increases value, while for other firms it is value-destroying” and urging “caution about legal solutions that advocate wholesale adoption or repeal of the staggered board”); K.J. Martijn Cremers, Simone M. Sepe & Saura Masconale, *Is the Staggered Board Debate Really Settled?*, 167 U. PA. L. REV. ONLINE 9, 9 (2019) (arguing that “the staggered board debate is very much alive rather than settled”); Emiliano M. Catan, *The Insignificance of Clear-Day Poison Pills*, 48 J. LEGAL STUD. 1, 1 (2019) (arguing that the “ostensive negative effect of pills on firm value is due to a spurious correlation”).

This larger question turns on a multitude of empirical questions that defy easy tests. Would easier transfer of corporate assets to higher-valuing users facilitate or hinder the transfer of assets to highest-valuing users?¹⁶² What are the relative contributions of targets and acquirers in generating gains from a merger, and what are the relative elasticities of investment in such gains as their ability to capture these gains is altered?¹⁶³ Are gains from search to potential acquirers decreased by a single-owner standard because they have to share those gains with target stockholders? Or are they increased because the ability of target stockholders to share in gains causes them to invest more in making themselves attractive targets?¹⁶⁴

Perhaps most elusively, just how reliable are market prices as a measure of firm value compared to the value that a board or a court might put on the company? This is a notoriously difficult—and arguably impossible—proposition to test. Any test of whether the market price is “right” about a company’s value would have to presume some other correct way of determining that value in the first place—a Catch-22 known in the finance literature as the “joint hypothesis problem.”¹⁶⁵

Even if it could be determined that the market price is an accurate measure of the value of a single share, is the market price accurate as a measure of the value of the firm as a whole, including the value of control? Easterbrook and Fischel have argued that the market price will naturally reflect the latent value of a potential change-of-control transaction in the future, rendering the distinction between the value of the shares and the value of the corporation specious.¹⁶⁶ This is so, Fischel has argued, because trading prices will incorporate the possibility of a merger transaction where the buyer pays for control—that is, that the price “already takes into account the consensus judgment of market participants as to the present value of all future outcomes, including the sale of the entire firm.”¹⁶⁷ Under this view, the investment problem is illusory as well, as the market price will also reflect the increased value of the target firm in a potential merger.¹⁶⁸

162. Haddock et al. point out that Bebchuk argues that “the real resource costs of resistance may be offset by savings in the transaction costs of subsequent serial transfers. Easterbrook and Fischel suspect the reverse, that auction costs exceed the costs of successive transfers. The issue is solely empirical, but neither side has presented any data to support its position.” Haddock et al., *supra* note 15, at 722 n.51 (internal citations omitted).

163. *See id.* at 710 (arguing that the debate “depends on the elasticity of value creation by each side with respect to the rewards realized” and that this “may vary substantially from one transaction to another”).

164. *See id.* at 724 (considering the question and concluding that “[t]here is no apparent reason to believe that the first impact dominates the second, or vice versa”).

165. *See* Eugene F. Fama, Professor, Booth Sch., Univ. of Chi., Prize Lecture: Two Pillars of Asset Pricing (Dec. 8, 2013), <https://www.nobelprize.org/uploads/2018/06/fama-lecture.pdf> [<https://perma.cc/W5U8-RXHC>] (“Tests of [value] efficiency basically test whether the properties of expected returns implied by the assumed model of market equilibrium are observed in actual returns. If the tests reject, we don’t know whether the problem is an inefficient market or a bad model of market equilibrium.”). *See also* Eugene F. Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. FIN. 383, 384, 413–14 (1970); EUGENE F. FAMA, *Efficient Capital Markets*, in FOUNDATIONS OF FINANCE: PORTFOLIO DECISIONS AND SECURITIES PRICES 133, 137 (1976).

166. Daniel R. Fischel, *Market Evidence in Corporate Law*, 69 U. CHI. L. REV. 941, 952 (2002) (discussing the distinction courts have made between market value and intrinsic value and asserting that the “distinction is specious”); EASTERBROOK & FISCHEL, *supra* note 29, at 205 (criticizing Delaware courts’ “belief that the market price of a firm’s stock is not (necessarily) its ‘real’ or ‘intrinsic’ value” and alleging that this view “has as much empirical support as the proposition that hurricanes are caused by witches”).

167. Fischel, *supra* note 166, at 953.

168. *See id.* at 952–53 (“[T]he market price of shares also reflects the prospect that the company as a whole will be sold at a given price.”).

This is undoubtedly true, as far as it goes. The trading price of a share of stock reflects two major components of value: (1) the cash flow rights associated with minority ownership and (2) the option value associated with a merger transaction if the board decides to pursue one. But the market will only value rights that the law would protect, and, thus, the price of an asset is inescapably dependent on the legal entitlements of the holder of the asset.¹⁶⁹ In particular, the market price will only incorporate the value of control or synergistic value—values that a single owner would capture—to the extent the stockholders can expect to capture those values. Under a market standard, however, boards would have no ability to negotiate for a share of those values, and the stockholders would be backstopped by an appraisal remedy that deferred to the market price. Fischel's argument, in other words, assumes the very condition—an effective single-owner standard—that he seeks to eliminate.

As a result, Fischel's argument descends into a circular paradox: If the law assiduously protects the stockholders' entitlement to share in the gains a single owner would capture in a merger, then the market price will reflect the expected value of those gains, and it will constitute an excellent benchmark for fair value. But to the extent the law relies on that benchmark by deferring to the market price, we can no longer be confident that it will reflect the value we are relying upon it to value. The price is reliable only when it is not relied upon. The crutch becomes weaker the more weight is placed upon it.¹⁷⁰ As a result, it is impossible to tell in any particular case whether the market price reflects potential gains from a merger.

Perhaps aware that he is treading on boggy ground, Fischel also suggests that even if the market price does not fully reflect the expected value a single owner would capture in a merger, this discount does not entail any unfairness to public stockholders. In his words, “[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.”¹⁷¹ He thus concludes there is no reason to ignore minority status when determining the fair value of minority stakes.¹⁷²

Again, this is true as far as it goes. Any discount a public stockholder receives in a

169. The price of gold, for example, is a function of the rights that society recognizes in the owner of gold. It is not the resource so much as the legal entitlements in the resource that commands some price. *See, e.g.*, Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 731–32 (1998) (“[N]early everyone agrees that the institution of property is not concerned with scarce resources themselves (“things”), but rather with the rights of persons with respect to such resources.”).

170. This type of paradox is familiar in finance. Markets are made efficient, for example, by traders competing to identify and exploit inefficiencies. But the more efficient this process causes a market to become, the smaller the profits become from finding inefficiencies, and the less incentive traders have to invest in searching for them. As a result, markets can only be efficient to the extent that market participants behave as though they are inefficient. *See, e.g.*, Sanford J. Grossman & Joseph E. Stiglitz, *On the Impossibility of Informationally Efficient Markets*, 70 AM. ECON. REV. 393 (1980); Ronald Gilson & Reinier R. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549 (1984). In the market efficiency context, however, there is an equilibrium level of disequilibrium: whenever markets become sufficiently inefficient, the mechanisms that drive efficiency reassert themselves. *See, e.g.*, Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 730 (2006); Charles R. Korsmo, *The Audience for Corporate Disclosure*, 102 IOWA L. REV. 1581, 1613–14 (2017). It is difficult to identify any similar mechanism in the merger process; the likely result is simply disequilibrium.

171. Fischel, *supra* note 166, at 946.

172. *Id.*

merger relative to what they would receive as a single owner will also be reflected in the price they must pay—and the price they are willing to pay—to purchase the stock in the first place. And it is no injury to a stockholder to be forced to relinquish at a discount stock that was purchased at that same discount. But it may be a significant injury, indeed, to those who *sell* public stockholders shares in the first place—the owners of the company at the time it goes public—who must necessarily bear the same discount in the selling. This insight forms the basis for the argument developed in the next Part.

IV. A DYNAMIC DEFENSE OF THE SINGLE-OWNER STANDARD

In this Part, we articulate a new argument in favor of the single-owner standard, rooted in dynamic considerations. In short, a departure from the single-owner standard would place the traditional public company with dispersed stockholders at a serious disadvantage versus other forms of ownership. That is, even if the market standard were advantageous from a social perspective, it would be highly disadvantageous to the original owners of a firm, giving them a powerful incentive to avoid it if at all possible. As a result, entrepreneurs and early-stage investors would have a strong incentive to avoid going public. This incentive would distort the public-private decision and reinforce the current trend of large firms remaining private (or going private if they are already public).

Not only would these dynamic effects raise the cost of capital for the individual companies themselves, but they would also imperil the substantial social benefits generated by public equity markets. The potential costs would almost certainly outweigh any benefits associated with a market standard. That is, even if you assume that the single-owner standard is inefficient, viewing the issue narrowly—that it wastes resources in dickering over gains produced by the acquirer and blocks value-enhancing transactions—moving away from it would be a potentially serious mistake.

A. Market Standard Would Discourage Firms from Going Public

Business enterprises are not birthed into the world, fully formed, as public companies. They are made so over time, and those who make them have many options as to how ownership should be structured. As is noted in Part I, ownership of a company by dispersed public stockholders is only one of those options.¹⁷³ Entrepreneurs and controlling early-stage investors seeking to raise capital have multiple options, only one of which is issuing shares to the public and becoming a traditional public company. If they choose to remain private, they can expect to bargain to capture a share of the gains from any potential sale of the firm, just like any other owner of private property. Depending on the circumstances, they may, in fact, be able to expect to capture the lion's share of any gains from an eventual sale.

Consider, for example, a hypothetical start-up pharmaceutical company, formed to develop a single new drug with the expectation of then selling the drug via a merger with a large pharmaceutical manufacturer.¹⁷⁴ The synergistic gains from such a merger would be enormous, allowing the start-up to focus entirely on the drug development in which they have special expertise while leveraging the ability of the ultimate purchaser to obtain

173. See *supra* Part I.

174. See, e.g., Haddock et al., *supra* note 15, at 711–12 (considering similar examples).

regulatory approvals, manufacture and distribute at scale, market the drug, and so on. Initially, perhaps, the firm was owned entirely by a single research biologist or a handful of early employees. A common next stage would be to secure venture financing to provide early working capital, perhaps with the venture capitalists taking a controlling stake, or perhaps with the entrepreneur(s) retaining control. Either way, if the drug is successfully developed, the owners could expect to bargain to share in the enormous gains created by the merger. Because there would likely be many potential buyers—Pfizer, Merck, Bayer, etc.—the sellers could expect to capture a large share of these gains by conducting an auction.¹⁷⁵

If the company needs additional capital to finance development, it is faced with a fundamental choice. It could attempt to raise additional capital—debt or equity—while remaining private. Or it could raise additional equity capital by selling stock to the public and becoming a public company. The price public investors are willing to pay, however, will be largely determined by the extent to which they can expect to share in the gains from an eventual merger. The single-owner standard grants public stockholders an entitlement to share in these gains as a single owner would.¹⁷⁶ The standard protects this entitlement by empowering—and to some extent requiring—directors to bargain as a single owner would—and by backstopping the stockholders with an appraisal remedy keying “fair value” to the value of the firm to a single owner. The protection is undoubtedly imperfect, and public investors will discount what they are willing to pay to reflect this imperfection. But as far as possible, the single-owner standard attempts to keep publicly-traded stock on an even footing with private-company stock.

A market standard, however, would leave public stockholders exposed. It would deny directors the tools to negotiate as a single owner. It would also deny dissenting stockholders a meaningful appraisal remedy to backstop their own resistance to an inadequate takeover bid. As a result, public stockholders could—at the very least—expect a much smaller proportion of any gains from a future merger. Knowing this, initial investors would be forced to discount what they are willing to pay for shares, raising the cost of equity capital to the original owners of the firm.

A pharmaceutical start-up with little standalone value and potentially large value in a merger is, admittedly, an extreme example where the bulk of the expected value of the firm is in gains from a sale. But the point is general: anything other than a single-owner standard would disadvantage the public company as a form of joint ownership of enterprise, in particular relative to remaining private. As a result, a subset of firms—potentially a large subset—that would go public under a single-owner standard would remain private under a market standard. These firms would necessarily face a higher cost of capital, resulting in less efficient allocation of investment capital.

In other property contexts, the law strives to avoid disadvantaging joint ownership arrangements in this fashion. Eminent domain provides an analogy to the merger context, as in both contexts, a property owner’s entitlements are taken involuntarily at a price determined by a third party. In eminent domain, the traditional rule is akin to the single-owner standard. In particular, under the dominant Unit Rule approach, “when property that is held in partial estates by multiple owners is condemned, the condemnor pays the fair

175. See generally Choi & Talley, *supra* note 123 (discussing auction dynamics).

176. See discussion *supra* Part I.

market value of *an undivided interest in the property* rather than the fair market value of each owner's partial interest."¹⁷⁷ That full amount is then apportioned between the persons with claims on the condemned asset.¹⁷⁸ The Unit Rule approach mirrors a single owner standard by focusing the valuation inquiry on the value of the entire property to a hypothetical single owner,¹⁷⁹ even where "the whole does not necessarily equal the sum of the parts."¹⁸⁰ In the unusual case, the Unit Rule may deliver less than the value of the fractionalized interests,¹⁸¹ but the more usual circumstance is that the assembly creates value. Under the Unit Rule, any gains from this assembly of ownership interests are shared *pro rata* by the holders of the divided claims.¹⁸² While the Unit Rule is often explained in terms of the incentives of the acquiring condemnor, it also has the benefit of not penalizing joint or divided forms of ownership and thus providing an incentive to avoid adopting them even where they would otherwise be most efficient.

The single-owner standard serves the same function in merger law. It keeps public company stockholders on an even footing with holders of assets in other forms, where it is utterly conventional that assets may be transferred only on terms satisfying the owner.¹⁸³ In theory, of course, public company stockholders could be kept on an even footing with other owners by stripping even single owners of the ability to bargain over the surplus from a sale, at least where the value of the underlying assets is reasonably susceptible to outside valuation. As Bebchuk pointed out from early on, "the logic of [the market standard] concerning takeover policy should also lead [its supporters], in some sole owner situations, to favor restrictions on the owners' freedom to reject acquisition offers."¹⁸⁴ In fact, relying on much of the same logic as the market standard, Eric Posner and Glen Weyl have proposed something along those lines.¹⁸⁵ However, they forthrightly "acknowledge that, for some readers, [their proposals] will seem like science fiction, too radical to be taken

177. City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Auth. of Milwaukee (*Milwaukee VFW*), 768 N.W.2d 749, 751 (Wis. 2009). See generally 4 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 13.01 [16] (3d ed. 2006). ("The unit rule requires that real estate be valued in respect to its gross value as a single entity as if there was only one owner.")

178. John D. Johnston, Jr., *Just Compensation for Lessor and Lessee*, 22 VAND. L. REV. 293, 302 (1969).

179. *Milwaukee VFW*, 768 N.W.2d at 761 (concluding that the condemnor should not have to pay an amount different from the value of the asset if it "were . . . property held by one person").

180. Dep't of Pub. Works & Buildings v. Lotta, 189 N.E.2d 238, 240 (1963).

181. In *Milwaukee VFW*, for example, the Veterans of Foreign Wars (VFW) had a leasehold interest in a portion of a building for \$1 in rent per year for a 99-year term, and an appraiser estimated that the value of the VFW's leasehold was \$1.2 million. *Milwaukee VFW*, 768 N.W.2d at 751. The court, however, applied the Unit Rule, tasking a jury with determining the value as if the asset "were the property held by one person," and the jury determined that the overall value to a single owner was \$0. *Id.* As a result, both the VFW and the landlord got nothing. *Id.*

182. *Id.*

183. See, e.g., MERRILL & SMITH, *supra* note 112, at 961 (3d. ed. 2017) ("[P]roperty rights are strongly associated with 'property rule' protection."). In Felix Cohen's famous description, the meaning of property is something to which an owner may attach the following label, endorsed by the state: "To the world: Keep off X unless you have my permission, which I may grant or withhold." Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954).

184. Bebchuk, *supra* note 7, at 202; see also *id.* at 201–02 ("I take it that Schwartz would support enabling [a] factory's sole owner to reject acquisition offers. Why, then, would Schwartz have a totally different position if the same factory were held by a corporation with no other assets and with dispersed ownership?").

185. See Eric Posner & E. Glen Weyl, *Property is Only Another Name for Monopoly*, 9 J. LEGAL ANALYSIS 51, 60 (2017).

seriously.”¹⁸⁶ To the extent such proposals remain in the realm of science fiction, and rights of private ownership are not hobbled in such a fashion, the owners of a firm would have a strong incentive to remain private were a market standard to apply in public company merger law.

B. Public Equity Markets Generate Large Benefits

A market standard would be problematic even if the only negative effect were the distortion of the decision to remain private or go public, resulting in a higher cost of capital for individual firms. But the larger costs would be systemic. Public stock markets generate tremendous social benefits.¹⁸⁷ By giving firms an incentive to remain private, a market standard would degrade these benefits.

The benefits of functioning public stock markets are too various to catalog and are sufficiently well-known as to render a full explication unnecessary. It is worth, however, dilating briefly on several of the most salient benefits. In particular, public stock markets (1) generate information and promote the efficient allocation of capital; (2) lower the cost of capital and encourage the pooling of savings; (3) facilitate the efficient amelioration of risk via easy diversification and liquidity; and (4) allow small savers to participate in the wealth generation of big business.¹⁸⁸

Perhaps most importantly, public markets generate a tremendous amount of information, which can then be used to direct resources to their most productive use.¹⁸⁹ Large, liquid, public markets permit anyone to easily profit from identifying mispricings, thus giving the broadest possible incentive to generate such information. The result is more accurate pricing and more efficient allocation of capital to productive uses, resulting in stronger economic growth.¹⁹⁰ The advantage of public markets in allocating capital is especially strong in developed economies like the United States, where the most productive allocation of capital is more uncertain.¹⁹¹ The information generated by public stock

186. *Id.* at 60.

187. For a general overview, see Ross Levine, *Finance and Growth: Theory and Evidence*, in HANDBOOK OF ECONOMIC GROWTH 865, 865–934 (Philippe Aghion & Steven Durlauf eds., 2005) (reviewing the role and impact of finance in economic growth); *see generally* Ross Levine & Sara Zervos, *Stock Markets, Banks, and Economic Growth*, 88 AM. ECON. REV. 537 (1998); Daron Acemoglu, Philippe Aghion & Fabrizio Zilibotti, *Distance to Frontier, Selection, and Economic Growth*, 4 J. EURO. ECON. ASS’N 37 (2005); Wendy Carlin & Colin Mayer, *Finance, Investment and Growth*, 69 J. FIN. ECON. 191 (2003).

188. *See, e.g.*, Nikita Koptyug, Lars Persson & Jaocim Tag, *Should We Worry About the Decline of the Public Corporation?* 1 (Rsch. Inst. of Indus. Econ., Working Paper No. 1298, 2019) (listing the beneficial functions of a stock market, including to “help growing firms secure financing . . . to provide liquidity to shareholders, to aid in price discovery and to provided diversification opportunities”).

189. *See* Levine, *supra* note 187, at 8.

190. *Id.* at 9 (“As markets become larger and more liquid, agents may have greater incentives to expend resources in researching firms because it is easier to profit from this information by trading in big and liquid markets Thus, larger more liquid markets will boost incentives to produce this valuable information with positive implications for capital allocation.”); *see generally* Albert S. Kyle, *Market Structure, Information, Futures Markets, and Price Formation*, in INTERNATIONAL AGRICULTURAL TRADE: ADVANCE READINGS IN PRICE FORMATION, MARKET STRUCTURE, AND PRICE INSTABILITY 45 (Routledge 2018) (1984); Bengt Holmstrom & Jean Tirole, *Private and Public Supply of Liquidity*, 101 J. POL. ECON 1 (1998); Robert C. Merton, *A Simple Model of Capital Market Equilibrium with Incomplete Information*, 42 J. FINANCE 483 (1987).

191. *See* COMM. ON CAP. MKT. REGUL., INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 24–25 (2006), <https://www.capmktreg.org/wp-content/uploads/2018/10/Interim-Report-of-the->

markets helps allocate capital not only among public companies but also among private companies. As Elisabeth de Fontenay notes, “the enormous volume of public side information . . . makes private company valuation vastly easier and more accurate.”¹⁹²

By providing access to the broadest possible sources of funding, traditional public equity markets reduce the cost of capital substantially.¹⁹³ As the Committee on Capital Markets Regulation noted, “[t]he United States has for many years been recognized as having the largest, most liquid, and most competitive public equity capital markets in the world,” and “[f]or years, established American companies, the dominant users of these markets, have raised capital on better terms—rates up to one percent lower”¹⁹⁴ Public stock markets allow for the efficient pooling of savings on a scale that otherwise would not be possible, helping to ensure that economically viable projects do not fail for lack of capital, even if the amount of capital required is extremely large.¹⁹⁵ While private markets are becoming capable of providing capital at increasing scales, public markets remain capable of pooling savings across the widest possible investor base.

Public stock markets also facilitate the reduction and efficient allocation of risk.¹⁹⁶ Public markets render diversification across multiple firms virtually cost-free, allowing a near-perfect elimination of firm-specific risk that would be difficult and costly to achieve through private company investment. Public stock markets also make it easy and nearly costless to buy and sell stock at any time, virtually eliminating the liquidity risks that plague private company investors.¹⁹⁷ By reducing these risks, public markets enable the financing of high-risk opportunities,¹⁹⁸ provide capital for otherwise-illiquid investments with expected returns that are high but distant and uncertain,¹⁹⁹ and contribute to greater long-

Committee-on-Capital-Markets-Regulation.pdf [https://perma.cc/9XHS-M3HT] [hereinafter INTERIM REPORT] (noting that “when a country is close to the technological frontier and it is more uncertain what the ‘right’ investments are, the guide provided by the stock market becomes invaluable”); *id.* at 25 (noting that developed economies with larger stock markets—like the United States and the United Kingdom—“enjoyed a much better record of economic growth than other similarly developed European economies . . . with less developed stock markets”) (citing Carlin & Mayer, *supra* note 187).

192. Elisabeth de Fontenay, *The Deregulation of Private Capital and the Decline of the Public Company*, 68 HASTINGS L.J. 445, 450 (2017). De Fontenay gives the example of the private cloud storage company Dropbox, whose investors benefit from the disclosures of its similar public company competitor, Box, and also from the ability to value Dropbox by using the trading prices of Box as a benchmark. *See id.* De Fontenay concludes that “public companies’ mandatory disclosure and stock trading prices provide a major information subsidy to private companies.” *Id.* at 449.

193. *See id.* at 448 (noting that public companies are “permitted to solicit the largest (and therefore cheapest) source of capital: the general public”).

194. INTERIM REPORT, *supra* note 191, at ix.

195. *See generally* Levine, *supra* note 187, at 23 (noting that without developed financial markets, “many production processes would be constrained to economically inefficient scales”).

196. *See id.* at 18 (explaining that “[b]y facilitating trade, stock markets reduce . . . risk”).

197. *See de Fontenay, supra* note 192, at 471 (noting that despite improvements, “these fledgling secondary markets [for private company stocks] do not (and are unlikely to) offer anything like the liquidity afforded by the public markets”) (citing Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 557 (2012) (noting that “despite appearances to the contrary, these markets [for private company stock] are quite illiquid”).

198. *See Levine, supra* note 187, at 16 (“The ability to hold a diversified portfolio . . . reduces risk and promotes investment in growth-enhancing innovative activities.”) (citing Robert G. King & Ross Levine, *Financial Intermediation and Economic Development*, in FINANCIAL INTERMEDIATION IN THE CONSTRUCTION OF EUROPE 156 (Colin Mayer & Xavier Vives eds. 2010).

199. Levine, *supra* note 187, at 19 (noting that the liquidity associated with stock markets “will induce a

term economic growth.²⁰⁰

Public stock markets also enable even small savers to invest in large enterprises and share in the wealth generated by large-scale business. In theory, small investors could pool their resources and invest in private companies, but the transaction costs associated with doing so remain prohibitive below a certain dollar value. As a result, private company investment skews heavily towards high-net-worth individuals and institutions that manage the money of high-net-worth individuals. By contrast, anybody with even a few dollars can open an account with an online broker and invest in public equity.

These wide-ranging benefits are difficult to quantify,²⁰¹ but they are manifestly large. Barrels of ink have been spilled, documenting recent trends of successful start-up companies refraining from going public and existing public companies going private.²⁰² Still more barrels have been spilled investigating the reasons for these trends and articulating the potentially baleful results. As the Committee on Capital Markets Regulation concluded, “the impact of a decline in the efficiency of the [public] U.S. equity markets could severely impact growth[.]”²⁰³

Conversely, even the most prominent advocates of a market standard in merger law concede that the potential bargaining failures associated with a single-owner standard would not result in a large efficiency loss.²⁰⁴ As Bebchuk has pointed out, given the modest potential benefits of a market standard, a single-owner standard should be favored if it “enjoys, on some other dimension, a significant advantage over the market standard.”²⁰⁵ Preventing a distortion of the public-private decision—particularly a distortion in favor of remaining private—is a decisive advantage of the single-owner standard.

C. The Increasing Salience of the Public-Private Choice

Earlier defenders of the single-owner standard were clearly attuned to dynamic factors—in particular, the risk that a market standard would distort investment incentives for public firms.²⁰⁶ It is worth asking why, then, they did not reach further back into the life-cycle of a firm to highlight the risk that a market standard would induce firms to remain private in the first place. We suspect that the main reason is that, until recently, firms requiring substantial equity capital had no meaningful choice as to whether to go public. It is only in recent years that regulatory changes and developments in the financial industry have made it practicable for a significant portion of large firms to remain private.²⁰⁷ As

shift to longer-gestation, higher-return technologies”) (citing Valerie Bencivenga, Bruce Smith, Ross Starr, *Transactions Costs, Technological Choice, and Endogenous Growth*, 67 J. ECON. THEORY 53 (1995)).

200. See *id.* at 16 (“[F]inancial systems that ease risk diversification can accelerate technological change and economic growth.”); *Id.* at 18 (“[G]reater stock market liquidity induces faster steady-state growth.”).

201. See Koptyug et al., *supra* note 188, at 22–23 (noting the “lack of [a] coherent research literature on the real effects of an active stock market [as] research on the topic seems to have been spread out across multiple branches of economics and finance”).

202. See, e.g., de Fontenay, *supra* note 192, at 454–61 (describing the decline of public company listings and collecting sources).

203. INTERIM REPORT, *supra* note 191, at 25.

204. See, e.g., Schwartz, *supra* note 105.

205. Bebchuk, *supra* note 7, at 204.

206. See *supra* notes 155–60 and accompanying text.

207. See de Fontenay, *supra* note 192, at 449 (arguing that, until recently, “[b]ecause of the restrictions on private capital raising, for the most part issuers needing to raise significant equity capital had no choice but to go

Professor de Fontenay puts it, “‘going public’ is no longer the unavoidable stepping stone to raising large amounts of capital.”²⁰⁸

In the past decade, more and more successful start-up firms have chosen to remain private even as they have grown very large. The small number of very large private companies in the United States—Koch Industries, Cargill, and a handful of others—were clear outliers. Until recently, it was extremely rare for a start-up company to attain a valuation in excess of \$1 billion while remaining private. This rarity was reflected in the name bestowed on such firms in venture capital jargon, “unicorns,” coined at a time (2013) when only thirty-nine such firms existed in the world.²⁰⁹ There are now nearly 1,000 such companies (perhaps it is time to change the term to “deer”), including over 500 in the United States alone.²¹⁰ On the other side of the coin, more and more formerly public firms have gone private. The net result of these trends is that the number of publicly traded companies has fallen to approximately 4,000, a drop of around half from the peak of more than 8,000 in 1996.²¹¹ As a share of all firms, the decline has been even greater.²¹²

A number of potential explanations exist for these phenomena. One prominent strain of scholarship argues that the regulatory costs of being a public firm have increased in recent decades, imposing a burden that is too great for all but the largest firms to bear.²¹³ In particular, the Sarbanes-Oxley Act,²¹⁴ enacted in the wake of the accounting scandals of the early 2000s, and the Dodd-Frank Act,²¹⁵ passed in the wake of the financial crisis, are often fingered for much of the blame. Another strain of scholarship focuses on the other side of the equation: the increasing viability (and regulatory tolerance) of private equity finance.²¹⁶

public”).

208. *Id.* at 461.

209. Aileen Lee, *Welcome to the Unicorn Club: Learning from Billion-Dollar Startups*, TECHCRUNCH (Nov. 2, 2013, 1:00 PM), <https://techcrunch.com/2013/11/02/welcome-to-the-unicorn-club/> [<https://perma.cc/S7RV-7R2D>].

210. *The Complete List of Unicorn Companies*, CB INSIGHTS, <https://www.cbinsights.com/research-unicorn-companies> [<https://perma.cc/BV8X-9CHU>].

211. See Andrew Ross Sorkin, *C.E.O.s Meet in Secret over the Sorry State of Public Companies*, N.Y. TIMES (July 21, 2016), <https://www.nytimes.com/2016/07/21/business/dealbook/ceos-meet-in-secret-over-sorry-state-of-public-companies.html> [<https://perma.cc/8HQ9-X3BV>] (reporting the findings of the National Bureau of Research).

212. See de Fontenay, *supra* note 192, at 456–58 (discussing declining exchange listings in the United States).

213. See, e.g., *id.* at 463 (noting the “marked increase in federal securities regulation” since 2000); William J. Carney, *The Costs of Being Public After Sarbanes-Oxley: The Irony of “Going Private”*, 55 EMORY L.J. 141, 159–60 (2006); Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 16–17 (2002); Jeff Schwartz, *The Twilight of Equity Liquidity*, 34 CARDOZO L. REV. 531, 545 (2012) (concluding that the increased cost of securities regulation “likely shoulders a portion of the blame” for the decline in U.S. IPOs).

214. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, 29 U.S.C.).

215. Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), Pub. L. No. 111-203, §§ 401–16, 124 Stat. 1376 (2010).

216. See de Fontenay, *supra* note 192, at 466–70 (arguing that “public markets would be in relative decline today even if” the regulatory burden on public companies had remained constant, due to “[t]he liberalization of the rules for selling and trading private securities”). De Fontenay points to a number of regulatory developments that have facilitated the growth of private markets, including Reg D in 1982, Rule 144A in 1990, amendments to

Whatever the reason, the result of the increasing viability of remaining (or going) private for large firms means that we have a new reason the single-owner standard is superior to the alternatives. Whatever negative effects a market standard might have threatened, it was probably not practical in the past for the owners of a large firm to choose to remain private to avoid it. That is no longer the case. Now, embracing a standard that disadvantages the public company form would invite an acceleration of the flight from public markets.

V. CONCLUSION

In conclusion, it is worth briefly noting some troubling developments in the Delaware Supreme Court's recent appraisal decisions, which appear to call into question the Court's continuing commitment to the single-owner standard, and sketching the doctrinal implications of our argument in the wake of these decisions.²¹⁷

Beginning in 2017, the Delaware Supreme Court issued a series of major decisions involving appraisal rights—*DFC Global*, *Dell*, *Aruba*, and *Jarden*—that indicate a deep shift in appraisal doctrine and, more broadly, in the fundamental commitment of Delaware law to the single-owner standard.²¹⁸ In light of the discussion of dynamic effects discussed here, the proper function of the appraisal remedy is as a judicial backstop for the entitlement of the stockholders to share in the gains from a merger in the same fashion that a single owner would. Only through this approach to fair value can public company stockholders be kept on a level footing with private company holders to avoid distorting the public-private decision.

As a result, courts in appraisal should seek to protect the entitlement of dissenting stockholders to share in the gains from a merger to approximately the same extent a single owner would. The appraisal statute's instruction that the dissenter must receive "the fair value of the shares *exclusive of any element of value arising from the accomplishment or expectation of the merger or consolidation*"²¹⁹ should be interpreted as requiring exclusion only of gains exclusively attributable to the buyer, for such gains would not typically be captured by a single owner. This interpretation would also serve to preserve the incentive of the highest value owner of the target firm's assets to undertake a merger in the first place.

The recent appraisal cases, however, evince a growing confusion in the Delaware courts as to the function of the appraisal remedy. In each case, stockholders had dissented

Sec. 3(c)(7) of the Investment Company Act in 1996, and the JOBS Act in 2012. Revision of Certain Exemptions from Registration for Transactions Involving Limited Offers and Sales, 47 Fed. Reg. 11,251 (Mar. 8, 1982) (codified at 17 C.F.R. §§ 230, 239); 15 U.S.C. § 80a-3(c)(7) (2016); 17 C.F.R. § 230.144A (2020); Jumpstart Our Business Startups Act, Pub. L. No. 112-106, (126 Stat. 306) (2012).

217. We address these issues more fully elsewhere. See Charles Korsmo & Minor Myers, *What do Stockholders Own? The Rise of the Trading Price Paradigm in Corporate Law*, 47 J. CORP. L. 390 (2022) (detailing Delaware's recent departures from the single-owner standard). As a result, we provide only a brief outline here.

218. See generally *DFC Glob. Corp. v. Muirfield Value Partners, L.P.*, 172 A.3d 346 (Del. 2017); *Dell, Inc. v. Magnetar Glob. Event Driven Master Fund Ltd.*, 177 A.3d 1 (Del. 2017); *Verition Partners Master Fund Ltd. v. Aruba Networks, Inc.*, 210 A.3d 128 (Del. 2019); *Fir Tree Value Master Fund, LP v. Jarden Corp.*, No. 454, 2020 WL 3885166 (Del. 2020).

219. DEL. GEN. CORP. L. tit. 8, § 262(h) (emphasis added).

from a public company merger, seeking an amount above what the target board had negotiated. In all four of its most recent cases, however, the Delaware Supreme Court used the market price as a benchmark in a way that is difficult to square with the traditional single-owner standard. In *Dell*, for example, the Court suggested that it was hard to imagine a difference “between Dell’s stock price and the Company’s intrinsic value,” as that would be “contrary to the efficient market hypothesis.”²²⁰ Similarly, in *Aruba*, the Supreme Court noted that a stock’s trading price was “an important indicator of [the target firm’s] economic value that should be given weight.”²²¹ Most explicitly, in *Jarden*, the Supreme Court rejected the dissenting stockholders’ argument on appeal that the lower court, in concluding that stockholders were entitled only to the unaffected trading price,²²² had “ignored . . . a ‘long-recognized principle of Delaware law’ that a corporation’s stock price does not equal its fair value.”²²³ In affirming the trial decision, the Supreme Court stated that “[t]here is no ‘long-recognized principle’ that a corporation’s unaffected stock price cannot equate to fair value.”²²⁴

Even if this new willingness to equate the stockholders’ entitlement to the market price is restricted to appraisal, it would mark a material weakening in the position of public company stockholders vis-à-vis single owners. The serious risk, however, is that the Delaware Supreme Court’s recent appraisal cases herald—as intellectual consistency would seem to demand—a broader shift away from the single-owner standard throughout merger law.²²⁵ The result could dramatically hasten the flight from public markets.

220. *Dell*, 177 A.3d at 23–24.

221. *Aruba*, 210 A.3d at 138.

222. *In re Appraisal of Jarden Corp.*, No. 12456, 2019 WL 3244085, at *1, *31 (Del. Ch. 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.”).

223. *Jarden*, 2020 WL 3885166, at *2.

224. *Id.* at *3.

225. See Korsmo & Myers, *supra* note 217.