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ARTICLES

THE APPRAISAL REMEDY AND THE GOALS OF CORPORATE LAW

Hideki Kanda*
and Saul Levmore**

INTRODUCTION

The appraisal remedy in corporate law confers upon shareholders a statutory right to dissent from specified fundamental or structural changes in the life of their corporation. The remedy requires the corporation to facilitate the shareholders’ withdrawal by buying back their shares for fair value, or its equivalent, as determined through appraisal proceedings. When state law makes the remedy available, a shareholder is able to translate dissent into action by filing a timely objection and demand for payment and, if no settlement with the corporation can be reached, beginning appraisal proceedings in court. On the other hand, when the appraisal remedy is not available a dissatisfied shareholder may suffer in silence, sell shares at a price that may reflect buyers’ similar disenchantment with the plans of the corporation, or try to convince a court that the corporation’s agents have violated a duty in a way that should yield monetary damages or prospective relief. The greater part of this Article deals with the baffling question of when the appraisal remedy is available. We argue that the details of availability, differing as they do from state to state, both are suggested by and derived from the goal or goals of appraisal statutes. Related questions—such as how much payment an appraisal should yield a dissenting

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2. See infra notes 53–105 and accompanying text.
3. See infra notes 22–34 and accompanying text.

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shareholder and whether its availability should affect the availability of other legal remedies—will be addressed in light of the appraisal remedy’s purposes. Unfortunately, it is not easy to draw conclusions from the ways in which the various state statutes make appraisal available to shareholders. There are almost as many varieties of appraisal statutes as jurisdictions. Declarations of the goals or rationales of these statutes abound. While our aim in this Article is to bring some order out of the chaos and then to suggest a more sensible order, it is worthwhile to sketch first a brief history of the commentary on appraisal.

The traditional view describes the appraisal remedy’s emergence as a protection developed for minority shareholders when the law no longer required shareholders to consent unanimously to changes in the contract of the corporate enterprise. But the chronology and causality between these two developments are not entirely clear. Some commentators imply that legislatures simultaneously abolished unanimity and substituted appraisal either as a remedy for the dissenting shareholder who could no longer veto the majority’s will or, possibly, as a tool for the majority to dissuade courts from granting dissenters’ requests for injunctions against majority-willed changes. Some report a lag before this substitution was regarded as necessary. Opinions differ over whether appraisal statutes codified a judicial experiment or sprang from the legislative chambers.


6. See Manning, supra note 5, at 229 (noting way in which appraisal freed majority from risk of injunction and wondering whether appraisal statutes consciously promoted this end); see also Lauman v. Lebanon Valley R.R., 30 Pa. 42, 49 (1858) (court creates appraisal remedy as alternative to dissenter’s claim for injunction).

7. See Voeller v. Neilston Co., 311 U.S. 531, 535 n.6 (1941) (“Unanimous shareholder consent was a prerequisite to fundamental changes . . . . To meet the situation, legislatures authorized . . . changes by majority vote. This, however, opened the door to victimization of the minority. To solve the dilemma, statutes permitting a dissenting minority to recover the appraised value of its shares, were widely adopted.”).

8. Compare Manning, supra note 5, at 246 n.38 (noting that Pennsylvania legislature took hint of appraisal from judicial creation) with M. EISENBERG, THE STRUCTURE OF THE CORPORATION 75 (1976) (noting that Ohio’s appraisal statute predates judicial creativity in Pennsylvania). We are unable to find any Ohio cases that would have directly encouraged the Ohio legislature to enact primitive appraisal statutes in the early 1850’s.
Moreover, this imbroglio includes a debate about the reason for this protection—if it has been that—of minority shareholders. Most observers have viewed the appraisal statutes as addressing a kind of *ex post* fairness; the minority should be able to jump ship when the master sends it in a new direction.\(^9\) Over time the *ex post* fairness view came under strong attack, especially by (then Professor) Manning. The attack was three-pronged: Appraisal is expensive for the very shareholders it is alleged to protect, it puts undue restraints on those corporations that may need to liquidate assets in order to buy back the appraised shares, and no one was able to distinguish rationally those events that trigger a right to appraisal from those that do not.\(^10\) In short, the attack maintained that appraisal delivered little fairness at odd moments and at high cost. This attack may have been insufficiently sympathetic with dissenters to see that uncertainty and costs for corporations might translate into management's increased sharing of profitable opportunities with passive investors.\(^11\) The attack was serious enough, however, to force a notable commentator to agree with Manning that appraisal is essentially an anachronistic remnant of the previous century's concern for property rights, but to maintain that, whatever its origins, appraisal may be worthwhile as the only "remedy of desperation" available to minority shareholders.\(^12\) Other commentators have preferred to rebuild from first principles and to ask why appraisal has survived in an evolving world and under what circumstances parties would bargain for it.\(^13\)

Since this Article seeks in part to join in the latter inquiry, it is useful to summarize the nature and degree of appraisal's survival. Appraisal remains firmly embedded in American corporate law, and is a remedy available in every American jurisdiction\(^14\) in at least some settings. It is a remedy that apparently is meant to protect these shareholders in the face of contrary developments such as

\(^9\) See M. Eisenberg, *supra* note 8, at 75, 78. Most commentators view the source of appraisal as fairness and not constitutional necessity; it is a right that admirably protects "the minority against being involuntarily dragged along . . . ." *Id.* at 78; see also Levy, *supra* note 5, at 421.


\(^11\) It is possible that appraisal was contemplated as a threat rather than as a recurring reality. Such a threat might be appropriate if managers are viewed as possessing both a good deal of inside information about the firm's opportunities and a means of stripping passive shareholders of their share of these opportunities.

\(^12\) M. Eisenberg, *supra* note 8, at 83.


\(^14\) See MODEL BUSINESS CORP. ACT ANN. § 80, ¶ 6 (Supp. 1977) (citing statutes of 50 states and District of Columbia).
legislative acceptance of cash-out mergers which force minority shareholders out of enterprises. The evolution of appraisal statutes has included retreats—perhaps in response to the famous attacks—in the form of "market exceptions" that withdraw the appraisal option when dissenters can use the stock market to transform their shares into cash. That evolution, however, also has included the expansion of appraisal remedies. Having emerged in the context of consolidations, appraisal now often extends beyond mergers for stock or cash alone to asset sales, charter amendments, and even asset and stock purchases. One who tries to explain the modern statutes and their exceptions might struggle not only with the statutes' general characteristics but also with the very different procedures that states have developed for valuing stock and with the relationship between appraisal and fiduciary suits or other forms of relief. As we shall see, conventional views of the goal of appraisal inadequately explain the variety of appraisal statutes in effect. In short, the continued spasmodic presence of appraisal in state statutes appears more chaotic than ever. While commentators bemoan the burdens that appraisal imposes, and imply that appraisal does not do all that it might to protect minority shareholders, virtually no one offers suggestions to make it a more effective tool.

In Part I of this Article we describe some views of the appraisal remedy's potential goals. We introduce three of these goals—including the conventional one (if the muddled history can be reduced to a single view) attacked by Manning and taught to generations of law students—and then put them aside since they fail to illuminate current statutes. We then introduce three other goals which we find


17. See M. EISENBERG, supra note 8, at 75–76 (limited emergence of appraisal may be explained by rarity of some fundamental changes in corporate structures and other historical realities).

18. The discussion below leads to clear conclusions regarding the implications of various goals or explanations of appraisal for valuation procedures. For a discussion of prevailing approaches to this valuation question, see W. CARY & M. EISENBERG, supra note 1; Fischel, supra note 13. The relationship between appraisal and other remedies is taken up infra notes 129–30 and accompanying text.

19. See infra text accompanying note 24. And an even more modern and sensible view of appraisal fails to explain the actual statutes. See infra text accompanying notes 25–29.

20. See Manning, supra note 5, at 230–31; Fischel, supra note 13, at 881–82.
THE APPRAISAL REMEDY

prescriptively and descriptively useful. We label them: inframarginality, reckoning, and discovery. In Part II we apply these goals to representative appraisal statutes. No fit is perfect, but many of the statutes appear remarkably more sensible and memorable when viewed as means of achieving one of the suggested goals.

We shift to a more normative presentation in Part III when we propose a new style of appraisal statute. We think this proposal is of both substantive and methodological interest. Substantively, it is designed to accomplish the "discovery goal," explained in Part I as essentially a goal allowing shareholders to use the appraisal remedy to uncover possible managerial misbehavior. In our view, shareholders must be concerned about a variety of inside information that we call "secrets"—corporate opportunities, discoveries, or disappointments of which passive shareholders and public markets are unaware—and must be concerned about agents whose conflicts of interest lead them to undersell these secrets. Our "discovery statute" aims, therefore, to warn shareholders about such conflicts or even discourage corporate transactions in which shareholders will be so vulnerable. At a methodological level we suggest that appraisal may have been underestimated or misunderstood because drafters and courts sitting in review never have linked appraisal to any particular goal of corporate law. Although we hardly insist on single-mindedness or neatness in statutory drafting or construction, we think that many observers whose instincts are to support the availability of appraisal will find it helpful to think of appraisal as aimed at a specific goal. Thus, even if our discovery goal is not shared, we think our methodology may be attractive.

I. THE CREDIBLE GOALS OF APPRAISAL

In this part we introduce some goals that might sensibly motivate and guide the construction of the appraisal remedy. Part II will use these goals to explain the many state appraisal statutes in effect. Before describing the three credible goals on which we focus in this inquiry, we sketch for comparison other views of the purpose of the appraisal remedy that we do not pursue in this Article. This history and the analysis which follows is concerned with the limited puzzle of existing appraisal statutes. We accept appraisal as a feature of corporate law and do not hazard any guesses as to whether the world would be better off without it. Similarly, we take certain features of corporate law as given, and we do not address the

21. In particular, although we discuss the free rider problem that appears to be at the core of any attempt to encourage constructive dissent to corporate decision-making, e.g., infra note 46, it is quite clear that the following analysis, like corporate law itself, slides over a variety of free rider problems. There appears to be a fair supply of dissenters to many majoritarian (corporate and noncorporate) maneuvers even though one
question of why the appraisal statutes evolved so differently in different jurisdictions.

A. The Purpose of the Appraisal Remedy—Background Views

1. Conventional View

The conventional view is built on the idea that appraisal statutes have sought to protect minority shareholders. Under this view minority shareholders gain the right to appraisal at the time of fundamental changes in their enterprise as a substitute for their former right to veto such changes. Thus, appraisal retains the flavor of minority veto power, since the minority shareholder can at least veto his own continuing involvement in a “fundamentally different” corporation.22

This view hardly needs another dismembering. It has been correctly attacked as greatly overestimating the protection offered minority shareholders who elect appraisal23 and, more significantly, as lacking explanatory power.24 For example, the conventional view does not explain why many appraisal statutes contain a broad market exception, allowing dissenting shareholders simply to sell their shares in an active stock market and reinvest in what might be close substitutes, while other statutes create an exception to the market exception and make appraisal available when shareholders receive cash in return for their widely traded stock. It is hard to see why—and the conventional view does not tell us why—shareholders who receive cash are worse off and more in need of appraisal than shareholders who receive stock of an acquiring or other corporation. More generally, the conventional view does not explain why the various appraisal statutes so differ in detail and why such different corporate changes trigger the availability of appraisal.

2. (Ex Ante) Group Coordination

In a recent article, Professor Fischel advanced a view of the appraisal remedy that we find attractive but of limited descriptive utility.25 Fischel describes appraisal as an arrangement that share-
holders find appealing *ex ante* because they realize that an acquiring bidder can one day try to profit from their lack of coordination.

Consider the familiar prisoner's dilemma problem where shares of the target are selling at $50. A bidder then announces a tender offer pursuant to which it will pay $60 for 51% of the shares and simultaneously announces that the remaining shares will be obtained in a freeze-out merger for $30. If one shareholder could negotiate for all the shareholders, this offer would be rejected because the pretransaction market value of the target ($50) exceeds the weighted average of the bid (approximately $45). Each shareholder acting individually, however, may rationally conclude to tender at $60 to avoid receiving only $30 for all their shares. Thus the offer might succeed (assuming no competition from other bidders) even though shareholders as a class are made worse off.

The appraisal remedy represents a solution to this prisoner's dilemma problem. If the shareholders in the second step of the transaction are likely to receive in excess of $40 in an appraisal proceeding, a bidder who is only willing to pay $45 for all the shares will not go forward. Thus the remedy protects all shareholders from this value-reducing transaction and by decreasing the probability of this negative outcome causes all shares to trade at a higher price.26

Unfortunately, this sensible "group coordination" view of appraisal also lacks explanatory power. It does not begin to explain, among other things, why Delaware's statute,27 which Fischel uses illustratively, denies appraisal when the target's shareholders give up widely traded stock and receive not cash or debt, but the acquirer's stock or any widely traded stock. Nor does the group coordination view, or the conventional view for that matter, explain the availability of appraisal in many states, including Delaware, for shareholders of an acquiring corporation that uses a significant amount of its stock to acquire another corporation, unless the acquiring corporation's stock is widely traded.28 Indeed, the group coordination view does not, on its own, explain any appraisal statute, although it provides a sensible and sophisticated theoretical insight that may be especially useful when coordinated with other appraisal goals.29

3. Coattails

Shareholders might reason *ex ante* that in the event of an acquisition, or other organic change affecting their corporation, their

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26. *Id.* at 878–79.
28. *Id.* §§ 251(c), 253, 262(b).
29. Each of the three views or goals introduced below and emphasized in this Article is easily married to the group coordination idea.
investment's security lies in continuing with the new successor enterprise. In particular, shareholders may reason that managers and acquirers know of a corporate secret or other indication of future success and, therefore, that their firm is currently underpriced in the market. The shareholders' aim then becomes to continue in the enterprise and not be frozen out. Shareholders thus wish to ride their representatives' or acquirers' "coattails" to success. One might therefore sympathetically hope that corporate law would give to a shareholder, who owned one percent of a corporation valued at $100x, one-half percent of the stock of an acquirer that was worth $100x and now will be of size $200x, rather than giving the shareholder cash only. Of course if the acquiring corporation's stock is widely traded, then shareholders who receive cash can simply purchase some of the acquirer's stock, thereby finding alternate access to the coattails.

Since this view has enjoyed some support among commentators and, in our experience, enjoys great support among novices, it is perhaps quite plausible that shareholders and legislators would have this goal in mind when fashioning an appraisal remedy. Presumably, appraisal's expense and potential to drain liquid assets would encourage managers not to abandon shareholders but, instead, to make plans that carried old shareholders on their coattails to success.

The coattails view does have some explanatory power with regard to appraisal statutes. It might, for example, explain the general lack of availability of appraisal for shareholders of a corporation that is acquiring another corporation's assets. It might also explain why some statutes deny appraisal to shareholders when charter amendments fundamentally change their corporations. Nevertheless, we do not take the coattails goal very seriously in this Article because in our view it does not necessarily advance shareholder interests or any convincing fairness or efficiency goal. The shareholder who is not shaken off but continues in the enterprise

30. The market is unlikely to take all nonpublic information into account. In the extreme case, if a controlling manager knows of the rich discovery of a future profitable contract and does not immediately trade on the basis of this knowledge, the market surely will underprice the firm's stock. See generally Gilson & Kraakman, The Mechanisms of Market Efficiency, 70 Va. L. Rev. 549 (1984).

31. We believe that this viewpoint has an efficiency as well as a fairness aspect. The former can be related to a concern regarding wasteful transactions and managerial activity while the latter should be associated with Brudney and Chirelstein, Fair Shares in Corporate Mergers and Takeovers, 88 Harv. L. Rev. 297 (1974). This is hardly the place to comment on the literature generated by Professors Brudney and Chirelstein; it should suffice to say that although not all sharing questions have only one correct answer, good arguments can be mounted against sharing patterns that are enormously favorable to insiders or other controllers.

32. Id. at 323.
may simply be given too little in the way of ownership of the surviving corporation. Indeed, there is no reason to think that one who gets cash for stock is on balance any worse off than one who receives an acquirer’s stock in exchange for target stock. Imagine, for example, that the original target corporation is valued in the marketplace at $100x. The target may have a terrific business opportunity that its managers have kept secret for no good business reason. They now hope to share the value of this opportunity with an acquirer, also worth $100x—at the expense of the old target shareholders. The new corporation may be worth not $200x but $300x, for example, and a true arm’s-length bargain might have yielded $200x for the assets and secrets of the target; allowing the old shareholders to stay on gives them $1.50 for every $2 in value that is really theirs (since they owned pieces of a $200x corporation and are now given half the stock of a $300x corporation). The ride on the coattails may thus sometimes be better than a cash-out that would, for example, give less than $1.50 for what was said to be $1 in value but what was really $2 in value.33 This is hardly the sort of arrangement, however, that shareholders and legislators should agree upon ex ante since it generates unnecessary and inefficient secret keeping, unnecessary and costly mergers, and ultimately, high costs in pooling equity.

The point is thus really a simple one. Allowing shareholders to continue on in the corporate enterprise gives them a share of the upside return but this share may still be less than the share or cash that they would have received in an arm’s-length bargain. Nevertheless, since this ride on the coattails seems attractive, conceivably it motivates appraisal statutes’ granting appraisal whenever shareholders are threatened with abandonment.34

B. The Purpose of the Appraisal Remedy—Credible Goals

The goals advanced in this section share the ex ante perspective of the group coordination and coattails views just described. These goals, however, explain more than the group coordination view and are more analytically sound than the coattails notion.

1. Inframarginality

Shareholders, or legislators acting on their behalf, may realize...
ex ante that they will not all "appreciate" their shares identically, that the marginal, or market, price therefore underestimates their average valuation of these shares, and that appraisal may serve to protect these inframarginal valuations. To be sure, shares of one company may be perfect substitutes for shares of another; in that case all shareholders would value their shares equally, object less or not at all to acquisition terms that gave each something equal to or more than the marginal market price, and sometimes enjoy being "frozen out" at some premium above market price. But it is plausible that some state statutes, or some shareholders, view shareholders' "demand" for a given enterprise's stock as not identical, while others assume that to the contrary this demand is in economic terms quite elastic, because shareholders do identically "appreciate" their shares. The former presumably would grant appraisal more than the latter. Note, furthermore, that as a matter of economic efficiency an acquirer paying a premium above market price for all the shares of a target may not necessarily put the target's resources to better use. The acquirer reveals a higher valuation of the company only when it offers a price per share that is greater than the average, rather than marginal, valuation of target shareholders. In short, market prices are marginally determined and do not necessarily reflect real inframarginal valuations.35

Consider, for illustrative purposes, shares that sell on the market for $10 but that shareholders on average value at $15. Some of these investors have, of course, purchased additional shares at the "bargain" marginal price, but eventually valued the last shares purchased at $10 or so, perhaps because each additional purchase decreased portfolio diversification. Even ex ante these shareholders might have agreed upon an appraisal remedy through which, in the event of a fundamental change such as a take-over, they could turn in their shares and receive more than $10 for each one. Such a remedy would compensate for inframarginal property values and

35. A firm's marginal, or market, price in the hands of Manager A may be $10 with 10 shares outstanding, but because of inframarginality, or inelasticity, its total value may be $140. Manager B may pay $120 for the firm by paying $12 per share, and yet B may be able to produce earnings that reflect only a price of $125 while A was able to produce the greater value of $140. The inframarginality of investors' demand for shares (or the owners' corresponding willingness to sell or supply shares) and the potential for inefficient transactions are illustrated in both Carney, supra note 4, at 112-17, and Levmore, Self-Assessed Valuation Systems for Tort and Other Law, 68 VA. L. REV. 771, 781 n.35, 849-52 (1982). Many sophisticated people cannot imagine that investors believe they can outguess the market and, therefore, insist on inframarginal value. It is therefore probably worthwhile to note that many small investors do not buy market funds, do spend substantial resources on market advice, and generally give no indication that they consider most shares substitutes for shares of other enterprises. Legislators are elected by these citizens and no doubt often are themselves just such investors. As the citation above shows, we do not mean to suggest that no sophisticated person would pursue the inframarginality goal.
discourage take-overs at a price less than the sum of the values all the individual shareholders put on their holdings. If a pure market exception is in effect or if an appraisal statute should demand that recent market prices—perhaps before news of a fundamental change clouded the market—determine the appraised value of shares, then the inframarginality goal is not served. Note also that if appraisal is meant somehow to account for inframarginal values, then appraisers are faced with a terribly difficult valuation problem, because no objective evidence exists regarding an individual's subjective valuation. Presumably, shareholders, legislators, and judges simply could understand that an incantation which yielded an appraised value somewhat greater than the marginal market value would do the job.36 Thus, although there is much to be said for inframarginality concerns as an appraisal statute goal, it is admittedly a goal that could be contracted for or legislated in only an inexact way.

Although the discussion in Part II sorts out various statutes in detail, it may be helpful to see the inframarginality goal applied. Consider again the market exception in Delaware’s statute.37 The shareholder of an acquired corporation generally is entitled to appraisal when the acquisition calls for him to give up his stock and receive stock, cash, or other consideration. But if the shareholder gives up widely traded stock and receives the acquirer's stock or any widely traded stock, then appraisal is not available. The link between marketability—that is, how widely traded shares are—and inframarginality now provides the necessary analytic tool. The more that a good has close substitutes in the market and the more that a buyer can acquire and exchange these substitutes, the less likely it is that an owner values such a good more than the (marginal) market. This is not to say that an owner of Exxon shares could not value his shares at a price higher than the prevailing market price; but it is more likely that a shareholder of a small, untraded enterprise values his shares differently from other investors in this

36. We hardly mean to contend that the notorious randomness that in practice has been the nature of both the Delaware block method, see, e.g., Application of Del. Racing Assn., 213 A.2d 203 (Del. 1965) (illustrating application of Delaware block method), and of other systems of “balancing” asset, market, and earnings figures, see W. CARY & M. EISENBERG, supra note 1, at 129–36, directly reflects a passion for inframarginality. The point is that courts do seem to work hard to arrive at valuations that exceed market prices, see cases collected in Schaefer, The Fallacy of Weighting Asset Value and Earnings Value in the Appraisal of Corporate Stock, 55 S. CAL. L. REV. 1031 (1982), and that a belief or understanding that things no longer for sale are worth more than their last price tags indicate may motivate these high appraisals. Indeed, although the Delaware Supreme Court disowned the use of the block method in Weinberger v. UOP, Inc., 457 A.2d 701, 712–13, (Del. 1983), it did so in favor of allowing more rather than less evidence as to values exceeding market prices.

37. DEL. CODE ANN. tit. 8, § 262(b) (1983).
little-known company. Indeed, it is quite unlikely that any two investors study an untraded enterprise enough to value it alike. Thus, shareholders or legislators, *ex ante*\(^\text{38}\), might well agree on appraisal—in pursuit of the inframarginality goal—when shareholders must give up thinly traded shares,\(^\text{39}\) since the shareholders probably lose inframarginal value in such a transaction. Moreover, even when shareholders give up widely traded shares for cash, they may lose some inframarginal value because marketability only increases the likelihood of, rather than guarantees, perfect elasticity. However, when shareholders give up widely traded shares and receive other widely traded shares or thinly traded shares of the acquirer, it may well be that no net loss of inframarginal value occurs; this is because that which is received is also not valued identically by all recipients so that inframarginal value may take the place of lost inframarginal value. Indeed, if shareholders’ demand for the stock received is more inelastic than for the stock given up, inframarginal value may be increased. To be sure, the Delaware statute does not appear to be of the inframarginality sort when it serves to reassert the availability of appraisal in circumstances in which target shareholders must give up widely traded shares in return for thinly traded shares of a corporation other than the acquirer.\(^\text{40}\) In these circumstances, there would seem to be an increase, as it were, in inframarginal value, and yet appraisal is available. Fortunately for the purposes of this illustration, such circumstances may be rare enough for the statute to have ignored them. It is hard to imagine a widely traded and, therefore, relatively large company being acquired in return for a large amount of consideration in the form of a remote thinly traded company’s stock. In any event, the inframarginality goal, described more fully in Part II as explaining the Delaware appraisal statute, consists of the notion that appraisal may serve to protect the “consumer surplus” or above-market valuation of investors.

Note that the inframarginality goal is quite different from the coattails theme described above. Most importantly they generate dissimilar prescriptive implications. The coattails problem is one of coming up with the proper exchange rate so that shareholders who give up their stock receive a fair amount of stock in the surviving

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\(^{38}\) The text adopts an *ex ante*, hypothetical bargaining view of legal rules. Like the group coordination approach, discussed *supra* text accompanying note 26, it thus considers some legal rules as off-the-rack rules that generate transaction cost savings. In this particular example, the “bargain” may be created by the entrepreneurs who begin a corporation (or by the legislators who formulate a state corporation statute that is then taken off the rack by the founder).

\(^{39}\) By “thinly traded” we mean stock that is not widely traded under statutory definition. Thus, stock for which there is no market at all is thinly traded.

enterprise. A ride on the coattails of insufficient magnitude will not do, but the correct exchange rate can be reached. If, for example, the target’s managers bargain selflessly and vigorously, they may arrive at a deal that gives their shareholders a fair amount of the acquirer’s stock. On the other hand, inframarginality is much more person-specific and therefore difficult to evaluate, even with the best of managerial intentions. Managers (or the law) may know that all investments are not perfect substitutes and that their firm’s outstanding shares contain inframarginal value, but there is little that they can do to determine the magnitude of such value. Managers can hardly poll the shareholders since shareholders want managers to bargain as effectively as possible regardless of their shares’ value and since some shareholders may act strategically by holding out beyond their share’s real valuation. In the absence of a measurement of inframarginal values, we can only agree ex ante on rules of thumb for the protection of such value against deals that undersell shares at market prices. These rules of thumb may then form the contents of appraisal statutes.

2. Reckoning

Shareholders must monitor their corporations in order to evaluate their agents, or managers. Such monitoring may lead to displacement of personnel, either directly or through a take-over, or to some shareholders’ selling out to new investors and committing the proceeds elsewhere. For a variety of reasons, then, shareholders, managers who will hope for promotions or lateral employment possibilities, and legislators can be expected to arrange ways in which management’s performance can be evaluated regularly. Generally speaking, this evaluation involves measuring the income that management produces from the capital put at its disposal. But this monitoring or measuring of performance—usually formalized at calendar intervals—can be confused in fundamental ways when the corporation undergoes major changes. Some managers may be good at a particular kind of business, in an organization of limited size, or when associated with other managers; but an acquisition or other fundamental change may so change the entity as to obfuscate the managers’ various performances. The entity that emerges after the change may be different enough from that managed before the change that much information about managers will be lost if the two experiences are evaluated as one. Appraisal at the time of the change thus may serve as a point of “reckoning”; prior performance is reckoned and future performance can be judged from the bench.

41. For a discussion of a system design that overcomes such strategic behavior, see Levmore, supra note 35, at 851–57 (self-assessment system for shares in freeze-out generates substantial transaction costs).
mark determined at appraisal. Similarly, an important change in a corporation’s structure itself may be credited or blamed for changes in profitability so that managerial performance before and after such a change might best be judged separately.42 In short, since appraisal of some shares requires appraisal of the enterprise’s value as a whole, it may be sensible for monitoring purposes to allow for or even to encourage appraisal, or reckoning, at important junctures.

For illustration we again look to a link between a credible goal of appraisal—here, reckoning—and the details of a statute’s market exception. Michigan’s statute, like others, provides for appraisal of a target corporation shareholder’s stock when the target is acquired for cash or another corporation’s stock.43 Clearly, such an acquisition is an important event in the life of the target’s managers and provides an appropriate opportunity to reckon their performances. The Michigan statute then proceedings to deny appraisal when the target shareholders give up widely traded stock, or give up thinly traded stock and receive cash or widely traded stock.44 Note that this statute does not pursue inframarginality since it does not require appraisal when the shareholders give up thinly traded stock and thus probably lose inframarginal value. Now consider the monitor seeking to measure managerial performance. It is possible that the Michigan statute attempts to offer appraisal when reckoning is particularly difficult, namely when two entities must be evaluated at one time. If widely traded shares or cash are received, then the target’s performance before and after the acquisition can be judged rather easily because the magnitude of the consideration is apparent.45 And if thinly traded shares are received but the target was itself widely traded so that widely traded shares are given up, then the target’s future performance can be separately measured simply by following the stock market. Thus, if one believes that marginal stock market prices are reliable indicators of a corporation’s value—that is, if one does not believe that inframarginal val-

42. To be sure, managers will hope to take credit for improvements, but the point in the text is that their supervisors, future employers, or investors may have good reason to believe that the change in corporate structure itself deserves the credit. Thus, the comment in the text does not offer appraisal as a solution to a familiar measurement problem but rather argues that appraisal can generate what might be an important tool.


44. Id. §§ 450.1761(a), 450.1762(1). This type of market exception was introduced in 1972 over the reporter’s objection. See Michigan Law Revision Commission, FIFTH ANNUAL REPORT SUPPLEMENT: BUSINESS CORPORATION ACT 219–20 (1970). New Jersey followed Michigan’s lead in 1973. See infra note 81.

45. The consideration received may reflect a mere guess about how these managers will perform in the future—while the reckoning enterprise looks for a benchmark to close up the past—but presumably this is the best we can do: Future benchmarks also will contain some sense of yet more futuristic expectations, but at least these benchmarks can be compared to one another.
ues are different from marginal values for widely traded corporations—but one fears that fundamental corporate changes will confuse monitoring, then a Michigan-type appraisal statute is fitting. Such a statute could be labelled a reckoning-plus-noninframarginality statute to reflect that it elegantly achieves the reckoning goal only if marginal, or market, prices of widely traded stocks are indicative of a corporation's value. A statute that sought to achieve both the reckoning and inframarginality goals presumably would grant appraisal at the time of an acquisition and contain no market exception or, if an active market is thought to provide sufficient information for reckoning purposes, then such a statute could offer a Delaware-style market exception.46

3. Discovery

It would be reasonable to fashion an appraisal statute that helps shareholders uncover and prevent truly wrongful behavior by the managers they employ. Shareholders must worry that their agents will usurp the best business opportunities that come along, postpone profitable investments until a greater portion of the upside return is secured away from passive shareholders, and otherwise breach their fiduciary duties and contractual responsibilities. In particular, mergers and other fundamental changes magnify the opportunities for managerial misbehavior. Managers at these times should bargain for bigger stakes on behalf of all shareholders, but they may be tempted to bargain less effectively when those across the bargaining table promise large salaries, side payments, or other inducements. Indeed, shareholders may fear most that the acquisition or change at issue is itself the product of managerial intrigue; managers may have kept secret an important corporate opportunity so that the market price is now unrealistically low, thus attracting a curious or partly informed potential acquirer who is now interested and ready to pay a "finder's fee" to the target's managers. In short, shareholders, and the economy itself, can be terribly shortchanged if major transactions are not negotiated at arm's length.

To be sure, fiduciary suits can compensate wronged sharehold-

46. See, e.g., Va. Code §§ 13.1-75(a), (i)(2), 13.1-78(a) (1985); see also infra note 65.

It is only fair to note that a serious reckoning statute might mandate appraisal at corporate expense, rather than simply offer it in the manner just described. Such a statute would overcome the free rider problem among shareholders who might hope that others will subsidize the reckoning enterprise—however inexpensive it is. See infra text accompanying note 88. Note that unfortunately—from the perspective of the reckoning goal—a shareholder cannot normally dissent with a few of his shares (to promote reckoning) while using his other shares in a different manner. This seeming blow to the reckoning idea's explanatory power might be explained as necessary to prevent speculative dissenters who, in the quest for occasional windfalls, will add unnecessarily to the costs of transactions.
ers and deter managerial or majority shareholder misbehavior. But such litigation can be expensive, with procedural and substantive hurdles to overcome. Potential plaintiffs do not necessarily know what they are looking for or where to look; they know only that there is potential for misbehavior. Nor will optimal private enforcement be easily generated by the grant of generous recoveries and attorneys fees to the successful whistle-blower. The appraisal remedy may, however, serve as a useful “discovery” tool for uncovering suspiciously non-arm’s-length bargains or side payments to the target’s managers, guiding future fiduciary suits, and, generally, deterring misbehavior. Appraisal can serve this discovery goal effectively because it is relatively quick (especially because there is no need to prove the presence of a wrongdoer), because it generally calls for a sharing of costs between the parties, and because it can bring out information about corporate assets and plans that is useful to anyone considering a fiduciary suit. Of course, a good deal hinges on the sort of information deemed relevant to appraisal; the more the appraiser calls for information about research developments, apparently idle assets, and elements of compensation, the more clues about strategic secrets and other misbehavior are likely to emerge. Note also that appraisal itself will threaten to drain the corporation’s funds and therefore may deter misbehavior by managers whose plans require the presence of these funds. Again, shareholders, managers, and legislators are likely ex ante to agree on such a system because it may contribute to corporate performance and help attract capital.

A statute, such as the Model Business Corporation Act of 1978, may provide for appraisal in virtually all circumstances in which managers could receive payments or in which they could continue to work for the surviving enterprise, or both. Such a statute may thus be explained as pursuing the discovery goal just described. The details of the explanations just introduced and the somewhat obvious implications of the discovery goal for decisions about the “exclusivity” of appraisal are taken up in the remaining

47. See Levmore, supra note 21, at 64–65 & n.71 (1982).
48. See, e.g., DEL. CODE ANN. tit. 8, § 262(j) (1983) (granting courts power to allocate appraisal costs to dissenters); CAL. CORP. CODE § 1305(e) (West 1977) (granting courts power to allocate appraisal costs—including attorneys fees—entirely to the corporation in certain specified circumstances); N.Y. BUS. CORP. LAW § 623(h)(7) (McKinney Supp. 1984–85) (same); MODEL BUSINESS CORP. ACT § 81(i) (1978) (same).
49. Of course the potential of appraisal to drain funds may provide a destructive dissenter with a tool. Shareholders inclined ex ante to offer appraisal must hope that legal and other costs will discourage exploitative “dissenters.”
50. MODEL BUSINESS CORP. ACT (1978).
51. Id. § 80.
52. Exclusivity refers, among related things, to the question of whether a share-
II. EXPLAINING CURRENT STATUTES

In this part we examine the variety of current state appraisal statutes in light of the possible and sensible appraisal goals discussed above. The discussion concentrates on three major and representative statutes that can be linked, respectively, to the inframarginality, reckoning, and discovery goals introduced in Part I. We demonstrate how each representative statute can be explained as codifying the suggested appraisal goal. A jurisdiction conveniently can be viewed as deciding, first, whether to grant appraisal at the time of a given event in the life of the corporation and its shareholders and, second, if appraisal is offered, whether then to withdraw appraisal if the corporation's stock is widely traded, if the transaction is a relatively minor one for the corporation involved, if the transaction calls for shareholders to receive cash, or if a given percentage of the shareholders approve of the transaction at issue. Why and when these possibilities should lead to the withdrawal of appraisal is one of the subjects discussed in this part.

As for the "events" which may stimulate the grant of appraisal, a few introductory comments are appropriate. There are, essentially, at least six such events: (1) a merger in which the corporation governed by the statute is acquired; (2) a merger in which the corporation acquires another corporation; (3) a sale of all or nearly all of the corporation's assets; (4) a sale of the corporation's assets followed by its liquidation so that shares are necessarily given up or made worthless; (5) a purchase of assets or stock for stock so that old shareholder ownership interests are diluted; and (6) a charter amendment. Note that a shareholder may be forced to give up his shares and, at best, be made part of a fundamentally different enterprise in (1) and (4), and that in all these events a shareholder may involuntarily find himself with a different ownership share of a fundamentally different business than he wished. That appraisal is, nevertheless, normally denied in (4) when the sale is for cash, for example, simply restates the explanatory impotence of the conven-

53. The appraisal remedy also may be withdrawn if the corporation is insolvent or if payments to dissenters would make it insolvent. See, e.g., MODEL BUSINESS CORP. ACT § 6 (1969) (restricting repurchase of any shares in insolvency); DEL. CODE ANN. tit. 8, § 160(a)(1) (1983). Such insolvency presents intriguing questions but in practice is unimportant and, in any event, outside the scope of this Article. See Manning, supra note 5, at 234–35 n.28.

tional view of the goal of appraisal.55

A. InfraMarginality Statutes: Delaware

In Delaware, as elsewhere, "market exceptions"56 constitute an important part of the statutory framework.57 It is therefore useful to begin with a review of the link between inframarginality and marketability. A statute could pursue a raw inframarginality goal, offering appraisal whenever shares must be exchanged or whenever an enterprise alters its course, on grounds that investors' tastes, positions, and alternatives are dissimilar. Indeed, it may be that all goods that are no longer sold are best thought of as "inelastically demanded." An appraisal statute which offers appraisal at virtually all junctures58 may be pursuing the inframarginality goal in such a straightforward and wholesale fashion. On the other hand, rather than provide for appraisal at every important juncture, a statute might protect inframarginal value by identifying those situations in which substantial inframarginal value is most likely to be at stake. In particular, it is more likely that shares do not have close substitutes and are fairly associated with inframarginal value when they are not actively and widely traded. A statute that sought to protect

55. See supra notes 23–24 and accompanying text.
56. Appraisal may be unavailable under a "market exception" if shares are widely traded. In that case, one can assume that the market price is close to the formal appraisal price. See generally Fischel, supra note 13.
Professor Manning describes the North Carolina statute, N.C. Gen. Stat. § 55-119(b) (1982) (introduced in 1955), and the Connecticut statute, Conn. Gen. Stat. Ann. § 33-373(c) (West 1960) (introduced in 1959), which grant the appraisal remedy upon a liquidation in kind, as reflecting the idea that "[a]ppraisal should be considered an economic substitute for the stock exchange and its use should be limited to situations in which the exchange, or some kind of a reasonable market, is not available [as in liquidation]." Manning, supra note 5, at 261. But actually such a "market substitution" idea is not very well reflected in the statutes of these two states; unlike the Delaware statute, or the 1969 Model Act, neither the North Carolina nor the Connecticut statute offers a market exception in other contexts. Moreover, the North Carolina and Connecticut liquidation provisions can better be viewed as aimed at the reckoning or the discovery goal, discussed infra in text accompanying notes 77–105.
58. Appraisal might not be offered when a sale of assets is followed by liquidation for cash when, arguably, inframarginal value is at least not exploitatatively appropriated by insiders.
inframarginality might therefore withhold appraisal when the shares that are given up, in a merger for instance, are widely traded (that is, traded on the great stock exchanges or owned by thousands of shareholders). Alternatively, as we argued earlier, a statute might reflect the notion that all shares, whether widely traded or not, can contain inframarginal value, but that thinly traded shares have more such value so that appraisal should protect shareholders when transactions call for a "net loss" of inframarginal value.

Delaware's statute appears to reflect this last sort of inframarginality goal in its treatment of dissenting target shareholders who face a merger. Appraisal is available whenever shareholders give up thinly traded stock. It is also available when shareholders give up widely traded stock and receive cash. The first of these settings obviously involves substantial inframarginal value; the second deals with a "net loss" in the sense that even though the shareholders involved may have relatively little inframarginal value, because their stock is widely traded rather than thinly traded, they are given in its stead cash which is associated with zero inframarginal value. When widely traded stock is both given up and received, appraisal is not available. Arguably, this is because there is no net loss of inframarginal value since the new stock is associ-


The Committee concluded that the Model Act should recognize the fact of life that in substantially every case other than related to control, the owner of shares of a company listed on a national securities exchange regards himself as an investor in those securities, rather than as a part owner of the corporate enterprise. The investor's objective is not to promote the income of the corporation but to enhance his distributive share, not to increase the corporate assets but to enhance the value of his securities. Since the measurement of these objectives is provided by the exchanges, where a free market is established, the Committee concluded that for such securities the concept of dissent and appraisal no longer was required.

Id. at 303. This type of market exception is explicable if the demand for widely traded stocks is highly elastic. In such a situation, shareholders' inframarginal interests would be protected by an efficient stock market.

This market exception was repealed entirely in 1978. MODEL BUSINESS CORP. ACT § 80 (1978). The drafters explained the repeal by expressing doubt about the reliability of market prices. See Changes in the Model Business Corporation Act Affecting Dissenters' Rights, 32 Bus. Law. 1855, 1862-63 (1977). The Model Act's evolution, like that of other state statutes that do not offer market exceptions, is better viewed in light of the discovery rather than the inframarginality goal.

60. See supra text accompanying notes 36-40.

ated with some consumer surplus. And when widely traded stock is given up in return for thinly traded stock of the acquiring, or surviving, corporation, there surely is no net loss in inframarginality and appraisal is again, fittingly, unavailable.

Two minor transactions do not fit elegantly into the inframarginality theme. If shareholders give up thinly traded stock in return for thinly traded stock, Delaware provides for appraisal, although there is no net loss of inframarginality. And if shareholders receive thinly traded stock of a corporation other than the acquirer in return for widely traded stock, appraisal is available even though there may even be an increase in inframarginal value. The first of these cases may reflect something like the coattails argument described in Part I: Shareholders might be exploited in a transaction which offers like currency—but not enough of it. Appraisal may help shareholders judge the wisdom of the transaction even though there is no net loss of inframarginality. In any event, there is no issue here of net gain in inframarginality; therefore, the availability of appraisal in this situation is probably, at best, a minor exception to the Delaware statute's inframarginality theme, although it might be described as fitting other credible goals. The second exception—receipt of thinly traded stock of a corporation other than the acquiring or surviving corporation—is less important still. There may be a fair number of triangular mergers of the opposite (inframarginality) type, in which a thinly traded subsidiary survives with old shareholders then receiving shares in a more widely traded parent. But for the old target's shareholders to receive less widely traded stock of a subsidiary or of some wholly unrelated and unknown company must be so rare that the statute can be expected either to ignore it or to be suspicious enough to grant appraisal.

When a corporation sells its assets and in return receives another corporation's stock or cash, and then either continues as a holding company or liquidates, the Delaware statute does not provide for appraisal. Unarmed with the inframarginality goal, it is

63. Id.
64. See id.


Like Delaware, Maine and Virginia offer market exceptions to the target's shareholders in a merger but, unlike Delaware, they also offer the appraisal remedy when the corporation sells its assets unless its shares are widely traded, Me. Rev. Stat. Ann. tit. 13-A, §§ 908(1), (4), 1003 (1964); Va. Code §§ 13.1-75(i)(2), 13.1-78(a), (i)(2) (Supp. 1984). As will become obvious, see infra text preceding note 76, these statutes easily
hard to understand why appraisal should be available—market exceptions aside—when shareholders have their enterprise essentially taken from them and transformed through a merger but not available when their corporation sells its assets. In both cases there survives a "fundamentally different" enterprise. In both there are grave coordination problems that are best solved by coordinating the responses of the target shareholders; it appears puzzling for the problems to be solved in one case, with appraisal guaranteeing minimum bargaining results, and not in the other.

The inframarginality notion solves this puzzle and provides a clear distinction between acquisitions by merger and by asset sale. If a shareholder's objection in a stock acquisition is that he values at least some of his shares above the prevailing market price—because the price reflects marginal and not average valuations—then in a total asset sale his objection disappears. After all, since the entire corporation will be sold, there will be no extrapolation from marginal information; the shareholder can expect that the total worth of all the assets divided by the number of shares outstanding will yield proceeds in liquid form if the corporation follows the asset sale with a dissolution that exceed the late market price. There will surely, in any event, be no exploitation of the shareholder's inframarginal value. Alternatively, one might note that the shareholder retains his inframarginal shares after the asset sale. To be sure, a shareholder may fear that his agent, the firm's manager, will not bargain well in selling off assets and will instead fashion his bargaining position by using the market price as a benchmark. But this is a separate problem of vigorous representation. A shareholder who worried only about inframarginal value would still, *ex ante*, seek an appraisal remedy when his stock was to be acquired and not when all the assets of his corporation were to be sold.

Inframarginality describes still other aspects of the Delaware statute. Appraisal is available neither when the corporation amends its charter nor when it purchases all the assets of another corporation in return for some of its own shares. Whatever makes some shareholders value a corporation's shares uniquely (inframarginally), is not likely to disappear in the course of a charter

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66. See *supra* text accompanying note 26.

67. Cf. *Orzech v. Englehart*, 41 Del. Ch. 361, 365–67, 195 A.2d 375, 377–78 (1963) (denying appraisal rights to shareholders whose corporation purchased controlling shares of other corporations in return for its controlling stock). Since *Orzech* involved managers who can be said to have been reliable bargaining agents for the shareholders, the case may stand for a representation principle. See *infra* text accompanying notes 91–94, 114.
amendment or expansion by asset purchase. The structure of an inframarginality statute, in Delaware or elsewhere, also appropriately denies appraisal in the context of a familiar tender offer, in which shareholders voluntarily and individually exchange stock for compensation offered by a bidder. Group coordination aside—because that is, after all, not the goal of a pure inframarginality statute—there is every reason to expect a bidder to consider the possibility of rejection by a number of inframarginal shareholders and to offer significantly more than the market price, thus satisfying the inframarginal needs of those tendering shareholders. Thus, not only is the inframarginality goal consistent with the denial of appraisal in tender offers, but also it—like the notion of corporate “secrets” discussed in Part III but unlike the group coordination and unadorned efficient market views of corporate law—explains the prevalence in tender offers of substantial premiums above market price.

What is not explained by the inframarginality-Delaware link is the availability of appraisal to shareholders of a corporation that is itself thinly traded and that acquires another in return for its own shares. We would have expected that since the inframarginal character of existing shares is likely preserved, as in the case of a 

68. Although some charter amendments surely affect inframarginality, the text simply posits it unlikely that the charter amendment process exploits inframarginal value.

69. A tender offer does not trigger the appraisal remedy in any jurisdiction. Note that the reckoning and discovery goals easily explain the unavailability of appraisal in a tender offer setting. As discussed in the text, the inframarginality goal is also consistent with the unavailability of appraisal in the tender offer context if one views the premiums normally available in tender offers as rough compensation for inframarginality losses.

Some state statutes provide for a “stock exchange”—and grant appraisal to dissenters from such a transaction—when more than half of the shares of a corporation are acquired by another corporation pursuant to a plan approved by the board of directors and the shareholders as stipulated in the statute. See, e.g., Model Business Corp. Act §§ 72A, 80 (1978). This stock exchange differs from a tender offer in that the requisite shareholder approval binds all target shareholders. In addition, viewed in terms of our discussion of the discovery goal and the representational needs of investors, infra text accompanying note 114, the board of directors appears to be a good representative of dispersed shareholders in the context of a stock exchange but might not be as useful a representative in a tender offer.

70. See infra text accompanying notes 91–94.

71. See supra text accompanying note 26.

72. Much recent work has sought to demonstrate that bidders do not lose in these transactions. See Jensen & Ruback, The Market For Corporate Control: The Scientific Evidence, 11 J. Fin. Econ. 5, 5 (1983) (target shareholders do extremely well and bidder shareholders do not lose); Asquith, Bruner, & Mullins, The Gains to Bidding Firms From Merger, 11 J. Fin. Econ. 121, 138 (1983) (shareholders of bidding firms benefit from mergers). But why do bidders not do even better and extract target shares with a very small premium?

73. See Del. Code Ann. tit. 8, § 262(b)(1) (1983). There are three exceptions to this availability of appraisal: when the company’s shares are widely traded, when less than 20% of its outstanding shares is used, and when a subsidiary is acquired in a short-
purchase of assets, appraisal would not have been made available. Put differently, while the inframarginality goal explains Delaware's different treatment of a sale of assets and an acquisition by merger, it does not explain the difference between a purchase of assets and an acquisition of another entity through merger. Weak arguments are possible; it may, for example, simply be very rare for an acquirer's stock not to be widely traded so that, as expected, no appraisal is available in a purchase or acquisition of another corporation. We prefer, however, to acknowledge that Delaware's statute is not entirely of the inframarginality type. This exception can be explained, with a bit of conviction, as reflecting the discovery goal, perhaps because acquiring corporations in mergers are sometimes really being acquired in a way that makes important the managers' self-interest. In other words, appraisal statutes may well reflect a variety of goals even while one goal alone makes them most comprehensible. Our own purpose is not to insist on a single goal but rather to explore the ability of these goals to explain appraisal statutes and to inform corporate law.

The inframarginality notion is thus a remarkably useful tool for predicting when appraisal is available under the Delaware statute. Still, one might wonder whether the inframarginality goal really could be achieved unless the appraiser were instructed or allowed to give the dissenter some compensation that was above the market, or reconstructed market, value. One hardly would expect an appraisal statute to call for a measurement of dissenters' idiosyncratic estimation of a corporation's future—but some power to give more than marginal value would be reassuring. Superficially, section 262(h) of the Delaware statute crushes rather than reassures by stating that the appraiser shall "determine . . . fair value exclusive of any element of the value arising from the accomplishment or expectation of the merger . . . ."74 We emphasize the penultimate word of this phrase. The appraiser may consider value that arises from the qualities of the target as a partner in other mergers, just not in the one dissented from. Therefore, there is a statutory source for an appraisal "premium" that could block efforts to exploit inframarginal holdings.75

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74. DEL. CODE ANN. tit. 8, § 262(h) (1983).

75. We believe that this reading of the Delaware statute is consistent with the recent Delaware case of Weinberger v. UOP, Inc., 457 A.2d 701, 713–14 (Del. 1983). The court held that "fair value" could include damages to minority shareholders—as opposed to mere "speculative elements of value that may arise from the 'accomplishment or expectation' of the merger," id. at 713, which are excluded from the section 262 appraisal. Note that our reading of the statute is also appropriate from the perspective of the discovery goal, although the complete absence of any exclusions from fair value
B. Reckoning Statutes: New Jersey

An uninteresting but plausible reckoning statute would grant appraisal at every opportunity. It would do so in order to give shareholders and other interested parties information about managers' performance whenever a shareholder was willing to part with shares and incur the costs of pursuing the appraisal remedy. Of course, a statute could serve both the reckoning and inframarginality goals by making appraisal readily available and, perhaps, by instructing appraisers to look at evidence other than market price. A subtler appraisal statute, cognizant perhaps of appraisal's costs and guessing that the parties would not agree ex ante to bear the burden of appraisal at every juncture in the corporation's life, would grant appraisal only when reckoning was particularly difficult without it. Such a statute also might pursue the inframarginality goal. Alternatively, the statute might disregard inframarginality, assuming that shareholders' demands for stock, as opposed to residential homes, for example, are similar enough to be satisfied by substitutes, causing average values of shares to approach their marginal values. The New Jersey statute is representative of this last sort. We call it a reckoning-plus-noninframarginality statute since it does not appear to protect inframarginal value in the way that Delaware's statute does. Since it is the reckoning goal that we seek to develop here, the following discussion considers the reckoning aspect of New Jersey's statute, and puts aside the ways in which inframarginality might be protected while pursuing the reckoning goal.

In New Jersey, the availability of appraisal in a transaction involving a sale of assets followed by liquidation, unless cash or widely traded shares are received, contrasts with the complete unavailability of appraisal when assets are sold under the Delaware statute. This feature of the New Jersey statute is a perfect codification of the reckoning goal unaccompanied by a concern for inframarginality; when cash or widely traded shares are received, shareholders and other employers are easily able to evaluate management performance. Appraisal is thus unnecessary to reduce reckoning costs. It is only when thinly traded shares are received in such a transaction that an ex post reckoning requires appraisal of these shares, which now constitute the corporation's only property.

When assets are sold but a liquidation does not follow, the
New Jersey statute grants appraisal even when cash or widely traded shares are received—unless the corporation's shares were themselves widely traded. 79 This limitation on the withdrawal of appraisal could be regarded as a partial departure from the suggested reckoning goal because appraisal is offered even when cash—which is perfect for reckoning purposes—is received by a thinly traded corporation. But it may be that unlike a merger or asset sale followed by liquidation, where all assets are clearly traded away, some asset sales are not total. Those trying to reckon managerial performance will be quite interested in the value of any patents, licenses, or other assets remaining in the corporation after "substantially all" its assets are sold. Thus, the withdrawal of appraisal only when the marketplace provides information for reckoning may be sensible.

We turn now to mergers and to the availability of appraisal to shareholders of both the target and the acquirer. Recall that Delaware imposed a type of market exception on both sides of mergers and that this uniformity, especially when it serves to offer appraisal to shareholders of the acquiring corporation, is not explicable in terms of inframarginality. 80 The New Jersey market exceptions are structured as follows: Shareholders of a target can enjoy appraisal unless the shares they give up are widely traded or they receive either widely traded shares or cash. 81 And shareholders of an acquirer are refused appraisal in precisely the same situation as they would be refused appraisal in Delaware; appraisal is unavailable whenever their shares are widely traded, whenever the shares used by their corporation to acquire another amount to no more than twenty percent of the corporation's outstanding stock, and whenever the acquisition is of a subsidiary in a short-form merger. 82 The reckoning concept works well when related to these rules. If the target's stock is widely traded, then, if inframarginality is not taken seriously or not pursued, shareholders can measure their managers' performance rather well and have no need for appraisal. Similarly, even if they give up thinly traded stock but receive cash or widely traded stock, shareholders can reckon simply by comparing the consideration they receive with that invested or measured at some time in the past. Either way it is relatively easy to assess value at

80. See supra text accompanying note 73.
the time of the merger. Only if thinly traded shares are given up and other difficult-to-measure shares are received is appraisal necessary to facilitate evaluation.

Much the same is true regarding the measurement of the acquiring managers’ performance. If the shares used to acquire the target are widely traded, then there is a benchmark for measuring earlier performance; the magnitude of the acquisition is clear enough to measure future performance. If the acquirer’s shares will not be widely traded, then appraisal will be useful as a means of separating preacquisition from postacquisition performance. Finally, if this acquisition is relatively small compared with the size of the acquirer, then arguably this event no more signals a time for reckoning than does any other. Moreover, changes in the acquirer’s performance are as likely to derive from sources other than this relatively minor acquisition.

Two other facets of the New Jersey statute are of interest. If an acquirer purchases a target corporation’s assets using a substantial amount of its own thinly traded stock, then appraisal is available to the acquirer’s shareholders.83 Such an appraisal can be a good reckoning tool because future corporate performance may derive from the new assets, the new size of the corporation, or a number of other factors.84 If widely traded stock is used, shareholders will have a good benchmark because they will be able to reckon preacquisition performance and know what was paid for the new assets. If cash is used then appraisal is not available, but the shareholders at least will know what was paid for the target and reckoning will be easier. The statute, however, also provides for appraisal for the acquirer’s shareholders if widely traded stock of the target is purchased with thinly traded stock of the acquirer.85 This is, of course, inconsistent with the reckoning goal as described because the market value of the target’s stock should provide the necessary measurement tool. It is arguable that such a transaction is rare because larger enterprises are generally more widely traded than smaller ones.86 Nevertheless, it is an exception to the reckoning theme worth noting.

Finally, New Jersey does not provide for appraisal in the event of a charter amendment. A statute in pursuit of the reckoning goal could go either way. To the extent that charter amendments effect minor changes such as adding to the number of corporate officers,
appraisal may be an unnecessary cost. A shareholder looking to reckon managerial performance after a change in state of incorporation or addition of a new class of stock might, however, wish there had been an appraisal at the time of the change. It is interesting that Michigan's statute, which is virtually identical to New Jersey's (except that it does not provide for appraisal when assets are purchased) and therefore appears to be a reckoning statute, does provide for appraisal at the time of a charter amendment.\footnote{MICH. COMP. LAWS ANN. §§ 450.1761, 450.1621 (West 1973).} Appropriately enough, given that it too must be a reckoning-plus-noninframarginality legislative package, the Michigan statute does not provide appraisal in the context of a charter amendment if the corporation's shares are widely traded. In that case, the effect of the charter amendment, as opposed to other managerial decisions, presumably can be reckoned by following the stock market.

However successfully statutes can be described as pursuing the reckoning goal, there is a free rider problem that can interfere with this reckoning, or monitoring, system. Statutes, such as New Jersey's, do not mandate appraisal when a benchmark would be useful for reckoning purposes; they simply offer it to shareholders who formally dissent from the transaction in progress. Those dissenters must pay for—or at least share in the cost of—appraisal if they elect it.\footnote{There is no uniform rule for the assignment of expenses but it is fair to generalize that the appraiser's fee usually is divided among the parties and that the parties' legal costs rarely are borne by the opposing side. See H. HENN & S. ALEXANDER, supra note 1, at 1008 n.23; In re Janssen Dairy Corp., 2 N.J. Super. 580, 589, 64 A.2d 652, 656–57 (1949) (assigning part of the appraiser's fees to dissenters). In any event, at least some costs fall on active dissenters and can lead to free rider problems.} Many shareholders may wish that a measurement were taken, but each may hope that someone else dissenters and expends resources in appraisal. It may be that as an empirical matter the statutes' disinclination to force appraisal is no obstacle to the reckoning theme; there may always be at least one feisty or selfless shareholder who does the job. In any event, the reckoning goal is both sensible and, as a descriptive matter, almost perfectly codified in some statutes. We do not make this statement to endorse such statutes, but simply to note their character.

C. Discovery Statutes: New York

We will present a discovery statute in the next part that we believe is more sophisticated and effective than any now in effect. But first, it is useful to review the nature of the discovery goal and the way it is apparently codified in a number of statutes. Again, we choose one statute, in this case New York's,\footnote{N.Y. BUS. CORP. LAW § 910(a)(1) (McKinney Supp. 1984–85).} as representative.

What underlies the discovery goal is nothing less than the most
fundamental problem in corporate law, namely that managers may not act in the interests of shareholders. Moreover, while managers as insiders are equipped with information about the firm and the opportunities that come its way, shareholders and other monitors often have little information with which to challenge their agents. Shareholders also have coordination problems in assembling information and mounting such challenges. In the context of fundamental corporate changes, which often trigger the appraisal remedy, we think it useful and illuminating to focus on an aspect of this agency problem that largely has been overlooked in the cases and literature. We call this inside information “secrets”: Managers may know of corporate opportunities or have plans already developed that lead them to think that the value of the corporation is greater than the value assigned by passive shareholders and other outsiders. The typical corporation surely must have many secrets; some indicate a rosy future and others warn of losses. But for expositive purposes we focus on those secrets that contain good news for the corporation. Managers may keep secrets for selfless reasons—most often revealing the secrets would destroy their value. On the other hand, more self-interested managers may keep secrets or even create them because they want to sell them to outsiders in return for attractive employment contracts or other consideration. Either way, outside shareholders cannot value their holdings accurately. Even if their shares are actively traded these shareholders will not be well informed, because the market is also ignorant—except to the extent that insider trading has increased the market price.

Of course, shareholders of such secretive corporations are not always in dire straits. While they may be relatively ignorant when they sell their shares, sometimes the secrets kept from them will conceal bad news and the sales will be fortunate. Most importantly, shareholders often can rely on their representatives, or managers, because these agents will bargain with outsiders at arm’s length or not at all and will not be tempted to undersell the secrets by offers of side payments. The idea of corporate secrets explains, even better than does the inframarginality concept, why substantial premi-
ums above market price are paid in corporate takeovers.\(^9\) The critical question for passive investors is thus whether or not their managers are reliable bargainers. Managers' "defensive tactics" are another aspect of this problem; managers may ward off seemingly attractive take-over offers because they are guarding secrets that indicate that the offers essentially undervalue the firm or because they enjoy their positions and selfishly wish to continue in control.\(^9\)

The law, or, \textit{ex ante}, coordinated shareholders and managers themselves,\(^9\) might take three approaches to this problem: (1) Offer appraisal at important junctures, when there is a special danger that managers are unreliable bargaining agents, and hope that it will unearth information about unreliable bargaining agents or about secrets themselves. While the law probably should not aim to discover and reveal the secrets these agents may harbor, because often the revelation will injure all shareholders and ultimately the economy as a whole, it may hope through threat of appraisal to force from management and the acquirer a large enough premium over market price to dissuade potential dissenters and discourage inefficient transactions and to roughly compensate shareholders for the secrets that are theirs. It seems sensible for shareholders to bring a fiduciary suit against self-interested managers if appraisal unearths information that supports such a claim;\(^9\) (2) Offer appraisal whenever managers are known to have conflicts of interest and be unreliable bargaining agents, and hope that the appraiser will find enough clues about corporate opportunities, untapped assets, and other secrets to compensate shareholders. More importantly, the burden, drain, and publicity of appraisal will discourage managers and acquirers from engaging in transactions that destroy the agency relationships crucial to the corporate structure; (3) Appoint a nonmanagement bargaining agent on the shareholders' behalf and


\(^9\) The literature on defensive tactics focuses on the importance of information—but only on information the target may have that is useful in assessing synergistic gains. Although the possible role of "secrets" is neglected, the literature is provocative. See Bebchuk, \textit{The Case for Facilitating Competing Tender Offers: A Reply and Extension}, 35 STAN. L. REV. 23 (1982); Easterbrook & Fischel, \textit{Auctions and Sunk Costs in Tender Offers}, 35 STAN. L. REV. 1 (1982); Gilson, \textit{A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers}, 33 STAN. L. REV. 819 (1981); Gilson, \textit{Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense}, 35 STAN. L. REV. 51 (1982). Of course, the acquirer may have developed a secret about the target or its potential for synergistic gains. The evaluation of this possibility, critical to any analysis of defensive tactics and "fair sharing" rules, is beyond the scope of this Article.

\(^9\) See \textit{supra} note 38. For the leading application of the idea that it is in managers' interests to set up rules that shareholders will like, see generally Jensen & Meckling, \textit{supra} note 90.

\(^9\) See \textit{infra} notes 129–30.
encourage managers with carrots, sticks, or moral suasion to confide in such an “independent representative.” If such a representative were privy to secrets and could advise shareholders about the desirability of proposed fundamental changes, then the agency problem would be solved, albeit at a cost.\(^9\) This last option is especially attractive if managers inevitably face conflicts of interest despite their role as bargaining agents for shareholders. This may well be the case if it is efficient for the acquirer to offer to continue the old managers in their positions in the enterprise because of their experience with the acquired assets and personnel.

Approach (3) may well be the wave of the future and an experiment worth trying,\(^8\) but it is not useful in describing any current American statute and since we have no way of judging its costs, it is pointless to sing its praises. Approach (2) is the tack which we take in Part III; managers are given a powerful incentive to disclose their conflicts of interest. Arguably, approach (1) is the one followed in many statutes, including New York’s.

Before turning to a particular discovery statute, it is useful to consider the link between the discovery goal, in approach (1) form, and marketability. If one distinguishes the breakdown of reliable bargaining occasioned by agents’ conflicts of interest (or even their

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97. Of course, there are problems with this agent’s incentives and behavior. See generally Levmore, supra note 21. Nevertheless, this approach may be better than the alternatives.

98. Approach (3) is found in other legal systems in the form of auditors or inspectors. In France, the terms of a merger or consolidation must be examined in advance by the auditors of each constituent corporation. In addition, the acquirer in a merger must apply to the court for the appointment of an independent inspector to examine the assets of the target. These experts submit their reports for the shareholders’ consideration when they vote at the shareholders’ meeting. FRENCH COMMERCIAL COMPANY LAW (Loi n° §§ 66-537 du 24 juillet 1966 sur les sociétés commerciales) §§ 377, 378. See J. Le Gall, FRENCH COMPANY LAW 242–44 (1974). This idea was taken up by the EEC company law harmonization program; its Third Directive in 1978 provided that the terms of a merger or consolidation must be examined in advance by an independent inspector whose written report must, among other things, evaluate whether the share exchange ratio is fair and reasonable. See Barbaso, The Harmonisation of Company Law with Regard to Mergers and Divisions, 1984 J. Bus. L. 176, 181. In 1982, West Germany introduced the above-mentioned directive to its company law and thus adopted the mandatory inspector system. See AKTIENGESETZ [AKTG] § 340b (Deutsche Gesetze 1983).

Japanese law does not have such a mandatory inspection system and only offers two “general” audit mechanisms (as France and West Germany do in addition to the mandatory inspector system just described). In Japan, a corporation must have auditors independent from management, and minority shareholders may apply to the court for the appointment of a special independent inspector when necessary. See Japanese Commercial Code (Shōōhō) §§ 273–280, 294 (1899 as amended). Among these countries, only Japan also offers a separate appraisal remedy. See Japanese Commercial Code (Shōōhō) §§ 245-2 (sale or purchase of assets), 408-3 (merger or consolidation) (1899 as amended). Compared to the Japanese system, the appraisal remedy found in state statutes in the U.S. may be assigned more “tasks” for discovery if aimed at such a goal.
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hopes of employment) at the time of acquisition, from the presence and problem of secrets, then one would offer appraisal at crucial times but might withdraw appraisal when the company involved was widely traded because the market could police fiduciary misbehavior. Inframarginality and secrets aside, obviously there is more opportunity for misbehaving managers to undersell their corporation when there is no market check on the performance and value of the enterprise. Indeed, California and Pennsylvania appear to have just such appraisal statutes although they rely on the stock market's reporting, or discovering, to different degrees.99 One may regard secrets as central to these agency problems, so that the concern is with the possible absence of reliable bargaining agents and the possible presence of corporate secrets known only to these agents, or to these agents and interested acquirers who will compensate the "agents" handsomely. If one holds this view, then marketability is

99. California provides unique rules. First, an acquiring corporation, or its parent, owning more than 50%, but less than 90%, of the voting stock of the target corporation that wishes to merge in a non-short-form merger, must obtain the unanimous consent of the target's shareholders if the consideration offered in the merger is anything but non-redeemable common stock of the acquirer or its parent. The Commissioner of Corporations, however, can approve a merger not meeting this requirement after reviewing the terms, conditions, and fairness of the transaction. CAL. CORP. CODE §§ 1101, 1101.1 (West Supp. 1983).

Second, the appraisal remedy is available to target shareholders in a short-form merger and to all shareholders in other mergers, asset sales, and stock exchanges, other than shareholders of the acquirer or its parent, if after the transaction they would in combination own at least five-sixths of the voting stock. Finally, appraisal is withdrawn if the dissenter's stock is widely traded unless transferability of shares is restricted or 5% or more of the shareholders of any class dissent. Id. § 1300.

This complex statute can be viewed as strongly oriented toward the discovery goal. The potential for managerial misbehavior must be thought to be relatively great in a cash-out merger unless there is an arm's-length bargain—as when the acquirer or its parent does not possess more than 50% of the voting power—or unless there is reason for shareholders to be pleased rather than worried about the controlling power of their fiduciaries—as when the shareholder has an interest in the acquirer in a short-form merger (and appraisal is not available). And, as discussed in the text, when the stock is widely traded, managerial misbehavior may be discoverable through market signals so that the added expense of appraisal as a discovery tool is less worthwhile.

In Pennsylvania, a merger, consolidation, sale or purchase of assets, and certain charter amendments all trigger the appraisal remedy except for shareholders whose stocks are widely traded. The shareholders of the target in a merger do, however, have the appraisal remedy available if they receive, in exchange for their widely traded stocks, anything other than stock of any corporation. This discovery statute relies more on the public stock market as a discovery tool than does California's. And while it does not essentially ban cash-out mergers (or other mergers in which the target's shareholders receive anything other than stock) by requiring California-style unanimity, it obviously considers such mergers suspect and grants the appraisal remedy as a discovery tool even if the target's shareholders surrender widely traded stock. PA. STAT. ANN. tit. 15, § 1515 (Purdon Supp. 1983).

Note, finally, that by lifting its "ban" on those cash-out mergers approved by the Commissioner of Corporations, California took a step in the direction of an "independent representative." See supra note 98 and accompanying text.
hardly relevant since the market is unaware of these secrets and therefore offers little help.

We turn now to the New York statute, which represents those seeking to discover managerial misbehavior and protect shareholder rights (while ultimately seeking to prevent misbehavior and inefficient transactions) when there is reason to worry both that managers are not serving shareholders well as bargaining agents and that managers have secrets about future opportunities or hidden values. The link between the New York statute and the discovery-and-secrets theme is straightforward. We should expect appraisal to be available in all important transactions except those in which managers representing the dissenting shareholders' interests already were on both sides of the bargaining table or when it is very unlikely that managers would be unreliable. The first of these exceptions is easy to identify. When a parent corporation merges with its mostly owned subsidiary in a short-form merger, appraisal is not available to the parent's shareholders under the New York statute. If there are secrets at stake, the parent's managers know them so that the denial of appraisal is consistent with the discovery-and-secrets theme.

The second exception, covering situations in which it is unlikely that managers will be unreliable or will switch allegiances, is more difficult to identify than the first exception of dual allegiances, or is simply vague. The New York statute offers appraisal to a target's shareholders when the target's assets are sold but withdraws appraisal in circumstances in which there is a sale of assets for cash followed by a liquidation of the target corporation. It is possible that such a transaction is less prone to managerial exploitation since it involves dispersing the target's assets and terminating the employment of the target's management. The transaction would be more prone to managerial exploitation if the managers continued in the surviving enterprise, which might create doubts about their reliability as bargaining agents for the target against the acquirer. Even if this correlation between the firm's liquidation and its managers' retirement is not strong, the remainder of the New York statute is easily linked with the discovery goal. Appraisal is available, with no market exceptions, to the target's shareholders in a merger as well as in a sale of assets other than a sale for cash followed by liquidation. It is also available to the acquirer's shareholders in a non-

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100. N.Y. BUS. CORP. LAW § 910(a)(1)(A)(i) (McKinney 1963). Many states have a similar provision, see also MODEL BUSINESS CORP. ACT §§ 80(g), 75 (1981).


short-form merger\textsuperscript{104} that adversely affects their rights, and to the shareholders of a corporation that undergoes a charter amendment seriously affecting shareholder rights.\textsuperscript{105}

104. \textit{Id.} §§ 910(a)(1)(A), 806(b)(6). Issuing many new shares as consideration for a merger would, in most cases, fall within the ambit of § 806(b)(6)(D) and therefore trigger appraisal, since such issuance in most cases would necessitate raising the authorized shares. If the acquirer already has a large number of authorized shares or uses treasury shares to accomplish a merger, then, to be sure, appraisal is unavailable at the time of the merger. Still, it was available when these shares were authorized—and the discovery goal is as least partially fulfilled at that time.

105. \textit{Id.} §§ 910(a)(1)(A)(ii), 806(b)(6). Under a discovery statute, the issue arises whether there should be any difference between a merger (or consolidation) and a sale of assets. One could argue that the need for discovery is equally strong in both situations. On the other hand, it is arguable that there is more reason to fear agent misbehavior in a merger than in a sale of assets because the latter often involves dispersing the target's assets and therefore it may be correlated with terminating the target managers' employment. It is certainly not surprising that statutes that we would regard as discovery oriented all offer appraisal for mergers and then are mixed in their provision of appraisal for a sale of assets. \textit{Compare}, e.g., \textit{N.Y. Bus. Corp. Law} § 910(a)(1)(B) (McKinney Supp. 1984) (shareholder has right to appraisal at sale, lease, or exchange of corporation's assets) \textit{with D.C. Code Ann.} §§ 29-373, 29-374 (1981) (shareholder has no right to appraisal at sale, lease, exchange, or mortgage of corporation's assets).

Similarly, a statute that granted appraisal in a merger only when the target's stock was thinly traded stock, might or might not grant appraisal for thinly traded stock when a sale of assets is concerned. The discovery goal argues for appraisal unless mergers are more likely to be free of conflicts of interest than are asset sales. But the inframarginality goal argues mildly against appraisal in asset sales since there is no exploitation of inframarginality and the bargain should be for total value. \textit{See supra} text accompanying notes 65–67. The 1969 Model Business Corporation Act in fact does offer appraisal and the various state statutes go either way. \textit{Compare}, e.g., \textit{Model Bus. Corp. Act} § 80 (1969) \textit{and Fla. Stat. Ann.} § 607.244(1)(b) (West Supp. 1984) \textit{with Nev. Rev. Stat.} §§ 78.505, 78.521, 78.565 (1979).

Note also that unlike Delaware, some states grant appraisal on a sale of assets. Some states also grant appraisal on a purchase of assets or stock through the judicially created "de facto merger doctrine" rather than through statutory developments. \textit{See}, e.g., \textit{Farris v. Glen Alden Corp.}, 393 Pa. 427, 438, 143 A.2d 25, 31 (1958) (assets purchase); \textit{Rath v. Rath Packing Co.}, 257 Iowa 1277, 1285–86, 136 N.W.2d 410, 414–15 (1965) (same). Some of these creations are codified. \textit{See}, e.g., \textit{Pa. Stat. Ann. tit. 15, § 1311F} (Purdon Supp. 1984–85) ("[t]he shareholders of a . . . corporation which acquires . . . all or substantially all of the property of another corporation . . . shall be entitled to the [appraisal rights] . . . if, but only if, such acquisition shall have been accomplished by the issuance of voting shares of such corporation to be outstanding immediately after the acquisition sufficient to elect a majority of the directors of the corporation") (response to \textit{Farris}); \textit{Ohio Rev. Code Ann.} § 1701.83 (Baldwin 1979) (an assets or stock purchase triggers the appraisal remedy if made for stock that, after the transaction, would result in more than one-sixth of the voting power). Such a trend, if viewed from the perspective of the discovery goal, is not at all puzzling; appraisal could be useful as a tool for reporting managerial misbehavior, not only to target shareholders who will need to litigate, but also to shareholders of the surviving corporation in a merger and to those of a purchasing corporation. Nevertheless, the de facto merger doctrine may, like other corporate law doctrines, have less to do with a general goal of corporate law and more to do with the integrity of the agency relationship in a given case. \textit{See supra} notes 91–94; \textit{infra} note 114 and accompanying text.
A significant number of appraisal statutes can be described as pursuing the inframarginality, reckoning, or discovery goals. Occasional imperfections in these pursuits invariably can be blamed on attempts to pursue more than one goal using only a single tool: Appraisal is, after all, but one method of accomplishing the various goals. Our aim in this part has not been the descriptive perfection of the goals we identify. We simply have tried to show, first, that the inframarginality, reckoning, and discovery goals are plausible and defensible aims of corporate law and, second, that these goals provide a framework for understanding and categorizing many appraisal statutes that previously appeared chaotic. Appraisal statutes are more ambitious than chaotic, reflecting as they do the many concerns of corporate law.

There are two loose ends in this discussion of the existing statutes: the imposition of voting requirements on the occasion of most fundamental corporate changes and the voluntary insertion of "extra" appraisal remedies by some corporations.106 Voting requirements do not shadow appraisal. Charter amendments require shareholder voting approval107 but as we have seen, they do not always trigger a right to appraisal; and statutes nearly always require voting for merger, asset sales, and so forth.108 In addition, while there are short-form merger exceptions to voting requirements,109 there are no market exceptions. In our view, shareholder votes are probably a vestigial tool, albeit an expensive one at times. While voting may evolve into a useful tool for eliciting preferences (or even for determining inframarginality) and encouraging monitors, it appears now to be offered only as a matter of course. It is possible that two factors will together speed the evolution of this potential tool: important literature on separating voting rights from ownership110 and on judicial inquiries into the will of the "majority of the minority,"111 or the votes of outside shareholders.112 At pres-

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111. See, e.g., Weinberger v. UOP, Inc., 457 A.2d 701, 703 (Del. 1983).
ent we find the details of voting not noteworthy and not attached to appraisal in any significant way.

As for the voluntary, corporation-specific expansion of appraisal, none of the suggested goals leads one to object to additional triggers of the remedy. Indeed, a state's statute may pursue one or two goals and a particular group of shareholders associated with some corporation may then wish to pursue an additional goal by way of increased opportunities for appraisal. For example, a corporation that offers appraisal when charter amendments are passed simply may be assuring that careful reckoning will be possible in the future. The possibility that such charter-tailoring is, instead, mostly a defensive tactic to ward off acquirers is beyond the scope of this Article. 113

III. TOWARD A CONSISTENT AND EFFECTIVE APPRAISAL REMEDY: A DISCOVERY STATUTE

It is difficult if not impossible for a single tool, appraisal, to serve effectively the variety of goals described in Part I. Although the discussion in Part II displays the significant descriptive power of some of these goals, it is hardly surprising that no goal enables us to explain perfectly even a single appraisal statute. At best, as appraisal remedies have evolved they have contained and balanced a few goals at once. But this evolution—influenced, no doubt, by strong criticism about appraisal's inability to meet what was conventionally seen as its goal and by a sense that the remedy could not play an important role in corporate law—often has been toward limiting the availability of appraisal. With this as background, our goal in this part has two components. First, it may be useful to show that an appraisal statute can straightforwardly and consistently pursue a single objective. There may be no particular reason to wish for such consistency in a statute, but a quest for consistency in light of alternative goals and the ways in which they can be codified may better inform and clarify legislative choices.

Second, as a normative judgment, we regard as crucial the managers' roles as objective representatives, or agents, of shareholders. We therefore suggest that the discovery goal is worth pursuing. Corporate law doctrines make good sense if one focuses on the shareholders' need for reliable agents, the problems posed by conflicts of interest in this agency relationship, and the role of law in facilitating this relationship by intervening when conflicts are apparent. 114 Thus, when a corporation sells one widget to a buyer,

113. See supra note 94.
114. For a good discussion reflecting this view, see W. KLEIN, BUSINESS ORGANIZATION AND FINANCE 112–21 (1980).

Arguably, the decided cases reflect our stress on good representation and the dis-
corporate law will dismiss a dissenting shareholder's objection that the price received for the widget was inadequate and not in the shareholders' best interests. In this context there is every reason to think that the corporation's management has fairly represented the shareholders; moreover, courts are unlikely to be very good at second-guessing pricing decisions. To be sure, since managers do not earn all the profits from each sale, there is an everyday conflict of interest that can lead to shirking. Presumably, however, shareholders are aware of this problem and can monitor performance and structure incentives to combat shirking.

Consider, though, a larger transaction such as a stock-for-stock merger or a sale of assets to an acquiring corporation. So much is at stake here that shareholders might well be concerned about unknown-conflicts of interest. If the target's managers do not have an interest in the acquirer's success, then shareholders normally can rely on the representation and bargaining ability of their managers. But if, because of conflicts of interest, the managers are neither reliable bargaining agents nor reliable advisors regarding an acquirer's offer, then shareholders must have two concerns: More is at stake than in the everyday sale of a widget, and, as noted earlier, selfish managers may have been unnecessarily silent about corporate opportunities or assets and may use an acquirer to exploit this secret.115

covery goal. For example, the "de facto merger" doctrine concerns the question of whether remedies available in a merger should be granted judicially in a sale of assets on the grounds that the merger often can be structured as the sale. It is, for instance, rather simple to "sell" assets for stock of the acquirer so that the transaction is completed with results indistinguishable from that of a standard merger. Delaware and Pennsylvania are divided on the matter. Compare the two famous cases of Hariton v. Arco Elecs., Inc., 41 Del. Ch. 74, 76, 188 A.2d 123, 125 (1963) (finding asset sale within Del. Code Ann. tit. 8, § 271, and therefore that remedies available in mergers were not transferable to asset sales) and Farris v. Glen Alden Corp., 393 Pa. 427, 438, 143 A.2d 25, 131 (1958) (asset sale accomplished what a merger would have, so "de facto merger" doctrine applied). But there is more to these cases. In Arco there is no evidence of conflicts of interest and every reason to think that the target's shareholders, including the plaintiff, were as well represented by their managers and directors as they had been in routine business transactions. On the other hand, in Glen Alden the directors of the two combining corporations were closely intertwined and thus potentially unreliable as bargaining agents; they were commingled, as it were, while bargaining was in progress. (We are indebted to Marvin Chirelstein for this point.) Some directors were sitting on the board of the other corporation and perhaps looking for jobs. The grant of appraisal is, therefore, strikingly appropriate from the perspective of the discovery goal, the goal we have, after all, "assigned" to Pennsylvania. See supra note 99. But the real point is not so much to link the Glen Alden decision with the discovery goal as to note that the divergence of the two cases may be based on factual differences rather than on judicial attitudes; in Arco there were reliable bargaining agents and therefore there was less reason to protect shareholders. In short, an unstated judicial sensitivity for unrepresented shareholders, as reflected in Glen Alden, makes the discovery goal we pursue in the text seem familiar rather than unattainable.

115. One can imagine that it is easier for a selfish manager to provide selective infor-
We suggest, therefore, that an appraisal remedy be fashioned to pursue the discovery goal as follows: In the event of a key change in a corporation’s structure, any manager who either participates in bargaining with an acquirer, target, or coventurer of the corporation, or who advises shareholders on the desirability or terms of the key change must disclose any conflict of interest. Conflicts include arrangements with the bargaining “adversary” regarding past or future salary, employment, or payments. If a manager reveals a conflict of interest, then the appraisal remedy is available to shareholders. Appraisal then serves both as a means of discovering information about the transaction and about the appropriateness of managerial behavior and as a way of discouraging acquirers, who do not wish to see appraisal drain the target’s cash, from offering side payments to their bargaining adversaries. If no manager reveals a conflict, then appraisal is not available. Finally, if it develops that a manager failed to disclose or misdisclosed a conflict—and shareholders were therefore denied appraisal—then the burden of proof in a subsequent fiduciary suit shifts to the defendant. Presumably, the statute of limitations for discovering such nondisclosure or misdisclosure and bringing related fiduciary suits will need to be lengthened. In short, since shareholders can use appraisal as part of the effort to assess their corporation’s value and the desirability of the transaction at hand, they need not be unduly wary of relying on unreliable managers for advice about fundamental changes at issue. Shareholders also could use appraisal to discover information about managerial misbehavior, including the unnecessary suppression of information about corporate opportunities. This information will help in constructing a fiduciary suit. If managers claim to be reliable bargaining agents, but turn out to have misrepresented shareholder interests, then it becomes much easier to bring a successful fiduciary suit. Our proposed “disclose-and-be-appraised” rule aims to influence managers to disclose conflicts of interest honestly and carefully.

116. A “key change” might simply be defined to include all events that currently trigger appraisal in at least one state. It would seem quite sensible, for example, for managers to disclose conflicts of interest when proposing charter amendments.

117. Of course, if the statute of limitations begins to run from the time a wrong is discovered rather than from the time it is committed, then no lengthening will be required. See 13 W. Fletcher, Cyclopedia of the Law of Private Corporations § 5886 (rev. perm. ed. 1980) (generally, but not always, statute starts running when wrongdoing is discovered).

118. Shareholders will welcome such cost-cutting help which is likely to contribute to the goals of such suits because fiduciary suits are relatively expensive to pursue. Plaintiffs must know what sort of smoking gun to look for and where to look for it. The information disclosed by managers will lead them in this direction.
This proposed shift in the burden of proof for fiduciary suits is really just an extension of familiar corporate law. Fundamental changes and appraisal aside, if a fiduciary has a conflict of interest so that self-dealing is an inevitable problem, as when Corporation X, controlled by A, purchases supplies from A's wholly owned business, then the law generally asks X's monitoring shareholders only to outline the conflict; the burden then shifts to A to show that the transaction was fair to X.119 Similarly, if managers are unreliable bargaining agents in a merger, then shareholders ought to be able to discover information about the true worth of the assets and opportunities involved, and leave management to prove the fairness of the transaction in a fiduciary suit.

When should managers be required either to disclose-and-be-appraised or be subjected to a shift in the burden of proof? The question cannot be answered without some experience with fiduciary suits in which plaintiffs are free of the burden of proof. It may, of course, be a good idea in all fiduciary suits—not only in those in which we suggest placing the burden of proof on the defendant—to require the loser to pay some or all of the winner's costs in order to discourage abusive litigation.120 One might wish for experiments containing the appraisal-discovery statutes outlined above. The experiments could range from statutes that called for the disclose-and-be-appraised rule only in the case of a merger to statutes that listed many fundamental changes and events as triggering the disclose-and-be-appraised rule. In all cases, inaccurate or incomplete disclosure would lead to shifting the burden of proof in a subsequent fiduciary suit. Some statutes might incorporate a rule for these, or any, fiduciary suits under which the loser paid the winner's legal costs. In short, details can be fine-tuned once appraisal is linked with a goal; but since the discovery goal is necessarily part of a larger enforcement system, we simply stress the value of thinking of ap-

119. Compare Sinclair Oil Corp. v. Levien, 280 A.2d 717 (Del. 1971) (intrinsic fairness test applied when fiduciary is on both sides of transaction and plaintiff is able to show real possibility of self-dealing through which fiduciary's benefit caused beneficiary's detriment) with Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977) (in a merger fiduciary standing on both sides of transaction has the burden of establishing its entire fairness). It is thus possible to describe Delaware law as automatically shifting the burden of proof to managers with dual allegiances, at least in mergers. In nonmerger transactions this shifting may require some additional help from plaintiff. The plaintiff, at least in a merger case, shifts the burden to defendant managers simply by complaining properly. In contrast, our rule gives managers the burden of disclosure; only if they choose to misdisclose (or not to disclose) does the burden shift in a subsequent fiduciary suit. We think, of course, that our rule will lead to greater revelation of information.

120. We do not mean to express a view on the desirability of an indemnity rule. Indeed, the matter is sufficiently complex that it is unlikely that one broad conclusion about the "best" rule could be right. See generally Shavell, Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs, 11 J. LEG. STUD. 55 (1982).
praisal as a discovery tool rather than insist on one vision of the 
ideal law of agency. Regardless of how a jurisdiction handles the 
assignment of litigation costs or the identification of events that 
should trigger appraisal, it is our view that the disclose-and-be-ap-
praised device can be an important tool for the regulation of agency 
relationships.

Our proposal deals more directly and effectively with manage-
ment-controlled secrets than does present law, although it does not 
deal with such secrets as ambitiously as it might. It is our view that 
the synergy and, therefore, the desirability of a merger—to take one 
important fundamental change—often may be known only to those 
with intimate knowledge of the affairs and opportunities of the cor-
porations involved. These opportunities may be kept secret for the 
familiar reason that their revelation can destroy their value if com-
petitors or even suppliers know the firm’s goals.121 A firm’s market 
value is not always a good (as opposed to statistically unbiased) pre-
dictor of its real value because the market by hypothesis is unaware 
of the firm’s secrets. If managers are good bargaining and operating 
agents, then all works well. These secrets will be revealed in due 
course, maximizing the firm’s profits. Shareholders on average will 
be satisfied—except to the extent that some will sell shares in igno-
rance of the corporate secrets—but managers will know better than 
to part with their shares during these periods of silence. This con-
cern for, or even presumption of, valuable secrets explains the very 
significant premiums over market price normally paid in acquisi-
tions.122 Some observers seem puzzled or dismayed by these premi-
ums, but they are no surprise in a world where managers withhold 
information from the public in order to complete projects profitably 
and bargain vigorously for their own and their shareholders’ inter-
ests. Findings that firms’ “asset values” exceed their “market val-
ues” illustrate the same point about the importance of secrets.123

If managers are not good bargaining agents because they are 
looking for jobs with the acquirer or otherwise have conflicting loy-
alities, then the agency relationship that is the heart of the corporate 
form is threatened. The problem is not only one of property rights 
and wealth transfers—although it is obviously these matters that 
most concern shareholders with inadequate representation—but 
also one of economic inefficiency; managers corrupted by conflicting 
interests may make less productive use of resources. Managers may

121. In the familiar case the firm must accumulate land to realize its goal. Sellers of 
land may hold out and block the project, collectively discouraging future innovation if 
they know that the buyer has a much higher use than they do for the properties 
involved.
122. See supra note 93.
123. See Note, The Dissenting Shareholder’s Appraisal Remedy, 30 Okla. L. Rev. 
keep secrets unnecessarily and delay innovations in the hope of eventually “selling” the secrets and the firm's assets to acquirers who may actually produce less with the secrets than the developing firm would have produced alone.124

Again, our hope is that appraisal will sometimes yield information about secrets or about the plans of managers, so that shareholders will be able to evaluate proposed changes such as mergers and will have a better sense of what sort of fiduciary suit, if any, to attempt. Expensive as appraisal may be, it is surely less expensive than a fiduciary suit entered into without focus. Jurisdictions that experience too many or too few appraisal inquiries, however such experiences might be evaluated,125 can experiment with different formulae for dealing with the costs of appraisal and with the problem of free riding shareholders.126 Secrets will remain a problem, but appraisal might be fashioned as a tool to search for these “assets.”

Although managers' attempts to appropriate corporate secrets may create greater inefficiencies, it is arguable that greater inefficiencies would be generated by anything that discouraged acquirers from seeking to employ a target’s old management. If appraisal, or easier fiduciary suits, are triggered when target’s management is tainted with offers of employment in the surviving enterprise, acquirers may back off or inefficiently ignore managers with developed human capital; the acquirers then would be forced to teach new managers to learn what the old managers have already mastered. This is certainly a risk of our disclose-and-be-appraised (or bear the burden in a fiduciary suit) approach, but it is not an inevitable result. Shareholders who receive fair compensation when managers disclose their side payments and unreliability will not necessarily litigate and normally will lose fiduciary suits—however the burden of proof is assigned—so long as the transaction at issue was a fair one. There is, for example, no evidence that corporations

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124. Of course the acquirer may also do better with these assets. The point in the text is that the combination of managerial misbehavior and secrets—even in the absence of inframarginality concerns—interferes with any assumption that an acquisition is efficient simply because assets appear to be moving to the hands of the user who values them most highly.

125. It is, to be sure, almost impossible to know whether a society is experiencing the “right” number of lawsuits or appraisal proceedings. But there surely will be a tendency to compare the number of proceedings under a new rule with that experienced under the previous rule—and to object, perhaps unfairly, if the number has grown by a large factor.

126. In particular, it might be sensible to charge the corporation with all of the dissenter's costs if the appraised value turns out to be more than a given percentage greater than the amount the shareholders would have received under the terms of the transaction without appraisal. This strategy might be useful generally in thinking about the assignment of litigation costs.
often pass up efficient transactions with suppliers or customers in
which their officers or directors have conflicting interests—and yet
shareholders who challenge such transactions do enjoy a shift in the
burden of proof. While there is a real question about the magnitude
of inefficiencies that the disclose-and-be-appraised rule could cause
as compared with the inefficiencies that arise when managers seek
to appropriate corporate secrets, we suspect that commentators
have ignored or underestimated the latter.

Once corporate law’s problems are viewed as agency problems,
it is tempting to suggest, as resolutions to particular issues, the for-
motion of new agency relationships. Thus, the following possibili-
ties might be considered: Independent directors could look over the
shoulders of inside directors and independent litigation committees
could review the termination of derivative suits. Similarly, an “in-
dependent representative” could advise and represent shareholders
whenever managers reveal a conflict or even whenever a fundamen-
tal corporate change is proposed. One might further hope that
managers would feel free to confide secrets to such an agent. Then,
after some investigation, this independent representative could ad-
vise shareholders regarding the wisdom of defensive tactics by man-
agement\textsuperscript{127} and the desirability of outside offers, and when
appropriate could even bargain on behalf of otherwise scattered
shareholders. This representative also would be empowered and
sufficiently financed to investigate the firm, inspect for conflicts of
interest, and otherwise pursue and achieve the discovery goal.
Although we would welcome some firms’ experimentation in this
direction, we have no way of knowing whether its benefits exceed its
costs. Instead, we prefer to look for a familiar arrangement such as
appraisal with which to pursue the discovery goal.\textsuperscript{128}

\textsuperscript{127}. We refer to defensive tactics that are in the firm’s interests and are not simply
motivated by managerial self-interest. Again, if firm X has a secret the exposure of
which would ruin some or all of the secret’s value, then X is likely to be undervalued in
the market and an acquirer’s willingness to pay a premium above market price certainly
does not mean that the acquirer can put X’s assets to better use.

\textsuperscript{128}. A brief comparison of our proposal with current California rules is worthwhile.
In California, a non-short-form cash-out merger between “related parties” is prohibited
unless all of the target shareholders or the Commissioner of Corporations approves of
the transaction. A stock-for-stock merger between related parties and a short-form cash
merger trigger the appraisal remedy for the target’s shareholders and sometimes for the
acquirer’s shareholders as well. This appraisal remedy is subject to a market exception,
and does not preclude a fiduciary suit. See supra note 99; infra note 130. In all these
situations, our proposed uniform rule is “disclose-and-be-appraised”—with misdis-
closure leading to a shift in the burden of proof in a subsequent fiduciary suit. It is our
view that some mergers between related parties are beneficial to all shareholders so that
a requirement of unanimity or of time-consuming regulatory approval has the potential
to harm all shareholders. Our disclosure scheme and a combination of appraisal and
fiduciary suits seem more likely to correct or deter wrongful (and inefficient) mergers
and to encourage beneficial ones.
CONCLUSION

A clear focus on the credible goals of appraisal will not answer all questions related to that remedy. Consider, for example, questions concerning the exclusivity of remedies: When a statute offers appraisal, should it be interpreted as precluding another remedy and, when a shareholder selects another remedy, should appraisal be regarded as no longer available? Although the resolution of these questions surely is assisted by reflecting on the goals of appraisal, there is more than these goals at stake. In particular, these questions raise concerns about the advantages and costs of relitigating matters that courts or appraisers have already considered.

129. There are almost as many prevailing rules as possible permutations. A shareholder could be: (1) allowed to bring an appraisal suit at the same time as a derivative or individual suit for damages, or suit for injunctive relief (i.e., no exclusivity); (2) allowed to choose among the remedies by a rule that might be called "procedural exclusivity"; (3) allowed the remedy of appraisal and no other remedy when appraisal is available ("real exclusivity"); or (4) allowed only to ask for injunctive relief or appraisal when the latter is available, perhaps because the monetary relief available in appraisal should be regarded as a substitute for a suit for damages. These are not the only possibilities. Most importantly, and most appropriately from the perspective of the discovery goal, when real managerial misbehavior or other fraud is at stake any exclusivity rule might be overruled so that shareholders can litigate as they like. These rules can be linked to the credible goals of appraisal. For example, it is arguable that under the discovery goal one should be able to bring an appraisal claim followed by a fiduciary suit, because secrets and misbehavior may have come to light in the appraisal. Indeed, appraisal may be appropriate even after a fiduciary suit (a broad rule (1)), since the appraisal inquiry may get at an issue different from that which has been litigated.

130. The choice of an exclusivity rule might hinge on responses to two familiar questions related to collateral estoppel. The first concerns the wisdom of allowing relitigation. Rule (1), supra note 129, can be faulted for encouraging relitigation and therefore imposing duplicative costs, strategic settlement requests, and uncertainty on a party that will not know what level of resources to devote to a first claim. A second procedural question related to the exclusivity rule concerns voluntary or forced class actions. If one dissenter chooses a fiduciary suit, can another go to appraisal? The argument is almost surely an affirmative one but is beyond the scope of this note and Article.

As for the relitigation issue, it is possible to defend any of the rules listed above. Such a liberal provision as rule (1), supra note 129, may offer minority shareholders the right variety of tools from which to choose. Appraisal will be selected when other options are burdensome, but withdrawing these other remedies might destroy an important corrective step in another setting. On the other hand, the procedural exclusivity of rule (2), supra note 129, may offer all the tools but impose a type of res judicata by preventing a shareholder who is unsuccessful at using one tool from simply trying again with another. A rule (1) proponent might argue that the cost of such litigation is a sufficient disincentive to the shareholder who would abuse these legal tools. Real exclusivity, as in rule (3), supra note 129, is the most difficult to comprehend if not overridden by the uncovering of fraud. Michigan introduced such a statute in 1931: "Objection by any such [dissenting] shareholder to any action of the corporation provided in this section [such as a merger or sale of assets] and his rights thereafter under this section shall be his exclusive remedy." See 1931 Mich. Pub. Acts 327, § 44 (2).

Courts, including Michigan's, indeed relaxed this apparent exclusivity when "fraud," "illegality," or "unlawfulness" was involved, see Weckler v. Valley City Milling Co., 93 F. Supp. 444, 455 (W.D. Mich. 1950) (legislature could not have intended the exclusive remedy rule when the transaction was not in good faith). Many states
Nevertheless, it is surely helpful to understand the credible goals of codified or initiated an exception to the exclusive remedy rule, see, e.g., N.J. STAT. ANN. § 14A:11-5(2) (West 1969) (nonexclusivity applies even if the corporate action would be ultra vires, unlawful, or fraudulent as to dissenting shareholder); MASS. ANN. LAWS ch. 156B, § 98 (Michie/Law Co-op 1979) (illegal or fraudulent as to shareholder); see also Clark v. Pattern Analysis and Recognition Corp., 87 Misc. 2d 385, 387, 384 N.Y.S.2d 660, 664 (1976) (allegation of fraud, illegality, or bad faith not offset by any clear corporate business purpose precludes exclusivity). Whether one is more comfortable with an "efficiency" or a "fairness" approach, it is easy to see why exclusivity was relaxed in this way. Whatever the goal of appraisal—even inframarginality, for instance—if fraud turns up during appraisal, one would expect a statute to facilitate its exposure in order to encourage the recovery of damages and assure future deterrence. At the very least, even if it is thought best to regard damages and appraisal as mutually exclusive remedies, to avoid both duplicative factfinding (both proceedings require stock valuation and inquiries into managerial plans and secrets) and "ex post forum shopping," shareholders could be governed by rule (4), supra note 129. Rule (4) would permit them to bring actions for injunctive relief, but not monetary damages, following or concurrent with an appraisal claim. Thus, one proceeding would be about alleged wrongdoing by managers and the other about valuation. Indeed, this is precisely the route that the New York courts have taken thus far. See Walter J. Schloss Assocs. v. Arkwin Indus., Inc., 90 A.D.2d 149, 152, 455 N.Y.S.2d 844, 846 (1982) (availability of appraisal does not preclude action for equitable relief); Beard v. Ames, 96 A.D.2d 119, 120, 468 N.Y.S.2d 253, 258 (1983) (same). In short, real exclusivity is sensible only when fraud is not discovered. When fraud is present, we might expect courts to overcome any statutory instructions regarding exclusivity and allow suits against misbehaving managers to proceed.

It is fair to conclude that real exclusivity (even when fraud is present) does not exist. A few words of explanation follow in support of this tangential but strong observation of de facto nonexclusivity. New York, as noted above, has an exclusivity rule under which shareholders may bring claims for such equitable relief as injunctions when they learn of wrongdoing through the appraisal statute's operation. See Eisenberg v. Central Zone Property Corp., 306 N.Y. 58, 66–67, 115 N.E.2d 652, 655–56 (1953); Miller v. Steinbach, 268 F. Supp. 255, 270 (S.D.N.Y. 1967); see also cases cited supra in this footnote. But we have found no New York case in which a subsequent suit based on appraisal was allowed. (Note, in passing, that this is quite consistent with our description of the New York statute's pursuit of the discovery goal.) Interestingly enough, in Delaware—which is clearly not a discovery state—a stockholder who actually thought he had discovered fraud during appraisal was not allowed by the state court to bring a fiduciary suit unless he withdrew from appraisal with the corporation's permission. The court's protection of in medias res or ex post forum shopping is thus quite consistent with the suggested goal of appraisal. See Dofflemyer v. W.F. Hall Printing Co., 432 A.2d 1198, 1201 (1981). The shareholder was allowed to pursue a federal securities law claim in Dofflemyer v. W.F. Hall Printing Co., 558 F. Supp. 372, 386 (D. Del. 1983). Arguably, since the basis for the claim is different in a securities suit, there is no forum shopping or relitigation problem. But even New York denies damage suits to shareholders who have brought claims in appraisal to prevent disappointed litigants from reopening proceedings. See Breed v. Barton, 54 N.Y.2d 82, 85, 429 N.E.2d 128, 129 (1981) (denying derivative suit for damages after appraisal and noting duplicative costs and possibility of strategic behavior).

On the other hand, if appraisal reveals managerial misbehavior it is hard to imagine a court's ruling that no tools remain at its disposal. New York's experience already has been noted. In Connecticut, the supreme court, after insisting that the statute (drafted in part by Professor Manning) took exclusivity seriously, permitted a shareholder to sue individually, as opposed to derivatively, despite the "exclusive" availability of appraisal. Yanow v. Teal Indus., Inc., 178 Conn. 262, 284–85, 422 A.2d 311, 322 (1979); see also Dower v. Mosser Indus., Inc., 648 F.2d 183, 188–89 (1981), in which
appraisal in order to analyze, fashion, and coordinate appraisal statutes and other corporate law remedies.

the court stated that frozen-out shareholders could sue for injunctive relief following an appraisal suit under the Pennsylvania statute, although in this particular case the shareholders were denied the injunction since the court found a legitimate business reason for the transaction.

Finally, although California's law denies other remedies to a shareholder who has appraisal available, it allows fiduciary suits "if one of the parties to a reorganization or short-form merger is directly or indirectly controlled by, or under common control with, another party to the reorganization or short-form merger." CAL. CORP. CODE § 1312(b) (West 1977). "Control" is defined at id. § 160. Thus, a shareholder who uncovers evidence of misbehavior during appraisal and then pleads correctly almost surely will be entitled to both remedies, unless a court's interpretation of statutory language (such as "parties" and "indirectly controlled") is exceedingly literal. See Sturgeon Petroleums Ltd. v. Merchants Petroleum Co., 147 Cal. App. 3d 134, 139-41, 195 Cal. Rptr. 29, 32-34 (1983) (dissenting shareholders unsuccessful in arguing that the situation triggers the exception to the exclusivity promulgated in CAL. CORP. CODE § 1312(b) (West 1977)). Note that California does insist on "reverse procedural exclusivity": once a shareholder brings a fiduciary suit, he waives appraisal rights. CAL. CORP. CODE § 1312(b) (West 1977); see also id. § 1300(c) (in fiduciary suit brought in the situations specified in § 1300(b), the controlling party bears burden of proving fairness of the transaction at issue). We see, then, that apart from a rule of total exclusivity of remedies, the four rules discussed above exist in practice in different jurisdictions and can be explained as deriving from procedural realities and common sense regarding the wisdom of relitigation. To be sure, a preference for one of the "credible goals" of the appraisal remedy can influence the selection of the exclusivity (or nonexclusivity) rule. For example, our own preference, in conjunction with the discovery statute proposed in Part III of the text, is for a rule that permits both injunctive and monetary relief despite the availability of appraisal. Again, we imagine that some shareholders could use appraisal as a relatively inexpensive discovery tool with which to formulate later litigation strategy. If the results of the appraisal yield no fuel for litigation, and the claimants are nevertheless insufficiently deterred by the costs of litigation from taking a second stab at the corporation, then, as discussed earlier, a jurisdiction could shift more litigation costs to the losing party. See N.Y. BUS. CORP. LAW § 623(h)(7) (McKinney Supp. 1984-85) (granting courts power to allocate appraisal costs against or in favor of either party).

In our view, this cost shifting is a better way to weed out overly strategic claims than is a real exclusivity rule. On the other hand, if a shareholder sees no need for the discovery step of appraisal and brings a full-scale derivative suit first, then exclusivity— withdrawing the availability of appraisal from such a shareholder—may be a good idea, see CAL. CORP. CODE § 1312(b) (West 1977), unless the dissenter is able to show some new information that motivates the appraisal.

In summary, preference for an exclusivity rule depends on whether one worries more about the dangers of relitigation opportunities than about the advantages of multiple tools; the particular goal of appraisal influences this tension but hardly resolves it. Apart from the group coordination view of appraisal—which suggests that there should be no exclusivity because appraisal serves an altogether different role from litigation against management—the other goals lead to similar conclusions. For instance, the reckoning goal suggests that appraisal be available at key junctures; however, if derivative suits were regular enough to bring out information that is useful to those seeking to measure managerial performance, then appraisal would be superfluous or unwise (because of opportunities for relitigation) alongside such suits. Note that in New Jersey, which, as described earlier, has a statute that sensibly can be viewed as aimed at the reckoning goal, see supra notes 76-79 and accompanying text, one court recently declined procedural exclusivity. The target shareholder in a short-form merger had sought appraisal and later asked for and was allowed to pursue equitable relief. Mullen v. Academy Life Ins. Co., 705 F.2d 971, 974 (8th Cir.), cert. denied, 104 S. Ct. 101
The disclose-and-be-appraised (or face a shift in the burden of proof in a later fiduciary suit) proposal advanced in this Article builds on the discovery goal, reflecting our view that the problems associated with managerial secrets and misbehavior are the most crucial problems of corporate law. But the other goals we have developed are also credible and they, too, address problems found throughout corporate law. That the implications of these goals often conflict with one another highlights the ways in which appraisal law reflects the ambitions, the chaos, and the methods of corporate law.

(1983). It is not worthwhile, however, even as an academic exercise, to tie the exclusivity rule of one state after another to the relevant appraisal statute and its possible goal or goals. While the various goals suggest different exclusivity rules, one is always left wondering how seriously to take the hazards of relitigation.