metadata, citation and similar papers at core.ac.uk

brought to you by

provided by Duke Law Scholarship R

Duke Law Journal

VOLUME 54 NOVEMBER 2004 NUMBER 2

SHAREHOLDER OPPRESSION AND "FAIR VALUE": OF DISCOUNTS, DATES, AND DASTARDLY DEEDS IN THE CLOSE CORPORATION

DOUGLAS K. MOLL†

ABSTRACT

The doctrine of shareholder oppression protects a close corporation minority investor from the improper exercise of majority control. When a minority shareholder establishes "oppressive" majority conduct, a court typically orders the majority to purchase the minority's stock at its "fair value." But what does fair value mean? Further, when is fair value to be measured? The questions are critical ones that affect the lives of countless close corporation investors and that generate an enormous amount of present-day litigation. This Article builds a case for defining fair value as enterprise value in the shareholder oppression context. The Article argues, in other words, that the buyout remedy should provide an oppressed minority investor with his pro rata share of the company's overall value, with no reductions (or "discounts") for the lack of control or liquidity associated with the minority's shares.

Copyright © 2004 by Douglas K. Moll.

† George Butler Research Professor of Law, University of Houston Law Center. J.D., Harvard Law School, 1994; B.S., University of Virginia, 1991. The author wishes to thank Kate Blain, Patrick Elkins, Adam Goldberg, Andrea Houston, Stefanie Moll, Michael Muskat, and Robert Ragazzo for their comments and assistance on earlier drafts.

Moreover, the Article suggests that, in many situations, courts should allow an oppressed shareholder to choose between the "date of filing" and the "date of oppression" as the appropriate valuation date.

TABLE OF CONTENTS

Introduction 294
I. The Doctrine of Shareholder Oppression 299
A. The Nature of the Close Corporation 299
B. The Cause of Action for Oppression 303
C. Measuring Oppression through "Reasonable Expectations" 305
D. The Buyout Remedy for Oppression 308
II. "Fair Value" and the Problem of Discounts 310
A. The Ambiguity of "Fair Value" 310
B. The Minority Discount 315
C. The Marketability Discount 316
III. Building the Case against Discounts 318
A. Strengths of the Case 318
1. Context Matters 319
2. Statutory Language 336
3. The Undercompensation Argument 338
B. Weaknesses of the Case 345
1. The Dissolution Analogy 345
2. The Punishment Rationale 353
3. The Liquidity Assertion 364
C. Summary 366
IV. The Valuation Date 366
A. Current Framework 367
B. A Rationale for the "Date of Filing" 368
1. Election Cases 368
2. Nonelection Cases 371
C. Plaintiff's Choice? An Argument for the "Date of Oppression" 373
Conclusion 381

INTRODUCTION

Value makes the world go 'round—at least the world of corporate law. Shareholders want it, managers chase it, and the

investment community celebrates it. The task of measuring value, therefore, is an important one. In the close corporation context, the task of measuring value is a particularly thorny one as well, as a close corporation, by definition, lacks a market for its stock.[1] Consequently, the value of an ownership stake in a close corporation cannot be determined merely by referencing a well-established market price.

Despite this difficulty, the need to determine the "fair value" of close corporation stock has arisen with great frequency in recent years. This frequency has coincided with the rise of the shareholder oppression doctrine—a doctrine that seeks to safeguard the close corporation minority investor from the improper exercise of majority control.[2] Over the past few decades, a number of jurisdictions have authorized, either by statute or judicial decision, a buyout of an "oppressed" close corporation investor's stock at the "fair value" of the shares.[3] When a minority investor establishes shareholder oppression, in other words, the question of fair value often takes center stage, as the remedy for oppression typically involves a court-ordered buyout of the minority's holdings at a judicially determined fair value. For close corporation shareholders seeking to exit an oppressive situation, therefore, fair value is a concept of considerable significance.

But what does "fair value" mean? The question affects the lives of countless close corporation investors and is, as a result, of tremendous importance. Some actual numbers are telling. In a Minnesota lawsuit, an expert witness in business valuation opined that the fair value of an oppressed minority's one-third ownership

1. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 514 (Mass. 1975) ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation."); *infra* notes 31–32 and accompanying text (noting that close corporation stock lacks a market).

2. *See, e.g.*, Bonavita v. Corbo, 692 A.2d 119, 124 (N.J. Super. Ct. Ch. Div. 1996) (noting that the "thrust" of the oppression-triggered dissolution statute "is protection from the abusive exercise of *power*"); *id.* at 128 ("[I]t is the 'wielding of . . . power' in a manner which 'destroy[s] a stockholder's vital interest and expectations' that constitutes oppression." (alteration and omission in original) (quoting *In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984)); *see also infra* Part I (describing the shareholder oppression doctrine).

The terms "majority" and "minority" are used in this Article to "distinguish those shareholders who possess the actual power to control the operations of the firm from those who do not." J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1, 5 n.7 (1977). Such power is "most often determined by the size of the shareholdings." *Id.*

3. *See infra* Part I.D (describing the buyout remedy for oppression).

stake in a company was $46,665.[4] The trial court, however, concluded that the fair value of the same one-third ownership stake was $475,381[5]—more than ten times the expert's assessment. This staggering difference largely resulted from two conflicting approaches to the meaning of "fair value"—conflicting approaches that litigants still argue over today.

The first approach equates fair value with fair market value. Under this position, a court values an oppressed minority's shares by considering what a hypothetical purchaser would pay for them.[6] Because minority shares, by definition, lack control, a hypothetical purchaser is likely to pay less for minority shares than for shares that possess control (the "minority discount").[7] Moreover, because close corporation shares lack a ready market and are, as a consequence, difficult to liquidate, a hypothetical purchaser is likely to pay less for close corporation shares than for readily traded public corporation shares (the "marketability discount").[8] Under the fair market value interpretation of fair value, therefore, minority and marketability discounts are appropriate. In the Minnesota lawsuit, the expert's fair value appraisal of $46,665 was derived by applying a 75 percent minority discount and a 35 percent marketability discount to the value of the oppressed investor's one-third stake in the company.[9]

The second approach to the meaning of fair value defines fair value simply as a pro rata share of a company's overall value.[10] If a close corporation is valued at $10 million, for example, the fair value of a 25 percent minority ownership position in that company is worth 25 percent of the overall company value, or $2.5 million. Under this "enterprise value" approach, discounting for the shares' lack of

---

4. *See* Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 288 (Minn. 2000) (describing the expert's testimony).

5. *Id.* at 289. This comparison requires some additional explanation. *See infra* note 11 (clarifying the comparison).

6. *See infra* Part II.A (discussing the meaning of "fair value").

7. *See infra* Part II.B (describing the minority discount).

8. *See infra* Part II.C (describing the marketability discount).

9. *See Follett*, 615 N.W.2d at 288 (describing the calculation). The expert had calculated the value of the company at $875,000. *Id.* On a pro rata basis, therefore, a one-third ownership interest in the company was worth $291,667. A 75 percent minority discount would reduce that sum to $72,917, and a 35 percent marketability discount on the remainder would yield $47,396. The slight difference between this figure and the $46,665 sum calculated by the expert is due to rounding. For further detail on how discounts are applied in a valuation calculation, see *infra* note 97.

10. *See infra* Part II.A (discussing the meaning of "fair value").

control and lack of liquidity is inappropriate. In the Minnesota lawsuit, the trial court's fair value appraisal of $475,381 was premised on this competing enterprise value standard.[11]

Because the combined effect of minority and marketability discounts can reduce the value of a pro rata stake in a company by 50 percent or more,[12] the propriety of discounts and the related debate over the meaning of fair value are issues of critical importance to close corporation investors. Significantly, these issues are far from settled, as there is considerable disagreement over the appropriateness of discounts in the shareholder oppression setting.[13] Indeed, the fight over discounts is perhaps the most frequently litigated valuation issue in close corporation disputes today.

Just as oppressed investors are affected by the meaning of "fair value" in a buyout proceeding, so too are they affected by the choice of the valuation date. As mentioned, the remedy for shareholder oppression typically involves a buyout of an aggrieved investor's holdings at the fair value of the shares—but fair value as of when? The date of the oppressive conduct? The date of the filing of the oppression lawsuit? The date of trial? The date of judgment? In the age of corporate scandals and internet ventures, it hardly needs

---

11. *See Follett*, 615 N.W.2d at 288–89 (noting that the trial court "found the fair value of [the oppressed investor's] shares to be one-third of the majority's appraised value of $1,426,143 of [the company] as an enterprise, or $475,381").

To be fair, the difference between the expert's $46,665 valuation of the oppressed investor's one-third ownership interest and the trial court's $475,381 valuation of the same interest, *see id.*, does not result solely from the ambiguity in the meaning of fair value and the corresponding disagreement over discounts. Even if the expert and the trial court had both used an "enterprise value" approach to fair value, there would still have been a sizable differential, as the expert valued the company at $875,000, whereas the trial court adopted a company valuation of $1,426,143. *See id.* at 288. Thus, even under the same enterprise value standard, the expert would have valued a one-third ownership interest at $291,667, whereas the trial court would have valued it at $475,381. To truly compare the effect of discounts, the same company value must be used. If the expert's 75 percent minority discount and 35 percent marketability discount had been applied to the trial court's $1,426,143 company valuation, *see supra* note 9 and accompanying text, the expert would have valued the oppressed investor's one-third stake at approximately $77,249 ($1,426,143 / 3 × .25 × .65). *See infra* note 97 (describing how discounts are applied in a valuation calculation). In that case, the trial court's enterprise value assessment of $475,381 for the oppressed investor's one-third interest would have been more than six times the expert's fair market value assessment of $77,249.

12. *See infra* note 97 and accompanying text (describing the cumulative effect of discounts).

13. *See, e.g.*, Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 734 (N.J. 1999) (noting that, in dissenters' rights cases, "there is no clear consensus on whether a marketability discount should be applied," and stating that "[t]here is even less consensus about whether discounts should be applied in oppressed shareholder actions").

saying that a company's value can change dramatically in a relatively short period of time. In a New Jersey case, for example, the value of a close corporation declined by over 71 percent, according to one expert, in a seven-month period.[14] Given how quickly a company's fortunes can change, the question of *when* to measure fair value is a critical inquiry in and of itself, as the choice of date can have a significant impact on the ultimate fair value conclusion.

This Article grapples with the difficult valuation issues surrounding discounts and dates in the shareholder oppression context. The Article methodically builds a case against discounts by using both conventional and novel arguments that are tailored to the shareholder oppression setting. In the course of constructing that case, the Article challenges some of the traditional arguments that courts and commentators have routinely relied on—and still rely on—to reject discounts. Further, by discussing the valuation date and various factors that should affect its designation, this Article underscores that the choice of the valuation date is an independently important component of the fair value analysis.

Part I of this Article provides necessary background information by discussing the nature of the close corporation, the development of the shareholder oppression doctrine, and the operation of the buyout remedy. Part II explores the concept of fair value and examines how its ambiguous meaning gives rise to the problem of discounts. Part III argues that the enterprise value interpretation of fair value is a superior approach in the shareholder oppression setting. Because the forced redemption nature of the oppression buyout bears little resemblance to the fair market value conception of a voluntary sale, and because the rationale for minority and marketability discounts is absent in many (if not most) buyout proceedings, this Part contends that the fair market value approach—together with its reliance on discounts—should be rejected. The conscious decision by many state legislatures to use "fair value" in their buyout statutes rather than "fair market value" further supports this position. Finally, because the substantial damage caused by oppressive behavior is not fully remedied by a conventional buyout award, this Part suggests that any

14. *See* Torres v. Schripps, Inc., 776 A.2d 915, 918–19, 922 (N.J. Super. Ct. App. Div. 2001) (noting one expert's conclusion that the value of a close corporation had declined from $222,400 on February 28, 1997 (the date when the plaintiff minority was terminated from employment with the company) to $64,000 on September 29, 1997 (the date when the company was sold)).

"overcompensation" caused by the absence of discounts is justified by the "undercompensation" that the buyout award otherwise provides.

Part III continues by challenging some of the traditional arguments that courts and commentators raise in their opposition to discounts. The limitations of the dissolution analogy, the punishment rationale, and the liquidity assertion are all examined. Such arguments are problematic because they may work against the oppressed investor's interests and, more importantly, they fail to provide solid bases for rejecting discounts. To the extent that other courts perceive the arguments' analytical weaknesses, those courts may feel less inclined themselves to reject the application of discounts. Part IV discusses the valuation date and explores the critical question of when fair value should be measured. Although sound reasons exist for choosing the date of filing of an oppression lawsuit as the valuation date, this Part suggests that a "plaintiff's choice" framework is appropriate in many disputes. When an oppressed shareholder has been wrongfully ousted from participation in the management of a company, allowing the aggrieved investor to choose between the date of filing and the date of oppression is a defensible position.

I. THE DOCTRINE OF SHAREHOLDER OPPRESSION

A. *The Nature of the Close Corporation*

A close corporation is a business organization typified by a small number of stockholders, the absence of a market for the corporation's stock, and substantial shareholder participation in the management of the corporation.[15] In the traditional public corporation, the

15. *See, e.g.*, Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 511 (Mass. 1975) (describing close corporations); Daniel S. Kleinberger, *Why Not Good Faith? The Foibles of Fairness in the Law of Close Corporations*, 16 WM. MITCHELL L. REV. 1143, 1148 (1990) ("Close corporations have a limited number of shareholders, and most, if not all, of the shareholders are active in the corporation's day-to-day business.").

There is some variation in the definition of a close corporation. *See* MELVIN ARON EISENBERG, CORPORATIONS AND OTHER BUSINESS ORGANIZATIONS 338 (8th unabr. ed. 2000) ("[W]hat constitutes a close corporation is a matter of theoretical dispute. Some authorities emphasize the number of shareholders, some emphasize the presence of owner-management, some emphasize the lack of a market for the corporation's stock, and some emphasize the existence of formal restrictions on the transferability of . . . shares."); 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S CLOSE CORPORATIONS § 1.02, at 1-4 to 1-7 (3d ed. 2002) [hereinafter CLOSE CORPORATIONS] (noting the following possible definitions of a "close corporation": a corporation with relatively few shareholders, a corporation whose shares

shareholder is normally a detached investor who neither contributes labor to the corporation nor takes part in management.[16] In contrast, within a close corporation, "a more intimate and intense relationship exists between capital and labor."[17] Close corporation shareholders "usually expect employment and a meaningful role in management, as well as a return on the money paid for [their] shares."[18] Further, close corporation investors are often linked by family or other personal relationships that result in a familiarity among the participants.[19]

Conventional corporate law norms of majority rule and centralized control can lead to serious problems for the close corporation minority shareholder.[20] Traditionally, most corporate power is centralized in the hands of a board of directors.[21] In a close

---

are not generally traded in the securities markets, a corporation in which the participants consider themselves partners *inter se*, a corporation in which management and ownership are substantially identical, and any corporation that elects to place itself in a close corporation grouping). Nevertheless, the typical close corporation possesses most, if not all, of the attributes described in these various definitions.

16. *See* 1 CLOSE CORPORATIONS, *supra* note 15, § 1.08, at 1-31 to 1-32 (describing the passive investor).

17. Robert B. Thompson, *The Shareholder's Cause of Action for Oppression*, 48 BUS. LAW. 699, 702 (1993).

18. *Id.*; *see, e.g.*, Pedro v. Pedro, 463 N.W.2d 285, 289 (Minn. Ct. App. 1990) ("[T]he primary expectations of minority shareholders include an active voice in management of the corporation and input as an employee."); 1 CLOSE CORPORATIONS, *supra* note 15, § 7.02, at 7-4 ("Ownership and management frequently coalesce in closely held corporations, where not uncommonly all the principal shareholders devote full time to corporate affairs. Even where one or two shareholders may be inactive, the business is normally conducted by the others without aid from nonshareholder managers.").

19. *See, e.g.*, Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193, 196 (1988) (discussing relationships among close corporation participants); *see also* Bostock v. High Tech Elevator Indus., Inc., 616 A.2d 1314, 1320–21 (N.J. Super. Ct. App. Div. 1992) ("[A] close[] corporation frequently originates in the context of personal relationships. Often such business entities are formed by family members or friends." (citation omitted)).

20. *See* 1 F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL'S OPPRESSION OF MINORITY SHAREHOLDERS § 1:02, at 1-3 to 1-4 (2d ed. 1985) [hereinafter OPPRESSION] (characterizing majority rule and centralized management as the "traditional pattern of corporat[e] management," and noting the dangers that this management pattern presents to close corporation minority shareholders); Thompson, *supra* note 17, at 702–03 ("In a closed setting, the corporate norms of centralized control and majority rule easily can become instruments of oppression.").

21. *See* MODEL BUS. CORP. ACT § 8.01(b) (2002) ("All corporate powers shall be exercised by or under the authority of, and the business and affairs of the corporation managed by or under the direction of, its board of directors . . . ."); Kleinberger, *supra* note 15, at 1152 ("In traditional theory, ultimate authority resides with the board of directors . . . .").

corporation, the board is ordinarily controlled "by the shareholder or shareholders holding a majority of the voting power."[22] Through this control of the board, the majority shareholder has the ability to take actions that are harmful to the minority shareholder's interests.[23] Such actions are often referred to as "freeze-out" or "squeeze-out" techniques[24] that "oppress"[25] the close corporation minority shareholder. Common freeze-out techniques include the refusal to declare dividends, the termination of a minority shareholder's employment, the removal of a minority shareholder from a position of management, and the siphoning off of corporate earnings through high compensation to the majority shareholder.[26] Quite often, these tactics are used in combination. For example, a close corporation investor generally looks to salary more than dividends for a share of the business returns because the "[e]arnings of a close corporation

---

22. Kleinberger, *supra* note 15, at 1151–52; *see, e.g.*, 1 OPPRESSION, *supra* note 20, § 1:02, at 1-3 ("Indeed, in most closely held corporations, majority shareholders elect themselves and their relatives to all or most of the positions on the board.").

23. *See, e.g.*, *Bostock*, 616 A.2d at 1320 ("[B]ased upon its voting power, 'the majority is able to dictate to the minority the manner in which the [close] corporation is run.'" (quoting Orchard v. Covelli, 590 F. Supp. 1548, 1557 (W.D. Pa. 1984), *dismissed*, 791 F.2d 920 (3d Cir. 1986))); Meiselman v. Meiselman, 307 S.E.2d 551, 558 (N.C. 1983) ("[W]hen the personal relationships among the participants break down, the majority shareholder, because of his greater voting power, is in a position to terminate the minority shareholder's employment and to exclude him from participation in management decisions."); Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 267 (S.C. 2001) ("This unequal balance of power often leads to a 'squeeze out' or 'freeze out' of the minority by the majority shareholders." (footnote omitted)); *see also* Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976) ("In the instant case [a group of four shareholders], acting in concert, control a majority of the outstanding stock, though no single shareholder owns 51%."); *id.* ("Because this control carries the power to destroy or impair the interests of minority owners, the law imposes equitable limitations on the rights of dominant shareholders to act in their own self-interest.").

24. *See* 1 OPPRESSION, *supra* note 20, § 1:01, at 1-3 n.2 ("The term 'freeze-out' is often used as a synonym for 'squeeze-out.'"). Professors O'Neal and Thompson note that the term "squeeze-out" means "the use by some of the owners or participants in a business enterprise of strategic position, inside information, or powers of control, or the utilization of some legal device or technique, to eliminate from the enterprise one or more of its owners or participants." 1 *id.* at 1-1. Similarly, a "partial squeeze-out" is defined as "action which reduces the participation or powers of a group of participants in the enterprise, diminishes their claims on earnings or assets, or otherwise deprives them of business income or advantages to which they are entitled." 1 *id.* at 1-1 to 1-2. *See generally* 1 *id.* §§ 4:01–4:08, at 4-1 to 4-61; 5:01–5:39, at 5-1 to 5-313; 2 *id.* §§ 6:01–6:17, at 6-1 to 6-97 (discussing various squeeze-out techniques).

25. *See infra* notes 43–45 and accompanying text (describing judicial definitions of "oppression").

26. *See* 1 OPPRESSION, *supra* note 20, §§ 3:04, 3:06, 3:07, at 3-13 to 3-20, 3-37 to 3-58 (discussing freeze-outs); *see also* Donahue v. Rodd Electrotype Co., 328 N.E.2d 505, 513 (Mass. 1975) (noting some of the possible freeze-out techniques).

often are distributed in major part in salaries, bonuses and retirement benefits."[27] When actual dividends are not paid, a minority shareholder who is discharged from employment and removed from the board of directors is effectively denied any return on his investment as well as any input into the management of the business.[28] Once a minority shareholder faces this "indefinite future with no return on the capital he or she contributed to the enterprise,"[29] the majority often proposes to purchase the shares of the minority shareholder at an unfairly low price.[30]

---

27. 1 CLOSE CORPORATIONS, *supra* note 15, § 1.08, at 1-32; *see* Kleinberger, *supra* note 15, at 1148 ("Payout is frequently in the form of salary rather than dividends.").

When calculating its taxable income, a close corporation can deduct reasonable salaries paid to its employees to "reduce the amount of income tax that the company pays." Thompson, *supra* note 19, at 197 n.12 (citing I.R.C. § 162 (1986)). A close corporation cannot, however, deduct any dividends paid to its shareholders. *Id*. As a consequence, corporate income paid as dividends is subject to double taxation—once as business income at the corporate level, and once as personal income at the shareholder level. *Id.* at 197. Because of "[t]he tax system's discouragement of dividends" in favor of salaries, "most close corporations provide a return to participants in the form of salary or other employee-related benefits." Thompson, *supra* note 17, at 714 n.90; *see also* Morrow v. Martschink, 922 F. Supp. 1093, 1100 (D.S.C. 1995) ("[A]ll shareholders have been paid a salary and/or director's fees throughout the Company's existence to avoid the double taxation embodied in a dividend distribution."); 1 OPPRESSION, *supra* note 20, § 1:03, at 1-4 to 1-5 ("[A] close corporation, in order to avoid so-called 'double taxation,' usually pays out most of its earnings in the form of salaries rather than as dividends.").

28. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return . . . and remaining involved in the operations of the business was dashed when Sylvester removed Balvik as a director and officer . . . ."); 1 CLOSE CORPORATIONS, *supra* note 15, § 1.15, at 1-89 ("[A minority investor] in a close corporation, expecting to receive a return on the investment in the form of a regular salary, would face the risk that, after a falling out . . . the directors would terminate the minority shareholder's employment and deprive that investor of any return on the investment . . . ."); *see also* Naito v. Naito, 35 P.3d 1068, 1072 (Or. Ct. App. 2001) ("Employment with the corporation was, as a practical matter, the only way that shareholders could receive any immediate benefit from their shares.").

29. Thompson, *supra* note 17, at 703; *see* 1 CLOSE CORPORATIONS, *supra* note 15, § 1.16, at 1-96 ("If, for example, the minority shareholder is fired from the employment that was providing the return on the investment in the close corporation, the minority may face an indefinite period with no return on the investment."); Charles W. Murdock, *The Evolution of Effective Remedies for Minority Shareholders and Its Impact upon Valuation of Minority Shares*, 65 NOTRE DAME L. REV. 425, 447 (1990) ("[T]he primary vulnerability of a minority shareholder is the spectre of being 'locked-in,' that is, having a perpetual investment in an entity without any expectation of ever receiving a return on that investment.").

30. *See, e.g.*, *Donahue*, 328 N.E.2d at 515 ("Majority 'freeze-out' schemes which withhold dividends are designed to compel the minority to relinquish stock at inadequate prices. When the minority stockholder agrees to sell out at less than fair value, the majority has won." (citations omitted)); 2 CLOSE CORPORATIONS, *supra* note 15, § 9.02, at 9-7 (noting that "[a] squeeze-out usually does not offer fair payment to the 'squeezees' for the interests, rights or

In a public corporation, a minority shareholder can escape these abuses of power simply by selling his shares on the market. In a close corporation, of course, there is no ready market for the company's shares.[31] Thus, when a close corporation investor is treated unfairly, he "cannot escape the unfairness simply by selling out at a fair price."[32]

B. The Cause of Action for Oppression

Over the years, state legislatures and courts have developed two significant avenues of relief for the oppressed close corporation shareholder. First, many state legislatures have amended their corporate dissolution statutes to include oppression by the controlling shareholder as a ground for involuntary dissolution of a corporation.[33] When oppressive conduct occurs, however, actual dissolution is not the only remedy at a court's disposal. Both state statutes and judicial precedents have authorized alternative remedies for oppression that are less drastic than dissolution—for example, buyouts and provisional directors.[34] As the alternative forms of relief have

---

powers which they lose"); Thompson, *supra* note 17, at 703–04 (observing that in a classic freeze-out "the majority first denies the minority shareholder any return and then proposes to buy the shares at a very low price").

31. *See, e.g.*, *Donahue*, 328 N.E.2d at 514 ("In a large public corporation, the oppressed or dissident minority stockholder could sell his stock in order to extricate some of his invested capital. By definition, this market is not available for shares in the close corporation."); Brenner v. Berkowitz, 634 A.2d 1019, 1027 (N.J. 1993) ("[U]nlike shareholders in larger corporations, minority shareholders in a close corporation cannot readily sell their shares when they become dissatisfied with the management of the corporation."); Bostock v. High Tech Elevator Indus., Inc., 616 A.2d 1314, 1320 (N.J. Super. Ct. App. Div. 1992) ("[A] minority interest in a close[] corporation is difficult to value because the shares are not publicly traded and a fair market is often not available."); 2 CLOSE CORPORATIONS, *supra* note 15, § 9.02, at 9-4 to 9-5 ("[A] shareholder in a close corporation does not have the exit option available to a shareholder in a publicly held corporation, who can sell [his] shares in a securities market if [he is] dissatisfied with the way the corporation is being operated."); Thompson, *supra* note 17, at 702 ("[T]he economic reality of no public market deprives investors in close corporations of the same liquidity and ability to adapt available to investors in public corporations.").

32. Kleinberger, *supra* note 15, at 1149; *cf.* Walensky v. Jonathan Royce Int'l, Inc., 624 A.2d 613, 615 (N.J. Super. Ct. App. Div. 1993) ("The interest owned by a minority shareholder in a closely held corporation is often a precarious one. In fact, it has been characterized by this court as being one of 'acute vulnerability.'").

33. *See* Thompson, *supra* note 17, at 708 (describing the dissolution statutes). *See generally* Murdock, *supra* note 29, at 452–61 (describing the development of oppression as a ground for dissolution).

34. *See infra* notes 54–55 and accompanying text (discussing alternative remedies).

broadened, orders of actual dissolution have become less frequent.[35] Thus, oppression has evolved from a statutory ground for involuntary dissolution to a statutory ground for a wide variety of relief.[36]

Second, particularly in states without an oppression-triggered dissolution statute, some courts have imposed a fiduciary duty among close corporation shareholders and have allowed an oppressed shareholder to bring a direct cause of action for breach of this duty.[37] In the seminal decision of *Donahue v. Rodd Electrotype Co.*,[38] the Massachusetts Supreme Judicial Court adopted such a standard:

> [W]e hold that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another. In our previous decisions, we have defined the standard of duty owed by partners to one another as the "utmost good faith and loyalty." Stockholders in close corporations must discharge their management and stockholder responsibilities in conformity with this strict good faith standard. They may not act out of avarice, expediency or self-interest in derogation of their duty of loyalty to the other stockholders and to the corporation.[39]

---

35. Thompson, *supra* note 17, at 708; *cf.* Harry J. Haynsworth, *The Effectiveness of Involuntary Dissolution Suits as a Remedy for Close Corporation Dissension*, 35 CLEV. ST. L. REV. 25, 53 (1986) (finding that courts ordered remedies other than dissolution in the majority of thirty-seven involuntary dissolution cases studied). *See generally* Murdock, *supra* note 29, at 461–64 (discussing the development of alternative remedies).

36. *See* 2 CLOSE CORPORATIONS, *supra* note 15, § 9.27, at 9-159 ("The inclusion of 'oppression' and similar grounds as a basis for involuntary dissolution or alternative remedies has opened up a much broader avenue of relief for minority shareholders caught up in a close corporation wracked with dissension."); Thompson, *supra* note 17, at 708–09 ("[I]t makes more sense to view oppression not as a ground for dissolution, but as a remedy for shareholder dissension.").

37. *See* Thompson, *supra* note 17, at 726 (discussing the fiduciary duty that close corporation shareholders owe one another); *see also id.* at 739 ("It should not be surprising that the direct cause of action is developed particularly in states without an oppression statute . . . ."); *id.* (stating that the direct cause of action "provides a vehicle for relief for minority shareholders in a close corporation where the statutory norms reflect no consideration for the special needs of such enterprises"). *See generally* Murdock, *supra* note 29, at 433–40 (discussing the development of the shareholder fiduciary duty).

38. 328 N.E.2d 505 (Mass. 1975).

39. *Id.* at 515 (citations and footnotes omitted). The *Donahue* duty of "utmost good faith and loyalty," however, was later scaled back by the same court. Due to concerns that the "untempered application of the strict good faith standard enunciated in *Donahue* . . . [would] result in the imposition of limitations on legitimate action by the controlling group in a close corporation which [would] unduly hamper its effectiveness in managing the corporation in the best interests of all concerned," the Supreme Judicial Court of Massachusetts suggested a balancing test. Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 663 (Mass. 1976).

Following the lead of the *Donahue* court, several courts outside of Massachusetts have also imposed a fiduciary duty running directly from shareholder to shareholder in a close corporation.[40]

The development of the statutory and fiduciary duty actions reflect "the same underlying concerns for the position of minority shareholders, particularly in close corporations after harmony no longer reigns."[41] Because of the similarities between the two remedial schemes, it has been suggested that "it makes sense to think of them as two manifestations of a minority shareholder's cause of action for oppression."[42] In the close corporation context, therefore, it is sensible to view the parallel development of the statutory action and the fiduciary duty action as two sides of the same coin—i.e., the shareholder's cause of action for oppression.

C. Measuring Oppression through "Reasonable Expectations"

The development of a shareholder's cause of action for oppression requires courts to determine when "oppressive" conduct has occurred. In wrestling with this issue, the courts have developed three principal approaches to defining oppression. First, some courts define oppression as "burdensome, harsh and wrongful conduct[,] . . . a visible departure from the standards of fair dealing and a violation of fair play on which every shareholder who entrusts his money to a [corporation] is entitled to rely."[43] Second, some courts link oppression to the breach of a fiduciary duty owed directly from one

Under this test, if the controlling group can demonstrate a "legitimate business purpose" for its actions, no breach of fiduciary duty will be found unless the minority shareholder can demonstrate "that the same legitimate objective could have been achieved through an alternative course of action less harmful to the minority's interest." *Id.*

40. *See, e.g.*, Guy v. Duff & Phelps, Inc., 672 F. Supp. 1086, 1090 (N.D. Ill. 1987) (discussing the fiduciary duty that close corporation shareholders owe one another); Orchard v. Covelli, 590 F. Supp. 1548, 1556–59 (W.D. Pa. 1984) (same); W&W Equip. Co. v. Mink, 568 N.E.2d 564, 570–71 (Ind. Ct. App. 1991) (same); Evans v. Blesi, 345 N.W.2d 775, 779 (Minn. Ct. App. 1984) (same); Fought v. Morris, 543 So. 2d 167, 170–71 (Miss. 1989) (same); Crosby v. Beam, 548 N.E.2d 217, 220–21 (Ohio 1989) (same); Estate of Schroer v. Stamco Supply, Inc., 482 N.E.2d 975, 979–81 (Ohio Ct. App. 1984) (same).

41. Thompson, *supra* note 17, at 739.

42. *Id.* at 700. *See generally id.* at 738–45 (describing the "combined cause of action for oppression").

43. *Id.* at 711–12 (omission in original) (quoting Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976)); *see, e.g.*, Skierka v. Skierka Bros., 629 P.2d 214, 221 (Mont. 1981) (quoting Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. Ct. App. 1976)); *see also* Haynsworth, *supra* note 35, at 36–39 (describing judicial definitions of oppression).

close corporation shareholder to another.[44] Third, a number of courts tie oppression to the "frustration of the reasonable expectations of the shareholders."[45] Of these three approaches, the "reasonable expectations" standard garners the most approval, and courts have increasingly used it to determine whether oppressive conduct has occurred.[46] The highest courts in several states have adopted the reasonable expectations standard,[47] and commentators have generally favored it as well.[48]

The New York decision of *In re Kemp & Beatley, Inc.*[49] has been particularly influential in giving some context to the reasonable expectations framework. In *In re Kemp*, the New York Court of Appeals stated that "oppressive actions . . . refer to conduct that substantially defeats the 'reasonable expectations' held by minority

---

44. *See supra* notes 37–40 and accompanying text (describing the enhanced fiduciary duty that some courts have imposed).

45. 2 CLOSE CORPORATIONS, *supra* note 15, § 9.27, at 9-161; *see In re* Kemp & Beatley, Inc., 473 N.E.2d 1173, 1179 (N.Y. 1984) (equating oppression with conduct that "defeats the 'reasonable expectations' held by minority shareholders in committing their capital to the particular enterprise").

46. *See, e.g.*, 2 CLOSE CORPORATIONS, *supra* note 15, § 9.28, at 9-168 ("One of the most significant trends in the law of close corporations in recent years is the increasing willingness of courts to look to the reasonable expectations of shareholders to determine whether 'oppression' or similar grounds exist as a justification for involuntary dissolution or another remedy.").

47. *See, e.g.*, Stefano v. Coppock, 705 P.2d 443, 446 n.3 (Alaska 1985) (adopting the reasonable expectations approach); Fox v. 7L Bar Ranch Co., 645 P.2d 929, 933–34 (Mont. 1982) (same); Brenner v. Berkowitz, 634 A.2d 1019, 1029 (N.J. 1993) (same); *In re Kemp*, 473 N.E.2d at 1179 (same); Meiselman v. Meiselman, 307 S.E.2d 551, 563–64 (N.C. 1983) (same); Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) (same); Masinter v. WEBCO Co., 262 S.E.2d 433, 442 (W. Va. 1980) (same). *But see* Kiriakides v. Atlas Food Sys. & Servs., Inc., 541 S.E.2d 257, 265–66 (S.C. 2001) ("We find [that] adoption of the 'reasonable expectations' standard is inconsistent with [the South Carolina oppression-triggered dissolution statute], which places an emphasis not upon the minority's expectations but, rather, on the actions of the majority."). A number of intermediate appellate courts in other states have adopted the reasonable expectations standard as well. *See, e.g.*, Maschmeier v. Southside Press, Ltd., 435 N.W.2d 377, 380 (Iowa Ct. App. 1988) (adopting the reasonable expectations approach); McCauley v. Tom McCauley & Son, Inc., 724 P.2d 232, 237–38 (N.M. Ct. App. 1986) (same); Davis v. Sheerin, 754 S.W.2d 375, 382 (Tex. App. 1988) (same).

48. *See* Haynsworth, *supra* note 35, at 37 ("The third definition of oppression, initially derived from English case law, and long advocated by Dean F. Hodge O'Neal as well as other leading close corporation experts, is conduct which frustrates the reasonable expectations of the investors." (footnotes omitted)); Thompson, *supra* note 19, at 211 ("Recognition of the intimate, illiquid relationship within a close corporation therefore provides the necessary foundation for judging whether relief should be granted and, if so, what relief is appropriate; the shareholders' reasonable expectations has become the standard which best facilitates that approach.").

49. 473 N.E.2d 1173 (N.Y. 1984).

shareholders in committing their capital to the particular enterprise."[50] As the court continued:

> A court considering a petition alleging oppressive conduct must investigate what the majority shareholders knew, or should have known, to be the petitioner's expectations in entering the particular enterprise. Majority conduct should not be deemed oppressive simply because the petitioner's subjective hopes and desires in joining the venture are not fulfilled. Disappointment alone should not necessarily be equated with oppression.
>
> Rather, oppression should be deemed to arise only when the majority conduct substantially defeats expectations that, objectively viewed, were both reasonable under the circumstances and were central to the petitioner's decision to join the venture.[51]
>
> . . . A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations and there exists no effective means of salvaging the investment.[52]

As illustrated by the *In re Kemp* court, the reasonable expectations standard focuses primarily on the effect that majority conduct has on the minority shareholder's interests. When majority conduct unjustifiably[53] harms a minority's reasonable expectations, oppression liability is typically found.

---

50. *Id.* at 1179.

51. *Id*.

52. *Id.*; *see also Meiselman*, 307 S.E.2d at 563 ("[F]or plaintiff's expectations to be reasonable, they must be known to or assumed by the other shareholders and concurred in by them. Privately held expectations . . . not made known to the other participants are not 'reasonable.' Only expectations embodied in understandings, express or implied, among the participants should be recognized . . . ."). It is worth noting that the *In re Kemp* court's focus on the shareholder's expectations at the time of investment has been criticized as unduly narrow. *See, e.g.*, Douglas K. Moll, *Shareholder Oppression & Reasonable Expectations: Of Change, Gifts, and Inheritances in Close Corporation Disputes*, 86 MINN. L. REV. 717, 762 (2002) ("A reasonable expectations framework that focuses solely on the time of investment, therefore, is overly restrictive. Instead . . . the framework should explicitly adopt a broader perspective that looks for investment bargains between the shareholders throughout the entirety of their relationship.").

53. If the majority's allegedly oppressive action (e.g., terminating the minority's employment) is justifiable in light of the minority's misconduct or incompetence, a finding of shareholder oppression is likely unwarranted. *See* Douglas K. Moll, *Shareholder Oppression in*

D. The Buyout Remedy for Oppression

Once reasonable expectations have been established, the shareholder oppression doctrine protects those expectations through a panoply of remedies. Many state statutes empower courts to offer a wide range of relief,[54] and judicial opinions frequently list various remedial options.[55] The most common remedy for oppression,

---

Close Corporations: The Unanswered Question of Perspective, 53 VAND. L. REV. 749, 800–01, 813 (2000) (discussing minority misconduct or incompetence). Even if the minority has engaged in wrongdoing, however, an excessive majority response should still result in oppression liability. *See* Douglas K. Moll, *Shareholder Oppression & Divided Policy in the Close Corporation*, 60 WASH. & LEE L. REV. 841, 881–88 (2003) (noting that, even if a minority shareholder's misconduct or incompetence justifies the minority's termination from employment, it does not necessarily follow that the minority may be excluded from the profit distributions of the company).

54. *See, e.g.*, MINN. STAT. ANN. § 302A.751 subd. 1–2 (West 2004) (authorizing "any equitable relief" and specifically authorizing a buyout of a shareholder's interest); N.J. STAT. ANN. § 14A:12-7(1) (West 2003) (providing a nonexclusive list of possible relief that includes the order of a buyout and the appointment of a provisional director or custodian).

55. The Supreme Court of Oregon, for example, listed the following "alternative remedies" for oppressive conduct:

> (a) The entry of an order requiring dissolution of the corporation at a specified future date, to become effective only in the event that the stockholders fail to resolve their differences prior to that date;
>
> (b) The appointment of a receiver, not for the purposes of dissolution, but to continue the operation of the corporation for the benefit of all the stockholders, both majority and minority, until differences are resolved or "oppressive" conduct ceases;
>
> (c) The appointment of a "special fiscal agent" to report to the court relating to the continued operation of the corporation, as a protection to its minority stockholders, and the retention of jurisdiction of the case by the court for that purpose;
>
> (d) The retention of jurisdiction of the case by the court for the protection of the minority stockholders without appointment of a receiver or "special fiscal agent";
>
> (e) The ordering of an accounting by the majority in control of the corporation for funds alleged to have been misappropriated;
>
> (f) The issuance of an injunction to prohibit continuing acts of "oppressive" conduct and which may include the reduction of salaries or bonus payments found to be unjustified or excessive;
>
> (g) The ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital;
>
> (h) The ordering of affirmative relief by the entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders at a price to be determined according to a specified formula or at a price determined by the court to be a fair and reasonable price;
>
> (i) The ordering of affirmative relief by the entry of an order permitting minority stockholders to purchase additional stock under conditions specified by the court;
>
> (j) An award of damages to minority stockholders as compensation for any injury suffered by them as the result of "oppressive" conduct by the majority in control of the corporation.

however, is a buyout of the oppressed investor's stockholdings.[56] A buyout is advantageous because it provides a mechanism for an oppressed shareholder to extricate his investment from a venture without having to dissolve the corporation. The majority shareholder continues to operate the close corporation and to participate in the company's successes and failures, while the minority shareholder recovers the value of his invested capital and removes himself from the company's affairs.[57]

Support for the buyout remedy exists in a substantial number of states, although the relevant statutes and judicial decisions differ in their operation. In some states, statutes authorize a court to order a buyout as one of several possible remedies in dissolution proceedings or in related shareholder litigation.[58] In other states, the applicable statutes authorize a buyout as part of an "election" procedure. When a minority investor files a petition seeking involuntary dissolution of a company, the statutes permit the corporation or the shareholders to "elect" to purchase the petitioning investor's shares in order to

---

Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 395–96 (Or. 1973) (footnotes omitted); *see also* Brenner v. Berkowitz, 634 A.2d 1019, 1033 (N.J. 1993) ("Importantly, courts are not limited to the statutory remedies [for oppression], but have a wide array of equitable remedies available to them."). *But see* Giannotti v. Hamway, 387 S.E.2d 725, 733 (Va. 1990) (stating that the dissolution remedy for oppression is "exclusive" and concluding that the trial court is not permitted "to fashion other . . . equitable remedies").

56. *See* 1 CLOSE CORPORATIONS, *supra* note 15, § 1.16, at 1-97 (noting that buyouts "are the most common remedy for dissension within a close corporation"); Murdock, *supra* note 29, at 470 ("The most common form of alternative remedy is the buy-out of the minority shareholder."); Thompson, *supra* note 19, at 231 ("The increased use of buyouts as a remedy . . . is the most dramatic recent change in legislative and judicial thinking on close corporations problems.").

57. *See, e.g.*, Robert A. Ragazzo, *Toward a Delaware Common Law of Closely Held Corporations*, 77 WASH. U. L.Q. 1099, 1119 (1999) ("[The buyout] is less harsh than dissolution and often gives both parties what they want most. The majority gets to run the business as it sees fit, unfettered by the continued participation of the minority, while, at the same time, the minority receives the fair value of its investment." (footnotes omitted)); Sandra L. Schlafge, Comment, Pedro v. Pedro*: Consequences for Closely Held Corporations and the At-Will Doctrine in Minnesota*, 76 MINN. L. REV. 1071, 1080 n.46 (1992) ("[T]he buyout is the preferred remedy for shareholder disputes because it allows a return of the shareholder's capital while not crippling the business."); *id.* at 1093 ("[T]he statute provides for a buyout, which the Minnesota Legislature described as the preferred remedy because it returns the shareholder's capital while leaving the business entity intact.").

58. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-1816 (West 2004) (authorizing a buyout); ME. REV. STAT. ANN. tit. 13-C, § 1434 (West Supp. 2003) (same); S.C. CODE ANN. § 33-14-310(d)(4) (Law. Co-op. 1990) (same); MODEL STATUTORY CLOSE CORP. SUPP. §§ 41, 42 (1997) (same).

circumvent the dissolution proceeding.[59] Courts have also ordered buyouts as part of their general equitable authority, even in the absence of direct statutory support.[60]

II. "FAIR VALUE" AND THE PROBLEM OF DISCOUNTS

A. *The Ambiguity of "Fair Value"*

When a majority shareholder is ordered (or elects) to buy out the shares of an oppressed minority shareholder, the price at which the buyout occurs is obviously of critical importance to both parties. Typically, the buyout price is set at the "fair value" of the minority's shares. The Revised Model Business Corporation Act specifies the possibility of a fair value buyout in an oppression dispute,[61] and the buyout statutes in several of the large commercial states are phrased in terms of fair value.[62] Even courts in jurisdictions without statutory authorization for a buyout have ordered buyouts at fair value as part of their equitable authority.[63]

Although there is widespread support for a fair value buyout as a possible oppression remedy, there is significant disagreement about what fair value means. Dissolution-for-oppression statutes usually fail

---

59. *See, e.g.*, ALASKA STAT. § 10.06.630 (Michie 2002) (providing an election procedure); CAL. CORP. CODE § 2000 (West 1990) (same); MINN. STAT. ANN. § 302A.751 subd. 2 (West 2004) (same); N.J. STAT. ANN. § 14A:12-7(8) (West 2003) (same); N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney 2003) (same); N.D. CENT. CODE § 10-19.1-115 (2001) (same); MODEL BUS. CORP. ACT § 14.34, at 14-144 to 14-146 (2002) (same).

60. *See, e.g.*, Orchard v. Covelli, 590 F. Supp. 1548, 1560 (W.D. Pa. 1984) (ordering a buyout); Davis v. Sheerin, 754 S.W.2d 375, 380, 383 (Tex. App. 1988) (same); Thompson, *supra* note 17, at 720–21 ("Courts increasingly have ordered buyouts of a shareholder's interest by the corporation or the other shareholders even in the absence of specific statutory authorization.").

61. *See* MODEL BUS. CORP. ACT § 14.34(a) ("In a proceeding under section 14.30(2) to dissolve a corporation . . . the corporation may elect or, if it fails to elect, one or more shareholders may elect to purchase all shares owned by the petitioning shareholder *at the fair value* of the shares." (emphasis added)); *see also* MODEL STATUTORY CLOSE CORP. SUPP. § 42(b)(1) (stating that a court, if it orders a share purchase, should "determine the fair value of the shares, considering among other relevant evidence the going-concern value of the corporation").

62. *See* Thompson, *supra* note 17, at 718 (noting that "[s]everal of the largest commercial states permit a corporation or its majority shareholders to avoid involuntary dissolution by purchasing the shares of the petitioning shareholders at their 'fair value'"); *infra* note 64 (citing statutes).

63. *See, e.g.*, *Davis*, 754 S.W.2d at 381 (stating, in a jurisdiction where there is no statutory authorization for a buyout, that "[a]n ordered 'buy-out' of stock at its fair value is an especially appropriate remedy in a closely-held corporation").

to define fair value.[64] For example, New Jersey's statute uses the term "fair value" repeatedly, but it neither provides a definition nor furnishes any guidance on how to apply the term.[65] Many courts look to state appraisal statutes for interpretive aid, as those statutes allow dissenting shareholders to receive the fair value of their shares upon the occurrence of certain fundamental corporate changes, such as mergers.[66] Unfortunately, most of the appraisal statutes also lack substantive definitions of fair value.[67]

As a result of this lack of guidance, two conflicting positions have developed on the meaning of fair value. The first position equates fair value with "fair market value" and incorporates the discounts that a fair market value analysis would apply.[68] A fair market value analysis determines the value of close corporation shares by asking what someone would hypothetically pay for those shares. More precisely, fair market value is defined as "the price at which property would change hands between a willing buyer and a willing seller when neither party is under an obligation to act."[69] A willing and

---

64. *See, e.g.*, MINN. STAT. ANN. § 302A.751 subd. 2 (West 2004) (providing for a fair value buyout, but failing to define "fair value"); N.J. STAT. ANN. § 14A:12-7(8) (West 2003) (same); N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney 2003) (same); N.D. CENT. CODE § 10-19.1-115 (2001) (same).

65. *See* N.J. STAT. ANN. § 14A:12-7(8).

66. *See infra* note 262 (discussing appraisal in the dissenters' rights context).

67. *See* John D. Emory, Jr., Comment, *The Role of Discounts in Determining "Fair Value" Under Wisconsin's Dissenters' Rights Statutes: The Case for Discounts*, 1995 WIS. L. REV. 1155, 1164 & n.51 (stating that "[t]he value standards as they relate to dissenters' appraisals in closely held corporations . . . are clearly defined in the statutes of only two jurisdictions," and citing California's "fair market value" standard and Ohio's "fair cash value" standard); *see also* ROBERT F. REILLY & ROBERT P. SCHWEIHS, HANDBOOK OF ADVANCED BUSINESS VALUATION 301 (1998) (noting that "fair value is rarely legislatively defined").

68. In the appraisal context, the Supreme Court of Colorado observed the following:

> Another interpretation of fair value is to value the dissenters' specific allotment of shares, just as one would value the ownership of a commodity. Under this view . . . the "fair value" of [an] ownership interest is only the amount a willing buyer would pay to acquire the shares. In effect, this interpretation reads fair value as synonymous with fair market value. An investor who wants to buy a minority allotment of shares in a closely-held corporation would discount the price he was otherwise willing to pay for the shares because the shares are a minority interest in the company and are a relatively illiquid investment. Likewise, under this interpretation, the trial court should usually apply minority and marketability discounts.

Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 360 (Colo. 2003); *see id.* at 361 ("Under a fair market value standard a marketability discount should be applied because the court is, by definition, determining the price at which a specific allotment of shares would change hands between a willing buyer and a willing seller.").

69. *Id.* at 362; *see also* REILLY & SCHWEIHS, *supra* note 67, at 302 (defining fair market value as "[t]he amount at which the property would change hands between a willing buyer and a

noncompelled buyer would generally pay more for shares that possessed value-enhancing attributes (e.g., control or liquidity) than for shares that lacked such features.[70] To reflect this economic reality, it is fairly standard for a fair market value appraisal to reduce or "discount" the purchase price of shares that lack control or other valuable attributes.[71] Because the shares of the typical close corporation minority investor are characterized by a lack of control and by a lack of liquidity,[72] one can expect the fair market value of those shares to be lower than shares that possess such features.[73] If a court accepts that fair value is equivalent to fair market value, discounting the buyout price of shares for the absence of value-enhancing attributes is appropriate.[74]

The second position on the meaning of fair value equates fair value with "enterprise value." The enterprise value approach sees an oppressed shareholder in a buyout setting as an investor forced to relinquish his ownership position, rather than as an investor looking to sell his shares.[75] Such an approach assumes that, absent the oppressive conduct, the investor would have retained his ownership position in the corporation and would have continued to receive the

---

willing seller when the former is not under compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of the relevant facts" (citing Rev. Rul. 59–60, 1959–1 C.B. 237)).

70. *See infra* note 73 and accompanying text (noting that close corporation minority shares will have a lower value to purchasers because the shares lack control and liquidity).

71. *See* REILLY & SCHWEIHS, *supra* note 67, at 303 (noting that "[d]iscounts are part of the 'willing buyer, willing seller' concept that defines fair market value").

72. By definition, a "minority" shareholder lacks sufficient voting power to control the operations of the firm. *See supra* note 2 (defining a "minority" shareholder). Moreover, a close corporation lacks an established market such that close corporation stock is not easily converted into cash (i.e., close corporation stock is not easily liquidated). *See supra* notes 31–32 and accompanying text (discussing the absence of a market for close corporation shares).

73. *See, e.g.*, *Pueblo Bancorporation*, 63 P.3d at 360 ("An investor who wants to buy a minority allotment of shares in a closely-held corporation would discount the price he was otherwise willing to pay for the shares because the shares are a minority interest in the company and are a relatively illiquid investment.").

74. *See supra* note 68 and accompanying text (equating "fair value" and "fair market value"); *see also Pueblo Bancorporation*, 63 P.3d at 362 ("[I]n arguing for the application of a marketability discount [one] is, in effect, urging an interpretation of 'fair value' that is synonymous with 'fair market value.'"); *cf.* ROBERT W. HAMILTON, BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS § 14.6, at 405–06 (observing that "fair value" has no inherent meaning and that, at best, it is merely a synonym "for the basic definition of value, namely the price on which a willing buyer and willing seller agree").

75. *See infra* Part III.A.1.a (explaining that a buyout in the oppression context is not equivalent to a voluntary sale).

benefits of owning a stake in the overall enterprise.[76] Under this position, the value of close corporation shares is determined not by referencing what the particular shares would fetch in a hypothetical market sale, but instead by valuing the company as a whole and by ascribing to each share its pro rata portion of that overall enterprise value.[77] Viewed in this manner, the specific shares of, for example, a 25 percent minority investor are not valued in and of themselves. Instead, they are valued solely as a part (25 percent) of the overall value of the close corporation as an operating business, with no discounting for the shares' lack of particular features.[78]

To distinguish these two positions on the meaning of fair value, a brief illustration is helpful. Assume that a close corporation is valued on a going-concern basis[79] at $10 million. Assume further that a court is valuing the shares of a 25 percent minority investor in a buyout proceeding. Under an enterprise value approach, a 25 percent ownership stake in a $10 million company would be valued on a pro rata basis at $2.5 million. Under a fair market value approach, however, a court would discount that $2.5 million amount to reflect (1) that a purchaser would pay less for a minority block of stock because it lacks control (the minority discount),[80] and (2) that a purchaser would pay less for a block of close corporation stock

---

76. *See infra* notes 110–13 and accompanying text (noting that, in the absence of oppression, a close corporation shareholder could have maintained his investment and earned his proportional share of the company's going-concern value).

77. As the Supreme Court of Colorado observed:

> One possible interpretation . . . is that fair value requires the court to value the dissenting shares by looking at what they represent: the ownership of a certain percentage of the corporation. In this case, the trial court found that Holding Company, as an entity, was worth $76.1 million. Lindoe owned 5.71 percent of Holding Company and therefore, under this view, Lindoe is entitled to 5.71 percent of Holding Company's value, or just over $4.3 million. Because the proper measure of value is the shareholder's proportionate interest in the value of the entity, discounts at the shareholder level are inapplicable.

Pueblo Bancorporation, 63 P.3d at 360; *see also* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1146 (Del. 1989) (noting that one "rationale for rejection of the minority discount is that the valuation focus is limited to the company level and does not involve the size of a particular shareholder's interest").

78. *See supra* note 77 and accompanying text (describing the enterprise value approach).

79. Value as a "going concern" is defined as "[v]alue in continued use, as a mass assemblage of income producing assets, and as a going-concern business enterprise." SHANNON P. PRATT ET AL., VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES 29 (3d ed. 1996); *see also* Edwin T. Hood et al., *Valuation of Closely Held Business Interests*, 65 UMKC L. REV. 399, 411 (1997) (describing going-concern value as when "the assets [are] valued as an operating unit").

80. *See infra* Part II.B (describing the minority discount).

because it cannot easily be sold (the marketability discount).[81] If the combined effect of these discounts reduced the $2.5 million amount by 40 percent,[82] the buyout price would decrease to $1.5 million. The valuation difference between the two approaches is equivalent to the amount of the discounts.

As the above discussion reveals, it is the ambiguity in the meaning of fair value that sets the stage for the thorny problem of discounts.[83] Under the fair market value approach, discounts are appropriate given that the fair value analysis focuses on the particular characteristics of the shares to be purchased in a buyout.[84] Under the enterprise value approach, discounts are inappropriate because the fair value analysis focuses on appraising the company as a whole. The specific shares to be purchased in the buyout are relevant only to the extent that they represent the percentage of ownership in the enterprise that the minority has been forced to relinquish.[85] Before plunging into the debate over discounts, some additional detail on the discounts themselves is needed.[86]

---

81. *See infra* Part II.C (describing the marketability discount).

82. Empirical data suggest that the combined effect of these discounts may be even greater than 40 percent. *See infra* note 97 (discussing the combined effect of the minority discount and the marketability discount). It should also be noted that when both minority and marketability discounts are applicable, the discounts are taken sequentially such that they do not have an additive effect. *See infra* note 97 (providing an example of the proper application of the discounts).

83. *See* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1144 (Del. 1989) (describing two possible positions on calculating fair value in an appraisal proceeding: (1) "value the *corporation* itself," or (2) value "a specific fraction of its *shares* as they may exist in the hands of a particular shareholder" (quoting the Vice Chancellor of the Delaware Court of Chancery); *supra* notes 68–78 and accompanying text (discussing the ambiguity in the meaning of "fair value"); *cf.* MOD. BUS. CORP. ACT § 13.01(4)(iii) & cmt. 2 (2002) (discussing fair value under the appraisal statute and referring to "the more modern view that appraisal should generally award a shareholder his or her proportional interest in the corporation after valuing the corporation as a whole, rather than [awarding] the value of the shareholder's shares when valued alone").

84. Stated differently, the fair market value approach posits that when the shares of oppressed minority investors are bought out, either by election or by court order, the lack of control and the absence of liquidity associated with the shares should decrease the buyout price. *See supra* notes 68–74 and accompanying text (describing the fair market value approach).

85. The enterprise value approach, in other words, focuses the fair value inquiry on a pro rata share of the company's overall value, rather than on the traits of the specific shares to be purchased. *See supra* notes 75–78 and accompanying text (describing the enterprise value approach).

86. Courts historically found the meaning of fair value to be ambiguous at another level—i.e., whether a fair value buyout contemplated valuation on a liquidation basis or on a going-concern basis. For example, California's buyout statute mentions that fair value shall be determined on the basis of liquidation value as of the valuation date, although the same statute

B. The Minority Discount

By definition, a minority interest in a business entity lacks sufficient voting power to independently control the operations of the firm.[87] Because of its lack of voting power, a minority interest is less valuable than a controlling interest. Indeed, a minority "discount" reflects the simple fact that "investors value the ability to direct management and thus would not be willing to pay as much for shares on a minority basis as they would for shares that convey a controlling

---

notes that the possibility of selling the company as a going concern should also be taken into account. *See* CAL. CORP. CODE § 2000(a) (West 1990) ("The fair value shall be determined on the basis of the liquidation value as of the valuation date but taking into account the possibility, if any, of sale of the entire business as a going concern in a liquidation."). On the other hand, the Model Statutory Close Corporation Supplement defines fair value with reference to going-concern value. *See, e.g.*, MODEL STAT. CLOSE CORP. SUPP. § 42(b)(1) (1997) (stating that a court, if it orders a share purchase, should "determine the fair value of the shares, considering among other relevant evidence the going concern value of the corporation").

By and large, courts now generally agree that fair value is to be measured on a going-concern basis so long as the close corporation at issue is not dissolving. *See, e.g.*, Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 290 (Minn. 2000) ("We conclude that fair value, in ordering a buy-out under the Minnesota Business Corporations Act, means the pro rata share of the value of the corporation as a going concern."); Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 347 (App. Div. 1985) ("The [fair] value of the corporation should be determined on the basis of what a willing purchaser, in an arm's length transaction, would offer for the corporation as an operating business, rather than as a business in the process of liquidation . . . ."); *see also* James H. Eggart, Note, *Replacing the Sword with a Scalpel: The Case for a Bright-Line Rule Disallowing the Application of Lack of Marketability Discounts in Shareholder Oppression Cases*, 44 ARIZ. L. REV. 213, 219 (2002) (noting that "there is general consensus that 'fair value' is the value of the oppressed shareholder's proportionate interest in the corporation as a going concern, rather than its liquidation value"). Moreover, of the various going-concern valuation techniques, the fair value of a close corporation is most commonly derived by calculating investment value—a calculation that is usually based upon the earnings of the corporation. *See* Thompson, *supra* note 19, at 233 ("The most common method for determining fair value is to calculate investment value, usually based on the company's earnings."); *id.* ("[T]he most commonly utilized formula [for calculating investment value] treats company earnings as determinant of investment value."). Net asset value and market value "are of little use in determining the fair value of an interest in an ongoing close corporation; net asset value is generally used when an enterprise is liquidating, and market value is not available because a close corporation by definition lacks a market for its shares." 2 CLOSE CORPORATIONS, *supra* note 15, § 9.32, at 9-190; *see, e.g.*, Taines v. Gene Barry One Hour Photo Process, Inc., 474 N.Y.S.2d 362, 366–67 (Sup. Ct. 1983) (rejecting net asset value and market value as methods for close corporation valuation proceedings).

87. *See, e.g.*, Emory, *supra* note 67, at 1160 ("Minority interests lack the power of controlling interests to dictate corporate management and policies."); Hetherington & Dooley, *supra* note 2, at 5 n.7 (defining a "minority" shareholder as a shareholder "who [does not] possess the actual power to control the operations of the firm").

interest."[88] Stated differently, a minority discount signifies that "investors will pay less for [a minority stake] in a close corporation because of the inability to elect a sufficient number of directors to control management."[89]

Empirical data "suggest an average minority discount of between 29-33% off the value of controlling shares."[90] Consequently, the impact of a minority discount on the amount of a buyout award is quite significant.

C. The Marketability Discount

Close corporation shares are not traded on a public market.[91] As a result, it is considerably more difficult to sell close corporation stock than public corporation stock.[92] Factors contributing to this difficulty include the greater time and expense associated with selling close corporation shares and the smaller pool of potential buyers for such investments.[93] The marketability discount is premised on a

---

88. Emory, *supra* note 67, at 1160; *see, e.g.*, PRATT ET AL., *supra* note 79, at 46 (noting that "a minority interest discount reflects a value decrement due to lack of control"); *id.* at 300–01 (observing that a minority discount is based on a lack of control).

89. Steven C. Bahls, *Resolving Shareholder Dissension: Selection of the Appropriate Equitable Remedy*, 15 J. CORP. L. 285, 301 (1990); *see also* Harry J. Haynsworth IV, *Valuation of Business Interests*, 33 MERCER L. REV. 457, 492–93 (1982) ("A potential investor in a closely held corporation is willing to pay more for a majority interest in the business than for a minority interest because of the ability to maintain voting control and to elect a majority of the directors.").

90. Emory, *supra* note 67, at 1161; *see* SHANNON P. PRATT ET AL., VALUING SMALL BUSINESSES AND PROFESSIONAL PRACTICES 438 (3d ed. 1998) (citing empirical data from 1980 to 1996 indicating that minority discounts average between 26 and 33 percent).

91. *See supra* notes 31–32 and accompanying text (discussing the lack of a market for close corporation shares).

92. *See, e.g.*, Emory, *supra* note 67, at 1161 ("It is much more difficult to liquidate (quickly sell for cash) a minority interest in a closely held corporation than a minority interest in a publicly traded corporation."); *infra* notes 93–95 and accompanying text (discussing the difficulties associated with selling close corporation stock).

93. As commentators observe:

> In the U.S. public markets, a security holder is able to sell a security over the telephone in seconds, usually at or within a small fraction of a percent of the last price at which the security traded, with a very small commission cost, and receive the cash proceeds within three working days.
>
> By contrast, the universe of realistically potential buyers for most closely held minority ownership securities is an infinitesimally small fraction of the universe of potential buyers for publicly traded securities. In any case, it is *illegal* for a person or company to sell privately held securities to the general public without a registration with either the SEC or the state corporation commission, an expensive and time-consuming process. Furthermore, *a minority stockholder cannot register stock for public trading*; only the company can register its stock for public trading.

recognition of these factors and the accompanying reality that investors will generally pay less for close corporation shares because of the shares' relative illiquidity.[94] As one noted valuation authority observes:

> The market for securities in the United States is the most liquid market for any kind of property anywhere in the world. This is one of the major reasons companies are able to raise investment capital from both institutional and individual investors: the ability to liquidate the investment immediately, at little cost, and with virtual certainty as to realization of the widely publicized market price. Empirical evidence demonstrates that investors are willing to pay a high premium for this level of liquidity, or, conversely, extract a high discount relative to actively traded securities for stocks or other investment interests that lack this high degree of liquidity.[95]

Empirical data "indicate that the discount for the lack of marketability factor alone averages between thirty-five and fifty percent."[96] By itself, therefore, the marketability discount can have a

---

> Besides the problems of actually trying to sell the stock (and because of them), the liquidity of closely held stock is further impaired by banks and other lending institutions' unwillingness to accept it as loan collateral—as they would accept public stock.

PRATT ET AL., *supra* note 79, at 334.

94. *See supra* notes 71–74 and accompanying text (discussing, *inter alia*, the problem of illiquidity and why this problem may warrant a discount); *infra* note 95 and accompanying text (explaining the basis for the marketability discount).

95. PRATT ET AL., *supra* note 79, at 333; *see, e.g.*, Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 357 n.2 (Colo. 2003) ("A marketability discount adjusts the value of specific shares to reflect the fact that there is no ready trading market for the shares."); *id.* ("Because there are a small number of potential buyers of closely-held corporate stock, a shareholder may be unable to secure a willing buyer if he decides to cash out of his investment."); Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 291 (Minn. 2000) ("[S]hares in a closely held corporation cannot be sold as readily as shares in a corporation with securities traded over an exchange or in an established market and therefore investors tend to pay less, and sometimes significantly less, for such shares."); *id.* ("A marketability discount 'adjusts for a lack of liquidity in one's interest in an entity' and should be distinguished from a minority discount, which adjusts for lack of control of the corporation." (quoting Balsamides v. Protameen Chems., Inc., 743 A.2d 721, 733 (N.J. 1999))); Bahls, *supra* note 89, at 302 (noting that a marketability discount is often imposed because "investors are not willing to pay as much for close corporation stock" given the "difficulty and expense associated with selling the stock at a later date").

96. Emory, *supra* note 67, at 1161; *see* PRATT ET AL., *supra* note 79, at 334 (noting the "extreme contrasts between the ability to sell or hypothecate closely held minority stock as compared with publicly traded stock," and stating that "empirical evidence . . . suggests that discounts for lack of marketability for minority interest closely held stocks tend to cluster in the range of 35 to 50 percent from their publicly traded counterparts"); *see also* Haynsworth, *supra*

dramatic effect on the amount of compensation provided in a buyout award. When both marketability and minority discounts are applied to a buyout award, the effect is even more severe.[97]

III. BUILDING THE CASE AGAINST DISCOUNTS

A. *Strengths of the Case*

Minority and marketability discounts have no place in shareholder oppression disputes. The shareholder oppression context is unsuited to discounts, and the statutory language in many states suggests that discounts are inapplicable. In addition, the undercompensatory nature of the buyout award signals that discounts should be avoided. Consequently, courts should adopt an enterprise value interpretation of fair value and should reject a fair market value approach.

---

note 89, at 490 ("[S]ome authorities have advocated that discounts of as high as fifty to seventy-five percent for lack of marketability in closely held companies should be accepted.").

97. *See, e.g.*, Emory, *supra* note 67, at 1162 ("Taken together, marketability and minority discounts often reduce the fair market value of minority shares to well under half the value of controlling shares in the same corporation."); Murdock, *supra* note 29, at 479 ("The cumulative effect of these [minority and marketability] discounts can reduce the value of the minority shares by fifty percent or more."); *id.* at 489 (observing that minority and marketability discounts "can have a dramatic and devastating impact on the value of minority interests").

When both minority and marketability discounts are at issue, it is important to note that the discounts are applied in a sequential, nonadditive manner. *See* PRATT ET AL., *supra* note 79, at 314 (providing an illustration of how multiple discounts affect a valuation). Assuming a $2,500,000 proportionate ownership stake in a company, a 40 percent minority discount, and a 40 percent marketability discount, a court should apply the minority discount first. This would reduce the buyout award to $1,500,000 (.6 × 2,500,000). A court should then apply the 40 percent marketability discount to this net amount, further reducing the buyout award to $900,000 (.6 × 1,500,000). As commentators explain:

> [T]his discounting from control value usually is done as a two-step process, first for minority interest, then for marketability . . . . Done this way, the discounts for minority interest and marketability are *multiplicative* . . . *not additive*. That is, the discounts are taken in chain. The discount for minority interest is taken first; then the discount for lack of marketability is taken from the *net* amount after the minority interest discount. Thus, the total of the two 40 percent discounts . . . is *not* 80 percent, but 64 percent . . . .

Id. at 314; *see also id.* (explaining the rationale for the sequential application of the discounts by referring to "the conceptual preference for distinguishing between the discount for minority interest and the discount for lack of marketability," and observing that, "perhaps more importantly, for most types of companies and ownership interests, far more empirical evidence is available for quantifying each of the two discounts taken one at a time than for quantifying them together").

1. *Context Matters*. Valuation is inherently contextual.[98] Setting and circumstances matter greatly, as they can significantly affect the value of a particular asset. The same automobile, for example, can have divergent values depending on the context in which it is appraised (e.g., retail sale, wholesale sale, or dealer trade-in).[99] In this regard, shares of close corporation stock are no different from any other asset. To appropriately determine the fair value of a minority investor's shares, a court needs to be mindful of the context in which the fair value inquiry is made. When that context is a buyout proceeding in an oppression setting, minority and marketability discounts are inappropriate, as the forced-sale nature of the buyout proceeding and the identity of the purchasers involved weigh heavily against the application of discounts.

a. The "Sale" Misnomer. The central problem in equating fair value with fair market value is that the conditions assumed in a fair market value appraisal are not actually present in an oppression setting. A fair market value appraisal assumes the presence of a willing seller and a willing buyer who are under no obligation to act.[100] That description utterly fails to reflect the actual circumstances surrounding buyouts in the oppression context. A willing, no-obligation seller contemplates a person who voluntarily offers to

---

98. *See, e.g.*, MODEL BUS. CORP. ACT § 13.01 cmt. 2 (2002) ("[D]ifferent transactions and different contexts may warrant different valuation methodologies."); 2 AM. LAW INST., PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.22(a) (1994) (stating that fair value "should be determined . . . in the context of the transaction giving rise to appraisal"); PRATT ET AL., *supra* note 79, at 22 ("*No single valuation method is universally applicable to all appraisal purposes*. The context in which the appraisal is to be used is a critical factor."); *id.* at 23 ("The word *value* means different things to different people. Even to the same person, *value* means different things in different contexts . . . ."); *id.* at 27 ("To understand what the expression *fair value* means, you have to know the context of its use."); Richard A. Booth, *Minority Discounts and Control Premiums in Appraisal Proceedings*, 57 BUS. LAW. 127, 156 (2001) (noting that "the standard of value in an appraisal proceeding should reflect the actual transaction under review"); *see also* PRATT ET AL., *supra* note 79, at 15 ("Many people hold the mistaken notion that there can be only one 'value.' . . . [T]here are many definitions of value, and the purpose of the appraisal usually determines the appropriate definition of value."); *id.* at 22 ("Many business appraisals fail to reach a number representing the appropriate definition of value because the appraiser failed to match the valuation methods to the purpose for which it was being performed." (emphasis removed)); *id.* at 23 ("The purpose of the valuation often determines the applicable standard of value—that is, the definition of value being sought—and almost always influences it.").

99. *Cf.* Assocs. Commercial Corp. v. Rash, 520 U.S. 953, 960–65 (1997) (holding that the Bankruptcy Code mandates valuing a truck at replacement value rather than foreclosure value).

100. *See supra* note 69 and accompanying text (defining fair market value).

sell—i.e., a person selling because he wants to do so, not because he has to do so. The seller in a buyout setting, however, is typically an aggrieved minority shareholder who, one should presume, would have preferred to remain a shareholder in the company absent the oppressive conduct.[101] Stated differently, it is the oppression itself that forces the minority to seek an exit from the corporation. The lawsuit leading to the buyout "sale" stems from the minority's view (and, in nonelection cases, from the court's agreement with that view) that conditions in the company have become intolerable.[102] Thus, valuing the minority's shares on the basis of a hypothetical sale makes little sense when the minority investor was not looking to sell in the first place.

The fair market value concept of willing, noncompelled parties is also a poor fit with respect to the buyer. The buyer in an oppression lawsuit is typically the oppressive majority shareholder who has been ordered by the court to purchase the shares of the aggrieved minority investor.[103] A purchase dictated by judicial order, of course, is far from the willing, no-obligation-to-act assumption of the fair market value standard.[104]

Even when a majority shareholder elects to purchase the holdings of a complaining minority shareholder,[105] the election is still less "willing" and more "compelled" than the hypothetical purchaser

---

101. Indeed, stock ownership in a successful close corporation typically provides a shareholder with a number of employment and management benefits that are difficult to obtain elsewhere. *See infra* notes 172–76 and accompanying text (describing the benefits of close corporation employment and management). Given these benefits, close corporation shareholders are often reluctant to sell their holdings unless, because of oppressive conduct, they are forced to do so. *Cf.* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) ("Where there is no objective market data available, the appraisal process is not intended to reconstruct a *pro forma* sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred."); Prentiss v. Wesspur, Inc., No. 36321-2-I, 1997 WL 207971, at *3 (Wash. Ct. App. Apr. 28, 1997) ("The process of appraisal consequently assumes that the shareholder was willing to maintain the investment position, rather than assuming that the ownership interest would be sold subject to the market's vissitudes [*sic*].").

102. *See, e.g.*, Murdock, *supra* note 29, at 487 (describing a buyout as a "forced sale" because "those in control have 'made it no longer tolerable for [the minority] to retain his interest in the company'" (quoting *In re* Bird Precision Bellows Ltd., [1984] Ch. 419, 430, *aff'd*, [1986] 2 W.L.R. 158)).

103. The purchaser in an oppression lawsuit is almost always the oppressive majority shareholder or the corporation itself. *See infra* note 119 and accompanying text (discussing the typical purchaser).

104. *See supra* note 69 and accompanying text (defining fair market value).

105. *See supra* note 59 and accompanying text (discussing election statutes).

contemplated by the fair market value approach. The hypothetical purchaser chooses to buy only if the price is acceptable and suffers no negative repercussions if the purchase fails to occur. This description, however, does not match the oppression context. Once an oppressive majority elects to purchase the minority's shares, the majority is bound to purchase them even if he later disagrees with the price set by the court.[106] Further, at least in some situations, the majority elects to purchase the minority investor's shares to avoid the possibility, however slight, of a court-ordered dissolution of the corporation.[107] Unlike the hypothetical purchaser, therefore, the specter of negative consequences does exist (i.e., dissolution) if the purchase of the minority's shares is not accomplished. Thus, regardless of whether a buyout is ordered or elected, a buyout in the oppression context does not involve a purchaser with the same degree of willingness and "free choice" that fair market value contemplates.

From the above discussion, it should be clear that the "voluntary sale" model contemplated by the fair market value approach is a poor fit in the oppression context. The oppressed minority investor was not looking to sell, and the oppressive majority investor, absent the threat of dissolution or other judicial sanction, was not looking to buy.[108]

---

106. *See, e.g.*, N.Y. BUS. CORP. LAW § 1118(a) (McKinney 2003) ("An election pursuant to this section shall be irrevocable unless the court, in its discretion, for just and equitable considerations, determines that such election be revocable."); MOD. BUS. CORP. ACT § 14.34(a) (2002) ("An election pursuant to this section shall be irrevocable unless the court determines that it is equitable to set aside or modify the election.").

107. *See, e.g.*, *In re* Seagroatt Floral Co., 583 N.E.2d 287, 289–90 (N.Y. 1991) (noting that the purpose of the buyout election statute was to provide shareholders with the ability to continue the business and to avoid any risk of dissolution); *see also infra* notes 283–85 and accompanying text (discussing the purpose of buyout election statutes and noting that the statutes enable shareholders to continue a company as a going concern).

108. *See, e.g.*, McKesson Corp. v. Islamic Republic of Iran, 116 F. Supp. 2d 13, 37 (D.D.C. 2000) ("[I]n a forced sale, discounts are inherently unfair to the forced-out shareholder who did not pick the timing of the transaction and thus is not in the position of a willing seller."), *aff'd sub nom.* McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101 (D.C. Cir. 2001); Hendley v. Lee, 676 F. Supp. 1317, 1330 (D.S.C. 1987) ("Discounts properly apply to the total value of the company in a 'willing buyer/willing seller' context, but do not apply at all when neither party is willing and the transaction is between insiders."); Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 838 (Minn. Ct. App. 1994) ("[B]ecause appellant [an oppressed minority shareholder] is an unwilling vendor of his shares in [the close corporation,] we hold the trial court properly exercised its discretion in not reducing appellant's shares' value by a minority discount."); Hansen v. 75 Ranch Co., 957 P.2d 32, 41 (Mont. 1998) ("[D]iscounts at the shareholder level are inherently unfair to the minority shareholder who did not pick the timing of the transaction and is not in the position of a willing seller."); Chiles v. Robertson, 767 P.2d 903, 926 (Or. Ct. App. 1989) ("This is not a sale by a willing seller to a willing buyer, and defendants should not benefit from reductions in value that are based on such a sale."); *id.* ("We

Instead of a voluntary sale conception, it is more accurate to characterize an oppression buyout as a compelled redemption of the minority's ownership position. The oppressive conduct has forced the minority to relinquish his investment, and a court order (or threat of dissolution) has forced the majority to "cash out" that investment. The buyout, in other words, should be viewed as a proceeding in which the majority compensates the minority for the investment that the minority has unwillingly surrendered.[109] It is the value of that investment that the buyout proceeding should award.

What, then, is the value of the investment that the oppressed shareholder has relinquished? It is, at a minimum, the shareholder's pro rata portion of the company's overall value as an operating business.[110] A minority investor owning 33 percent of a company is

---

require defendants to purchase plaintiffs' interests because of their breach of duty to plaintiffs. The purchase is a judicial remedy to compensate plaintiffs for the damage resulting from defendants' wrongs, not a market transaction."); Prentiss v. Wesspur, Inc., No. 36321-2-I, 1997 WL 207971, at *3 (Wash. Ct. App. Apr. 28, 1997) ("Whether by dissolution or the majority owner's purchase, the minority shareholder is not selling on the market and the court should not impose a discount in the face of a majority owner's misconduct."); *cf.* Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 361 (Colo. 2003) ("[I]n a dissenters' rights action, the dissenting shareholder is not in the same position as a willing seller on the open market—he is an unwilling seller with little or no bargaining power."); Haynsworth, *supra* note 89, at 459 ("The purpose of applying these discount variables is to determine the investment value or fair market value of a minority interest in the context of a hypothetical sale between a willing seller and buyer, a situation that does not exist in the dissenting shareholder situation.").

109. *Cf. Pueblo Bancorporation*, 63 P.3d at 364 ("The purpose of the dissenters' rights statute would best be fulfilled through an interpretation of 'fair value' which ensures minority shareholders are compensated for what they have lost, that is, their proportionate ownership interest in a going concern."); Tri-Cont'l Corp. v. Battye, 74 A.2d 71, 72 (Del. 1950) (stating that "[t]he basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern," and observing that "[b]y value of the stockholder's proportionate interest in the corporate enterprise is meant the true or intrinsic value of his stock which has been taken by the merger"); Chicago Corp. v. Munds, 172 A. 452, 455 (Del. Ch. 1934) (noting, in the appraisal context, that "[w]hat [a dissenting shareholder] has been deprived of is his proportional share of an active enterprise which but for the compulsion of others he could continue to be associated with in the indefinite future," and stating that "[w]hat he is deprived of is what he should be paid for"); Woodward v. Quigley, 133 N.W.2d 38, 43–44 (Iowa 1965) ("The basic concept of value under the appraisal statute is that the stockholder is entitled to be paid for that which has been taken from him, viz., his proportionate interest in a going concern." (quoting Tri-Cont'l Corp., 74 A.2d at 72)).

110. *See supra* note 109 (observing that a shareholder has relinquished his proportionate interest in a going concern). It is important to note that the value of the investment relinquished by the oppressed shareholder may equate to more than a pro rata share of the company's overall value. *See infra* notes 169–71 and accompanying text (indicating that a close corporation investment is valuable not only because it conveys a proportionate interest in a going concern, but also because it typically includes employment and management benefits).

relinquishing a 33 percent claim on the overall worth of that company. The dollar amount of the claim is what the investor could have received over time by remaining a shareholder in the business.[111] Indeed, it is not accurate to maintain, as discount proponents often do, that minority shareholders can only realize the value of their shares by selling them independently to a third party.[112] In the absence of oppression, a close corporation shareholder can expect to receive, over time, his percentage share of the company's value through dividends, salary, acquisition consideration, and/or other distributions.[113] In a merger, for example, a 33 percent shareholder would receive 33 percent of the total price paid for the company—a price that should reflect the overall value of the business. Assuming no oppressive conduct, therefore, an aggrieved shareholder could have maintained his investment and earned his proportional share of the company's going-concern value. When forced to relinquish that investment because of oppressive conditions, the shareholder should receive compensation for what has been taken—the right to receive a pro rata portion of the company's overall value.[114]

---

111. *See* N. Trust Co. v. Comm'r, 87 T.C. 349, 365 (1986) ("This [discounted cash flow] valuation method is based on the assumption that the price an investor will pay for a share of stock is the present value of the future stream of income *he expects to receive from the investment*." (emphasis added)); *see also* JAMES D. COX ET AL., SECURITIES REGULATION: CASES & MATERIALS 28–29 (3d ed. 2001) (observing that the present value of a share of stock is based on "the future payouts of a corporation *to its shareholders*" (emphasis added)); Hood et al., *supra* note 79, at 417–18 (noting that the discounted cash flow method of valuation is based on "the actual cash produced by a business *and returned to the investor*" (emphasis added)); *supra* note 109 (indicating that when a shareholder relinquishes his ownership stake, he is giving up a proportionate interest in a going concern).

112. *Cf.* Emory, *supra* note 67, at 1171–72 (noting, in the appraisal context, that "[a]dvocates of discounts . . . point to the fact that ordinarily the only way for minority shareholders to realize the value of their shares is to sell them at market prices").

113. *Cf.* Murdock, *supra* note 29, at 487 ("Were the minority shareholder not being squeezed-out or frozen-out, he or she would have the right to continue to enjoy the perquisites of employment, which as previously discussed are most valuable, or to await a more beneficial price from a third party." (footnote omitted)).

114. This same argument can be made in a slightly different manner. Broadly speaking, an investor has two options as a shareholder in a close corporation. First, assuming compliance with any stock transfer restrictions, the investor may attempt to sell his holdings at any time. In the absence of exigent circumstances, the investor would presumably sell only when conditions were advantageous (e.g., when the company's future prospects were favorable). Second, the investor can maintain his holdings and share in the going-concern value of the venture through dividends, salary, or the possible sale of the company. Significantly, the investor retains discretion to pursue either option.

Oppressive conduct by the majority shareholder, however, can force a minority investor's hand. Indeed, oppressive conduct may make the second "hold" option an impossibility, as the

In short, valuing a minority's investment in a voluntary-sale context is very different from valuing a minority's investment in a forced redemption context. In a voluntary sale, the valuation focus is from the perspective of outsiders—i.e., what will a third party pay? Because the absence of control and the lack of liquidity are important variables to outsiders, those factors are relevant to the valuation inquiry.[115] In a forced redemption, however, the valuation focus is

---

majority's oppressive acts frequently prevent the minority from sharing in the value of the company. The minority may be forced to seek a "sale" of his holdings through judicial intervention, even when conditions for such a "sale" are not otherwise favorable (e.g., when the company's earnings have declined due to an economic recession).

Because the majority's oppressive conduct has eliminated the minority's discretion to choose the "sale" or "hold" option that he prefers, one could argue that a buyout award should compensate the oppressed minority for whichever option has the most potential value. If discounts are associated with the "sale" option, the minority should be able to demand a "hold" valuation that would provide undiscounted compensation for the minority's proportional share of the company's going-concern value. Professor Murdock has expressed similar sentiments:

> [T]he acts of those in control, by squeezing-out or freezing-out the minority shareholders, have abrogated the right of such minority shareholders to continue to hold such shares and to await a more favorable sale opportunity. Since the majority has determined when the minority must sell, the majority should not be further rewarded by acquiring such shares at a discount.
>
> . . . .
>
> Were the minority shareholder not being squeezed-out or frozen-out, he or she would have the right to continue to enjoy the perquisites of employment, which as previously discussed are most valuable, or to await a more beneficial price from a third party. . . .
>
> The action of those in control, by setting in motion events which lead to the buy-out of the minority (thereby providing liquidity), forecloses the minority from participating in any future growth or future advantageous sale. Having lost the ability to alienate these shares more advantageously, it would again be paradoxical to discount minority shares for lack of alienability when the majority, through triggering a buy-out have created a market now but foreclosed the possibility of a more attractive market later.

Murdock, *supra* note 29, at 487–88 (emphasis removed) (footnote omitted); *see also* Kellogg v. Ga.-Pac. Paper Corp., 227 F. Supp. 719, 724 (W.D. Ark. 1964) (noting that minority shareholders have an "interest in an existing business with its attendant possibilities of growth and appreciation in value, an interest which may be worth much more than the present cash value of the minority shares").

115. Even when the valuation focus is from the perspective of outsiders—i.e., what will a third party pay—it is not entirely clear that discounts would be applicable. The issue turns on a court's view of what is being paid for. If a court asks what a third party will pay for the entire company, the inquiry is similar to an enterprise value approach. The minority shareholder will receive a pro rata share of that company value. Alternatively, if a court asks what a third party will pay for the minority's specific shares, the inquiry is similar to a fair market value approach, and discounts are likely to be applied. *See* Barry M. Wertheimer, *The Shareholders' Appraisal Remedy and How Courts Determine Fair Value*, 47 DUKE L.J. 613, 666 (1998) (contrasting the third-party sales value of a corporation as a whole with the third-party sales value of a minority block of stock).

from the perspective of the one being redeemed—i.e., what has the minority given up?[116] In this setting, factors significant to outsiders are irrelevant.[117] The proper interpretation of fair value for an oppression buyout is the interpretation that most closely matches the circumstances that are present in an oppression setting. Because a buyout of the typical oppressed shareholder resembles a forced redemption far more than it resembles a voluntary sale, the fair market value standard should be rejected. By providing an oppressed investor with his pro rata share of the company's overall worth, the enterprise value standard properly focuses on what the investor has relinquished.[118] As a consequence, it is a superior approach.

b. The Identity of the Purchaser. One of the more basic objections to the fair market value approach and the related issue of discounts is that the rationale for discounts is inapplicable when the identity of the purchaser is considered. Put differently, because the purchaser in an oppression buyout is almost always the majority (or

---

116. *See supra* note 109 (observing that a shareholder has relinquished his proportionate interest in a going concern); *cf.* Cavalier Oil Corp. v. Harnett, 564 A.2d 1137, 1145 (Del. 1989) ("Where there is no objective market data available, the appraisal process is not intended to reconstruct a *pro forma* sale but to assume that the shareholder was willing to maintain his investment position, however slight, had the merger not occurred.").

117. Even if a minority shareholder bought into a company at a discount, it is still fair to provide an undiscounted buyout award to that shareholder when oppressive conduct occurs. The minority shareholder's entrance into the company is often part of a voluntary transaction in which the absence of control and the lack of liquidity are relevant factors. The minority shareholder's exit from the company, however, is not part of a voluntary transaction, as the majority's oppressive conduct has forced a redemption of the minority's shares. Providing an undiscounted buyout award simply allows the minority to retain the benefit of his original bargain—i.e., the minority bought in at a discount from pro rata value and, absent oppression, he could have received pro rata value by remaining as a shareholder in the company. Moreover, any perceived "windfall" to a minority who bought in at a discount but received an undiscounted buyout award is tolerable given that a discounted buyout award would encourage a majority shareholder to engage in oppression. *See infra* notes 127–28 and accompanying text (discussing the incentives created by discounts); *cf.* Wertheimer, *supra* note 115, at 645 n.146 ("[I]f minority shareholders receive less than their pro rata share of the value of the corporation, those engaging in the cash-out merger would necessarily receive more than their pro rata share. This would violate tenets of fundamental fairness, and encourage wrongful conduct."). *See generally* Wertheimer, *supra* note 115, at 645 n.146 (arguing that discounts should be rejected in the appraisal context even if a shareholder acquired his stock at a discount).

118. *See supra* Part II.A (describing the fair market value and enterprise value approaches to the meaning of fair value).

controlling) shareholder or the corporation,[119] the reasons for applying a minority or marketability discount are often absent.

As mentioned, the premise of the minority discount is that the control of a company has value.[120] Consequently, a corporation's control shares are worth more to a purchaser than the corporation's minority shares. Rather than pay a price per share equal to the pro rata value of the company as a going concern, a buyer of a minority stake in a close corporation will pay less than that amount because the purchased shares will lack control.[121]

Implicit in the justification for the minority discount, therefore, is the critical assumption that the buyer, postpurchase, will lack control over the company's affairs.[122] This assumption, however, is rarely (if ever) true in shareholder oppression disputes. As previously noted, a court typically orders the majority shareholder or the corporation to purchase the aggrieved minority's shares or, in some states, the majority shareholder or the corporation may elect to purchase the minority's shares.[123] By definition, a majority shareholder already possesses control.[124] Thus, when a majority (or controlling shareholder) is the buyer, "it can hardly be said that the shares are worth less to the purchaser because they are noncontrolling."[125] After all, a purchase of the minority's holdings simply enables the majority shareholder to further consolidate his control. Under these

---

119. *See, e.g.*, Hollis v. Hill, 232 F.3d 460, 462, 464 (5th Cir. 2000) (purchase by a controlling shareholder); Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 836 (Minn. Ct. App. 1994) (purchase by controlling shareholders); *In re* Fleischer, 486 N.Y.S.2d 272, 273 (App. Div. 1985) (purchase by a corporation); Davis v. Sheerin, 754 S.W.2d 375, 377–78 (Tex. App. 1988) (purchase by a majority shareholder); *see also* MODEL STAT. CLOSE CORP. SUPP. § 42(a) (1997) (providing a court with the authority to order "the corporation or one or more of its shareholders" to purchase the oppressed investor's holdings); *infra* note 132 (noting that the purchaser in an oppression buyout is typically the corporation or the shareholder(s) in control).

120. *See supra* notes 87–89 and accompanying text (describing the minority discount).

121. *See, e.g.*, PRATT ET AL., *supra* note 79, at 45 ("In most cases, a minority interest is worth less than a pro rata proportion of the value of the enterprise as a whole."); *id.* at 300 (noting that the minority discount rebuts the assumption that "a partial interest is worth a pro rata portion of the value of the total enterprise"); *supra* notes 87–89 and accompanying text (describing the minority discount).

122. *See supra* notes 87–89 and accompanying text (describing the minority discount).

123. *See supra* note 119 and accompanying text (noting that the purchaser in an oppression buyout is almost always the majority/controlling shareholder or the corporation); *supra* note 59 and accompanying text (discussing election statutes).

124. *See, e.g.*, Hetherington & Dooley, *supra* note 2, at 5 n.7 (defining a "majority" shareholder as a shareholder "who possess[es] the actual power to control the operations of the firm").

125. Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 176 (Ct. App. 1979).

circumstances, the premise of the minority discount is absent. The buyer, postpurchase, will not own a minority stake in the venture, nor will he lack control over the company's decisions.[126] In fact, applying a minority discount when the majority is the purchaser might actually encourage the majority to engage in oppression, as it presents a unique arbitrage opportunity. For every 1 percent of the company that the majority acquires from the minority in a buyout proceeding, the majority will pay something less than 1 percent of the value of the company, even though the majority has control over the business.[127]

---

126. As Professor Bahls observes:

> Sale of the minority shareholders' stock to the corporation or majority shareholders is unlike a sale to third parties. When a shareholder sells his or her shares to third parties, the value of the shares sold by shareholders to third parties is indeed diminished because the third party has no right to control management. A sale to majority shareholders of a corporation, however, simply serves to consolidate the interests of those already in control. To require application of a minority discount in this case would result in a windfall for majority shareholders . . . .

Bahls, *supra* note 89, at 302; *see, e.g.*, *Brown*, 154 Cal. Rptr. at 176 ("[T]he rule justifying the devaluation of minority shares in closely-held corporations for their lack of control has little validity when the shares are to be purchased by someone who is already in control of the corporation."); Royals v. Piedmont Elec. Repair Co., No. 97 CVS 720, 1999 WL 33545516, at *13 (N.C. Super. Ct. Mar. 3, 1999), *aff'd*, 529 S.E.2d 515 (N.C. Ct. App. 2000) (observing that "[t]he majority shareholders are thus in a position to have the company buy the shares which could then be resold with the majority shares at a value based upon 100% control value," and concluding that "[t]hey should not be allowed to buy at a discounted price that which they could immediately turn around and resell at full value"); Robblee v. Robblee, 841 P.2d 1289, 1294 (Wash. Ct. App. 1992) ("[R]ecognition of a minority discount has little validity when the corporation or someone already in control of the corporation is the purchaser."); *id.* at 1295 (noting that after a buyout, the majority shareholder's ownership "will go to almost 80% and he will be ridding himself of a minority shareholder who had become, and would continue to be, extremely difficult," and stating that "[t]his is one of the very reasons a minority shareholder's stock should not be discounted to fair market value, because the value to the [majority shareholder] is different from what it would be in the market"); Murdock, *supra* note 29, at 486 ("In both dissenters' rights proceedings and those involving a judicial buy-out, the purchaser of the minority shares is either the corporation or those in control. Accordingly, the purchaser of the minority shareholders' interest does not thereafter hold a minority interest."); *id.* ("One of the rationales for [the minority] discount[] is that the purchaser would pay less because he or she would not be able to exercise any control over the investment after the purchase. This obviously is not true if the purchaser is the majority shareholder.").

127. *See, e.g.*, McKesson Corp. v. Islamic Republic of Iran, 116 F. Supp. 2d 13, 36 (D.D.C. 2000) ("Courts rejecting the minority discount have reasoned that the application of the discount would provide the majority with a windfall because they would receive a controlling level of value from the newly obtained shares but only have to pay a non-controlling price for them."), *aff'd sub nom.* McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F.3d 1101 (D.C. Cir. 2001); *id.* ("Because allowing discounts creates incentives for oppressive behavior, both [minority and marketability] discounts are particular[ly] disfavored where the stock trade is a result of such behavior."); Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 738 (N.J. 1999) ("The [oppression] statute does not allow the oppressor to harm his partner and the company and be rewarded with the right to buy out that partner at a discount. We do not want to afford a

Giving the majority an incentive to oppress is, obviously, unwise.[128]

When the corporation is the buyer of the minority's shares, a minority discount remains inapposite. Stock repurchased by the corporation is often characterized as "treasury stock" that is no longer outstanding.[129] The corporation, as an entity, does not become a shareholder that now owns a minority stake in itself. Instead, the effect of the corporation's purchase of its own shares is to raise the percentage ownership of the remaining shareholders.[130] The control

---

shareholder any incentive to oppress other shareholders."); Friedman v. Benway Realty Corp., 661 N.E.2d 972, 977 (N.Y. 1995) ("[A] mandatory reduction in the fair value of minority shares to reflect their owners' lack of power in the administration of the corporation will inevitably encourage oppressive majority conduct, thereby further driving down the compensation necessary to pay for the value of minority shares."); *Royals*, 1999 WL 33545516, at *13 (rejecting minority and marketability discounts on the ground that the buyout election statute should not "be interpreted in such a way as to provide an incentive for majority shareholders to oppress minority shareholders and force them to sell"); Murdock, *supra* note 29, at 487 ("[P]ublic policy argues against a discounting process in order that there be a disincentive to acting in an oppressive fashion."); *see also* Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 349 (App. Div. 1985) ("[The dissolution for oppression statute] was enacted for the protection of minority shareholders, and the corporation should therefore not receive a windfall in the form of a discount . . . ."); Murdock, *supra* note 29, at 489 ("[I]t is incomprehensible that wrongful conduct that drives the minority out of the corporation can doubly advantage those in control by driving down the value of minority shares."); *cf. Brown*, 154 Cal. Rptr. at 176 ("[I]f . . . the controlling shareholder has been using his position to insure that no benefits . . . ever accrue to the owners of the minority shares, then an argument could be made that the value of the minority shares should be reduced even further, perhaps to zero."); Wertheimer, *supra* note 115, at 644 ("If a minority shareholder did not receive a full pro rata share of the value of the corporation, those engaging in the cash-out merger would, by definition, receive more than their pro rata share of the value of the corporation."); *id.* ("This would permit them to 'profit' from engaging in a cash-out merger, and would encourage controlling shareholders to attempt to take advantage of minority shareholders.").

128. *See supra* note 127 and accompanying text (noting that a minority discount might actually encourage oppressive conduct).

129. *See, e.g.*, JAMES D. COX & THOMAS LEE HAZEN, COX & HAZEN ON CORPORATIONS § 21.11, at 1287 (2d ed. 2003):

> [A] corporation usually has the option on reacquisition of shares to treat them as treasury shares or to retire or cancel them. Treasury shares are carried on the books as authorized and still issued but not outstanding. When retired or cancelled, the shares usually retain the status of authorized but unissued shares.

(footnotes omitted).

130. The remaining investors, in other words, own the same number of shares that they owned before the corporation's purchase, but the number of outstanding company shares has decreased. *See supra* note 129 and accompanying text (discussing treasury stock). For example, a shareholder formerly owning one share out of a total of ten company shares may now own one share out of a total of five company shares. Because of the corporation's purchase, the shareholder's percentage ownership increased from 10 percent (1/10) to 20 percent (1/5). *See*

already possessed by a majority shareholder, in other words, simply increases as a result of the corporation's purchase.[131] Thus, even where the corporation is the purchaser, the rationale for the minority discount is absent. The corporation's buyout of the minority does not result in a purchaser that owns a noncontrolling stake in the company.[132]

With respect to the marketability discount, the discount presumes that purchasers will pay less for close corporation stock because the lack of an established market makes such shares difficult to sell.[133] Where the purchaser is a majority shareholder, however, this rationale is weak, as a controlling position in a company is far easier to sell than a minority position. As one commentator observes:

> It seems particularly inappropriate to apply such a [marketability] discount when a shareholder is selling to a person or family that owns all or most of the other shares of the corporation. While the lack of a market affects the ability to sell minority shares in a company, the market for all of a company's assets or shares or for a controlling interest operates differently and may not be adversely

---

also infra note 131 (providing another example of the effect of a corporation's purchase of its own stock).

131. *See, e.g.*, Murdock, *supra* note 29, at 486 ("[I]f the purchaser [of the minority's shares] is the corporation, the effect of the purchase is to increase the control which a majority shareholder already has."); *id.* ("For example, if shareholdings were split on a 60:20:20 ratio and the corporation purchased one 20% holding, the 60% shareholder would then hold 75% and he alone could provide the two-thirds approval necessary for some corporate action in some states."); *see also supra* note 130 (providing another example of the effect of a corporation's purchase of its own stock).

132. *See, e.g.*, Charland v. Country View Golf Club, Inc., 588 A.2d 609, 612 (R.I. 1991) ("When a corporation elects to buy out the shares of a dissenting shareholder, the fact that the shares are noncontrolling is irrelevant."); Murdock, *supra* note 29, at 486 ("In both dissenters' rights proceedings and those involving a judicial buy-out, the purchaser of the minority shares is either the corporation or those in control. Accordingly, the purchaser of the minority shareholders' interest does not thereafter hold a minority interest."); Thompson, *supra* note 19, at 234 ("[S]uch a [minority] discount would be inappropriate since the [buyout] purchase is by controlling shareholders or the corporation; to apply such a discount would be to further oppress minority shareholders aggrieved by the controlling shareholders' misconduct."); *see also* Hansen v. 75 Ranch Co., 957 P.2d 32, 41 (Mont. 1998) ("[T]he majority of courts addressing the issue of minority discounts has held that discounts should not be taken when determining fair value of minority shares sold to another shareholder or to the corporation.").

133. *See, e.g.*, PRATT ET AL., *supra* note 79, at 332 ("All other things being equal, an interest in a business is worth more if it is readily marketable or, conversely, worth less if it is not. Investors prefer liquidity to lack of liquidity. Interests in closely held businesses are illiquid relative to most other investments."); *id.* at 46 (noting that a "discount for lack of marketability reflects a value decrement due to lack of liquidity"); *supra* Part II.C (discussing the marketability discount).

> influenced by the fact that the company's shares are not traded on a securities market.[134]

Given the lesser difficulty of disposing of a controlling block of shares, a marketability discount should be substantially reduced, if not rejected outright, when a majority shareholder is the purchaser.[135]

---

134. Thompson, *supra* note 19, at 235. Similarly, as Professor Bahls observes:

> If, however, a minority block of shares is sold to a shareholder who will be a controlling shareholder after the sale, the full discount for lack of marketability may be inappropriate. To the extent that the purchase allows the shareholder to consolidate control, there may be a ready market for the subsequent resale of the majority shareholder's stock. While a minority interest in a close corporation is difficult to sell, a majority interest might be sold much easier. Likewise, consolidating control may enable the majority shareholder to realize a control premium.

Bahls, *supra* note 89, at 303; *see* PRATT ET AL., *supra* note 79, at 300 ("The difficulty in liquidating a minority interest in a closely held company generally is much greater than the difficulty in liquidating a controlling interest."); *id.* at 301 ("Control shares in a privately held company may also be subject to some discount for lack of marketability, but usually not nearly as much as minority shares."); PRATT ET AL., *supra* note 90, at 430 ("[I]t still is usually much harder to sell a minority ownership interest than to sell a controlling ownership interest in the same closely held business."); Hood et al., *supra* note 79, at 444 (noting that a "discount for illiquidity of a controlling block of stock is somewhat questionable"); William P. Lyons & Martin J. Whitman, *Valuing Closely Held Corporations and Publicly Traded Securities with Limited Marketability: Approaches to Allowable Discounts from Gross Values*, 33 BUS. LAW. 2213, 2226–27 (1978) ("[W]e believe that as long as businesses are truly solvent . . . there are always markets for control blocks of stock. . . . Therefore, as a general rule . . . where control shares exist, no discounts from gross value should logically be taken to account for a lack of marketability . . . ."); *see also* Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 725, 729 (N.J. 1999) (involving a valuation expert who testified, in a dispute in which one 50 percent shareholder bought out the other 50 percent shareholder, that "only a nominal [marketability] discount was warranted, perhaps seven percent to reflect a brokerage fee").

When a majority shareholder's purchase results in 100 percent ownership of a corporation's stock, a marketability discount makes even less sense. With sole ownership, there is no minority shareholder to account for and, correspondingly, there is no risk of litigation for oppressively failing to consider the minority's interests. To outside purchasers, therefore, sole ownership of a company is more attractive than ownership of a controlling (but less than 100 percent) interest. *Cf.* Laserage Tech. Corp. v. Laserage Labs., Inc., 972 F.2d 799, 805 (7th Cir. 1992) (noting that the district court rejected a minority discount based in part on the "fact that the buy-out would mean that [the close corporation] would no longer 'be required to deal with a substantial minority interest which has been the adversary in a protracted, emotional and undoubtedly very expensive complex of legal proceedings'" (quoting the trial record)).

135. *See supra* note 134 and accompanying text (observing that a controlling interest in a close corporation is considerably easier to liquidate than a minority interest in the same company). *But see infra* note 198 and accompanying text (noting that even controlling interests may suffer from a lack of marketability).

In a family business, which close corporations often are, the inappropriateness of a marketability discount is even more apparent. Family members typically do not want outsiders to own a stake in the company. Illiquid stock is, therefore, helpful, as illiquidity makes the company's stock less attractive to outsiders. *See, e.g.*, Haynsworth, *supra* note 89, at 489 n.92 (noting that marketability discounts may be inappropriate for intrafamily transfers: "In family

Even when the purchaser of the minority's shares is a corporation, the justification for the marketability discount is missing. Once again, a corporation's purchase of its shares does not leave the corporation as an investor owning shares in itself.[136] Thus, it makes no sense to view the corporation as a purchaser that will discount the price of the minority's shares to reflect its concern about reselling the shares in the future.

When the purchaser in a buyout proceeding is a majority shareholder or a corporation, therefore, the rationale for applying minority and marketability discounts is weak, if not absent. In the New York decision of *In re Gift Pax, Inc.* (*Gift Pax*),[137] however, the court concluded that New York's statutory election scheme prohibited it from considering the purchaser's identity. In *Gift Pax*, a referee appointed by the court to determine the fair value of the petitioner's shares for buyout purposes refused to apply a marketability discount on the ground that "[the respondent corporations], by electing to purchase the petitioner's shares . . . , became the willing and available buyers."[138] The referee, in other words, considered that the corporations were purchasing the petitioner's shares, and he presumably rejected a marketability discount on that basis—i.e., a marketability discount is inapposite when the corporation is the purchaser.[139] The buyout election statute in New York, however, stated that the court should determine the "fair value of the petitioner's shares as of the day prior to the date on which such petition [for dissolution] was filed, exclusive of any element of value arising from such filing."[140] Because of this language, the court determined that it could not consider any event occurring after March 27, 1980—the day prior to the March 28, 1980 filing of the dissolution petition. As a result, the court concluded that it had to value the petitioner's shares assuming that the respondent

businesses, the members do not want outsiders to have ownership interests. Thus, the lack of marketability can actually enhance the value of the stock . . . ."); *see also* Morrow v. Martschink, 922 F. Supp. 1093, 1105 (D.S.C. 1995) (quoting the same language from Haynsworth, *supra* note 89, at 489 n.92).

136. *See supra* note 129 and accompanying text (discussing treasury stock).

137. 475 N.Y.S.2d 324 (Sup. Ct. 1984).

138. *Id.* at 328.

139. *See supra* note 134 and accompanying text (discussing the inapplicability of the marketability discount when a corporation is the purchaser); *see also infra* note 143 (questioning the rationale of the referee in *Gift Pax*).

140. N.Y. BUS. CORP. LAW §§ 1104-a, 1118 (McKinney Supp. 2003).

corporations had *not* elected to buy out the petitioner, as that election occurred *after* the March 27, 1980 valuation date:

> In this proceeding, the petition [for dissolution on oppression grounds] was filed on March 28, 1980; therefore, the valuation date is March 27, 1980. The Referee's expert and the Referee, in failing to apply an illiquidity discount by reason of the fact that the [respondent corporations] were the purchasers of the petitioner's shares, improperly made April 3, 1980[—]the date of the respondents' election to purchase the shares[—]as the date of valuation. Furthermore, the explicit language contained in the statute requiring that there be no consideration given to either an increase or diminution in value arising from the filing of the petition, was also violated when an illiquidity discount was not applied. Indeed, on this issue, the independent expert testified that the sole reason he did not impose an illiquidity discount was that [the respondent corporations] elected to purchase under [New York's election statute]. Clearly, he was increasing fair value based upon [the] election, and this he could not do.[141]

The court concluded that the referee should have applied a 25 percent marketability discount in calculating the fair value of the petitioner's shares.[142]

The *Gift Pax* decision is puzzling. Perhaps the most puzzling aspect of the decision is the court's use of the valuation date to reject the referee's consideration of the purchasers' identity (and the referee's refusal to apply a marketability discount on that basis).[143] The designation of the valuation date is typically an independent issue—an issue that is wholly separate from the debate over discounts—that significantly affects the determination of a company's fair value. For this reason, the choice of the valuation date is

141. *In re Gift Pax*, 475 N.Y.S.2d at 328.

142. *See id.* ("[T]here was sufficient evidence presented which required the Referee to apply a 25% lack of marketability discount . . . .").

143. Even the referee's rationale for rejecting the marketability discount is puzzling. The referee rejected the discount on the ground that the respondent corporations became "willing and available buyers" by electing to purchase the petitioner's shares. *Id.* at 328. To the extent that the referee was emphasizing that the corporations were the purchasers, and that a marketability discount was inapposite in that context, the referee's rationale was sensible. *See supra* note 134 and accompanying text (discussing the inapplicability of the marketability discount when a corporation is the purchaser). If the referee was emphasizing the presence of "willing and available" buyers, however, his rationale was suspect. The mere presence of any "willing and available" purchaser in a buyout proceeding is not a reason for rejecting the marketability discount. *See infra* Part III.B.3 (criticizing the liquidity assertion).

discussed in a subsequent Part.[144] The *Gift Pax* decision is unique, however, in that it blends (albeit erroneously) the valuation date and discount issues. Indeed, the court determined that the valuation date prohibited the referee from denying a discount on the basis of the purchasers' identity. In this respect, it is appropriate to discuss the *Gift Pax* decision here.

The *Gift Pax* court apparently believed that the above-quoted language from the buyout election statute ("fair value of the petitioner's shares as of the day prior to the date on which such petition [for dissolution] was filed, exclusive of any element of value arising from such filing") prevented it from considering that the respondent corporations had elected to purchase the petitioner's shares.[145] It is worth repeating, however, that the statutory language relied on by the court was found in the buyout election statute.[146] The purpose of such a statute is to provide a majority counterbalance to the minority's right to seek dissolution. By purchasing the minority's shares, the majority circumvents any liability inquiry and eliminates the potential risk of dissolution of the company.[147] Given this purpose of the election statute (and as this Article further discusses in Part IV.B.1), the likely intent of the command to determine fair value "as of the day prior to the date on which [the dissolution] petition was filed"[148] was to provide a fixed date for the prospective purchaser to assess whether it would be prudent, as well as financially feasible, to

---

144. *See infra* Part IV (discussing the valuation date).

145. *See supra* note 140 and accompanying text (quoting the New York election statute); *supra* note 141 and accompanying text (providing the court's reasoning). Even if this interpretation of the statutory language is correct, one wonders why the court believed that it inexorably led to a conclusion that a marketability discount was required. On any given day, a minority ownership position can be valued assuming that the minority sells his position, or assuming that the minority retains his position. If a sale is assumed, discounts may be appropriate, as certain third-party purchasers will care about the features (or lack thereof) associated with the shares. *See supra* Parts II.B–C (discussing minority and marketability discounts). If retention is assumed, however, discounts are inappropriate, as a shareholder can expect to receive, over time, his proportionate share of the corporation's going-concern value. *See supra* notes 110–14 and accompanying text (discussing the retention of an ownership position). Even if the court was correct in believing that it could not consider the buyout context at issue, therefore, it nevertheless should have confronted the issue of what "fair value" on any particular date means—an assumed sale on that date, or an assumed retention from that date forward.

146. *See In re Gift Pax*, 475 N.Y.S.2d at 328 (quoting N.Y. BUS. CORP. LAW § 1118 (McKinney Supp. 1992)). The *Gift Pax* holding, therefore, is only applicable to election cases.

147. *See infra* notes 283–85 and accompanying text (discussing the purpose of election statutes).

148. N.Y. BUS. CORP. LAW § 1118 (McKinney Supp. 2003).

purchase the holdings of the petitioning investor.[149] To give effect to the purpose of the election statute, a majority shareholder must be able to assess whether his interests are better served by contesting liability or by making an election to purchase. The likely intent of the statutory language is to designate a specific date for valuation purposes so that a majority shareholder has a fixed benchmark for making this assessment, not to prohibit courts from considering that a known purchaser has elected to buy out the petitioner. Because context is so important to valuation,[150] this interpretation is far more sensible than the *Gift Pax* court's belief that the language was meant to preclude courts from considering both the identity of the purchaser and the more general fact that an election has occurred. Put differently, it is hard to believe that a statute providing for a buyout election by certain parties was also meant to preclude a court from considering that one of those parties has actually made an election.[151]

Similarly, the language "exclusive of any element of value arising from such filing"[152] is likely meant to eliminate any impact that the filing of a dissolution petition might have on the value of the company. A dissolution-for-oppression petition is a public document that usually reveals serious discord among the owners/managers of a corporation. If employees, creditors, suppliers, or other parties vital to the health of a business become aware of such discord, it may have a very serious impact on the company's future.[153] An aggrieved minority shareholder wishing to exercise his rights to seek relief from

149. *See infra* notes 283–89 and accompanying text (discussing the purpose of election statutes and the reasoning underlying election decisions).

150. *See supra* notes 98–99 and accompanying text (noting that context is critical to valuation).

151. The appellate court arguably shared this sentiment. Although it affirmed the marketability discount of the superior court, it did so by simply citing precedent. The appellate court made no mention of the superior court's interpretation of the election statute language. *See In re* Fleischer, 486 N.Y.S.2d 272, 275 (App. Div. 1985) (affirming the 25 percent marketability discount, but noting only that "[i]n determining the 'fair value' of [close corporation] shares . . ., discounts for . . . lack of marketability . . . are appropriate and do not provide a windfall to the majority shareholders merely because the shares to be purchased by the majority . . . constitute a minority interest in the corporation" (citing Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 347 (App. Div. 1985)).

152. N.Y. BUS. CORP. LAW § 1118(b).

153. When a company is threatened with dissolution, for example, it is not hard to imagine that key employees may decide to depart for more stable businesses. Similarly, banks and other lending institutions may decide that additional credit should not be extended to the corporation until its viability as a continuing entity is resolved. On the same basis, suppliers may decide to cease providing new goods.

oppression should not be deterred from doing so because of the fear that requesting such relief will diminish any recovery. The statutory language seems designed to eliminate this deterrent by clarifying that a company will be valued without considering the effect of the filing of the dissolution petition itself.[154] To say that the language is meant to prohibit a court from considering that a responsive election has been made, and that a majority shareholder or a corporation is behind the election, goes too far. Once again, an interpretation that forces a court to ignore the buyout context of the valuation should be rejected on the grounds that it is entirely antithetical to the concept of valuation itself.[155]

In short, given that a majority (or controlling) shareholder or a corporation is frequently the purchaser in an oppression buyout setting,[156] the context of the buyout is ill-suited to minority and marketability discounts. Courts should logically reject discounts when the premises underlying their application are absent in the circumstances at issue. Because the enterprise value approach avoids

154. One wonders, however, why the "exclusive of any element of value arising from such filing" language is needed at all given that the language immediately preceding it in the election statute clearly states that the valuation should be performed as of the date before a petition is filed. *See* N.Y. BUS. CORP. LAW § 1118 (stating that the court shall "determine the fair value of the petitioner's shares as of the day prior to the date on which such petition [for dissolution] was filed, exclusive of any element of value arising from such filing"). After all, if a company is valued as of the day before a dissolution petition is filed, the effect of the next-day filing presumably has not yet occurred. Perhaps the "exclusive . . . of value arising from such filing" language is meant to cover the situation in which the company's value has been impacted by some outside knowledge that a dissolution proceeding will be filed, even though the actual filing has not yet taken place. For example, key employees in day-to-day contact with an aggrieved shareholder may be told that dissolution litigation will soon commence. One can imagine that employees might decide to exit the corporation at that point rather than to wait around for the result of litigation. Such an exodus could affect a company's valuation even before the actual filing of a dissolution petition. Alternatively, perhaps the language was simply borrowed from the analogous statute in the appraisal context, with little thought given to its purpose in the dissolution context. *See* N.Y. BUS. CORP. LAW § 623(h) (McKinney Supp. 1981) (stating that "fair value" in an appraisal should be determined "as of the close of business on the day prior to the shareholders' authorization date, excluding any appreciation or depreciation directly or indirectly induced by such corporate action or its proposal"). It should be noted that New York's appraisal statute no longer contains this "excluding" language. *See* N.Y. BUS. CORP. LAW § 623(h) (McKinney Supp. 2003) (omitting the "excluding" clause and stating that a court's fair value assessment may account for "all other relevant factors").

155. *See supra* notes 98–99 and accompanying text (noting that context is critical to valuation).

156. *See supra* note 119 and accompanying text (noting that the purchaser in an oppression buyout is frequently the majority/controlling shareholder or the corporation).

incorporating discounts, it is superior to a fair market value standard in the shareholder oppression context.

2. *Statutory Language*. The buyout statutes in several of the large commercial states, as well as the buyout provisions of the Revised Model Business Corporation Act, are phrased in terms of fair value.[157] In these jurisdictions, one of the simplest and most powerful arguments for rejecting discounts is the observation that the state legislature consciously chose the term "fair value" over "fair market value," presumably to signify disapproval of a fair market value approach and the discounting that would accompany it.[158] This argument is strengthened when other statutes in the same jurisdiction use the term "fair market value," as it indicates that the legislature knew how to provide for a fair market value standard when it wanted one.[159]

Proponents of discounts argue that the "fair value" statutory language supports a contrary inference. Many of the buyout statutes

---

157. *See supra* notes 60–63 and accompanying text (discussing fair value buyouts).

158. *See, e.g.*, Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 361 (Colo. 2003) (noting that the legislature used the term "fair value" and not "fair market value"); Devivo v. Devivo, No. CV980581020, 2001 WL 577072, at *4 (Conn. Super. Ct. May 8, 2001) ("[T]he legislature, or the drafters of the model business corporation act, could have employed 'fair market value' as the standard if they meant that meaning. The fact [that] they did not is highly significant. . . . [F]air value . . . is not synonymous with fair market value."); Royals v. Piedmont Elec. Repair Co., No. 97 CVS 720, 1999 WL 33545516, at *12 (N.C. Super. Ct. Mar. 3, 1999):

> If the Legislature had intended for the valuation to be set at "fair market value," it could have and would have used that term. Instead, it chose to use a broader definition ["fair value"] which gave the trial court more leeway in determining value for purposes of the alternative relief provided by the statute.

Matthew G. Norton Co. v. Smyth, 51 P.3d 159, 163 (Wash. Ct. App. 2002) ("It is clear, however, that our Legislature's use of the term 'fair value' was not a slip of the pen—the Legislature did not intend to say 'fair market value,' instead."); *see also* Joseph W. Anthony & Karlyn Vegoe Boraas, *Betrayed, Belittled . . . But Triumphant: Claims of Shareholders in Closely Held Corporations*, 22 WM. MITCHELL L. REV. 1173, 1186 (1996) ("'Fair value' is not the same as, or short-hand for, 'fair *market* value.' 'Fair value' carries with it the statutory purpose that shareholders be fairly compensated, which may or may not equate with the market's judgment about the stock's value." (footnote omitted)); Bobbie J. Hollis II, *The Unfairness of Applying Lack of Marketability Discounts to Determine Fair Value in Dissenters' Rights Cases*, 25 J. CORP. L. 137, 142 (1999) ("The decision by the state to use one term ['fair value'] over the other ['fair market value'] cannot be viewed as arbitrary."). The argument is usually strengthened by references to other statutes in which the legislature did use the "fair market value" term. *See infra* note 159 and accompanying text (referencing other statutes).

159. *See, e.g.*, *Pueblo Bancorporation*, 63 P.3d at 362 ("If the General Assembly intended to create a fair market value measure for the price of a dissenter's shares, it knew how to provide it; the phrase has been used many times in a wide variety of other statutes."); *id.* (citing statutes).

explicitly state that "the fair value of *the petitioner's shares*" is to be determined.[160] By focusing the analysis on the value of the aggrieved investor's shares, discount proponents contend that the statutory language suggests a fair market value standard in substance, even if not in form. Such language conveys, in other words, that it is the particular shares themselves, along with the shares' favorable or unfavorable attributes (e.g., lack of control or lack of liquidity), that courts are to value.[161]

Although it is true that buyout statutes are phrased in terms of determining the fair value "of the petitioner's shares," such language does not imply that a fair market value analysis was intended. The phrase "petitioner's shares" is neutral language that simply refers to an aggrieved investor's ownership stake in a company. A buyout always values a "petitioner's shares" in the sense that a buyout will only cover the number of shares owned by a petitioner. Whether those shares are valued by their worth in a market sale, or by their worth as a proportionate fraction of a company's overall value, is still the question.[162] That question turns only on what "fair value" means—not on the neutral "petitioner's shares" language. Thus, the inclusion of the "petitioner's shares" language does not dilute the significance of the legislature's decision to use "fair value" rather than "fair market value."[163] If the legislature had intended for the well-known

---

160. N.Y. BUS. CORP. LAW § 1118(b) (McKinney Supp. 2003) (emphasis added); *see id.* § 1118(a) (stating that the corporation or its shareholders may "elect to purchase the shares owned by the petitioners at *their* fair value" (emphasis added)); MODEL BUS. CORP. ACT § 14.34(d) (2002) ("If the parties are unable to reach an agreement . . . the court . . . shall . . . determine the fair value of *the petitioner's shares* . . . ." (emphasis added)); MODEL STATUTORY CLOSE CORP. SUPP. § 42(b)(1) (1997) (stating that a court shall "determine the fair value of the shares").

161. *See, e.g.*, Emory, *supra* note 67, at 1169 ("By defining the entity to be valued as the [aggrieved minority's] own shares, rather than as the entire corporation, the statute appears to contemplate valuing the [aggrieved minority's] shares on the basis of what they are—a minority interest [in an illiquid close corporation]."); *see also* Atl. States Constr. Inc. v. Beavers, 314 S.E.2d 245, 251 (Ga. Ct. App. 1984) (noting, in an appraisal case, that the "focus of the valuation process is on the value of the stock held by the dissenting shareholders, not on the value of some specified percentage of the corporate worth").

162. *See supra* Part II.A (describing the fair market value and enterprise value approaches to the meaning of fair value).

163. *See supra* notes 157–59 and accompanying text (distinguishing fair value and fair market value). One wonders, however, why state legislatures were not clearer about their intentions. After all, if a legislature had truly intended for the statutory "fair value" term to mean a pro rata share of enterprise value, rather than fair market value, it easily could have said so. A statute could state, for example, that a court should determine the buyout price by calculating the "fair value of the enterprise and by awarding the petitioner its proportional share

fair market value standard to govern buyout awards, it presumably would have used that term.[164]

3. *The Undercompensation Argument.* The goal of the shareholder oppression doctrine is to "protect the fair value of the close corporation shareholder's investment."[165] The components of a close corporation shareholder's investment, however, differ significantly from the components of a public corporation shareholder's investment. In a public corporation, a shareholder commits his capital with the expectation that the investment entitles him to a proportionate share of the company's value.[166] Accordingly, a public corporation shareholder understands that his investment return will be comprised solely of financial sums reflecting this proportionate share (e.g., dividend payments).[167] Stated differently,

---

of that enterprise value." Alternatively, the legislature could have directed that a petitioning shareholder be awarded his "proportional share of the fair value of the enterprise."

164. Some have argued that a legislature's choice of "fair value" over "fair market value" is not particularly significant. Fair market value suggests a market benchmark. Yet close corporations, by definition, lack a market for their shares. *See supra* notes 31–32 and accompanying text (discussing the absence of a market for close corporation stock). The term "fair market value," therefore, suggests a standard that is not descriptively accurate, and a different term may be more appropriate. The choice of "fair value" over "fair market value," in other words, may reflect considerations of style rather than substance. Emory, *supra* note 67, at 1170. As one commentator observes:

> The terms fair value and fair market value have been used in case law to describe one general principle: the inherent value of an asset. In cases where a ready market for shares exists, courts have used the term fair market value. Where no market exists, another valuation method is employed to determine the fair value of shares. Essentially, these values are the same, only determining fair value without the aid of a market place causes the court to adopt and recognize other methods of evaluation which are most equitable under the facts.

Id. at 1171 (citing Pohl v. Milsco Mfg. Co., No. 89-CV-02091, slip op. at 6 (Wis. Cir. Ct. July 12, 1991)); *see also* Devivo v. Devivo, No. CV980581020, 2001 WL 577072, at *3 (Conn. Super. Ct. May 8, 2001) ("The terms actual valuation, actual value, market value, fair market value, market price and fair value are synonymous in the determination of the valuation of property for assessment purposes, but the term 'fair value' is the preferable one." (quoting Bridgeport v. Stratford, 216 A.2d. 439, 440 (Conn. 1966))).

165. Moll, *supra* note 52, at 731.

166. A 12 percent shareholder, for example, expects that his investment entitles him to 12 percent of the corporation's profits, generally received through capital appreciation or dividends. *See infra* notes 167–68 and accompanying text (discussing the investment return of the public corporation shareholder).

167. *See, e.g.*, Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 560 (N.J. Super. Ct. Law Div. 1979) ("Large corporations are usually formed as a means of attracting capital through the sale of stock to investors, with no expectation of participation in corporate management or employment. Profit is expected through the payment of dividends or sale of stock at an appreciated value."); Terry A. O'Neill, *Self-Interest and Concern for Others in the*

"[t]he shareholder of a publicly traded corporation invests money . . . with a view to receiving money, as opposed to steady employment or associational benefits, in return."[168]

In a close corporation, a shareholder typically commits his capital with the expectation that the investment entitles him to employment and to a management role, as well as to a proportionate share of the company's value.[169] A close corporation shareholder, therefore, usually understands that his investment return will be comprised of employment benefits, management participation, and financial sums reflecting a share of the company's gains.[170] The components of a

---

Owner-Managed Firm: A Suggested Approach to Dissolution and Fiduciary Obligation in Close Corporations, 22 SETON HALL L. REV. 646, 663 (1992) ("The shareholder of a publicly traded corporation may realize a return on her investment in either of two ways: directly, by a distribution of dividends, or indirectly, by an increase in the market value of her shares.").

168. O'Neill, *supra* note 167, at 663; *see also* Schlafge, *supra* note 57, at 1073 n.14 (noting that the interests of public corporation shareholders are "limited to the amount of their dollar investment in their shares, which can be sold at any time on the public market, and [are] not tied to their salary and other employment benefits").

169. *See, e.g.*, *Exadaktilos*, 400 A.2d at 561 ("Unlike their counterparts in large corporations, [close corporation minority shareholders] may expect to participate in management or to influence operations, directly or indirectly, formally or informally."); *id.* ("Furthermore, there generally is an expectation on the part of some participants that their interest is to be recognized in the form of a salary derived from employment with the corporation."); Balvik v. Sylvester, 411 N.W.2d 383, 386 (N.D. 1987) ("[I]t is generally understood that, in addition to supplying capital and labor to a contemplated enterprise and expecting a fair return, parties comprising the ownership of a close corporation expect to be actively involved in its management and operation."); Schlafge, *supra* note 57, at 1077 n.29 ("[Public corporation and close corporation] investors expect appreciation in the value of their investment. Investors in [public] corporations receive dividends as a form of return on this investment, while investors in [close] corporations may expect to receive a salary and a management position as a *condition* of their investment." (emphasis added)); *see also* Michaud v. Morris, 603 So.2d 886, 888 (Ala. 1992) ("Certain basic expectations of investors are enforceable in the courts, and among those is a right to share proportionally in corporate gains."); Bahls, *supra* note 89, at 330 ("Shareholders in close corporations expect proportional distribution of the earnings of the corporation while it is operating."); *infra* note 170 and accompanying text (discussing the investment return of the close corporation shareholder).

170. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 662 (Mass. 1976) ("The minority stockholder typically depends on his salary as the principal return on his investment . . . ."); Bonavita v. Corbo, 692 A.2d 119, 124 (N.J. Super. Ct. Ch. Div. 1996) ("[E]mployment is, of course, a frequent and perfectly proper benefit of stockholders in a close corporation."); *id.* at 126 (noting that "the primary benefit that [the defendant close corporation shareholder] receives from the corporation is continued employment for himself and his family"); Ingle v. Glamore Motor Sales, Inc., 535 N.E.2d 1311, 1319 (N.Y. 1989) (Hancock, J., dissenting) ("A person who . . . buys a minority interest in a close corporation does so not only in the hope of enjoying an increase in value of his stake in the business but for the assurance of employment in the business in a managerial position."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); 1 CLOSE

close corporation investment, in other words, should be viewed as much broader than the components of a public corporation investment. As a result, the shareholder oppression doctrine must concern itself with protecting much more than an investor's proportionate share in the success of a company.[171]

For many close corporation investors, the desire for employment (and, to some extent, for management participation) is the principal enticement motivating their decision to commit capital to a venture.[172]

CORPORATIONS, *supra* note 15, § 1.08, at 1-32 ("Even if [close corporation] shareholders . . . anticipate an ultimate profit from the sale of shares, they usually expect (or perhaps should expect) to receive an immediate return in the form of salaries as officers or employees of the corporation rather than in the form of dividends . . . . "); Murdock, *supra* note 29, at 468 ("The courts have recognized the reality that compensation paid to those in control has a two fold function: to recompense services and to provide a return on investment."); Ragazzo, *supra* note 57, at 1110 (noting that a close corporation shareholder "often invests for the purpose of having a job, and the salary and other benefits he receives are conceived to be part of the return on his investment"); *id.* at 1109 ("In a closely held corporation, a shareholder-employee has interests in his job and stock that are often economically intertwined."); *id.* at 1110 ("[T]he discharge of an employee in a closely held corporation usually involves appropriation of a portion of his investment by the remaining shareholders."); Schlafge, *supra* note 57, at 1094 ("Section 302A.751 [the Minnesota statute protecting minority shareholders] recognizes that shareholders in a closely held corporation legitimately expect a return of their investment, often in the form of a management position and a salary."); *see also supra* note 169 and accompanying text (discussing the expectations of close corporation shareholders).

171. *Cf.* Meiselman v. Meiselman, 307 S.E.2d 551, 565 (N.C. 1983) (rejecting an argument that a close corporation shareholder is entitled to relief only when "traditional shareholder rights" have been infringed: "While it may be true that a shareholder in . . . a publicly held corporation may have 'rights or interests' defined as defendants argue, a shareholder's rights in a [close] corporation may not necessarily be so narrowly defined. . . . [A close corporation shareholder's] 'reasonable expectations' are not as limited as defendants contend.").

172. *See, e.g.*, 1 CLOSE CORPORATIONS, *supra* note 15, § 1.08, at 1-31 to 1-32 ("Providing for employment may have been the principal reason why the shareholder participated in organizing the corporation."); *see also Wilkes*, 353 N.E.2d at 662 ("A guaranty of employment with the corporation may have been one of the 'basic reason(s) why a minority owner has invested capital in the firm.'" (quoting Symposium, *The Close Corporation*, 52 NW. U. L. REV. 345, 392 (1957))); *In re* Wiedy's Furniture Clearance Ctr. Co., 487 N.Y.S.2d 901, 903 (App. Div. 1985) ("Although the exact amount of the capital contribution is disputed, petitioner utilized his own funds in getting this new venture underway, not simply as an investment, but to provide employment and a future for himself."); Alyse J. Ferraro, Note, Ingle v. Glamore Motor Sales, Inc.*: The Battle Between Ownership and Employment in the Close Corporation*, 8 HOFSTRA LAB. L.J. 193, 215 (1990) ("Ingle was compensated for the sale of his shares, but to believe that the dollar amount received met his expectations would . . . dismiss his purpose in acquiring those shares. Ingle had reasonably expected his employment to continue until he chose to retire or to acquire his own Ford dealership . . . ."); Murdock, *supra* note 29, at 468 ("That people often invest in a closely-held corporation to provide a job is almost self-evident . . . ."); *id.* ("To deny a minority shareholder employment *when a job was part of his rationale in investing* is oppressive, as is the failure to pay dividends to nonemployee shareholders when employed shareholders are receiving *de facto* dividends through salaries." (emphasis added) (footnote omitted)); *id.* at 472 ("[W]hat is at stake in the 'oppression' cases is often a job—a very

Compared to similar employment in other contexts, a close corporation job is frequently associated with a higher salary,[173] a prestigious management position,[174] and intangible benefits stemming from self-employment.[175] Thus, the loss of a close corporation job may

---

attractive job."); Ragazzo, *supra* note 57, at 1110 (noting that a close corporation shareholder "often invests for the purpose of having a job").

173. *See, e.g.*, 1 OPPRESSION, *supra* note 20, § 3:07, at 3-70 n.5 (noting that "the special prerogatives enjoyed by a majority in a close corporation not infrequently block the sale of a close corporation because the majority has difficulty obtaining such lucrative employment elsewhere" (citing J.C. Hetherington, *Special Characteristics, Problems, and Needs of the Close Corporation*, 1969 U. ILL. L.F. 1, 20 n.72)); PRATT ET AL., *supra* note 79, at 121 ("It is not uncommon to find an owner/manager of a successful closely held company earning a greater amount in annual compensation than the amount an equivalent nonowner employee would earn as compensation."); Ragazzo, *supra* note 57, at 1109 ("The shareholder may invest for the purpose of having a job that produces higher compensation than could be garnered through employment by third parties."); *see also Bonavita*, 692 A.2d at 124 ("[W]hile there is no claim that the [close corporation] salaries are excessive, neither was there a showing that if the 'inside' employment were terminated those family members could earn as much elsewhere."); Nelson v. Martin, 958 S.W.2d 643, 644 (Tenn. 1997) (noting that the annual compensation of a shareholder-employee of a commercial printing business "was in excess of $250,000"). This assertion, of course, assumes a comparison between similar jobs in businesses at similar stages of development.

174. *See, e.g.*, *Wilkes*, 353 N.E.2d at 659–60 & n.9 (observing that all of the close corporation participants were directors of the company and that the offices of president, treasurer, and clerk were held by each of the participants over the years); Balvik v. Sylvester, 411 N.W.2d 383, 384 (N.D. 1987) (noting that both participants in a close corporation were directors of the company and observing that one shareholder-employee served as the president and the other served as the vice-president); *see also* 1 OPPRESSION, *supra* note 20, § 3:07, at 3-67 (referring to the "prestige, privileges, and patronage that come from controlling a corporation and occupying its principal offices"); *id.* § 3:06, at 3-47 ("[L]osing the prestige of a directorship may be of considerable consequence to the shareholder."); *cf.* WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 174 (8th ed. 2002) ("[T]here is obvious psychic income associated with being a senior manager of a 'Fortune 500' firm or other well known corporation. . . .").

175. *See Ingle*, 535 N.E.2d at 1319 (Hancock, J., dissenting) (noting "the challenge, the independence, the prestige, the feeling of achievement, and the other intangible benefits of being part of the management of a successfully run small company"); Bahls, *supra* note 89, at 290–91 (clarifying that close corporation ownership includes "the social status and challenge of operating one's own company and the satisfaction of providing employment to one's children"); *id.* at 299 n.96 (noting that "[i]ntangible amenities include the social status of operating one's own company, together with the associated challenges"); *id.* at 319 n.212 (mentioning the "loss of satisfaction and other qualitative perks associated with operating a business"); O'Neill, *supra* note 167, at 668, 671 (describing the "psychological payoffs" that an "owner-manager" anticipates when investing in a venture, including "the pleasure of being one's own boss, the feeling of satisfaction in creating a viable enterprise and even the excitement of taking a substantial risk"); Ragazzo, *supra* note 57, at 1110 ("Additionally, the employee may simply derive satisfaction from working in a business that he himself takes a substantial part in managing."); *see also Bonavita*, 692 A.2d at 124 ("[A] job in the family business probably provides considerably more security than one might find in other employment.").

inflict great harm upon a shareholder, even if that shareholder is still receiving his proportionate share of the company's value.[176]

If the goal of the shareholder oppression doctrine is to protect these broader components of the close corporation shareholder's investment,[177] one would expect that an effective remedy for oppression would provide compensation for any harm to these components. Significantly, however, the fair value buyout fails to provide any compensation for the value of a lost job or a lost management position—two central components of the close corporation shareholder's investment return.[178] For example, when the majority oppressively terminates the minority's executive-level employment and the minority is unable to obtain comparable employment elsewhere, such "lost job" compensation should presumably approximate the damages conventionally awarded in a wrongful termination action—namely, back pay[179] and, in appropriate cases, front pay.[180] In theory, additional sums for any lost prestige or

176. Close corporation employment has value beyond its use as a vehicle for distributing the earnings of a business. *See supra* notes 27–28 and accompanying text (noting that close corporations often distribute their corporate earnings through salary and other job-related benefits rather than through the declaration of dividends). As mentioned, having a close corporation job, in and of itself, has significant value that often induces a shareholder's commitment of capital to a venture. *See supra* notes 173–75 and accompanying text (describing the benefits of close corporation employment).

177. *See supra* note 165 and accompanying text (describing the goal of the shareholder oppression doctrine).

178. *See supra* note 170 and accompanying text (describing the components of a close corporation shareholder's investment return).

179. *See* 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 9.24, at 331 (1994) ("[A] major element of damages in any discharge action is the compensation (wages, salary, commissions, or other payments, plus fringe benefits) the employee lost by reason of the discharge."); *id.* ("As a general matter, the employee should recover back pay damages, less any mitigation amounts, from the date of the discharge until the date of trial, unless his or her employment would have ended earlier for a lawful reason.").

180. As commentators observe:

> In addition to compensation lost in the past, plaintiffs often seek future damages, or front pay, for some period of time beyond the date of the trial. The duty to mitigate means that, if the court permits awards of front pay, they can go only to those plaintiffs who have not been able to find other comparable employment after their discharge; in many future damages cases, however, the employee has another job that pays less than the former employment and argues that the defendant should have to compensate him or her for the lifetime earnings differential.

Id. § 9.24, at 583.

For example, assume that a terminated shareholder-employee was earning a "true" salary of $90,000. Despite the best efforts of the shareholder-employee, comparable alternative employment can only be obtained at a $60,000 salary. The termination, therefore, robbed the shareholder-employee of the ability to earn an additional $30,000 in salary in a comparable

lost ability to work for oneself would also be required.[181] In calculating fair value for a buyout, however, none of the typical valuation techniques accounts for the value associated with the loss of a specific close corporation position.[182] This omission is particularly significant given that a minority shareholder's expectations of employment benefits and management participation are frequently damaged by oppressive conduct, as the typical shareholder oppression dispute involves the majority terminating the minority's employment and removing the minority from any management role.[183] As the above discussion demonstrates, the fair value buyout leaves the employment and management components of a close corporation shareholder's

---

position. *See supra* note 173 (noting that a close corporation job is frequently associated with a higher salary). If compensation for the fair value of a shareholder's investment included compensation for the lost job, the terminated shareholder would presumably receive $30,000 per year in back pay from the time of termination until the time of trial and, potentially, a properly discounted front pay award representing the lost $30,000 per year for some specified period of time into the future.

181. After all, back-pay and front-pay awards may not make a terminated shareholder completely "whole." Such awards do not compensate the shareholder for any loss of prestige caused by removal from a management position (except to the extent that the prestige of the position was represented by a higher salary). Furthermore, such awards do not compensate the shareholder for any loss of intangible "be your own boss" value. *See supra* notes 173–75 and accompanying text (describing the benefits of close corporation employment). These losses are, of course, difficult to quantify, and assessing damages for them would be speculative at best. *See, e.g.*, Bahls, *supra* note 89, at 298–99 (discussing "the loss of an expectation of a voice in management," and observing that "[p]roblems inherent in quantifying the value of this expectation to intangible amenities often preclude the court from awarding any value for loss of the expectation").

182. *See, e.g.*, Murdock, *supra* note 29, at 472 (calculating the losses of a shareholder-employee earning $250,000 per year in salary before termination and $100,000 per year in salary after termination, and implying that a standard buyout is not entirely satisfactory because it does not compensate for this loss); *cf.* Bahls, *supra* note 89, at 296 ("Although dissolution of the corporation may enable the shareholder to generate income by reinvesting the proceeds of the liquidation, it does not enable the shareholder to realize expectations of continuing employment or participation in management."); *id.* at 298–99 (observing that "[a]warding the fair market value of a shareholder's interest does not compensate for the loss of an expectation of a voice in management" because "[p]roblems inherent in quantifying the value of this expectation to intangible amenities often preclude the court from awarding any value for loss of the expectation"). *See generally* PRATT ET AL., *supra* note 79, at 149–297 (discussing several valuation methods—including discounted economic income, guideline company, merger and acquisition, asset-based valuations, and excess earnings—with no mention of adjustments for the value of a lost job or a lost management position); *id.* at 23–30 (discussing fair market value, investment value, intrinsic value, fair value, going-concern value, and liquidation value with no mention of adjustments for the value of a lost job or lost management position).

183. *See, e.g.*, Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661 (Mass. 1976) (involving a minority shareholder who was terminated from employment and removed from a management position); *In re* Topper, 433 N.Y.S.2d 359, 362 (Sup. Ct. 1980) (same); Balvik v. Sylvester, 411 N.W.2d 383, 384–85 (N.D. 1987) (same).

investment unprotected, even though these components are almost always harmed in shareholder oppression disputes. The conventional buyout remedy provides compensation to an aggrieved shareholder only for the value of the shareholder's proportionate interest in the company.[184] Thus, even if one believes that an undiscounted buyout award "overcompensates" an aggrieved investor for the value of his shares, such overcompensation could be justified on the basis that the buyout woefully undercompensates the investor (or fails to compensate the investor at all) for other substantial harms caused by oppressive behavior. To offset the uncompensated damages to the employment and management components of a shareholder's investment, courts should reject discounts on the ground that the higher buyout price will help to remedy those otherwise ignored losses.[185]

In summary, by focusing on the context of shareholder oppression disputes, the language of the dissolution statutes themselves, and the operation of the buyout award, one can make a strong case against the application of discounts. Nevertheless, courts and commentators have frequently relied on other arguments to reach the conclusion that discounts are inappropriate. Although the same "no discounts" result is reached, often the arguments are, at best, not particularly persuasive, or are, at worst, conceptually unsound. Such arguments are problematic, particularly because other courts may perceive their weaknesses and may, as a result, feel compelled to apply discounts given the absence of any legitimate ground for their rejection. The use of such problematic arguments is worrisome, therefore, as there is some risk that prodiscount

184. *See, e.g.*, *supra* Part II.A (describing the fair market value and enterprise value approaches to the meaning of fair value).

185. Admittedly, any overcompensation provided by the lack of discounts is unlikely to be a perfect dollar-for-dollar offset of the undercompensation caused by the buyout's failure to account for employment and management harm. Depending on the numbers, "lost job" and "lost management position" damages may be higher or lower than the dollar amount of the discounts. Alternatively, a court may not be able to calculate such damages at all. The loss of prestige and independence that potentially results from a termination of employment and a removal from management may be difficult, if not impossible, to quantify. *See supra* notes 175, 181 and accompanying text (discussing damages for "lost prestige" and "lost ability to work for oneself"). Nevertheless, there is no doubt that such harm is frequently suffered by a frozen-out minority shareholder and that the standard buyout award fails to compensate for it. *See supra* notes 181–83 and accompanying text (noting the harms that a frozen-out shareholder typically faces and the incompleteness of a buyout award). In many oppression disputes, therefore, the undercompensation argument can, at the very least, serve as a justification for reducing discounts, even if it cannot "mathematically" justify their wholesale rejection.

precedent will be created, especially in jurisdictions that have not yet taken a position on the propriety of discounts in the shareholder oppression setting. Moreover, some of these arguments can, in certain situations, be used against the interests of oppressed minority shareholders.[186] For these reasons, it is important to identify the "weaknesses" of the case against discounts so that litigants can focus on asserting the stronger and more credible arguments previously discussed in this Article.

B. Weaknesses of the Case

1. *The Dissolution Analogy*. A number of courts and commentators argue against discounts by focusing on the relationship between the buyout remedy and the dissolution-for-oppression statute. As mentioned, in many jurisdictions the shareholder oppression action derives from state statutes that provide for a corporation's involuntary dissolution in the event of oppressive conduct by those in control.[187] Nevertheless, the courts often view dissolution as a drastic remedy.[188] Thus, even when dissolution is the only remedy specified in a statute, courts have felt empowered to grant less severe relief.[189]

---

186. *See, e.g.*, *infra* notes 217, 255–62 and accompanying text (discussing the compensatory aspect of dissolution and the punishment rationale).

187. *See supra* notes 33–36 and accompanying text (discussing dissolution-for-oppression statutes).

188. *See, e.g.*, Bahls, *supra* note 89, at 296 (observing that "[c]ourts historically looked askance at dissolution as an extreme remedy"); Robert W. Hillman, *The Dissatisfied Participant in the Solvent Business Venture: A Consideration of the Relevant Permanence of Partnerships and Close Corporations*, 67 MINN. L. REV. 1, 47 n.147 (1982) (noting that "courts frequently view corporate dissolution as a 'drastic,' 'harsh,' or 'last resort' remedy"); Murdock, *supra* note 29, at 440 ("The cases in which courts refer to dissolution or liquidation as a drastic remedy, if not legion, are certainly numerous." (footnote omitted)).

189. *See, e.g.*, Davis v. Sheerin, 754 S.W.2d 375, 378, 380 (Tex. App. 1988) (observing that the relevant Texas statute only provided "for the appointment of a receiver, with the eventual possibility of liquidation" as a remedy for oppressive conduct, but concluding that courts "could order less harsh remedies" under "their general equity powers in the absence of statutory authority"); *id.* at 379 ("[C]ourts of other jurisdictions have recognized a 'buy-out' as an appropriate remedy, even in the absence of express statutory or contractual authority.").

In some jurisdictions, the relevant statutes expressly grant courts the ability to award alternative, nondissolution remedies. *See, e.g.*, MINN. STAT. ANN. § 302A.751 subd. 1 (West Supp. 2000) (authorizing a court to provide "any equitable relief it deems just and reasonable in the circumstances"); N.J. STAT. ANN. § 14A:12-7 (West Supp. 1999) (providing a list of remedies).

Within this setting, the prevalence of the buyout award is easy to understand. A buyout allows a court to remedy oppressive conduct without terminating a company's existence.[190] The corporation continues in business with the majority still in control, and the minority exits the company with the fair value of his investment.[191] The key point, however, is that the buyout remedy is awarded in lieu of dissolution. As a result, courts have analogized to the dissolution scheme in wrestling with how the buyout remedy should operate. Judicial authorities seem to make two distinct arguments by analogy, although the contentions are related. First, because dissolution proceeds are distributed to shareholders on a pro rata basis, without distinguishing between controlling and non-controlling shares, the buyout remedy should also provide a pro rata award that treats all shares equally.[192] Second, because dissolution would provide a minority shareholder with some amount of compensation, a buyout in lieu of dissolution should offer the minority no less than that amount.[193] Despite the appeal of these arguments, both are limited in their ability to justify a rejection of discounts.

a. The "Equal Treatment" Aspect of Dissolution. When a corporation is dissolved, shares of the same class are treated equally. A distribution of dissolution proceeds provides an equivalent per-share price, with no distinction made between controlling and minority shares.[194] In the oft-cited decision of *Brown v. Allied Corrugated Box Co.*,[195] the California Court of Appeal rejected a minority discount by relying in part on this rationale. The *Brown* court observed that "[h]ad plaintiffs been permitted to prove their case and had the corporation been dissolved," then "upon

190. *See* Murdock, *supra* note 29, at 452 (describing dissolution as "judicially-imposed [corporate] death" (quoting *In re* Radom & Neidorff, Inc., 307 N.Y. 1, 7 (1954)).

191. *See supra* Part I.D (discussing the buyout remedy).

192. *See infra* Part III.B.1.a (discussing the equal treatment aspect of dissolution).

193. *See infra* Part III.B.1.b (discussing the compensatory aspect of dissolution).

194. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1031 (N.J. 1993) ("In the case of dissolution, a distribution results in the termination of the corporation's business, with its assets being proportionately distributed to the stockholders."); HARRY G. HENN & JOHN R. ALEXANDER, HANDBOOK OF THE LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES 992 (3d. ed. 1983) (describing the process of dissolution and noting that "[t]he shareholders, subject to any applicable liquidation preferences and other rights, share proportionately in the net assets remaining after the satisfaction of corporate creditors" (footnote omitted)); *infra* note 196 and accompanying text (noting the pro rata nature of dissolution).

195. 154 Cal. Rptr. 170 (Ct. App. 1979).

distribution of the dissolution proceeds each of the shareholders would have been entitled to the exact same amount per share, with no consideration being given to whether the shares had been controlling or noncontrolling."[196]

It is certainly fair to assert that the equal treatment aspect of dissolution should apply to any remedy, such as a buyout, that is offered in lieu of dissolution. Indeed, the choice of dissolution as a statutory remedy for oppression may signal, at least implicitly, that legislatures favor a remedy that treats all shares equally. Nevertheless, the equal treatment assertion refutes only the application of the minority discount—not the application of the marketability discount—because only the minority discount is premised wholly on the distinction between controlling and noncontrolling shares.[197] The marketability discount, in contrast, may apply to all close corporation shares, controlling or otherwise, on the basis that close corporation shares are difficult to sell.[198] Thus, although the equal treatment aspect of dissolution can (and should) be applied to a "substitute" buyout award, the analogy's significance may be limited. Although it refutes the applicability of the minority

---

196. *Id.* at 176. Professor Murdock expresses similar sentiments:

> [T]he events that trigger the need for a valuation are either an "organic" change that squeezes out a minority shareholder, such as a cash-out merger, thereby giving rise to dissenters' rights, or a suit for liquidation, generally predicated upon the oppressive conduct of those in control, followed by a request for alternative relief in the form of a judicially supervised buy-out. Both of these types of triggering events contemplate pro rata or nondiscriminatory distributions or payments of value.

Murdock, *supra* note 29, at 483; *see id.* ("Similarly, with respect to distributions pursuant to dissolution statutes, the essence of shares of the same class is that each share is entitled to a pro rata portion of that class's claim on the corporation's assets."); *id.* at 484 ("Since the basic schemes are pro rata in nature, discounting a minority interest would upset the even-handedness inherent in the basic statutory schemes.").

197. *See supra* Part II.B (discussing the minority discount).

198. *See, e.g.*, Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 733 (N.J. 1999) ("Even controlling interests in nonpublic companies may be eligible for marketability discounts, as the field of potential buyers is small, regardless of the size of the interest being sold."); Blake v. Blake Agency, Inc., 486 N.Y.S.2d 341, 349 (App. Div. 1985) ("A discount for lack of marketability is properly factored into the equation because the shares of a closely held corporation cannot be readily sold on a public market. Such a discount bears no relation to the fact that the petitioner's shares in the corporation represent a minority interest."); PRATT ET AL., *supra* note 79, at 47 ("Even controlling interests can suffer to some extent from a lack of marketability. A majority but less than 100 percent control position may take longer to sell, thereby reducing its present value by the time value of money, for example."); PRATT ET AL., *supra* note 90, at 430 ("Even controlling ownership interests suffer to some extent from a lack of marketability. For example, it usually takes several months—and a significant amount of expense and effort on the part of the owners—to sell a company.").

discount, it has less force when used against the marketability discount—assuming that a court believes that all close corporation stock is equally illiquid.[199] If a court believes that controlling shares are easier to sell than minority shares (such that a smaller marketability discount, or none at all, is appropriate for controlling interests),[200] the equal treatment argument would have greater utility. A minority shareholder might prevail in arguing for a reduced "controlling shares" marketability discount on the ground that discounting minority shares more than controlling shares violates the equal treatment aspect of dissolution.

b. The Compensatory Aspect of Dissolution. Because a buyout award is made in lieu of dissolution, some courts have asserted that a minority shareholder should not receive less compensation in a buyout than the shareholder would have received upon dissolution of the company.[201] Providing less compensation in a buyout than in dissolution, it is argued, is particularly unfair in jurisdictions where the majority can circumvent the minority's petition for dissolution by electing to buy out the minority's shares.[202] As one court observed, "Minority shareholders should not receive less than this [dissolution] value if, instead of fighting the dissolution action, the majority decides to seek appraisal of minority shares in order to buy out the minority and reduce corporate discord."[203]

---

199. *See, e.g.*, Bahls, *supra* note 89, at 303 ("To the extent that discounts for lack of marketability are shared by shareholders on a pro rata basis, shareholders' expectations of equal treatment are not violated."); *cf. Balsamides*, 734 A.2d at 737 (citing the testimony of a valuation expert who stated that "whether you [applied] a marketability discount to one hundred percent of the shares of stock, fifty percent of the shares of stock, or twenty percent of [the] shares of stock, the marketability discount would be the same").

200. *See supra* notes 133–35 and accompanying text (noting that a smaller marketability discount, or perhaps no marketability discount at all, is appropriate for the sale of a controlling interest in a close corporation).

201. *See infra* note 203 and accompanying text (citing authorities for the proposition that a buyout should provide at least as much compensation as dissolution would provide).

202. *See supra* note 59 and accompanying text (describing election statutes).

203. Charland v. Country View Golf Club, Inc., 588 A.2d 609, 613 (R.I. 1991) (quoting Robert B. Heglar, Note, *Rejecting the Minority Discount*, 1989 DUKE L.J. 258, 269 n.63); *see* Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 176 (Ct. App. 1979) ("[T]he statutes suggest that a minority shareholder who brings an action for the involuntary dissolution of a corporation should not, by virtue of the controlling shareholder's invocation of the buy-out remedy, receive less than he would have received had the dissolution been allowed to proceed.").

Using the compensatory aspect of dissolution as an argument against discounts, however, may not be particularly helpful. The problem stems from the fact that the value of a company in dissolution may be considerably less than the value of a company in a buyout proceeding. Even when discounts are applied, a buyout award might furnish more compensation than dissolution would provide. In a dissolution proceeding, a company is generally sold—either intact as an operating business (or "going concern"), or piecemeal on an asset-by-asset basis.[204] As an economic matter, a company whose value as an operating business exceeds its piecemeal-asset value should sell for the higher "going-concern" value, even in dissolution, as the company's value as an intact business should attract a purchaser who is willing to pay more than the mere sum of the firm's assets. In a buyout proceeding, an operating company is also typically valued as a going concern rather than as a defunct business whose value stems only from its assets.[205]

If the going-concern value of a company sold in dissolution were equivalent to the going-concern value of a company in a buyout proceeding, the dissolution analogy would have some bite. Any

---

204. As a California court stated:

> "[A] liquidation does not necessarily contemplate that the assets will be sold piecemeal and the goodwill of the business sacrificed by a termination of the business." It may be possible to sell the entire business as a going concern in liquidation. "If that is true, then the moving parties should be entitled to a value which takes into account that possibility, since such a sale of the entire business as a going concern could be made in the liquidation if the dissolution were permitted to proceed."

Mart v. Severson, 115 Cal. Rptr. 2d 717, 719–20 (Ct. App. 2002) (citation omitted) (quoting 2 MARSH ET AL., CALIFORNIA CORPORATION LAW § 21.08[C], at 21–45 (4th ed. Supp. 2001)); *see also id.* at 724 ("The appraisers all agreed that this figure reflects [the company's] *piecemeal liquidation value*, but that value is not equivalent to its fair value because [the company] could have been sold as a going concern in liquidation on the valuation date."); *id.* at 726 (noting that "[t]he fair value [of a corporation] is the liquidation value," but that "liquidation value can mean going concern value if the corporation could be sold as a going concern in liquidation"); *Brown*, 154 Cal. Rptr. at 178 ("[H]ad the corporation been dissolved, its liquidation might very well have been accomplished by a piecemeal sale of its assets."); Hillman, *supra* note 188, at 82 (equating a recovery in dissolution with "the liquidation value of corporate assets"); Murdock, *supra* note 29, at 442 ("Often with a third party bidder and invariably with a shareholder bidder . . . what will be purchased from the liquidating corporation are the assets of the enterprise as a going concern."); *id.* at 443 (stating that "dissolution is not necessarily synonymous with either destruction of the enterprise or with loss of going concern value"); *id.* at 447 (noting the possibility that a minority might receive only "dead asset" value upon dissolution).

205. *See supra* note 86 (noting that fair value in a buyout proceeding is generally determined on a going-concern basis).

discounting of the minority's pro rata share of the company's value in a buyout would leave the minority shareholder with less compensation than he would receive in dissolution. Market imperfections in a dissolution sale, however, may lead to much lower values for the company than a going-concern valuation outside of dissolution. Indeed, "[b]uyers generally are unwilling to pay full value for a business at a judicial sale even though it is a going concern."[206] Such unwillingness stems from the following risks: (1) the risk of losing the management team shortly after the sale,[207] (2) the risk of receiving inadequate or inaccurate financial statements prior to the purchase,[208] (3) the risk of competition from the seller,[209] and (4) the risk of adverse changes from abnormal operation of the business before the purchase is completed.[210] In a privately negotiated

---

206. Bahls, *supra* note 89, at 331; *see also* Murdock, *supra* note 29, at 443 n.127 (noting the possibility that the sale of an operating business in dissolution may be "predicated upon a distress sale situation" and that, as a result, less than going-concern value will be received); *id.* ("To realize going-concern value, either a competitive bidding, nondistress environment is necessary or, with respect to a shareholder bidder, some legal constraint must be in place to insure that a fair price is paid.").

207. *See* Bahls, *supra* note 89, at 331 (stating that "[b]uyers have no assurance that present management of the company will continue to participate in management, even for a transition period, after the sale," and observing that "[t]he problem is particularly acute in small corporations in which managers tend to be independent-minded entrepreneurs not wanting to be under the thumb of new owners").

208. As one commentator notes:

> Buyers at judicial sales have little assurance that the information received about the business is adequate to value the business or fairly reflects the financial condition of the business. . . . Because of the difficulty in evaluating the business, frequently the only bidder at the court-supervised sale is the defendant. Without competing bidders, the defendant has monopsony power and is able to drive the price to much lower levels.

Id.

209. *See id.* ("Buyers at judicial sales have little assurance that the seller's management will not compete. Selling shareholders that compete with the corporation threaten to deprive the buyer of valuable customer relationships which jeopardizes the value of the goodwill.").

210. *See id.* at 331 ("Buyers at judicial sales have little assurance that the current management of the business will operate the business normally between the date of the buyer's assessment of the price and the date control of the business is transferred.").

Purchase prices at dissolution sales are further depressed because buyers in dissolution proceedings "must pay the full purchase price in cash at closing or within a relatively short period of time." *Id.* at 332 n.273. In private transactions outside of dissolution, the parties can increase the purchase price by allowing for payments in installments or, alternatively, by providing sufficient time to secure adequate financing. *See id.* (discussing installment sales and financing terms). Court-supervised buyouts may have similar flexibility. *See, e.g.*, Royals v. Piedmont Elec. Repair Co., No. 97 CVS 720, 1999 WL 33545516, at *15 (N.C. Super. Ct. Mar. 3, 1999) (stating, in an oppression dispute, that "[a] fair and reasonable purchase procedure should provide that the purchase price be paid 25% at closing and the balance paid in the form of a

transaction outside of dissolution, these risks could be reduced.[211] Similarly, if the majority shareholder purchased the business in dissolution, these risks could be minimized or eliminated as well, as the majority shareholder would remain in control of the business.[212] Yet even if the majority shareholder was the purchaser in dissolution, he would rationally bid only nominally higher than the depressed price that an outside bidder—a person who could not control the risks—would offer.[213]

Depending on the numbers, therefore, a shareholder may actually receive significantly more compensation through a buyout award at going-concern value—even a discounted buyout award—than he would if the business were sold as a going concern in dissolution.[214] When a business is sold piecemeal on an asset-by-asset

---

promissory note which provides that the remaining principal be paid in three equal annual installments"); Bahls, *supra* note 89, at 328 n.258 ("Several state statutes permit the courts to order installment payments."); Hillman, *supra* note 188, at 83 (discussing the possibility of "structur[ing] installment payments with a commercially reasonable rate of interest over an extended period of time"); *cf.* Bonavita v. Corbo, 692 A.2d 119, 130 (N.J. Super. Ct. Ch. Div. 1996) (appointing a "special fiscal agent" to consider the appropriate terms and conditions for a court-ordered buyout, including the interest rate, the payment schedule, and the need for any security). It is also worth noting that, if prospective purchasers know that a company's sale is part of an involuntary dissolution proceeding, their knowledge of the "distressed" nature of the sale may lead to lower bids.

211. *See* Bahls, *supra* note 89, at 331–32 (discussing ways to contractually reduce risk in a privately negotiated transaction).

212. *See id.* at 332 (noting that, "as is usually the case, the majority shareholder . . . , because of a management position in the business, can control the risks described"). Indeed, a majority shareholder purchasing the business can continue to operate it. The majority remains an insider with access to the company's books, and the majority is, typically, the key manager. As a consequence, the majority shareholder can reduce or eliminate the risks of (1) losing the core management team (the majority, as the key manager, remains), (2) receiving inadequate financial information, and (3) operating the business abnormally. Without a contractual noncompetition agreement, however, the majority is probably unable to control the risk of the former investors' establishing a competing business.

213. *See id.* (noting that a majority shareholder would simply buy the business at a court-supervised dissolution sale for "one dollar higher than the maximum an outside bidder would pay"); *id.* at 332 n.275 ("The net result of court ordered dissolution is frequently the majority shareholders buying the interest of the minority shareholder at a depressed price."); *see also id.* at 332 ("The rational majority shareholder . . . would never pay the minority shareholder more than the net cost to acquire the business at judicial sale.").

214. Professor Bahls provides an example of a company that is worth $1,000,000 on a going-concern basis outside of dissolution. *See id.* at 332 (assuming a $1,000,000 company value "if the corporation is sold in an arms-length transaction in which the buyer is able to eliminate or substantially minimize the [various] risks"). He then assumes that the amount realized for the company would only be $500,000 "if the business were sold at a court-supervised sale." *Id.* On these numbers, the proportionate interest of a 25 percent minority shareholder would be worth $250,000 on a going-concern basis outside of dissolution. Valued in dissolution, however, the 25

basis in dissolution, this compensation differential is likely to increase further in favor of a buyout award, as the piecemeal liquidation value of an enterprise is usually less than its going-concern value.[215] At the very least, a credible use of the dissolution analogy would require a court to compare the amount of the buyout award to the amount expected in dissolution—a comparison that courts rarely, if ever, make.[216]

At bottom, it is defensible to contend that dissolution value is the compensatory "floor" in an oppression buyout proceeding.[217]

---

percent interest would be worth only $125,000. Thus, even if the 25 percent interest at going-concern value ($250,000) was discounted by 50 percent, it would nevertheless provide as much compensation as the same interest valued in dissolution. On these numbers, a buyout at going-concern value, even with a substantial discount, provides more compensation to the minority shareholder than dissolution would provide. *See also* Grato v. Grato, 639 A.2d 390, 401 (N.J. Super. Ct. App. Div. 1994) ("It is undisputable that a shareholder's interest in a business under a buy-out procedure will have a higher value than in dissolution, for the 'good will' or value of the business is not reflected in the latter.").

215. *See, e.g.*, Hillman, *supra* note 188, at 47 n.147 ("There is general acceptance of the proposition that the going concern value of an enterprise is likely to exceed its liquidation value."); *id.* at 82 (noting that liquidation value is "a technique of valuation which under most circumstances can be expected to result in a lower figure than other approaches"); *see also* Mart v. Severson, 115 Cal. Rptr. 2d 717, 721, 723 (Ct. App. 2002) (stating that appraisers calculated a $1.48 million liquidation value and a $5.6 million going-concern value for the same company); Bahls, *supra* note 89, at 297 ("When corporations are liquidated, they usually sell their assets for cash. . . . Auction sales are fire sales. Rather than selling the entire business as a going concern, the business assets might be sold separately. If so, the sale does not yield the full value of a going concern." (footnotes omitted)).

216. *See, e.g.*, Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 176 (Ct. App. 1979) (rejecting a minority discount by noting that a "minority shareholder who brings an action for the involuntary dissolution of a corporation should not . . . receive less than he would have received had the dissolution been allowed to proceed," but providing no comparison with the amount of compensation that the shareholder would have received upon the dissolution of the company); Charland v. Country View Golf Club, Inc., 588 A.2d 609, 613 (R.I. 1991) (rejecting a marketability discount by observing that, in a buyout proceeding in lieu of dissolution, "[m]inority shareholders should not receive less than this [dissolution] value," but providing no comparison with the amount of compensation that the shareholder would have received upon the dissolution of the company (quoting Robert B. Heglar, Note, *Rejecting the Minority Discount*, 1989 DUKE L.J. 258, 269 n.63)).

Even if courts did make such comparisons, the dissolution analogy would likely result only in the reduction of discounts—not in their elimination. For example, assume that an investor's pro rata share of a company would be valued at $250,000 in a buyout proceeding at going-concern value, and at $125,000 in a dissolution setting. *See supra* note 214 (providing a similar example). Discounts totaling $125,000 or less would be permitted in the buyout proceeding, as a buyout award in such circumstances would be equal to or better than a recovery in dissolution. Discounts totaling in excess of $125,000 would presumably be scaled back to $125,000, rather than eliminated in their entirety.

217. Because a buyout award is made in lieu of dissolution, a court may be just as likely to characterize the expected recovery in dissolution as the compensatory "ceiling" in an oppression buyout proceeding. *See, e.g.*, Hillman, *supra* note 188, at 82 ("Since the ultimate remedy which

Undoubtedly, there will be some circumstances in which the argument is applicable, particularly when a court has chosen high discount percentages. With some companies, for example, the minority shareholder and the majority shareholder may both be interested in (and capable of) purchasing the business in dissolution. When such competitive bidding between insiders is present, one might expect a sale price in dissolution that approximates what the company would sell for outside of dissolution.[218] In these circumstances, the argument should, at a minimum, compel a court to reduce the amount of the discounts to avoid awarding less than dissolution value.[219] The argument's weakness, however, stems from the uncertainty surrounding whether it will apply in a particular buyout situation.[220] Given the imperfections of dissolution, the argument, if properly applied by courts,[221] may have little practical effect in combating discounts.

2. *The Punishment Rationale*. Another common argument raised in opposition to discounts asserts that discounts are unjustified

---

can be granted to a dissatisfied shareholder is the right to compel . . . dissolution of the enterprise, the valuation of the withdrawing participant's account under an expectations-based analysis should yield no more than the amount which would be realized if the dissolution was ordered.").

218. Compared to an outsider purchasing a business in dissolution, a minority shareholder faces considerably less risk when he purchases his own business. The minority shareholder is an insider who likely was (or still is) an active participant in the management of the business. As a consequence, the minority will typically have superior knowledge about the company's present affairs and future prospects. *See supra* notes 207–10 and accompanying text (noting the risks that buyers typically face when purchasing a business in dissolution).

219. *See supra* note 216 (providing an example).

220. Perhaps this uncertainty should always favor the oppressed investor. After all, estimating what the shareholder would receive if the company were dissolved is likely to involve a good deal of speculation. Because the oppressive conduct of the majority has created the need to engage in this speculation, it is fair to resolve any uncertainty against the majority's interests. *See infra* notes 311–14 and accompanying text (discussing the resolution of uncertainty). Given that it is possible for a company's sale price in dissolution to approximate its sale price outside of dissolution (e.g., a minority shareholder could engage in competitive bidding with the majority shareholder), a court might fairly decide, for buyout purposes, that a company's value in dissolution is equivalent to its going-concern value outside of dissolution.

221. Admittedly, courts have not seemed interested in properly applying the argument. As mentioned, a proper application would presumably require a court to calculate what the shareholder would expect to receive in dissolution and to compare that amount to the price of the buyout. If the buyout price, through discounts or otherwise, is less than the dissolution value, the buyout price would need to be increased. *See supra* note 216 (providing an example). Instead of performing this comparison, however, courts seem to treat the argument as one that inexorably leads to a bright-line rule of rejecting discounts. *See supra* note 216 (citing cases).

because the majority shareholder is the party who has acted (or has allegedly acted) oppressively. This argument has punishment overtones in that it characterizes the oppressive majority as the wrongdoer and it denies the majority a "benefit" (a less expensive buyout price) because of the majority's wrongdoer status.[222]

The New Jersey Supreme Court decision of *Balsamides v. Protameen Chemicals, Inc.*[223] provides an example of a judicial discount analysis that was influenced, at least arguably, by punishment considerations. In *Balsamides*, the trial court found that Leonard Perle, a 50 percent shareholder in the company, had oppressed Emanuel Balsamides, the owner of the remaining 50 percent of the company's stock.[224] In a rather unusual twist, the trial court ordered the oppressing shareholder (Perle) to sell his 50 percent ownership interest in the company to the oppressed shareholder (Balsamides).[225] In effect, the oppressed shareholder received the right to buy out the stock of the oppressing shareholder—a reversal of the typical buyout scenario.[226] Significantly, the trial court based its decision in part on its "belief that Perle was more at fault,"[227] indicating that the court took Perle's misconduct into account when deciding on the appropriate remedy.

The trial court applied a 35 percent marketability discount in calculating the buyout price.[228] On appeal, the appellate division concluded that it was inappropriate to apply a marketability discount given the circumstances before the court.[229] The court's rationale was based in part on the notion that the premise for a marketability discount is absent when a buyer is acquiring sole ownership of a corporation.[230] As mentioned, controlling interests of close corporations are easier to sell than minority interests of the same

---

222. *See, e.g.*, Bahls, *supra* note 89, at 302 ("To require application of a minority discount in this case would result in a windfall for majority shareholders *which is inequitable particularly when it is the majority shareholder who initially acted oppressively*." (emphasis added)).

223. 734 A.2d 721 (N.J. 1999).

224. *See id.* at 724 (listing the oppressive acts found by the court).

225. *Id.* at 724–25 (ordering Perle to sell his shares to Balsamides).

226. *See supra* note 56 and accompanying text (noting that the typical buyout is of the oppressed investor's stockholdings).

227. *Balsamides*, 734 A.2d at 725.

228. *Id.* at 726.

229. *See id.* (noting that the appellate division "disagreed with [a marketability discount's] propriety in these circumstances").

230. *See infra* note 232 and accompanying text (explaining the rationale of the appellate division).

company, as the market for controlling interests is larger and more liquid. Thus, a marketability discount—a discount premised on the difficulty of selling close corporation shares—should be smaller, or perhaps inapplicable, when a purchaser winds up with a controlling block.[231] As the appellate division observed:

> The problem with applying such a [marketability] discount in this case is that there was no sale of Perle's stock to the general public nor was Balsamides buying an interest in the company, minority or otherwise, that might result in the later sale of a partial interest to a member of the public. Rather, this was a case of a fifty percent owner buying the stock of the other fifty percent owner, resulting in the buyer obtaining total ownership of the corporation.[232]

On appeal, the New Jersey Supreme Court rejected the position of the appellate division and reinstated the 35 percent marketability discount.[233] Some of the supreme court's discussion indicates that it believed that a marketability discount was appropriate on the facts before it. The court seemed to argue that a later purchaser would discount even a 100 percent ownership interest in a close corporation because of the absence of an established market and the accompanying difficulties of liquidating an ownership position.[234] Such

---

231. *See supra* notes 133–35 and accompanying text (discussing the relationship between a controlling interest and the marketability discount).

232. Balsamides v. Perle, 712 A.2d 673, 683 (N.J. Super. Ct. App. Div. 1998); *see also id.* at 683 & n.2 (noting that "[t]here is no question that if a minority interest in a closely held corporation is sold to an outsider there is usually a marketability discount that must be applied to determine the fair market value of the shares," but also observing that "this principle is inapplicable to a transfer where the transferee will own all of the stock"); *id.* at 684 (stating that "[n]ot all jurisdictions agree that there should be no marketability discount in connection with a transfer of controlling interests," but determining that the New Jersey oppression statute "does not warrant a departure from the sensible approach that would decline to apply a discount for lack of marketability when one owner transfers his or her interests to another owner, who in turn becomes the corporation's sole shareholder").

233. *Balsamides*, 734 A.2d at 736 (reinstating the discount).

234. As the New Jersey Supreme Court stated:

> The position of the Appellate Division ignores the reality that Balsamides is buying a company that will remain illiquid because it is not publicly traded and public information about it is not widely disseminated. [The company] will continue to have a small base of available purchasers. If it is resold in the future, Balsamides will receive a lower purchase price because of the company's closely-held nature. . . .
>
> . . . [I]f Perle is not required to sell his shares at a price that reflects [the company's] lack of marketability, Balsamides will suffer the full effect of [the company's] lack of marketability at the time he sells. Accordingly, we find that Balsamides should not bear the brunt of [the company's] illiquidity merely because he is the designated buyer. . . .

an argument focuses on the reason for applying a marketability discount—i.e., because subsequent purchasers will pay less for shares that are difficult to sell—and on whether that reason is present in the circumstances before the tribunal.[235] It is difficult to fault the *Balsamides* court for addressing this central issue.

The problem with the *Balsamides* opinion is that some of the supreme court's language suggests that its decision to reinstate the marketability discount was actually motivated by its desire to punish Perle for his oppressive conduct. The court explicitly noted that failing to apply a marketability discount "would be unfair, particularly since Perle was the oppressor and Balsamides was the oppressed shareholder."[236] Further, the court stated that, "[b]ecause the 'equities' of this case quite clearly [lay] with Balsamides, it would [have been] unfair to allow Perle to receive . . . undiscounted value."[237] In describing the *Balsamides* decision, one authority observed that the application of a marketability discount "penalized" Perle, and that "[p]enalizing Perle[] . . . seems to have been exactly the result the New Jersey court intended."[238]

> . . . The fact that the buyer is known is irrelevant. When Balsamides eventually sells, he will suffer the full effect of any marketing difficulties.

Id. at 735–36; *cf. id.* at 737 (citing the testimony of a valuation expert who testified that even 100 percent ownership interests in close corporations are subject to marketability discounts).

235. *See supra* Part II.C (describing the marketability discount); *supra* notes 133–36 and accompanying text (discussing the applicability of a marketability discount when the majority shareholder or the corporation is the purchaser).

236. *Balsamides*, 734 A.2d at 736.

237. *Id.*; *see also id.* at 737 (distinguishing another New Jersey precedent that disallowed a marketability discount on the ground that "[a]pplication of the equities in the two cases . . . dictates opposite results"); *id.* at 738 ("In cases where the oppressing shareholder instigates the problems . . . fairness dictates that the oppressing shareholder should not benefit at the expense of the oppressed. Requiring Balsamides to pay an undiscounted price for Perle's stock penalizes Balsamides and rewards Perle.").

238. JEFFREY D. BAUMAN ET AL., CORPORATIONS LAW AND POLICY: MATERIALS AND PROBLEMS 35 (4th ed. Supp. 2000); *see* Eggart, *supra* note 86, at 240 (suggesting that the *Balsamides* analysis may also advocate the "lack of marketability discounts as a punitive measure"); *id.* at 241 ("Forcing Perle[] to sell his shares to Balsamides at a marketability discount thus did not benefit the oppressor, it penalized him."); *see also* 2 AM. LAW INST., *supra* note 98, § 7.22, at 325 (noting that fair value in the appraisal context should not incorporate a marketability discount except in "extraordinary circumstances," which requires "more than the absence of a trading market in the shares," and suggesting that "the court should apply this exception only when it finds that the dissenting shareholder has held out in order to exploit the transaction"); Hollis, *supra* note 158, at 159 ("[T]here is an implicit contention in the ALI [Principles of Corporate Governance § 7.22] that the 'lack of marketability' discount should be used as a punitive measure."); *cf.* Lawson Mardon Wheaton, Inc. v. Smith, 734 A.2d 738, 748 (N.J. 1999) ("The very nature of the term 'fair value' suggests that courts must take fairness and

Although Perle, as the oppressive shareholder, was certainly at "fault" in the *Balsamides* dispute,[239] it is far from clear that such fault should affect the applicability of a marketability discount. A marketability discount is a well-accepted valuation convention that reflects the economic reality that purchasers often pay less for close corporation stock because, without an established market, such shares are difficult to sell.[240] Application of the discount should turn on whether that economic reality is present on the facts of the case—that is, will the buyout result in the purchaser owning a block of close corporation stock that will be difficult to liquidate? If yes, a marketability discount is appropriate.[241] If no, a marketability discount is inappropriate. The discount's application, in other words, is meant to turn on whether the purchaser will be left with an illiquid stake in the company, not on whether the shareholder's conduct is viewed as good or bad.[242] Not surprisingly, one can apply a similar analysis to the minority discount.[243]

As a conceptual matter, therefore, it makes little sense to use a discount (or the lack thereof) as a means of punishment. Beyond the absence of a conceptual fit, the use of a discount as a punitive tool has related practical problems as well, as there is a significant risk of over-

---

equity into account *in deciding whether to apply a discount* to the value of the dissenting shareholders' stock in an appraisal action." (emphasis added)).

239. Evidence of Perle's blameworthy conduct led the trial court to find oppression under the relevant New Jersey statute. *See Balsamides*, 734 A.2d at 723–24 ("The trial court found that Balsamides was an oppressed shareholder . . . and was entitled to buy-out Perle's interest in [the companies] . . . ."); *id.* at 724 (listing Perle's oppressive acts).

240. *See supra* Part II.C (defining the marketability discount).

241. The amount of the marketability discount should bear some relationship to the expected level of "liquidation difficulty." *See supra* notes 133–35 and accompanying text (arguing that the marketability discount for controlling interests should be reduced, if not eliminated, because controlling interests are easier to sell).

242. *Cf.* Hollis, *supra* note 158, at 159 (stating that "[f]air value should measure the price, not the person").

243. A minority discount is a well-accepted valuation convention that reflects the economic reality that purchasers of stock, whether public corporation stock or close corporation stock, will pay less for shares that lack voting control. *See supra* Part II.B (defining the minority discount). Application of the discount, therefore, should turn on whether this economic reality is present on the facts of a case—i.e., will a buyout result in a purchaser owning a minority position in a close corporation? If yes, a minority discount is appropriate. If no, a minority discount is inappropriate. The minority discount's application, in other words, is meant to turn on whether a purchaser will be left with a minority stake in a company, not on whether a shareholder's conduct is viewed as good or bad. *See supra* notes 122–32 and accompanying text (discussing the applicability of a minority discount when a majority shareholder or a corporation is the purchaser). *But see infra* note 251 (discussing a possible relationship between the size of a minority discount and the conduct of an oppressor).

or under-punishing the oppressive shareholder. After all, a marketability discount is poorly calibrated to the conduct of an oppressive investor. Valuation experts derive marketability discounts from empirical data comparing sales of illiquid securities to sales of liquid, publicly traded securities.[244] To fit the particular circumstances of a given company, experts may adjust the data by considering a number of factors,[245] including the presence of a "put" right,[246] the existence of potential buyers,[247] the prospect of a public offering or sale of the company,[248] and the existence of restrictive transfer provisions.[249] Neither the empirical data nor these factors, however, have any relationship to the conduct of an oppressive shareholder.[250]

---

244. *See, e.g.*, PRATT ET AL., *supra* note 79, at 334 ("[E]mpirical evidence . . . suggests that discounts for lack of marketability for minority interest closely held stocks tend to cluster in the range of 35 to 50 percent from their publicly-traded counterparts."); *id.* at 334–48 (summarizing the findings of "[t]wo general types of empirical studies" on the marketability discount—studies of "[d]iscounts on sales of restricted shares of publicly traded companies," and studies of "[d]iscounts on sales of closely held company shares compared to prices of subsequent initial public offerings of the same company's shares"); *id.* at 357 (noting the existence of empirical data on marketability discounts for controlling interests); *see also Balsamides*, 734 A.2d at 728 (citing the testimony of a valuation expert who justified his application of a 35 percent marketability discount on the ground that, "*according to studies*, thirty-five percent was a mid-range or conservative discount rate" (emphasis added)); Hall v. King, 675 N.Y.S.2d 810, 814 (Sup. Ct. 1998) ("Both of the defendant's valuation witnesses approved a lack of marketability discount greater than 10%. Both justified their choice of a figure by reference to an accepted range of lack of marketability discounts as set forth in various appraisers' studies of private stock transactions.").

245. *See* PRATT ET AL., *supra* note 79, at 358 (noting that "[t]here are *degrees* of marketability or lack of it, which depend on the circumstances in each case," and listing factors that "affect the degree of marketability" and that "should guide the analyst's judgment as to where the subject interest should fall within the reasonable range of discounts for lack of marketability").

246. *See id.* (stating that "the most powerful factor that could reduce or eliminate a discount for lack of marketability would be the existence of a 'put' right," and describing a "put" as "a contractual right that entitles the holder, at his option, to sell the stock to a specified party at some time or under some specified circumstances"); *id.* ("In other words, a put *guarantees* a market under specified circumstances.").

247. *See id.* ("The existence of a reasonable number of potential buyers or even one strong potential buyer (often as demonstrated by past activity in the stock) could dampen the discount for lack of marketability.").

248. *See id.* at 359 ("An imminent public offering or sale of the company could decrease the discount for lack of marketability. . . . Conversely, if a company is committed to remaining private and in the hands of current control owners for the foreseeable future, this would tend to exacerbate the discount for lack of marketability.").

249. *See id.* ("Any provision that limits the right of the holder to transfer the stock would tend to increase the amount of the discount for lack of marketability.").

250. The oppressive shareholder's conduct may, in some instances, play a small role in the setting of the marketability discount. For example, another factor that experts consider in

As a result, in most disputes the size of the marketability discount is no more tailored to the "bad" conduct of the oppressive investor than the current U.S. divorce rate is tailored to the "bad" conduct of the oppressive investor.[251] Even in the shareholder oppression context,

---

adjusting the empirical discount data is the level of dividend payments in a company, as shares of companies paying low or no dividends are generally less marketable. *See id.* at 358 ("Stocks with no or low dividends typically suffer more from lack of marketability than stocks with high dividends. . . . If the stock pays no dividend, the holder is dependent *entirely* on some future ability to sell the stock to realize any return."). Similarly, an investor's ability to access company information is a factor that affects the marketability discount. *See id.* at 359 ("The degree to which information is or is not made available to minority owners and the reliability of that information affects the discount for lack of marketability."). Because dividend suppression and exclusion from company information are two common acts of majority shareholder oppression, one could argue that a marketability discount is tailored, at least in part, to the "bad" conduct of the majority (at least when these acts of oppression are present). Among different companies, in other words, more significant instances of dividend suppression and information exclusion by the majority should result in a higher marketability discount, all other variables being equal.

Despite this argument, it is still fair to assert that a marketability discount is not sufficiently tailored to the conduct of an oppressive shareholder to justify the discount's application (or the discount's denial) as a punitive device. When the majority's oppressive conduct does not include dividend suppression and information exclusion, the factors contributing to the size of the discount are wholly unrelated to the majority's actions. *See supra* notes 244–49 and accompanying text (describing factors affecting the size of the discount); *supra* notes 24–26 and accompanying text (providing examples of common acts of oppression). Even when the majority's oppressive conduct does encompass dividend suppression and information exclusion, the effect of these arguably tailored factors is distorted by the other factors contributing to the size of the discount that are unrelated to the majority's behavior. *See supra* notes 244–49 and accompanying text (describing factors affecting the size of the discount). Finally, it is not entirely clear that an assessment of the dividend payments and information access factors should include the effect of any oppressive conduct. *Cf.* PRATT ET AL., *supra* note 79, at 24 (noting that, under most interpretations of fair market value, "the willing buyer and willing seller are hypothetical persons dealing at arm's length, rather than any particular buyer or seller," and stating that "a price would not be considered representative of fair market value if influenced by special motivations not characteristic of a typical buyer or seller"). If a correct assessment of such factors requires an exclusion of the effect of any oppressive conduct, then even those factors bear no relation to the majority's "bad" behavior.

251. *See, e.g.*, Eggart, *supra* note 86, at 244 ("The percentage discount applied by a court appointed appraiser or expert witness may or may not bear any nexus to the magnitude of the wrongs perpetrated by the oppressing shareholder."). In some disputes, the size of the marketability discount may be loosely (although insufficiently) related to the oppressive shareholder's conduct. *See supra* note 250 and accompanying text (discussing the relationship between the size of the marketability discount and the oppressive shareholder's conduct).

Compared to the marketability discount, the minority discount is perhaps better tailored to the "bad" conduct of the oppressor—although still not enough to justify its use (or nonuse) as a punitive device. Valuation experts typically derive minority discounts from empirical data comparing "control acquisition prices with pre-acquisition minority interest transaction prices." PRATT ET AL., *supra* note 79, at 316; *id.* at 314 ("[T]his discounting from control value usually is done as a two-step process, first for minority interest, then for marketability, *each step drawing as much as possible on empirical data available to assist in quantifying the respective discounts.*" (emphasis added)). The empirical data may then be adjusted for the presence or absence of

the punishment should fit the crime. If a court believes that an oppressive shareholder's conduct warrants punishment, the court should mete out that punishment with damages awards or other remedies (e.g., payment of fees or injunctions) that are tailored to the punishment-worthy behavior.[252]

---

certain factors that affect a minority shareholder's degree of control, including (1) whether the applicable state statute provides for supermajority voting, appraisal rights, or dissolution for oppression; (2) the distribution of the company's shares among the investors; (3) the presence of provisions affecting control in the corporate documents, including preemptive rights; (4) the presence of cumulative voting; and (5) the existence of contractual restrictions on control. *See id.* at 308–12 (discussing the factors); PRATT ET AL., *supra* note 90, at 428 ("Relevant state statutes, the subject company's articles of incorporation and bylaws, and the way the overall ownership of the subject company is distributed have a bearing on the relative rights of the noncontrolling and of the controlling stockholders."). Significantly, neither the empirical data nor these factors have any direct relationship to the "bad" conduct of the oppressor.

At some level, however, the size of the minority discount is related to the likelihood of the majority shareholder using his control to take unfair advantage of the minority investor. A track record of oppressive conduct by the majority would presumably concern a prospective investor more than the absence of prior abusive conduct, potentially leading to a larger minority discount. *Cf.* Brown v. Allied Corrugated Box Co., 154 Cal. Rptr. 170, 176 (Ct. App. 1979) ("[I]f . . . the controlling shareholder has been using his position to insure that no benefits . . . ever accrue to the owners of the minority shares, then an argument could be made that the value of the minority shares should be reduced even further, perhaps to zero."). In this sense, the size of the minority discount may have some relationship to the "bad" conduct of the majority. Nevertheless, the effect of this arguably tailored "past oppression" factor would be distorted by, at a minimum, the empirical data—data unrelated to any particular majority shareholder—that are used to establish the size of the discount. Moreover, the effect of the "past oppression" factor would be diluted by the other factors that contribute to the size of the discount, such as the strength of the dissolution-for-oppression precedents in the jurisdiction. Finally, one could argue that a majority shareholder deemed an "oppressor" in a prior lawsuit would be less likely to oppress again for fear of additional litigation. A track record of oppressive conduct, in other words, may decrease the likelihood of the majority abusing his control in the future (and therefore may decrease the size of the minority discount), so long as the prior oppression was judicially resolved against the majority. In short, any relationship between the "bad" conduct of an oppressor and the size of a minority discount is distorted by other relevant variables, and the effect of the relationship is uncertain. As a consequence, it remains fair to question the use of the minority discount as a punitive device.

252. For example, in addition to a buyout, oppression courts have awarded damages to rectify specific instances of "bad" conduct by an oppressive majority shareholder. *See, e.g.*, Davis v. Sheerin, 754 S.W.2d 375, 378, 388 (Tex. App. 1988) (affirming the trial court's award of damages for willful breach of fiduciary duty). Similarly, courts have awarded punitive damages, presumably in amounts that are at least loosely correlated with the blameworthy conduct of the oppressive shareholder. *See, e.g.*, Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 725–26 (N.J. 1999) (noting that punitive damages in the amount of seventy-five thousand dollars were assessed against an oppressive shareholder); *Davis*, 754 S.W.2d at 378, 388 (affirming the trial court's award of exemplary damages against oppressive shareholders). In some jurisdictions, litigation fees can be awarded. *See, e.g.*, CONN. GEN. STAT. ANN. § 33-900(e) (West Supp. 2004) (stating, in the buyout election statute, that "[i]f the court finds that the petitioning shareholder had probable grounds for relief under [the dissolution-for-oppression section], it may award to the petitioning shareholder reasonable fees and expenses of counsel and of any experts

Admittedly, this suggestion might not significantly alter the total award of relief. Courts might simply recharacterize the amount of the marketability discount as a punitive damages award or some other damages payment.[253] Even a mere recharacterization, however, would have some benefit, as a court's effort to punish an oppressive investor would be more clearly identified rather than obscured within a discount analysis.[254] This increased transparency would push courts to justify their punishment awards *as punishment* and, in turn, appellate courts would review such awards for what they are—punishment based on the conduct of the oppressor, not discounts based on the presence or absence of certain economic conditions.

It is important to note that courts' use of discounts as a punitive tool can also disadvantage a minority shareholder. Although tying discounts to "fault" or "blameworthy" behavior usually works in the oppressed minority's favor (either because a discount is not applied when the oppressive majority is the purchaser, or because a discount is applied when the oppressed minority is the purchaser), there is nothing preventing a court from using a discount against an oppressed, but "blameworthy," minority shareholder.[255] For example, the typical close corporation distributes much of its earnings to shareholders as employment-related compensation rather than as dividends, usually for tax purposes.[256] Assume that a minority shareholder engages in misconduct and is legitimately terminated from company employment.[257] Although the minority is now excluded

employed by him."). Finally, a court could enjoin an oppressive majority shareholder from engaging in certain types of punishment-worthy conduct in the future. *See, e.g.*, Patton v. Nicholas, 279 S.W.2d 848, 857 (Tex. 1955) (ordering, through a "mandatory injunction," the immediate payment of reasonable dividends as well as future payments of reasonable dividends); *Davis*, 754 S.W.2d at 378, 388 (affirming the trial court's order that enjoined oppressive shareholders from contributing disproportionately to a profit-sharing plan).

253. *Cf.* Emory, *supra* note 67, at 1158 n.19 ("[A]ttempts to limit judicial discretion on the issue of discounts may be relatively ineffective. Judges can arrive at desired fair values by simply accepting values that indirectly account for potential discounts.").

254. *See* Eggart, *supra* note 86, at 244 ("[L]ack of marketability discounts are too coarse a [punishment] tool because they obscure courts' reasoning for deciding that a particular value is fair.").

255. *Cf.* Hendley v. Lee, 676 F. Supp. 1317, 1323 (D.S.C. 1987) ("Under generally established equitable principles, fault is a factor to be considered by a court in fashioning equitable relief under the statute, but in the case at bar, the court finds as a fact that both sides contributed equally to the disharmony which precipitated this litigation.").

256. *See supra* note 27 and accompanying text (discussing the distribution of profit in close corporations).

257. *See supra* note 53 (discussing justifiable majority conduct).

from the vehicle used by the company to distribute earnings (i.e., employment), assume that the company maintains its policy of avoiding "true" dividends and continues to pay only "de facto" dividends through employment compensation.

Even though the majority was justified in terminating the minority's employment, it is undoubtedly oppressive to continue distributing the company's earnings through employment when the minority is no longer an employee.[258] The minority is still a shareholder of the company and, as a shareholder, he is entitled to a pro rata portion of all earnings that the company distributes.[259] Nevertheless, it is not hard to imagine a court finding fault with the minority for "causing," through misconduct, his exclusion from the earnings-distribution scheme of the company. Even a court deciding that indefinite exclusion from company earnings is oppressive might nonetheless determine that the minority's "fault" warrants some degree of punishment.[260] If a court orders a buyout of the minority's

---

258. *See, e.g.*, Gimpel v. Bolstein, 477 N.Y.S.2d 1014, 1017, 1021 (Sup. Ct. 1984) (finding that a minority shareholder who embezzled from the company was justifiably terminated from employment, but concluding that the other shareholders "must by some means allow him to share in the profits"); *see also* Exadaktilos v. Cinnaminson Realty Co., 400 A.2d 554, 561–62 (N.J. Super. Ct. Law Div. 1979) (concluding that a minority shareholder's termination was not oppressive in light of the minority's "unsatisfactory performance," but noting that the minority's expectation of dividends was a separate issue that could potentially establish an oppression claim).

259. *See, e.g.*, Michaud v. Morris, 603 So. 2d 886, 888 (Ala. 1992) ("Certain basic expectations of investors are enforceable in the courts, and among those is a right to share proportionally in corporate gains."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation."); *see also* Cratty v. Peoria Law Library Ass'n, 76 N.E. 707, 708 (Ill. 1906) ("Dividends among stockholders of the same class must always be equal and without discrimination . . . ."); Leslie v. Boston Software Collaborative, Inc., No. 010268BLS, 2002 WL 532605, at *9 (Mass. Super. Ct. Feb. 12, 2002) ("What must not be done is to make payments only to the majority shareholders, payments having different names or styles but being in reality dividends."); Henry G. Manne, *Our Two Corporation Systems: Law and Economics*, 53 VA. L. REV. 259, 274 (1967) ("[T]he directors may not declare a dividend to some holders of a class of shares but not to others holding shares of the same class.").

260. In the New York decision of *Gimpel v. Bolstein*, 477 N.Y.S.2d 1014 (Sup. Ct. 1984), a close corporation distributed all of its profits as de facto dividends through employment compensation. *See id.* at 1023 (describing the company "policy of distributing profits in the form of salaries, benefits and perquisites, without declaring dividends"). A minority shareholder who embezzled from the company was terminated from employment and was, therefore, excluded from the company's profit-distribution scheme. *See id.* at 1017–18. The court ultimately concluded that the "other shareholders need not allow him [the embezzling minority shareholder] to return to employment with the corporation, but they must by some means allow him to share in the profits." *Id.* at 1021. Despite this minority-friendly outcome, the court

shares, the imposition of a minority or marketability discount may serve as a quick and dirty way of assessing that punishment while still providing the minority with relief from the oppressive situation. Thus, just as a court can use a discount to punish an oppressive majority, so too can a court employ a discount to punish an oppressed, yet blameworthy, minority.[261] Either way, to the extent that a discount decision is made for punishment reasons rather than for legitimate economic reasons, the decision itself makes little sense.[262]

---

seemed to decide that the minority's fault nonetheless warranted some level of punishment. Although the minority had been excluded from ten years' worth of de facto dividends by the time of the *Gimpel* opinion, the court provided no compensation to the minority for his pro rata share of these past dividends. *See id.* at 1017, 1021–22 (observing that the majority must "by some means allow [the minority] to share in the profits," but providing no compensation for past dividends); *see also supra* note 259 and accompanying text (noting that dividends must be distributed proportionately to all shareholders of the same class). Moreover, the court's language suggests that this remedial omission was intentional. *See Gimpel*, 477 N.Y.S.2d at 1021 (stating that the minority's "past misdeeds provided sufficient justification for the majority's acts *to date*," and awarding only forward-looking relief (emphasis added)).

261. *See, e.g.*, Vincent E. Gentile, *New Jersey Supreme Court Rules on Marketability Discounts in Valuation Cases*, N.J. LAW., Dec. 1999, at 11 (noting that, in disputes between shareholders, "no one is likely to be blameless, and each side is likely to have engaged in conduct that can later be deemed unfair by a court"); *cf.* Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 837–38 (Minn. Ct. App. 1994) (considering the controlling shareholders' argument that "a balancing of the equities" required a minority discount because the oppressed minority investor had been terminated from company employment as a result of his criminal conviction, but ultimately rejecting the discount); *id.* at 838 ("They [the controlling shareholders] reason that [the minority's] criminal activities weigh against him receiving equal value for his shares.").

262. If one believed that discounts should be tied to "fault" or "blameworthy" behavior, a useful comparison to the appraisal context could be made. Minority shareholders in every jurisdiction have the right to "dissent from certain corporate actions, primarily mergers and other fundamental corporate changes, and to receive the appraised fair value of their shares." Wertheimer, *supra* note 115, at 613–14 (footnote omitted); *see also* Emory, *supra* note 67, at 1163–64 ("Today, all states and the District of Columbia have statutes requiring corporations to buy back their dissenters' shares at 'fair value' or at similar standards."). This right to relief "is sometimes known as the dissent and appraisal remedy, dissenters' rights, or, simply, the appraisal remedy." Wertheimer, *supra* note 115, at 614. Significantly, a dissenting minority shareholder's right to a fair value appraisal can be triggered merely by the majority's benign decision to engage in a merger or some other corporate transaction. In appraisal cases, in other words, the majority has not necessarily engaged in any blameworthy conduct. Nevertheless, the prevailing view in such cases is that the statutory command to provide "fair value" to the dissenter dictates an enterprise value approach and a corresponding absence of discounts. *See, e.g.*, Pueblo Bancorporation v. Lindoe, Inc., 63 P.3d 353, 363–64 (Colo. 2003) (adopting an enterprise value approach to fair value and noting that such an interpretation is the "clear majority view" in appraisal cases); Lawson Mardon Wheaton, Inc. v. Smith, 734 A.2d 738, 748 (N.J. 1999) ("[E]quitable considerations have led the majority of states and commentators to conclude that marketability and minority discounts should not be applied when determining the fair value of dissenting shareholders' stock in an appraisal action"). If fair value appraisals in "no-fault" dissenters' rights cases avoid discounting the value of the minority's shares, it is

3. *The Liquidity Assertion*. As a basis for rejecting the marketability discount, some authorities have argued that the shareholder oppression action, along with the accompanying emergence of the buyout remedy, has created a new liquidity for close corporation shares.[263] Whereas in past decades a minority shareholder was unable to exit from a close corporation in times of discord,[264] the modern buyout remedy for shareholder oppression has altered that state of near-permanent illiquidity. As a result, proponents argue, a discount based on the illiquidity of close corporation shares should be rejected as a relic of history.[265] Professor Murdock summarizes the argument:

> Clearly legislatures and courts have provided liquidity where heretofore it either did not exist or existed on a more limited basis. If courts are to consider all relevant factors . . . one very relevant factor is the existence of legislatively and judicially created exits from the corporation. It would be incongruous to discount the shares of a minority shareholder for lack of liquidity when the valuation is being done in connection with a proceeding that creates liquidity.[266]

perverse to apply such discounts in the shareholder oppression context where the majority is often culpable.

263. *See infra* note 266 and accompanying text (citing authorities and describing the liquidity argument).

264. *See, e.g.*, *In re* Pace Photographers, Ltd., 525 N.E.2d 713, 716 (N.Y. 1988) ("Prior to 1979, minority shareholders in close corporations who suffered abuse at the hands of the majority lacked the options available to business partners and shareholders in public corporations to extricate the value of their investments.").

265. *See* Murdock, *supra* note 29, at 484 (observing that "minority shareholders are no longer helpless in the face of majority misconduct," and stating that "[t]he specter of being 'locked-in' but frozen out is being relegated to history"); *infra* note 266 and accompanying text (describing the liquidity argument).

266. Murdock, *supra* note 29, at 486; *see also* Emory, *supra* note 67, at 1169 n.81 (describing a trial court decision in which the referee "declined to apply a marketability discount under the theory that the appraisal statute itself created a liquid market for the dissenter's shares"); Murdock, *supra* note 29, at 484–85 ("The development of the concept of fiduciary duties running from those in control to minority shareholders, the restatement of oppression in terms of the reasonable expectations of minority shareholders, and the development of a buy-out remedy converge into a vastly changed posture for minority shareholders."); *id.* at 485 (describing an elected buyout case and stating that the court did not consider that "there now was a market for the shares," and noting that "[i]t is illogical to ignore the existence of a market in applying a discount predicated upon the lack of a market"); *id.* at 486 (stating that "[w]hile the actual election to buy, or a court order mandating a buy-out, cannot occur until after suit is filed, the legislation—or in some states, judicial decisions—creating this new market is already existent," and observing that "[o]nce a buy-out remedy as an alternative to dissolution is in

Although it is true that the emergence of the oppression doctrine and the buyout remedy has created an exit where one previously did not exist, it is an overstatement to contend that this development has obviated the liquidity concerns of close corporation investors. Even with the rise of the oppression doctrine, close corporation shares are liquid only to the extent that an investor is willing to undergo the significant time and expense of litigation, and only then if the shareholder successfully proves oppression.[267] Indeed, when a majority shareholder has acted appropriately, the buyout remedy, in the absence of an election, will be unavailable. Even if a minority shareholder successfully proves oppression, it is uncertain whether a court will order a buyout, as the choice of remedy remains within the court's equitable discretion.[268] The availability of a buyout remedy for oppression, therefore, is far from a guarantee of liquidity to a close corporation investor. A prospective purchaser of close corporation stock must still concern himself with the fact that publicly traded shares are sold "over the telephone in seconds . . . with a very small commission cost,"[269] while close corporation shares are usually sold, if at all, only with considerable time and expense.[270] Thus, the core liquidity concerns prompting the marketability discount are, at best, only marginally eased by the availability of a buyout remedy.

---

place, the position of the minority shareholder with regard to liquidity has changed dramatically").

267. *See, e.g.*, Hood et. al., *supra* note 79, at 442 ("Although minority shareholders do have some protection under corporate law from the oppressive acts of those in control of the corporation, obtaining judicial relief is a long, arduous, expensive, and uncertain process." (footnote omitted)). Even in disputes in which the need to prove oppression is obviated by a buyout election, litigation over the fair value of the minority's shares often involves considerable time and expense. *See, e.g.*, Advanced Communication Design, Inc. v. Follett, 615 N.W.2d 285, 288–89 (Minn. 2000) (involving litigation that commenced in 1996 and ended, at the state supreme court level, in 2000, and noting the testimony of the expert witnesses whom the parties hired to present valuation evidence).

268. *See, e.g.*, Brenner v. Berkowitz, 634 A.2d 1019, 1031 (N.J. 1993) ("Although a buy-out may be preferable to dissolution, other remedies may be more appropriate [than] a buy-out."); *id.* at 1032 (noting that "when a statutory [oppression] violation occurs, a court retains its discretion to fashion equitable remedies"); *id.* at 1033 (stating that "the trial court has the discretion to choose the appropriate remedies"); *id.* at 1033–34 (upholding the trial court's reinstatement of a minority shareholder to a director position and stating that "we find that the quantity and substantiality of the acts of misconduct committed by defendants do not warrant any more expansive relief").

269. PRATT ET AL., *supra* note 79, at 334.

270. *See supra* Part II.C (discussing the difficulties associated with selling close corporation stock).

A related argument against the application of a marketability discount posits that such a discount is inappropriate when a purchaser for the minority's shares has been found.[271] The presence of an available purchaser in one transaction, however, does not negate the liquidity difficulties associated with the shares in subsequent transactions. In fact, the basis for the marketability discount is that even a willing and available buyer will pay less for shares that lack liquidity because the buyer may have difficulty selling those shares down the road.[272] Consequently, it is not particularly persuasive to argue for the rejection of the marketability discount solely on the ground that a purchaser is present in the transaction at issue.[273]

C. *Summary*

Minority and marketability discounts are inappropriate in shareholder oppression disputes. Arguments focusing on the shareholder oppression context, the statutory choice of "fair value" over "fair market value," and the undercompensatory nature of the buyout award offer strong support for rejecting discounts and for adopting an enterprise value approach. Although arguments premised on dissolution analogies, punishment rationales, and liquidity assertions also seek to justify the rejection of discounts, such arguments are of limited utility. When constructing a case against discounts, litigants should downplay or eliminate these suspect arguments in favor of the stronger and more credible grounds discussed above.

IV. THE VALUATION DATE

Separate and apart from the debate over discounts, the determination of fair value is also critically influenced by the choice of the valuation date. Even if the meaning of fair value were settled, there would still be an independent question about when the fair value of a corporation should be measured. This question is of

271. *See, e.g.*, *In re* Gift Pax, Inc., 475 N.Y.S.2d 324, 328 (Sup. Ct. 1984) (involving a referee who rejected a marketability discount on the ground that "[the respondent corporations], by electing to purchase the petitioner's shares . . . , became the willing and available buyers").

272. *See supra* Part II.C (describing the marketability discount).

273. *See, e.g.*, Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 735 (N.J. 1999) (rejecting the notion that the presence of a designated buyer renders the marketability discount inapplicable); *id.* ("Balsamides is buying a company that will remain illiquid . . . . If it is resold in the future, Balsamides will receive a lower purchase price because of the company's closely-held nature.").

enormous consequence to the relevant parties, as a company's value is affected by internal and external factors that can materially change over a short period of time.[274] The designation of the valuation date, therefore, is an important inquiry in and of itself, as the choice of date can significantly affect a court's ultimate fair value conclusion.

A. Current Framework

In a number of jurisdictions with election statutes, the statutes themselves set forth a valuation date. In New York, for example, the buyout election statute states that courts are to "determine the fair value of the petitioner's shares as of the date prior to the date on which such petition [for dissolution on the grounds of oppression] was filed."[275] Similar to this "date-before-filing" approach, election statutes in other states prescribe a "date-of-filing" standard. In California, for instance, the valuation date is specified as "the date upon which . . . [an involuntary dissolution for oppression] action was commenced," although a "court may, upon the hearing of a motion by any party, and for good cause shown, designate some other date as the valuation date."[276] Even in nonelection cases, courts tend to

---

274. As one authority observes:

> The date, or dates, at which the business is being valued is critically important because circumstances can cause values to vary materially from one date to another, and the valuation date directly influences data available for the valuation. . . .
>
> Many internal and external factors can cause changes in the value of an interest in a company. Obviously, a sudden change in a company's earnings, especially if unanticipated, can have a substantial effect on value. Also, the value of a business interest varies with the cost of capital, a factor over which individual businesses have little control. Major events, such as the signing or termination of a major customer contract, can also have a dramatic, immediate impact on value.

PRATT ET AL., *supra* note 79, at 21; *see* PRATT ET AL., *supra* note 90, at 24 ("The date, or dates, at which the business or professional practice is being valued is critical. Even within very short time spans, circumstances can cause values to vary materially from one date to another.").

275. N.Y. BUS. CORP. LAW § 1118(b) (McKinney Supp. 2003); *see also* MODEL BUS. CORP. ACT. § 14.34(d) (2002) (stating that, when a buyout election has been made, a court must "determine the fair value of the petitioner's shares as of the day before the date on which the petition [for dissolution] was filed or as of such other date as the court deems appropriate under the circumstances").

276. CAL. CORP. CODE § 2000(f) (West 1990); *see also* MINN. STAT. ANN. § 302A.751 subd. 2 (West Supp. 2000) (stating, in an election statute, that "[t]he purchase price of any shares so sold shall be the fair value of the shares as of the date of the commencement of the action or as of another date found equitable by the court"); N.J. STAT. ANN. § 14A:12-7(8)(a) (West Supp. 1999) (stating that "[u]pon motion of the corporation or any shareholder who is a party to the proceeding, the court may order the sale of all shares of the corporation's stock held by any other shareholder who is a party to the proceeding to either the corporation or the moving shareholder[s]," and further stating that "[t]he purchase price of any shares so sold shall be their

analogize to election statutes for guidance. As a result, the date of filing of the oppression action is usually designated as the presumptive valuation date.[277]

B. A Rationale for the "Date of Filing"

Although many jurisdictions designate the presumptive valuation date as the date the plaintiff files his shareholder oppression action,[278] no case or statute sets forth a rationale for this choice. Because election and nonelection cases may have different considerations, an examination of each is helpful.

1. *Election Cases*. The corporation or the shareholders are permitted by statute in some states to "elect" to purchase the shares of a minority investor who seeks involuntary dissolution on the ground of oppression.[279] Under the Revised Model Business Corporation Act, for example, the corporation or one or more shareholders can elect to purchase the petitioning investor's shares "within 90 days after the filing of the [dissolution] petition . . . or at such later time as the court in its discretion may allow."[280] After an election is made, the parties have sixty days to "reach agreement as to the fair value and terms of purchase of the petitioner's shares."[281] If the parties fail to reach an agreement, the court, "upon application of any party, shall stay the [dissolution] proceedings and determine the fair value of the petitioner's shares as of the day before the date on which the [dissolution] petition . . . was filed or as of such other date as the court deems appropriate under the circumstances."[282]

---

fair value as of the date of the commencement of the [oppression] action or such earlier or later date deemed equitable by the court"); R.I. GEN. LAWS § 7-1.1-90.1 (2003) (stating, in an election statute, that the court shall determine fair value "as of the close of business on the day on which the petition for dissolution was filed").

277. *See, e.g.*, Hollis v. Hill, 232 F.3d 460, 472 & n.39 (5th Cir. 2000) (stating, in a nonelection case, that "[t]he presumptive valuation date for other states allowing buy-out remedies is the date of filing unless exceptional circumstances exist which require an earlier or later date to be chosen," and citing in support a New Jersey decision that designated the date of filing as the presumptive valuation date in accordance with the language of the New Jersey election statute); *supra* note 276 (citing the New Jersey election statute).

278. *See supra* notes 275–77 and accompanying text (setting forth the date of filing as the presumptive valuation date).

279. *See supra* note 59 and accompanying text (discussing election statutes).

280. MODEL BUS. CORP. ACT § 14.34(b).

281. *Id.* § 14.34(c).

282. *Id.* § 14.34(d).

Election provisions are designed to serve as a counterbalance to the dissolution-for-oppression statutes. Although an aggrieved investor is entitled to petition for dissolution of a company on the ground of oppressive conduct, shareholders who wish to continue the business may elect to buy out the petitioner's ownership stake to avoid any risk of dissolution.[283] Thus, the purpose of the election provisions is to provide the remaining shareholders with a mechanism for continuing the business and, relatedly, to safeguard against the risk of dissolution. In operation, an election usually circumvents any liability inquiry and converts an oppression lawsuit into a mere valuation proceeding.[284] Indeed, because an election often occurs before a court has made a finding of oppression, the election statutes, in most instances, effectively create a no-fault "divorce" procedure. The company at issue continues as a going concern under the control

---

283. *See, e.g.*, *In re* Seagroatt Floral Co., 583 N.E.2d 287, 289–90 (N.Y. 1991) (stating that, "[i]n order to afford the other shareholders the option to continue the enterprise as a going concern, a buy out provision was concomitantly added [to] the Business Corporation Law," and observing that, "[u]nder that provision, those interested in maintaining the business—a class of 'prospective purchasers' explicitly limited to the other shareholders or the corporation itself—may within 90 days of the filing of [a dissolution] petition elect to purchase the shares owned by the petitioners"); *id.* at 290 ("Thus, the Business Corporation Law protects both the right of the allegedly oppressed shareholder to liquidate an investment at fair value and the right of the remaining shareholders to preserve an ongoing—and likely prosperous—business."); *In re* Gift Pax, Inc., 475 N.Y.S.2d 324, 326 (Sup. Ct. 1984) ("[The election statute] § 1118 was enacted to protect majority shareholders so that they may buy out a minority shareholder who seeks dissolution under [the dissolution for oppression statute].").

284. *See, e.g.*, *In re* Friedman, 661 N.E.2d 972, 976 (N.Y. 1995) ("[O]nce the corporation has elected to buy the petitioning stockholders' shares at fair value, 'the issue of [majority] wrongdoing [is] superfluous.'" (alterations in original) (quoting *In re* Pace Photographers, Ltd., 525 N.E.2d 713, 717 (N.Y. 1988)); *In re Seagroatt*, 583 N.E.2d at 290 ("Thus, once [the corporations] elected to buy out petitioners, the misconduct charges became irrelevant. The issue became one of valuation.").

In the appraisal context, Professor Wertheimer observes that some courts consider evidence of majority wrongdoing or misconduct to be relevant to the valuation inquiry. As Professor Wertheimer states:

> Determining fair value in an appraisal proceeding depends very much on the underlying factual assumptions made as to the future prospects of the business. Inevitably the corporation, through its agents, will either testify as to those underlying assumptions, or provide information to an expert witness for use by that witness in determining fair value. In either case, the dissenting shareholder may then challenge the underlying assumptions by attacking, with evidence of unfair dealing, the credibility of the corporation's agents.

Wertheimer, *supra* note 115, at 686 (footnote omitted); *see also* Ala. By-Prods. Corp. v. Neal, 588 A.2d 255, 257–58 (Del. 1991) (concluding that evidence of unfair dealing is admissible to impeach the valuation contentions of a party); *In re* Radiology Assocs., Inc., 611 A.2d 485, 498 (Del. Ch. 1991) (observing that the defendant's breach of fiduciary duty "undermine[d] the credibility of the information" provided to the defendant's expert witness).

of the majority shareholder, the allegedly aggrieved investor is cashed out of the business, and no finding of wrongdoing is made by the court.[285]

In no-fault election cases, therefore, designating the date of filing (or the date before filing) as the presumptive valuation date is appropriate. With no finding of wrongdoing, there is no date of oppression to serve as a viable alternative.[286] A fixed date is needed so that the corporation or the remaining shareholders can assess whether purchasing the petitioner's holdings is both beneficial and financially feasible.[287] Stated another way, to determine if an election is in a prospective purchaser's interests, the prospective purchaser needs a fixed point in time to assess whether his interests are better served by contesting liability or by making an election to purchase. The date of (or before) filing arguably serves this purpose well. Later valuation dates, such as the date of trial or the date of judgment, are likely to involve a greater expenditure of resources. After all, presumably a prospective purchaser would not be forced to make an election until that later valuation date arrives.[288] By that time, the parties, as well as the court, are likely to have engaged in an expensive and intrusive liability inquiry—an inquiry that an earlier, date-of-filing election procedure would largely, if not wholly, avoid.[289]

---

285. *See supra* notes 56–57, 284 and accompanying text (discussing the benefits of a buyout and the no-fault nature of the election procedure). *But see infra* note 330 (noting that some election statutes allow a buyout election to occur after a court has found oppression).

286. *See infra* Part IV.C (discussing the use of the date of oppression). *But see infra* note 330 (noting that some election statutes allow a buyout election to occur after a court has found oppression).

287. *See, e.g.*, Waller v. Am. Int'l Distrib. Corp., 706 A.2d 460, 463 (Vt. 1997) ("The [Vermont election] statute encourages electing shareholders to calculate whether it is in their interests to buy out the petitioner or risk entry of a dissolution order."); *id.* ("Once they make an election, several results ensue, each requiring a determinable focal date, including the posting of a bond, the commencement of interest payable to the minority on the value of the shares to be purchased, and the loss of the minority rights as shareholders.").

288. *See, e.g.*, MODEL BUS. CORP. ACT § 14.34(b), (d) (2002) (stating that, in general, the valuation date shall be the date the petition for dissolution was filed, and providing a prospective purchaser with ninety days from that date to make an election to purchase).

289. Because a prospective purchaser must generally elect to buy within ninety days of the date on which the dissolution petition was filed, the parties can hold off on significant discovery into liability issues until that ninety-day period has passed. *See, e.g.*, N.Y. BUS. CORP. LAW § 1118(a) (McKinney Supp. 2003) (allowing an election, without leave of court, for ninety days from the date of the filing of a dissolution petition); MODEL BUS. CORP. ACT § 14.34(b) (same); *supra* notes 284–85 and accompanying text (noting that an election converts an oppression lawsuit into a mere valuation proceeding). If a prospective purchaser could elect to buy up until

In the election context, therefore, designating the date of filing as the presumptive valuation date is sensible.

2. *Nonelection Cases*. Outside of the election context, the choice of the date of filing is puzzling. One simplistic explanation for choosing the date of filing is that such a date is easily established and verified. Because the clerk's office will likely affix a manual or electronic file stamp to the petition setting forth the date and time of receipt,[290] the date of filing is clear and indisputable. In contrast, an alternative date of oppression may be difficult to pinpoint. Because oppressive conduct often happens over a period of time, rather than solely on one particular date,[291] fixing a date of oppression as the valuation date may require an assessment of when the most severe acts of oppression occurred. Such an assessment is often open to argument, rendering the date of oppression uncertain. Nevertheless, the advantage of certainty associated with the date of filing is minor at best, as a court is certainly competent to evaluate the evidence and to choose a date when the most damaging oppressive conduct occurred. Moreover, although the certainty rationale helps to explain the choice of the date of filing over the date of oppression, it fails to explain the inferiority of other dates that will ultimately be fixed (e.g., the date of trial, the date of judgment, or the date of entering the buyout order).[292]

Perhaps a better rationale for choosing the date of filing as the presumptive valuation date derives from the notion that an oppressed investor is still an owner of the company, even after the oppressive conduct has occurred. As an owner, the investor is entitled to participate in the company's fortunes until his status as an owner, or

---

the date of trial or beyond, however, discovery into liability issues could not be avoided, as the parties would need to prepare for trial on those particular issues.

290. *See, e.g.*, N.Y. C.P.L.R. 304 (McKinney 2000) ("An action is commenced by filing a summons and complaint or summons with notice. . . . At . . . filing, the original and a copy of such papers shall be date stamped by a court clerk who shall file the original and maintain a record of the date of the filing . . . .").

291. *See, e.g.*, Hollis v. Hill, 232 F.3d 460, 472 (5th Cir. 2000) (noting that the oppressive conduct found by the court took place between February 1998 and November 1998).

292. *See, e.g.*, Hendley v. Lee, 676 F. Supp. 1317, 1327 (D.S.C. 1987) (choosing the date of trial as the valuation date); *Waller*, 706 A.2d at 463 (choosing "the approximate date of trial and decision" as the valuation date); *infra* notes 296–99 and accompanying text (discussing why postfiling dates are inferior valuation dates).

"shareholder," ceases.[293] A majority's oppressive conduct should not negate this basic shareholder right to participate in changes in the company's overall worth. From this perspective, the value of a plaintiff minority's shares is properly affected by changes in a company's value—even changes that occur after oppressive conduct has transpired—for as long as the minority remains a shareholder.[294] If the filing of an oppression action is viewed as an investor's request to be judicially divested of his shareholder status, the date of filing could be seen as the appropriate valuation date. On that date, the minority's shareholder status has "unofficially" ceased for valuation purposes, as the lawsuit often represents the minority's wish to relinquish his ownership position and to end his association with the company.[295] In theory, a postfiling date (e.g., the date of trial or the date of judgment) could also be appropriate given that the "official" end of the plaintiff's shareholder status does not occur until the court actually enters an order for the plaintiff to surrender his shares.[296] A presumptive postfiling valuation date is problematic, however, because the parties' actions will be influenced by the litigation context.[297] In addition, because oppression lawsuits inevitably involve valuation experts,[298] there are practical problems associated with

293. *See, e.g.*, Michaud v. Morris, 603 So. 2d 886, 888 (Ala. 1992) ("Certain basic expectations of investors are enforceable in the courts, and among those is a right to share proportionally in corporate gains."); Baker v. Commercial Body Builders, Inc., 507 P.2d 387, 397 (Or. 1973) ("It is also true that the Bakers, as stockholders, had a legitimate interest in the participation in profits earned by the corporation.").

294. *See supra* note 293 and accompanying text (noting that a shareholder is entitled to participate in a company's fortunes until his "shareholder" status ceases).

295. *See, e.g.*, Willis v. Bydalek, 997 S.W.2d 798, 800 (Tex. App. 1999) (involving an allegedly oppressed shareholder who sued for "a buy-out of [his] corporate interest").

296. *See, e.g.*, MODEL BUS. CORP. ACT § 14.34(f) (2002) ("Upon entry of an order [directing the purchase of petitioner's shares], the court shall dismiss the petition to dissolve . . . *and the petitioning shareholder shall no longer have any rights or status as a shareholder* . . . , except the right to receive the amounts awarded to him by the . . . court . . . ." (emphasis added)).

297. Once litigation commences, the majority will have an incentive to manipulate the company's revenues and expenses so as to minimize the company's overall valuation. *See* 2 OPPRESSION, *supra* note 20, § 7:21, at 7-114 ("Anticipating the buyout of a minority shareholder, majority shareholders . . . may manipulate a corporation's financial records to show no or little . . . assets and . . . earnings."); *cf.* Wertheimer, *supra* note 115, at 639 (noting that a controlling shareholder "can conduct or manipulate corporate affairs in a manner that depresses market prices prior to mergers").

298. *See, e.g.*, Rapid-Am. Corp. v. Harris, 603 A.2d 796, 802 (Del. 1992) ("It is frequently the case in appraisal proceedings that valuation disputes become a battle of experts."); Balsamides v. Protameen Chems., Inc., 734 A.2d 721, 729 (N.J. 1999) (observing that valuation disputes "frequently become battles between experts").

setting postfiling valuation dates. If the valuation period extends through (and potentially beyond) the date of trial, experts may be unable to draw final conclusions about a company's value by the time their reports are due, by the time their deposition testimony is required, and perhaps even by the time their trial testimony is needed.[299]

In summary, the date of filing is defensible as the presumptive valuation date to the extent that it is deemed to reflect the "unofficial" end of a plaintiff's shareholder status. Up until that point, the oppressed investor was entitled, as a shareholder, to participate in any changes in the company's value.[300] It is important to note that this rationale can work both for and against a plaintiff shareholder, as changes in the company's value from the date of oppression to the date of filing can encompass losses as well as gains.[301] Thus, although a court can emphasize the plaintiff's continuing "shareholder" status in justifying a filing-date valuation, it should be kept in mind that the plaintiff shareholder assumes the risk of negative changes in the company's value until the time the oppression action is filed.

C. Plaintiff's Choice? An Argument for the "Date of Oppression"

Even if the date on which the shareholder files his oppression action is viewed as the presumptive valuation date, there is often a strong argument for departing from the filing date and for using the

---

299. *But see supra* note 292 (citing cases in which the date of trial was used as the valuation date). At the very least, setting a postfiling date of valuation, such as the date of trial or the date of judgment, is likely to involve an even greater degree of speculation by the valuation expert than company appraisals typically involve. *See, e.g.*, Murdock, *supra* note 29, at 473 (noting that valuation is an "inexact science"); Wertheimer, *supra* note 115, at 630 (observing that expert testimony on valuation involves "inherent subjectivity and estimation"). After all, the expert may be testifying about the company's value at some future, rather than past, date.

300. *See supra* note 259 and accompanying text (noting that "shareholder" status entitles one to participate in a company's fortunes).

301. For example, assume that a corporation is valued at $10 million on the date of an oppressive freeze-out of a minority shareholder. Assume further that the minority spends one year in an unsuccessful attempt to negotiate a nonlitigation solution to the freeze-out. The minority then files suit for oppression. If the company's value over the past year has increased to $12 million by the date on which the lawsuit is filed, the minority is better off under a date-of-filing rule than a date-of-oppression rule. As mentioned, the rationale would emphasize that the minority, as a shareholder, is entitled to participate in the corporation's gains. *See supra* note 259 and accompanying text (noting that "shareholder" status entitles one to participate in a company's fortunes). If the company's value over the past year decreased to $8 million, of course, the same rationale would work against the minority. As a shareholder, the minority should also participate in the corporation's losses. Under these circumstances, the minority is better off with a valuation keyed to the date of oppression rather than to the date of filing.

date of oppression instead. Many close corporation shareholders invest in a company with the reasonable expectation that their investment entitles them to participate in the management of the venture.[302] In a number of oppression disputes, however, the minority investor is wholly excluded from the company's affairs. Indeed, in the typical freeze-out scenario in which the majority unjustifiably terminates the minority's employment and strips the minority of management responsibilities, the minority has been fully ousted from any participatory role in the company.[303] Because the majority has forced the minority into this passive, nonparticipatory role—a role that unjustifiably frustrates the minority's reasonable investment expectations[304]—and because the majority is making company decisions without any minority shareholder input, there is an argument that post-freeze-out changes in the value of the company should not be ascribed to the minority's shares. Given that the minority has been wrongfully ousted from company participation, in other words, it is only fair to conclude that the value of the minority's shares should no longer be affected by the majority's decisions[305]—

302. *See supra* notes 169–70 and accompanying text (discussing the reasonable expectations of close corporation shareholders).

303. *See, e.g.*, Balvik v. Sylvester, 411 N.W.2d 383, 388 (N.D. 1987) ("Balvik was ultimately fired as an employee of the corporation, thus destroying the primary mode of return on his investment. Any slim hope of gaining a return . . . and remaining involved in the operation[s] of the business was dashed when Sylvester removed Balvik as a director and officer . . . ."); *see also* Wilkes v. Springside Nursing Home, Inc., 353 N.E.2d 657, 661 (Mass. 1976) (involving a freeze-out in which the minority shareholder was ousted from company participation); *In re* Burack, 524 N.Y.S.2d 457, 459–60 (App. Div. 1988) (same); *In re* Wiedy's Furniture Clearance Ctr. Co., 487 N.Y.S.2d 901, 903–04 (App. Div. 1985) (same); Landstrom v. Shaver, 561 N.W.2d 1, 10 (S.D. 1997) (describing freeze-out situations as "typical of oppression cases").

304. *See supra* notes 169–70 and accompanying text (discussing the reasonable expectations of close corporation shareholders).

305. *See, e.g.*, Torres v. Schripps, Inc., 776 A.2d 915, 918, 925 (N.J. Super. Ct. App. Div. 2001) (choosing the date when a plaintiff shareholder was terminated from employment as the valuation date); *id.* ("The decrease in the corporate value from February [the termination date] to September was not due to plaintiff's efforts, but may have been due to [the majority shareholder's] lack of experience in managing the corporation. *Because plaintiff was terminated, it was fair not to ascribe the losses to plaintiff*." (emphasis added)); *id.* (observing that the trial court chose the date of the plaintiff shareholder's termination as the valuation date, and stating the trial court's reasoning that "[t]he business was different after [plaintiff's termination] and was not in the control of the plaintiff who was the real manager" (alteration in original) (quoting the opinion of the trial judge)); *see also* Hughes v. Sego Int'l Ltd., 469 A.2d 74, 77 (N.J. Super. Ct. App. Div. 1983) (describing the trial court's determination that, as between the date on which the oppressed plaintiff was fired and the date on which the judgment for dissolution was entered, the judge "adopted the earlier date since the subsequent increase in value of [the company] could not be attributed to plaintiff's efforts").

particularly when the minority specifically bargained for such management participation and the majority has spurned that bargain.[306] The logical consequence of this argument is that a court should set the valuation date as close as possible to when the oppressive exclusion from management occurred, as that date signifies when the majority decided that the minority's participation would cease.[307]

This date-of-oppression argument is premised on the notion that the minority should not be held responsible for changes in the company's value after the minority's role in management has unjustifiably ended.[308] Had the minority retained his management

---

306. *See supra* notes 169–70 and accompanying text (noting that many close corporation shareholders have a reasonable expectation that their investment entitles them to participate in the management of the company); *see also In re* Topper, 433 N.Y.S.2d 359, 365 (Sup. Ct. 1980) ("These reasonable expectations constitute the bargain of the parties in light of which subsequent conduct must be appraised."); Sandra K. Miller, *How Can the Reasonable Expectations Standard Be Reasonably Applied in Pennsylvania?*, 12 J.L. & COM. 51, 54 (1992) (describing the reasonable expectations approach as a "departure from the bargain struck by the majority and minority shareholders"); *cf.* Bahls, *supra* note 89, at 321 ("Remedies fashioned to protect expectations help insure that innocent shareholders will realize their bargained-for benefit."); *id.* at 325 ("Because participation and rights in a closely held corporation are normally negotiated, expectations are reasonable when they provide a basis for the bargain."); Murdock, *supra* note 29, at 465 (noting that, when applying the reasonable expectations standard, "the crux is not identifying a traditional wrong but rather identifying the basis of the bargain—what were the explicit or implicit conditions pursuant to which the parties associated themselves together in the corporate form"); Ralph A. Peeples, *The Use and Misuse of the Business Judgment Rule in the Close Corporation*, 60 NOTRE DAME L. REV. 456, 504 (1985) ("If a shareholder's reasonable expectations have been frustrated, the shareholder has lost the benefit of the original bargain.").

307. *See, e.g.*, Hendley v. Lee, 676 F. Supp. 1317, 1327 (D.S.C. 1987) ("In cases of minority stockholder oppression, the date of ouster seems appropriately used."); Moore v. Carney, 269 N.W.2d 614, 617 (Mich. Ct. App. 1978) (noting that the trial court "required defendants to purchase the stock from [the oppressed minority] at the value of the stock in 1969," and observing that the "oppressive acts . . . began in 1969"); Pooley v. Mankato Iron & Metal, Inc., 513 N.W.2d 834, 836 (Minn. Ct. App. 1994) (choosing the date when the minority shareholder was voted out as an officer as the valuation date); Prentiss v. Wesspur, Inc., No. 36321-2-I, 1997 WL 207971, at *1 (Wash. Ct. App. Apr. 28, 1997) ("'[F]air value' means the shares' value at the moment just before the majority committed misconduct."); *id.* at *3 ("'Fair value' is determined as of the time before the disputed action occurred . . . ."); *supra* note 305 and accompanying text (noting that when the minority has been wrongfully ousted from company participation, the value of his shares should no longer be affected by the majority's decisions).

308. This argument is inapplicable, therefore, when the alleged acts of oppression do not result in an ouster from management participation. *See, e.g.*, Hollis v. Hill, 232 F.3d 460, 472 (5th Cir. 2000) (observing that a 50 percent shareholder in a two-shareholder corporation "commanded as much authority to assert control over the corporation" as the other shareholder); *see infra* notes 315–30 and accompanying text (discussing *Hollis*). This argument is potentially applicable, however, in nonelection cases as well as in election cases. *See infra* note

role, however, it is entirely possible that the same company decisions would have been made and that the same changes in the company's value would have occurred. Stated differently, if the oppressive conduct had not taken place, there is no guarantee that the company would have been in a more favorable position, as the minority's input, by definition, could have been overruled by the majority.[309] Allowing the minority to avoid sharing in any postoppression company losses, therefore, may seem unfair, as one cannot prove that the minority's management participation would have caused a change in company fortunes.[310]

Although there is clearly a good deal of uncertainty on this "causation" point, it is critical to note that the majority's oppressive ouster of the minority created this uncertainty. Perhaps the minority's active managerial role would have prevented the missteps that led to the decline in the company's value.[311] Even without an active managerial role, perhaps the minority's mere input would have caused the majority to rethink or abandon a poor decision.[312] Even if

330 (noting that some election statutes allow a buyout election to occur after a court has found oppression).

309. *See supra* notes 87–89 and accompanying text (discussing the lack of control associated with a minority interest).

310. *Cf.* Barnes v. Andrews, 298 F. 614, 616–17 (S.D.N.Y. 1924) ("But when a business fails from general mismanagement, business incapacity, or bad judgment, how is it possible to say that a single director could have made the company successful, or how much in dollars he could have saved?"); *id.* at 617 ("[T]he plaintiff must show that, had [a director who had violated his duty of care] done his full duty, he could have made the company prosper, or at least could have broken its fall. He must show what sum he could have saved the company."); *id.* ("How could any one guess how far a director's skill and judgment would have prevailed upon his fellows, and what would have been the ultimate fate of the business, if they had?"). *But see* Cede & Co. v. Technicolor, Inc., 634 A.2d 345, 370 (Del. 1993) ("While *Barnes* may still be 'good law,' *Barnes*, a tort action, does not control a claim for breach of fiduciary duty.").

311. *See, e.g.*, Torres v. Schripps, Inc., 776 A.2d 915, 925 (N.J. Super. Ct. App. Div. 2001) (citing testimony that "there had been a 'significant change' following plaintiff's [a terminated minority shareholder] departure from the business, including a decrease in the company's financial stability," and further noting that "the plaintiff . . . was the real manager" and that the "defendant [majority shareholder] did not know how to run the day-to-day operations of the business"); *id.* ("The decrease in the corporate value from February [the date of the plaintiff's termination] to September was not due to plaintiff's efforts, but may have been due to [the majority shareholder's] lack of experience in managing the corporation.").

312. *Cf.* Francis v. United Jersey Bank, 432 A.2d 814, 827 (N.J. 1981) (suggesting that an inactive director's objection and resignation may have had an effect on the two remaining directors, and noting the trial court's conclusion that "[t]he actions of the [two remaining directors] were so blatantly wrongful that it is hard to see how they could have resisted any moderately firm objection to what they were doing" (quoting Francis v. United Jersey Bank, 392 A.2d 1233, 1241 (N.J. Super. Ct. Law Div. 1978)).

the majority had rarely listened to the minority in the past, perhaps this time the majority would have been persuaded. The point, simply put, is that no one will ever know with certainty what would have happened because the majority oppressively denied the minority an opportunity to participate.[313] Because this uncertainty stems from the majority's conduct, it is appropriate to resolve the uncertainty against the majority's interests.[314] If a company experienced postoppression losses, a court could legitimately presume that the minority's managerial participation would have prevented the decline. On this basis, a court could decide that the minority does not have to share in the losses.

The Fifth Circuit decision of *Hollis v. Hill*[315] provides at least indirect support for this date-of-oppression position. In *Hollis*, James Hollis and Dan Hill were each 50 percent owners of a Nevada close corporation.[316] Hill was a director of the company and served as the president. Hollis was a director and served as the vice-president.[317] The spouses of Hill and Hollis comprised the two remaining members of the board of directors.[318] On December 8, 1998, Hollis filed a shareholder oppression action against Hill.[319] A few weeks after the filing, "Hill terminated Hollis as vice-president and eliminated all of his company benefits," although Hollis continued to serve as director and corporate secretary.[320]

---

313. *Cf.* W. PAGE KEETON ET AL., PROSSER & KEETON ON TORTS § 41, at 269–70 (5th ed. 1984) ("The fact of causation is incapable of mathematical proof, since no one can say with absolute certainty what would have occurred if the defendant had acted otherwise.").

314. *Cf.* Murdock, *supra* note 29, at 480 ("Another perspective from which to view this situation is for the valuation process to resolve doubts as to value against the person who forces the sale."); *id.* ("In the situation in which the minority shareholder seeks a judicial buy-out because of oppressive conduct, it is the conduct of those in control that forces the sale.").

315. 232 F.3d 460 (5th Cir. 2000).

316. *Id.* at 463.

317. *Id.* at 460.

318. *Id.* at 463.

319. At the time the lawsuit was filed, tensions between Hill and Hollis were high. Hill had ceased paying Hollis a salary and had threatened to close down the business and establish his own comparable venture. *Id.* Hill, without authority, had moved the company's annuity business to his own sole proprietorship. *Id.* Hill had also stopped sending Hollis any financial information about the company, and he later stripped Hollis of various company benefits. *Id.* at 463–64. Hill even terminated the employment of Hollis's wife. *Id.* at 464.

320. *Id.* at 464.

The district court concluded that Hill's conduct was oppressive and ordered Hill to buy out Hollis's shares in the company.[321] The court chose a valuation date of February 28, 1998—"the date the court found that the oppression began."[322] Apparently, the company's value had steadily declined between the date on which the oppressive conduct began (February 28, 1998) and the date on which the oppression lawsuit was filed (December 8, 1998).[323] The Fifth Circuit agreed that Hill's conduct constituted oppression,[324] but it disagreed with the district court's decision to value the company as of the commencement of the oppressive conduct. As the Fifth Circuit observed:

> We do disagree . . . with the trial court's decision to use February 1998 as the valuation date for the buy-out. Although Hollis'[s] relationship with Hill began to decline significantly in February 1998, many of the actions upon which we base our finding of oppression occurred after this date. Hollis continued to receive his agreed upon salary until September of 1998, when it was reduced by 50%. His salary was not reduced to zero until October of 1998. Hill's unilateral decision to close the Florida office, discontinue the car lease payments, and terminate phone service was not communicated

---

321. Technically, the district court found that Hill's actions amounted to a breach of fiduciary duty. *See id.* at 466; *supra* notes 37–40 and accompanying text (discussing the breach of fiduciary duty approach to shareholder oppression).

322. *Hollis*, 232 F.3d at 464; *see id.* at 471 (stating that "the [district] court determined that Hill began his oppressive conduct on February 28, 1998").

323. *See id.* at 463–64 (describing the problems faced by the company); *see also* Brief of Appellee James P. Hollis at 26, Hill v. Hollis, 232 F.3d 460 (5th Cir. 1999) (No. 99-20725) (suggesting that the company's value declined after February 1998, and stating that "[t]he use of any subsequent date [after February 28, 1998] would effectively be Hill's last oppressive act"); Appellant's Reply Brief at 9, Hill v. Hollis, 232 F.3d 460 (5th Cir. 1999) (No. 99-20725) (noting that "the business was basically defunct at the time of trial").

324. In support of its finding of oppression, the Fifth Circuit stated the following:

> [W]e conclude that Hollis demonstrated an injury as a shareholder. He was a founder and 50% shareholder of FFUSA [the close corporation]. His positions as vice president and director clearly resulted therefrom. He had no reason to expect he would be able to sell his FFUSA shares for a higher price, meaning that the value of his investment was tied directly to his employment. The benefits he received from his investment were distributed in the form of salary and certain perquisites; the firm never declared a dividend and paid no salary to its directors. Hill totally deprived Hollis of those benefits by terminating his employment and salary, closing the Florida office, and cutting him off from company benefits. As a result, Hollis'[s] shares in FFUSA were rendered worthless. No offer was made by the corporation to purchase Hollis'[s] shares at a fair price upon termination, and Hollis did not have the option of selling his shares to another buyer.

Id. at 471.

> to Hollis until November of 1998. Hollis'[s] original complaint was filed in the district court in December of 1998.[325]

Based on this language, it appears that the *Hollis* court felt that February 1998 was not close enough in time to when most of the damaging acts of oppression occurred. The language supports the notion that a court should fix a date-of-oppression valuation at the time when the most serious acts of oppression take place, rather than at the time when the oppressive actions begin. Significantly, the court went on to discuss the shareholders' abilities to participate in the management of the venture:

> As an equal shareholder, Hill commanded as much authority to assert control over the corporation as did Hollis. His [Hollis's] failure to act on this authority until December of 1998 [the time period of the filing of the lawsuit] was his choice. The presumptive valuation date for other states allowing buy-out remedies is the date of filing unless exceptional circumstances exist which require an earlier or later date to be chosen. No such circumstances exist in this case. Therefore, we conclude that the date of valuation for the court ordered buy-out should be the date suit was filed herein. Use of this date will take into consideration all of Hill and Hollis'[s] actions, inactions, and prudent and imprudent business decisions which affected the value of the business during the intervening period.[326]

This passage strongly suggests that the Fifth Circuit believed that Hollis shared some of the responsibility for the decline in the company's value from the date on which the oppressive conduct began to the date on which the oppression lawsuit was filed. The court implies that Hollis, as a 50 percent shareholder, could have participated in the management of the business but simply chose not to.[327] Although one can question whether Hollis could, in fact, have exercised some management control over the business,[328] the broader

325. *Id.* at 472.

326. *Id.* (footnote omitted).

327. *See id.*; *see also* Appellant's Brief at 52, Hill v. Hollis, 232 F.3d 460 (5th Cir. 1999) (No. 99-20725) ("[I]t is undisputed that Appellee [Hollis] never exercised his power to call a shareholders meeting or a directors meeting or to exercise his power as a co-owner, co-director and officer.").

328. The *Hollis* court noted in several places in its opinion that Hill had effective control over the business. *See Hollis*, 232 F.3d at 466 n.16 (describing Hill as having "virtually unfettered control"); *id.* (analogizing to partners who "clearly controlled [their] organization, much like Hill"); *id.* at 468 n.21 ("Hill acknowledges that he had control over [the corporation]."). As a practical matter, therefore, it may not have been possible for Hollis to

point is that the court seems to credit the notion that, when an investor has the ability to participate in management, the investor should share responsibility for any losses that managerial decisions may have caused. While the *Hollis* facts do not squarely support the converse of this proposition—i.e., when an investor has no ability to participate in management due to oppressive conduct, the investor should not share in any losses that managerial decisions may have caused—the court's observations lend some support for the argument. Thus, when an investor truly has no ability to participate in management—as in the typical oppression case in which an investor with less than equal ownership is ousted from all company involvement[329]—the *Hollis* language suggests that an earlier date-of-oppression valuation may be appropriate given that the oppressed investor was wrongfully excluded from any postouster decisions.[330]

---

easily inject himself into the management of the business. Similarly, given that Hill was the president of the company, it may not have been true that Hollis "commanded as much authority to assert control over the corporation as did [Hill]." *Id.* at 472. Because Hollis and Hill had equal representation on the board of directors, however, it does seem that Hollis was not in a powerless situation. *See id.* at 463 (noting that Hollis, Hill, and their spouses comprised the board of directors of the company).

329. *See supra* notes 302–04 and accompanying text (discussing the typical oppression lawsuit).

330. Some jurisdictions allow a party to elect to purchase the petitioning investor's shares even after the court has found oppression. *See, e.g.*, MINN. STAT. ANN. § 302A.751 subd. 2 (West Supp. 2000):

> In an action under subdivision 1, clause (b) . . . in which one or more of the circumstances described in that clause *is established* [including oppression], the court may, upon motion of a corporation or a shareholder . . . order the sale by a plaintiff or a defendant of all shares of the corporation held by the plaintiff or defendant to either the corporation or the moving shareholders . . . .

(emphasis added); *see also* N.Y. BUS. CORP. LAW § 1118 (McKinney Supp. 2003) (stating, in an election statute, that a prospective purchaser must elect "at any time within ninety days after the filing of such [dissolution for oppression] petition *or at such later time as the court in its discretion may allow*" (emphasis added)); R.I. GEN. LAWS § 7-1.1-90.1 (2003):

> [O]ne or more of [a company's] other shareholders may avoid the dissolution [for oppression]by filing with the court prior to the commencement of the hearing, *or, in the discretion of the court, at any time prior to a sale or other disposition of the assets of the corporation*, an election to purchase the shares owned by the petitioner at a price equal to their fair value.

(emphasis added); MODEL BUS. CORP. ACT § 14.34(b) (2002) ("An election to purchase . . . may be filed with the court at any time within 90 days after the filing of the [dissolution for oppression] petition . . . *or at such later time as the court in its discretion may allow*." (emphasis added)). When such postliability elections occur, a court should consider whether the date of oppression would serve as a more appropriate valuation date, particularly when the court determines that the petitioner possessed a reasonable expectation of management participation that was frustrated by the majority's oppressive actions. Depending on the circumstances, therefore, one could make a date-of-oppression argument even in an election context.

In the typical oppression dispute where the minority's reasonable expectation of management participation is frustrated,[331] therefore, it may be appropriate to let the minority choose between the date of oppression and the date of filing as the appropriate valuation date.[332] Such a prominority proposition may seem inequitable, as a plaintiff minority will undoubtedly choose the date that generates a higher valuation—the date of filing when the company's value has improved after the oppressive conduct, and the date of oppression when the company's value has subsequently worsened. Nevertheless, in the common freeze-out situation, the "plaintiff's choice" position is defensible. As a shareholder, an oppressed minority is entitled to participate in changes in the company's value, at least until he files his lawsuit. Yet because those value changes might not have occurred if the minority's bargained-for management role had continued as expected, the minority should not be required to participate in those changes.[333] In light of the fact that the majority's ouster of the minority created the uncertainty surrounding whether minority participation would have prevented losses, any doubt on the issue should be resolved against the majority. Thus, when a company has declined in value after a minority's ouster, a court reasonably could allow a date-of-oppression valuation on the presumption that the minority's managerial input would have prevented the company's decline. Similarly, when a company has increased in value after a minority's ouster, a court reasonably could allow a date-of-filing valuation on the presumption that the minority's managerial input would not have prevented the increase.

CONCLUSION

> The old story, so often told, of [an investor's] reply to the question of what the shares in his company were worth, is very apt:

331. *See supra* notes 302–04 and accompanying text (discussing the typical oppression lawsuit).

332. *Cf.* KENNETH S. ABRAHAM, THE FORMS & FUNCTIONS OF TORT LAW 269 (2d ed. 2002) (noting that some courts allow successful fraud plaintiffs to choose between "benefit of the bargain" damages and "out of pocket" damages because "there are times when the benefit-of-the-bargain measure does not maximize the plaintiff's recovery").

333. *See supra* notes 311–14 and accompanying text (making a date-of-oppression argument).

> "There are 51 shares," said he, "that are worth $250,000. There are 49 shares that are not worth a —."[334]

Such is the value, we are crassly (but refreshingly) told, of a minority shareholder's stake in a close corporation. Without the ability to control the direction of the company, and without the liquidity of publicly traded stock, close corporation minority shares are worth less to outsiders in the typical purchase and sale transaction.

Accepting this economic truth, however, does not inexorably lead to the conclusion that "fair value" buyouts should incorporate minority and marketability discounts. After all, valuation is contextual, and a buyout in the shareholder oppression setting bears little resemblance to a voluntary sale to outsiders. As this Article has argued, it is far more accurate to view an oppression buyout as a compelled redemption by insiders (typically insiders with control), rather than as a willing sale to outsiders. When viewed in this manner, minority shares are, in fact, worth a "—," as they represent a partial ownership stake in an existing business venture. When that stake is involuntarily relinquished as a result of oppressive behavior, the aggrieved investor should be compensated for what he has given up—i.e., a proportionate share of the company's overall value. The enterprise value interpretation of fair value properly captures this notion by rejecting discounts and by avoiding the voluntary sale conception that plagues the fair market value approach—a conception that poorly describes the realities of the shareholder oppression setting. Moreover, the conscious legislative use of the term "fair value" rather than "fair market value" in oppression buyout statutes, and the inherent undercompensatory nature of the buyout award in oppression disputes, further support rejecting a fair market value approach and spurning the use of discounts. Finally, although courts and commentators have traditionally relied on dissolution analogies, punishment rationales, and various other arguments in opposing discounts, this Article has revealed that such arguments should be asserted with caution, if at all, as they are often of dubious validity.

In addition to building a case against discounts, this Article has examined the critical issue of the valuation date. Although sound

334. Humphrys v. Winous Co., 133 N.E.2d 780, 783 (Ohio 1956) (quoting John H. Doyle, Address to the Ohio State Bar Ass'n (July 1893)).

reasons exist for measuring fair value as of the date of the filing of an oppression lawsuit, this Article has contended that, in many cases, the date of the occurrence of the oppressive conduct may serve as a more appropriate benchmark. Such an argument sets the stage for the suggestion that courts should allow an oppressed investor to choose between a date-of-filing valuation and a date-of-oppression valuation. On the one hand, the oppressed minority remains a shareholder of the company. As a shareholder, the minority is still an owner, and he is entitled to participate in postoppression changes in the company's value—at least until he files his lawsuit and "unofficially" ceases his shareholder status. On the other hand, when oppression involves the wrongful ouster of a minority from management participation in the business, one can make an equally valid argument that the minority should not have to share in any postoppression changes in the company's value. Indeed, the minority's bargained-for role in company decisionmaking ended the moment that the oppressive ouster occurred. Consequently, the minority's responsibility for company decisions arguably ended at that time as well. As this Article has suggested, therefore, a "plaintiff's choice" view of the valuation date decision may, in certain circumstances, be an appropriate position to take.

In conclusion, value is central to corporate law, and the close corporation context is no exception. Fair value buyouts in shareholder oppression disputes are quite common, and they show no sign of abating. By rejecting the application of discounts and by recognizing the importance of the valuation date, courts can insure that "fair value," as a principle, lives up to its name.