TOO MANY MERGERS? THE GOLDEN PARACHUTE AS A DRIVER OF M&A ACTIVITY IN THE TWENTY-FIRST CENTURY

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ABSTRACT

This Article argues that the corporate governance regime in the United States has produced a level of mergers and acquisition activity greater than the social optimum because of the current version of the "golden parachute," a super-bonus payoff to a target CEO. In the late nineteenth through the twentieth century, M&A activity was characterized by "waves" that reflected adaptations to changing external environment, whether the efficient production frontier, regulatory constraints, or capital market developments. Economically-motivated parties saw the opportunities in changing the boundaries of the firm; successful first-movers spawned imitators, hence a wave, which eventually subsided, often alongside deteriorating capital market conditions.

The twenty-first century is different. There is a persistently high level of M&A. Yes, there are fluctuations, but not "waves." This pattern can be explained at least in part by an important internal governance change, the transformation of the golden parachute into a high-powered driver of M&A activity. Golden parachutes were introduced as a corporate governance innovation in the 1980s to overcome managerial hostility to an unsolicited premium bid. Over time, especially as executive compensation radically shifted toward stock-based pay, golden parachutes have become increasingly lucrative. They now provide a CEO with a high-powered incentive to become a target CEO, compensating the CEO like a deal-hunting investment banker, and thus have changed the pattern of M&A activity. Historically M&A activity has been a response to changes in the external environment. Without reflective intentionality, golden parachutes have become an independent (and internal) driver of M&A activity. The distortive effects of golden parachutes result in efficiency losses at the firm level, produce social losses because of excessive layoffs, and because of the resultant "inequality with privity," will exacerbate social resentments that may have political consequences.

This incentives mismatch can be addressed by shareholders as part of the annual Say-on-Pay vote. The simplest adjustment would be the elimination of the acceleration of unvested equity awards for target CEOs triggered by M&A.

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TOO MANY MERGERS?

INTRODUCTION

Mergers and acquisitions activity ("M&A") is one of the pivotal features of the modern capitalist economy. Well-executed M&A can exploit economies of scale and scope to transform linear growth at the firm level to exponential growth. M&A at the firm level, accordingly, raises the "growth frontier" of an economy of such firms. M&A also often entails investment in large amounts based on flawed assumptions about "synergies" and thus can destroy value.[1] M&A can serve as the vehicle through which a firm scoops up rivals and thus grabs a share of scale and scope economies beyond the competitive optimum.[2] And M&A also provides a mechanism for "exit"—divestment and shrinkage in the case of obsolescence or excess capacity, serving goals that are "contractionary" as well as "expansionary."[3]

M&A enables firms to pursue scale and scope economies faster than would be possible with organic within-firm growth and, also, facilitates divestment more rapidly than otherwise. Because of this, "adjustment costs" (the obsoleting of employee skills, the loss of "human capital," layoffs; and disruptions of previous supplier and customer networks) will occur more frequently and extensively throughout the economy. Even if M&A facilitates growth overall, the gains will be distributed differently than under previous arrangements and often unevenly.

M&A undercuts the idea that a particular corporation ought to hold to its "purpose"—at least not without significant sacrifice of value. The canonical example is the Kraft takeover of Cadbury, a British confectionery. Cadbury's purpose may have been the ongoing production of sweets beloved in the United Kingdom, but its value to Kraft was in the global distribution network it had created in emerging markets that could be additionally purposed to the distribution of Kraft's extensive array of snack food brands.[4] M&A transformed Cadbury's purpose.

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1. *See*, *e.g.*, Tim Arango, *How the AOL-Time Warner Merger Went So Wrong*, N.Y. TIMES (Jan. 10, 2010), https://perma.cc/7E83-ZUS2; James B. Stewart, *Was This $100 Billion Deal the Worse Merger Ever?*, N.Y. TIMES (Nov. 28, 2022), https://perma.cc/BYR2-WGVA; Sara B. Moeller, Frederik P. Schlingemann, René M. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757 (2005); Robert F. Bruner, DEALS FROM HELL (2005); *A McKinsey Perspective on Creating Transformational Value from Mergers*, McKinsey & Co. (Jun. 1, 2010), https://perma.cc/3F5U-UYRX (noting that 70% of mergers fail).
2. *See* Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 J. POL. ECON. 649 (2021).
3. Gregor Andrade & Erik Stafford, *Investigating the Economic Role of Mergers*, 10 J. CORP. FIN 1 (2004); Michael C. Jensen, *The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems*, 48 J. FIN. 831, 833-35 (1993).
4. *See*, *e.g.*, *Cadbury Vows to Fight Kraft Offer*, FIN. TIMES (Sept. 8, 2009), https://perma.cc/LZ79-LUNN (Cadbury "has a global footprint that people will die for"); Jenny Wiggins, *Cadbury Attacks Kraft's Strategy*, FIN. TIMES (Sept. 13, 2009), https://perma.cc/9R9C-UG73 (Cadbury has "'unique'" position in the global confectionary market due to its strength in developed and emerging markets"); Press

The history of the corporation as an organizational form usually focuses on the permanence of its committed capital (including the transferability of ownership interests),[5] the partitioning of the corporation's assets and liabilities from those of its owners and officers,[6] and the centralization of operational control over the corporation in a board of directors.[7] These elements of organizational law established the corporation as the dominant business form.[8] But one missing piece to this story has been the changes in organizational law that empowered corporations to engage in M&A, which in turn enabled the corporation to rapidly increase the scale and scope of its business and take advantage of changes in transportation, communication, and technology in order to pursue exponential growth. In the United States, these are changes to enabling statutes[9] that permitted corporations to own stock in other corporations, to buy assets using own stock as consideration, and the establishment of "merger" and "consolidation" as the formal means to expand the size of the firm.[10]

Release, Mondelēz International, Inc., *Kraft Food Succeeds in Offer for Cadbury PLC* (Feb. 2, 2020), https://perma.cc/VW3L-2AU4 (quoting Kraft CEO Irene Rosenfeld: "The combination of Kraft Foods and Cadbury creates a global powerhouse in snacks, confectionary and quick meals with annual revenues of approximately $50 billion and sales in approximately 160 countries"); Lara Spiteri-Cornish, *A Sweet Deal: Cadbury Leads Kraft into Emerging Markets*, in Marketing Cases from Emerging Markets 93 (Dilip S. Mutum, Sanjit Kumar Roy & Eva Kipnis eds., 2014).

5. Giuseppe Dari-Mattiacci, Oscar Gelderbloom, Joost Jonker & Enrico C. Perotti, *The Emergence of the Corporate Form*, 33 J. L., ECON. & ORG. 193 (2017); Margaret M. Blair, *Locking in Capital: What Corporation Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387 (2003); Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012).

6. Henry Hansmann & Reinier Kraakmann, *The Essential Role of Organizational Law*, 110 YALE L. J. 387 (2000); Henry Hansmann, Reiner Kraakmann & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006).

7. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. L. REV. 547 (2002); Stephen M. Bainbridge, *Director Primacy and Shareholder Disempowerment*, 119 HARV. L. REV. 1735 (2006).

8. *See generally* John Armour et al., THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH (3d ed. 2017).

9. The most prominent example, which set the model for other jurisdictions, was the revision of New Jersey corporate law over the 1880-1910 period, especially the general revision of 1896. *See* James B. Dill, THE GENERAL CORPORATION ACT OF NEW JERSEY (1910 eds.); Edward Q. Keasbey, *New Jersey and the Great Corporations*, 13 HARV. L. REV. 198 (1899). These statutory innovations are usually framed in terms of the chartering competition initiated by New Jersey to provide a legal safe haven for combinations in the late nineteenth century that had been jury-rigged under existing law as "trusts." *See*, *e.g.*, Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910,* 32 J. CORP. L. 323 (2007); Camden Hutchison*, Corporate Law Federalism in Historical Context: Comparing Canada and the United States*, 64 MCGILL L. J. 109 (2018). *See generally* Herbert Hovenkamp, ENTERPRISE AND AMERICAN LAW, 1836-1937, at 241-67 (1991).

10. An important complement to the organizational law changes that permit expansion

More directly put, corporate law has played a critical role in the M&A story in the United States, and vice versa. Changes to corporate law at the turn of the twentieth century facilitated the creation of national firms in the United States through M&A. The early state-level corporate chartering competition was focused on the facilitation of M&A, not the fashioning of the optimum shareholder/management balance that figures centrally in current corporate governance debates.[11] As corporations took on national economic footprints, there was broad consensus that national enterprise required national regulation. The logic called for a national charter, since the right regulatory match was not between the national corporation and any particular state, whose interests necessarily would be parochial. Rather, the match was between the national corporation and the *State*, thus a national charter. As Camden Hutchison shows, the first national chartering movement failed precisely because of disagreement over the scope of permitted M&A activity.[12] The absence of a national legislative consensus to constrain M&A through restrictive corporate governance (or, to embrace it subject to a national regulatory regime) meant a default to the permissive state regimes of New Jersey and then Delaware.

The central claim of this Article is that the current corporate law and governance regime in the United States has produced a level of M&A activity that is greater than the social optimum. In broad strokes, the argument is that the "waves" that characterized M&A activity in the late-nineteenth through the twentieth century reflected adaptations to the changing external environment—whether the efficient production frontier, the regulatory constraints, or capital market developments. Economically-motivated parties saw the opportunities in changing the boundaries of the firm. Successful first-movers spawned imitators—hence a wave (which eventually subsided)—often alongside deteriorating capital market conditions.

The twenty-first century is different: To date, there has been a persistently high level of M&A. While there are still fluctuations in activity, they are not characterizable as "waves."[13] This paper argues that this pattern is best explained, at least in part, by

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through mergers and acquisitions are those changes that facilitate exit and re-deployment of capital and capacities, such authorization of stock repurchases, demergers through spin-offs and split-offs, and exit through tender offers.

11. *See* Camden Hutchison, *Progressive Era Conceptions of the Corporation And The Failure Of The Federal Chartering Movement,* 3 COLUM. BUS. L. REV. 1017 (2017); Sarath Sanga, *The Origins of the Market for Corporate Law*, 24 AM. L. & ECON. REV. 369 (2022); Charles M. Yablon, *The Historical Race Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880-1910*, 32 J. CORP. L. 323 (2007); Ofer Eldar & Gabriel Rauterberg, *Is Corporate Law Non-Partisan?*, 2023 WIS. L. REV. 177 (2023).

12. *See* Hutchison, *supra* note 11.

13. *See infra* note 80 and accompanying text and figures. The merger waves in the twentieth century were reactions to exogenous changes in the economic and regulatory landscape, followed by periods of very low merger activity. For example, in the first significant merger wave recorded in the United States (from approximately 1895 to 1904, driven by economic expansion, changes to corporate law, and structural changes in manufacturing

the introduction of an internal driver of M&A activity: The "golden parachute," a super-bonus payoff to the CEO of the "target" in an M&A transaction.

Golden parachutes were introduced as a corporate governance innovation in the 1980s as a complement to the directors' then-weak monitoring capacity over the CEO's frequently negative response to an unsolicited premium bid.[14] The governance goal was to provide an incentive that would make a CEO neutral or perhaps mildly favorable when confronted with such a bid. Golden parachutes have become increasingly lucrative over time, especially as compensation has shifted towards stock-based performance pay. Indeed, it might be more accurate to describe them as "platinum parachutes."

Consequently, the function of the golden parachute has fundamentally changed: It now offers a high-powered incentive to become a target CEO, compensating the target CEO akin to a deal-hunting investment banker, and thereby has changed the pattern of M&A activity. Put otherwise, fee-driven promoters have always been part of the M&A story. Target CEO incumbency has commonly been a friction. The contemporary golden and platinum parachute can convert the CEO into another promoter.

To put the matter another way: M&A is a mechanism by which firms adapt to external change, "exogenous shocks," so-called. Golden parachutes have distorted the adaptive role of M&A. Instead of securing the CEO's unbiased evaluation of an unsolicited M&A proposal at a time of weak governance, the golden parachute has become an internal driver of M&A. The consequence is "endogenous" M&A that will predictably increase the level of M&A activity above the adaptive response rate.

The institutional change wrought by the current golden parachute has negative implications both from a shareholder and a social point of view. First, the new incentive structure for CEOs will distort how the firm is managed and the projects that the firm pursues. The CEO has an incentive to guide the firm to pick projects that could generate complements as a target (increase synergies) or substitutes (to invite killer acquisitions) through M&A rather than projects of highest long term expected value

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industries), the total M&A consideration amount in the manufacturing and mining sectors rose to over 10 percent of United States' GDP. *See* Ralph L. Nelson, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895–1956 (1959); supplemented by author [RA Greg Zaffino] calculations. But, after the "wave" ended in 1905, M&A consideration amount fell to approximately one percent of GDP, a level at which it essentially remained until the next merger wave, driven by changes in banking regulations, in the late 1920s. *See* Eugene Nelson White, *The Merger Movement in Banking, 1919–1933*, 45 J. ECON. HIST. 285 (1985). But this pattern changed around the start of the twenty-first century. After a merger wave in the late-1990s, the amount of M&A consideration has never fallen below 5% of United States GDP (research assistant Greg Zaffino calculations). This high "merger floor" is persistent even when accounting for cross-border deals, indicating that increased globalization alone cannot explain this trend.

14. *See* Kenneth C. Johnson, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L. J. 909 (1985).

of an independent firm. Second, the structure will also distort the pattern of CEO succession: Why should the incumbent CEO groom a successor when the absence of such a successor can be invoked as a reason to pursue target-side M&A transaction? From a social point of view, since M&A transactions are commonly associated with layoffs, a higher level of M&A activity will impose an additional level of risk on employees for which compensation is unlikely. Moreover, such layoffs undermine social connectivity and peer-based reality testing associated with the workplace. At a time when "bowling alone" is an increasingly prominent feature of American life, excess M&A activity may further degrade social cohesion and, on the analogy of certain trade impacts, generate sociopolitical effects that spill over into electoral politics.

To be clear, the thesis of this Article does not reject the view that M&A activity in general facilitates adaptation at the firm level to a changing external environment. Neither does it reject the claim that M&A can be a powerful engine of economic performance. Rather, the thesis captures a theme that has run through sober reflection on the implications of a high level of M&A over the past several decades.[15] The reallocation of resources and control rights associated with M&A intensifies the adjustment costs of economic change. Growth or shrinkage can happen organically (which extends the time frame of adjustment), or through M&A (which can dramatically enhance the rate of change). The argument that I develop in this Article is that golden and platinum parachutes add excess energy to this system. They provide asymmetric payoffs to target CEOs and impose systemic costs. Obviously it is fraught to identify the "optimal" level of M&A, but golden parachutes create a higher level of M&A through an endogenous energizer. While this is an area ripe for regulatory action, the present corporate governance structure also gives tools to shareholders to curb the excesses of the golden parachute regime.

There is an additional concern that this paper does not address: Whether "excess" M&A separately raises antitrust issues. These could, for example, stem from a belief that M&A inexorably promotes concentration, which, in turn, would increase producer power and rents.[16] In general, it would seem that antitrust analysis requires a market-specific focus. But someone who was concerned about overall concentration levels might contemplate legal reform or bully pulpit use focusing on golden parachutes as an adjunct to antitrust policy.[17]

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15. *See*, *e.g.*, Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 COLUM. L. REV. 1931, 1971-82 (1991).

16. *See* Matias Covarrubias, Germán Gutiérrez & Thomas Philippon, *From Good to Bad Concentration? U.S. Industries Over the Past 30 Years*, 34(1) NBER MACROECONOMICS ANN. 1 (2019) (showing evidence that concentration becomes "bad" around 2000); Spencer Y. Kwon, Yueran Ma & Kaspar Zimmermann, *100 Years of Rising Corporate Concentration*, 114(7) AM. ECON. REV. 2111 (2024).

17. This article will show that golden parachute payoffs are generally increasing in the target company's size and can vary by industry sector. These elements might add additional

This Article proceeds as follows. Part I describes the United States' M&A waves of the late-nineteenth and twentieth century, then compares them to the persistently high level of activity seen in the twenty-first century. As this Part I shows, the nineteenth to twentieth century waves can be linked to changes in the external economic environment, including regulatory constraints, that generated adaptation effectuated through M&A. In contrast, in the twenty-first century, M&A is persistently high, even after a potential source of external change, inward-bound M&A from globalization, is subtracted.

Part II traces the rise of golden and platinum parachutes, a kind of special severance pay for C-suite executives (especially the CEO) first introduced in the 1980s and 1990s to overcome managerial resistance to unsolicited premium bids. Golden parachutes illustrate a characteristic feature of the "modern" corporate law period: That devices introduced to address the rise of hostile bids take on a separate life and, in fact, become transformative. In this particular case, the increasing independence of directors and the growing reconcentration of stock ownership eliminated the corporate governance need for golden parachutes. But the parachutes survived as a "market" term of executive compensation. As CEO compensation escalated over the course of the 1990s and increasingly consisted of stock-based components, the CEOs parachute payoff from being "taken over" became increasingly lucrative. A target CEO could move from wealthy to rich.

Part II presents fresh evidence on the extent of the riches. Over the eleven-year period 2011-22, for transactions over $10 billion—large and consequential—the average parachute payout was approximately $48 million.[18] Smaller (but still consequential) transactions produced multi-million-dollar parachute payouts as well. It seems obvious that these payouts would increase the CEO's incentive to become a promoter of target-side M&A.[19] We can't both believe a general incentives-based theory of compensation and disbelieve that these powerful incentives will have their effect.

Parts III and IV discuss consequences from a shareholder perspective and social perspective of "excess" mergers because of the golden parachute.

Part III identifies three major adverse effects from the shareholder perspective: (1) The distortion of project choice, (2) acceptance of immediate M&A rather than holding out for foreseeable future higher value realization, and (3) a shortfall in CEO succession planning, which can lead to suboptimal M&A and weaker performance

dimensions to antitrust policy consideration.

18. *See infra* Figure 7.

19. It is well understood that "CEOs play a key role in their firm's decisions leading up to a bid (e.g., the decision to seek out a buyer or to initiate merger talks). . ." Dirk Jenter & Katharina Lewellen, *CEO Preferences and Acquisitions*, 70 J. FIN. 2813, 2813 (2015). For judicial recognition of the incentive effects of high-powered incentives on the CEO decision to pursue M&A, see McRitchie v. Zuckerberg, 315 A.3d 518 (Del. Ch. 2024), 554 n.97 (discussing cases, including the effects of option vesting) (Laster, VC).

after non-merger CEO turnover. A CEO who is preparing for a merger exit will likely either pick or avoid projects with objectives and a time horizon consistent with that goal. At the same time, a CEO looking for a merger will be reluctant to groom a successor, because the failure of an obvious successor enhances the CEO's optionality. Moreover, a motivated target CEO will be especially keen to sell the acquirer on a transaction, even if net value-reducing.

The advent of high parachute payouts coincides with a shift in the average target CEO age over the 1989–2007 period. Early in that period, impending retirement is not a strong predictor of a transaction.[20] Later in the period, the likelihood of becoming a target escalates as the CEO approaches sixty-five.[21] In a framing drawn from behavioral corporate finance,[22] rich parachutes have helped establish exit-through-merger as part of a "good" CEO career, as opposed to "left the company in capable next-generation hands." Yes, shareholders approve the merger, but there is not a counterfactual alternative developmental path over which they have choice. Some tech and pharma startups are self-consciously targeted towards M&A, and compensation is structured accordingly.[23] However, the golden parachutes that are virtually universal among significant public companies hardly seemed tailored for discrete strategic reasons. The issue is not that project choice is shaped by short-termism versus long-termism but is distorted by this special kind of managerial agency cost.

This concern about the distortive effects is not merely conjectural, as two recently decided Delaware cases demonstrate.[24] One case came to light only because of a parallel insider trading case;[25] the other because the transaction attracted as an appraisal proceeding.[26] Most "settling" cases—bad for shareholders—will not catch the glare.

Part IV addresses one particular concern of excess M&A: The additional employee layoffs that commonly lead to lower pay, a significant loss of human capital, and diminished career prospects. The net employment effects of M&A are debated in the

20. *See* John C. Coates IV & Reinier Kraakman, *The Link Between Acquisitions Market and the Market for CEOs* (Feb. 17, 2011), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1760154.

21. Jenter & Lewellen, *supra* note 19.

22. Malcom Baker & Jeffrey Wurgler, *Behavioral Corporate Finance: A Current Survey*, 2 HANDBOOK OF THE ECON. OF FIN. (George Constantinides, Milton Harris, & Rene Stulz, eds., 2012).

23. *See* Ronald J. Gilson, *Locating Innovation: The Endogeneity of Technology, Organizational Structure, and Financial Contracting*, 110 COLUM. L. REV. 885 (2010). *See also* Gad Weiss, *The Venture Corporation*, 2025 AM. BUSN L. J. 1, 4 (2025) (highlighting that exit alternatives for a successful start-up includes a "trade sale" to a strategic buyer).

24. *See infra* notes 144-147 and accompanying text.

25. Goldstein v. Denner, 2022 WL 1671006 (Del. Ch. May 26, 2022).

26. In re Columbia Pipeline Grp., Merger Litig., 299 A.3d 393 (Del. Ch. 2023).

labor economics literature,[27] but many types of M&A—such as horizontal mergers or take-private transactions initiated by private equity firms—commonly entail significant layoffs.[28] An extensive economic literature documents the losses in future income by displaced workers.[29] Although M&A generally produces net social gains—what a welfare economist would call a Kaldor-Hicks improvement—the United States' record in assuring that losing parties are made whole is generally inadequate.[30] Even if layoffs associated with M&A might be thought of as an inevitable consequence of a dynamic economy, there is no reason to build in high-powered managerial incentives that promote M&A, particularly where the benefits are so skewed in favor of the individual CEO. Such a structure is likely to produce socially costly distortion.

Part IV then argues that the mixture of M&A, layoffs, and golden parachutes will have adverse socio-political consequences. At a time when many social bonds are fraying, when many adults are "bowling alone,"[31] the workplace is a place of common enterprise and attachment, and perhaps even the cultivation of civic virtue.[32] The forced sociability and interaction of the workplace is a counterweight to the echo chamber of individual narrow-casting and (imperfectly) helps people steer clear of rabbit holes. Thus the disruption of an established workplace has costs beyond the economic.

Golden parachutes exacerbate the social costs of M&A. In the midst of pain among those laid off when the firm is sold, there is plainly one winner – the CEO with a golden parachute. The historian Robert Schneider observed that our current age is one where "resentment" has returned again as a "political emotion."[33] Such a mismatch of fates –

27. *See infra* notes 168-174 and accompanying text.

28. For example, outplacement consultants Challenger, Gray & Christmas report annual M&A-linked layoffs that vary between 123,000 and 150,000 over the 2004-2019 period. These reports seem to have a downward bias since they are limited to layoffs that are specifically associated with a merger, but companies often place M&A-related layoffs within a broader "restructuring" category that would not be captured in the M&A-linked layoff figures. *See also* John N. Drobak, RETHINKING MARKET REGULATION 46-48 (2021) (critic of M&A bemoans lack of comprehensive database of M&A-related layoffs and cites many M&A-related mass layoffs cases identified in the media).

29. *See, e.g.*, Kenneth A. Couch & Dana W. Placzek, *Earning Losses of Displaced Workers Revisited*, 100 AM. ECON. REV. 572 (2010).

30. *See* Alex Raskolnivoc, *Distributional Arguments, In Reverse*, 105 MINN. L. REV. 1583 (2021).

31. Robert Putnam, THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY Ch. 6 (2000).

32. *See generally* Cynthia Estlund, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (2003); Michael Sandel, *What Liberals Get Wrong About Work*, THE ATLANTIC (Sept. 20, 2020). For a more pessimistic view about the possibilities of the current workplace 20 years later, *see* Cynthia Estlund, *Coming Apart: How Union Decline and Workplace Disintegration Imperil Democracy* in Angela B. Cornell & Mark Barenberg, eds., THE CAMBRIDGE HANDBOOK OF LABOR AND DEMOCRACY (2020).

33. Robert A. Schneider, THE RETURN OF RESENTMENT: THE RISE AND DECLINE AND RISE AGAIN OF A POLITICAL EMOTION 169-200, 217-235 (2023).

layoffs on the one hand, a golden parachute on the other—readily generates such feelings.

The scholarship on trade effects suggests that such resentment has political valence, including a shift in partisan voting behavior. An emerging literature connects economic shocks in which there are salient losers to shifts in political sentiment, in particular increases in polarization and especially with a tilt towards populism.[34] This literature has been motivated by the desire to understand the impact of expanded foreign trade, especially the "China shock"—the rapid influx of Chinese manufactured goods after China's accession to the WTO in 2001.[35] This fits with models that include behavioral primitives, like social-identity, in more conventional models of responses to economic shocks.[36]

The outcomes mismatch of golden parachutes and layoffs may activate some of the same behavioral responses associated with other economic shocks in which the losers perceive that their losses are tied to others' gains. This is "inequality with privity," not the generalized inequality which thus far has not had much electoral effect, as demonstrated by the easy recharacterization of the estate tax as a "death tax," the long-standing slide of the labor share of economic rents,[37] and the secular shift in favor of shareholders.[38] Perhaps this muted response is because the purported villains, the shareholders, are diffuse and many employees see themselves as beneficiaries through their retirement savings, whether or not that is the case. The case of golden and platinum parachutes is stark in an important set of cases: layoffs for thee, riches for me. The response to this inequality is energized by loss aversion of the adversely affected parties. Thus the role of golden and platinum parachutes in "too many mergers" is not just the distortion of investment decision making at the firm level or the pecuniary losses experienced by laid-off employees, but the potential socio-political impact with systemic implications.

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34. Notable contributions are David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *Importing Political Polarization? The Electoral Consequences of Rising Trade Exposure*, 110 AM. ECON. REV. 3139 (2020); Yotam Margalit, *Costly Jobs: Trade-related Layoffs, Government Compensation, and Voting in U.S. Elections*, 105 AM. POL. SCI. REV. 166 (2011).

35. *See* David Autor, David Dorn, Gordon Hanson & Kaveh Majlesi, *Political Polarization? The Electoral Consequences of Rising Trade Exposure* 1-61 (Nat'l Bureau of Econ. Rsch., Working Paper No. 22637, 2017), at p. 41 *et seq*. For evidence that trade liberalization via NAFTA shifted partisan allegiances particularly for voters with conservative social views, see Jiwon Choi, Ilyana Kuziemko, Ebonya Washington & Gavin Wright, *Local Economic and Political Effects of Trade Deals: Evidence from NAFTA*, 114 AM. ECON. REV. 1540, 1559-72 (2024).

36. *See, e.g.*, Giampaolo Bonomi, Nicola Gennaioli & Guido Tabellini, *Identity, Beliefs, and Political Conflict*, 136 Q. J. ECON. 2371 (2021).

37. Jeffrey N. Gordon, *Employees, Pensions, and the New Economic Order*, 97 COLUM. L. REV. 1519 (2007).

38. Zohar Goshen & Doron Levit, *Agents of Inequality: Common Ownership and The Decline of the American Worker*, 72 DUKE L. J. 1 (2022).

Lastly, the conclusion asks, what is the recourse? A technocratic approach would say that golden parachutes are a compensation device that has outrun its purpose, that the distortions are too great for its persistence. Shareholders could decide to intervene in the fashioning of golden parachutes to avoid costs to shareholder welfare from distorted project choice, failures in CEO succession planning, and the greater propensity to enter into value-reducing M&A transactions. Shareholders could also decide that the socio-political effects of one-sided payoffs create systemic risks to their portfolio by inviting a politics that would disrupt innovation and economic growth. The annual "say on pay" vote affords ample opportunity to reconsider how to refashion or perhaps to end golden parachutes. One straightforward adjustment would be to end the acceleration of unvested equity awards for the target CEO. This element accounts for 75% of the value of golden parachutes for the largest firms[39] and its elimination would dramatically reduce the parachute's distortionary effect. Shareholder inaction will invite Congressional intervention and should.

I. FROM MERGER WAVES TO MERGER PERSISTENCE

A. Data: 1895 to Present

A longtime staple of industrial organization analysis is that mergers occur in waves, "*short* periods of very intense merger activity… Himalayan bursts where the number of M&A increase several-fold over a single period."[40] Whatever the historical basis for this claim, it is no longer true in the twenty-first century. The "waves" of the twentieth century have been replaced in the twenty-first century with a persistently high level of M&A activity, fluctuations on top of a durable base.

Figures 1, 2, and 3 show the rise, fall, and persistence of merger activity in the United States for 125 years, from 1895 to 2019. Although "one continuous and consistently assembled time series on the number of aggregate mergers and acquisitions does not exist,"[41] we have used various standard sources for 1895-1966 and a single source (Mergerstat) for 1967–2019 to compile a timeline of M&A activity measured in economic terms for the entire 1895–2019 period. [42] To enable comparability over time, we normalize M&A activity in terms of the size of the US

39. Alvarez & Marsal, 2021/2022 EXECUTIVE CHANGE IN CONTROL REPORT, at 3, available at https://perma.cc/HXG6-GHZ5.

40. *See* R.J. Town, *Merger Waves and the Structure of Merger and Acquisition Time Series*, 7 J. APPLIED ECONOMETRICS S83, S83 (1992) (citing sources) (emphasis added).

41. *Id.* at S86.

42. *See* Appendix I for elaboration and citation. One general objection to this method is that definition of the "consideration" paid is often time varying and not always disclosed. That objection is less weighty after adoption of the federal securities laws in the 1930s. Moreover, the alternative measure that is sometimes used—the *number* of transactions—insufficiently weighs the economic importance of a transaction.

economy, proxied by GDP (Figure 1), the market capitalization of all publicly traded companies (Figure 2), and a composite stock index compiled by Robert J. Shiller (Figure 3).

Figure 1: M&A Consideration Amount as % of GDP (1895-2022)

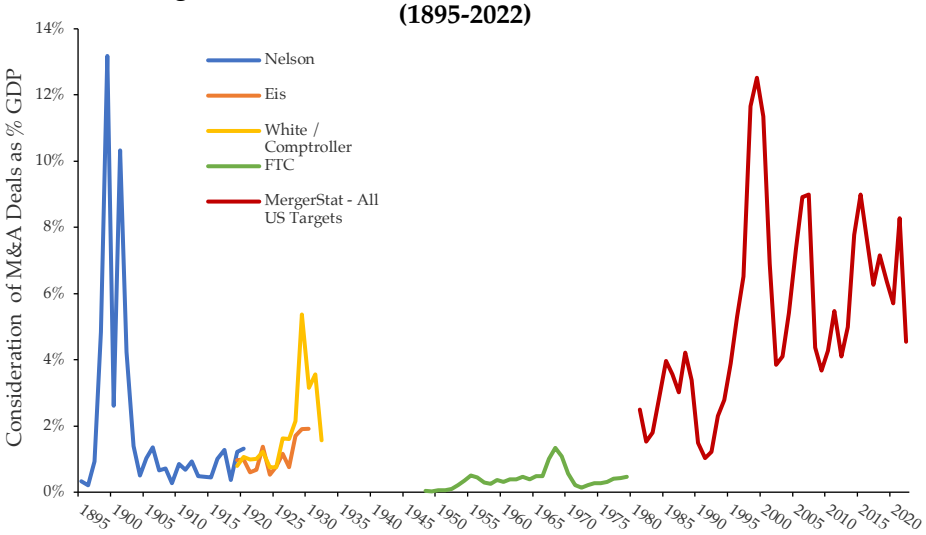


Figure 2: M&A Consideration Amount as % of Total U.S. Market Cap (1900-2022)

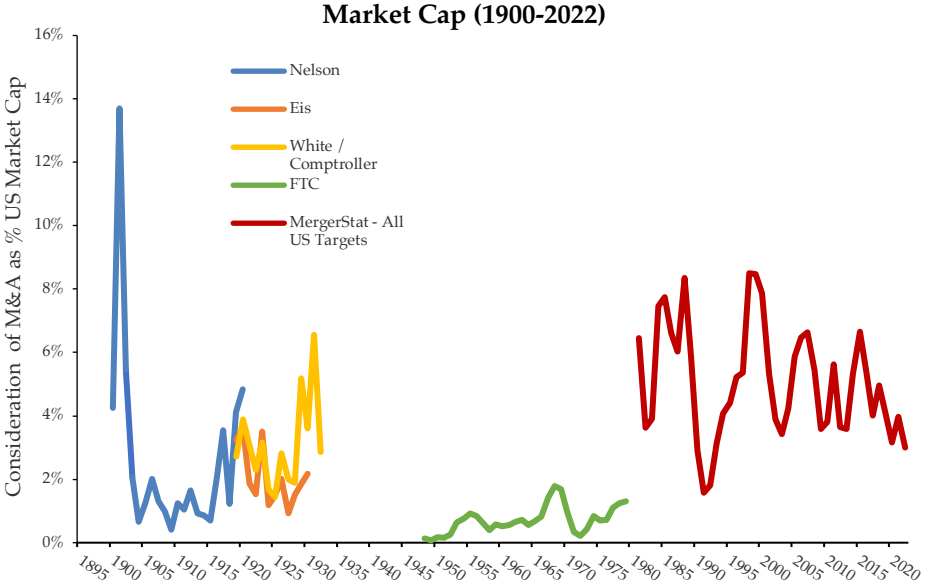


Figure 3: Ratio of M&A Consideration (in $M) to S&P Index (1985-2022)

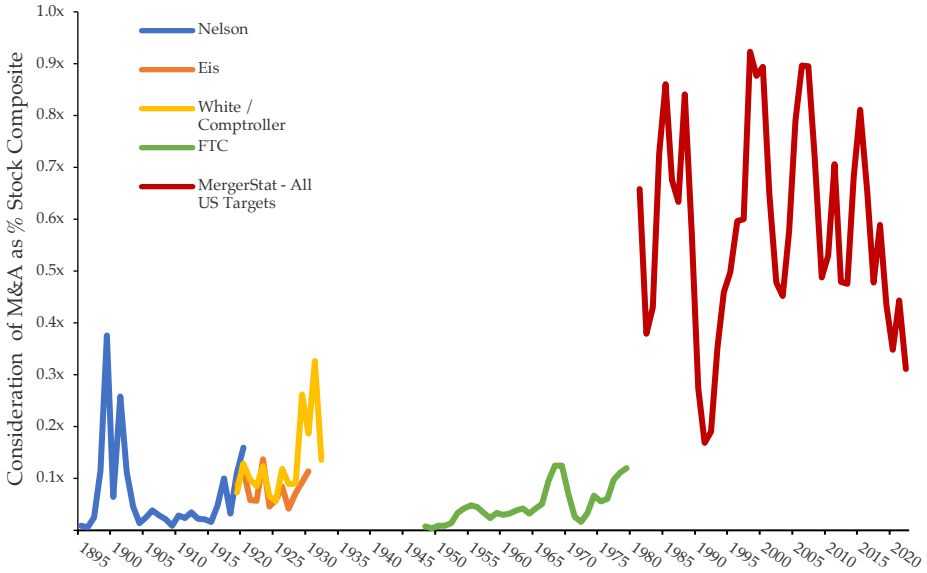
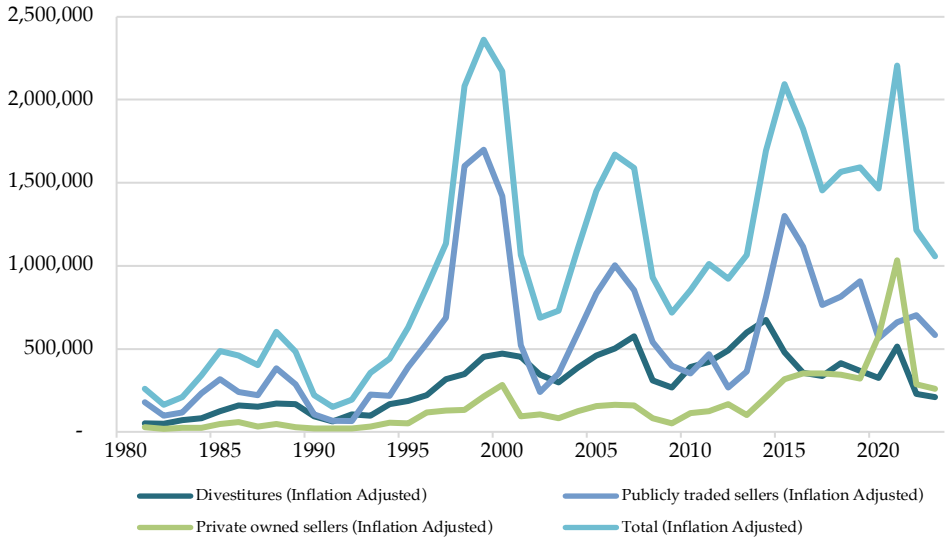


Figure 4: M&A Announcements (1980-2022) Total and Composition
(in $ M, inflation adjusted; base period: December 2022)



The pattern that emerges is striking: In the twentieth century we see merger waves that peak and subside, "Himalayan bursts." In the twenty-first century we see continuous merger activity that fluctuates from a persistently high base that in some prior periods would have been taken as evidence of a "wave." In prior periods of economic disruption (stock market crashes and panics, recessions, the Great Depression), M&A activity went nearly to zero for an extended period. In the twenty-first century, even during the Global Financial Crisis of 2007-09 and the Covid crisis of 2000-21, M&A activity was, by historical standards, robust.

Now turn to Figure 4, which tracks M&A activity from 1980 to 2022 based on a continuous data source, Mergerstat. Figure 4 not only provides an inflation-adjusted level of the dollar value of M&A activity over the 1980-2022 period, but it also breaks the data down in terms of the type of transaction that is generally lumped in "M&A." We are then able to look at the level of transactions with public sellers separately from that of private sellers and divestitures.[43] The predominance of public firm sellers shows that classic M&A drives the post-2000 persistence. Golden parachutes are a general feature of public firm sellers and are not typically important elements for the other transactions that are included in M&A statistics.[44]

In the twenty-first century, M&A activity is a persistent feature of the economic landscape. Measured in terms of GDP (Figure 1), the low point of M&A activity in the twenty-first century equals the high point of M&A activity over the long period 1895–1999, except for (i) the initial M&A burst of the "Great Merger Wave" at the end of the nineteenth century and beginning of the twentieth century, (ii) a brief spike of M&A activity in the 1920s following liberalization of national bank mergers, and (iii) a peak in the 1990s driven by the internet-crazed Time-AOL combination.[45] Measured in terms of stock market capitalization (Figure 2), twenty-first century M&A activity seems to lose its wave-like characteristic. Instead, a high level of activity persists over a two-decade period, an important ongoing economic activity with fluctuations. Measured in terms of the composite stock index (Figure 3), the high point of twenty-first century M&A activity exceeds the high point of prior M&A activity, except for the 1990s internet peak. Its low point exceeds almost all preceding high points, and its

43. In Appendix II we provide a table with unadjusted values (II.A) and volume (II.B) for each category over the 1980-2022 period. This table compiles data from several separate Mergerstat volumes over the period. Although Mergerstat reports total M&A activity beginning as of 1967, the classification series began only in 1980, when "bust-ups" became more common. The increase in private acquisitions beginning around 2013 presumably reflects the growth of private equity beginning in 2010. *See* Sebastian Segerstrom, *A Decade of Growth for U.S. Private Equity*, FACTSET INSIGHT (Apr. 8, 2020), https://perma.cc/75UZ-YQT9.

44. *See*, *e.g.*, Lucian Bebchuk, Alma Cohen & Charles C.Y. Wang, *Golden Parachutes and the Wealth of Shareholders*, 25 J. CORP. FIN 140 (2014) (excluding spinoffs from M&A set).

45. *See* Arango, *supra* note 1 (AOL acquires Time Warner for $165 billion; the total deal value was $350 billion, "the largest merger in American business history").

persistent importance is manifest.[46]

B. Twentieth Century Waves

The twentieth century waves corresponded to significant changes in the environments in which companies operated.[47] The Great Merger Wave (1895–1904) was triggered by changes in transportation, telecommunications, and technology, and population growth and spread. This is not to deny the self-interested energy of the transaction promoters, nor the speculative opportunities of newly developing stock markets. Nevertheless, powerful economic logics were at work. A "second industrial revolution" enabled the possibility of wide geographic distribution of centrally produced manufactured goods and the follow-on mergers resulted in the first national industrial firms in the US.[48] This development was profound, because it changed the nature of the US economy away from local enterprise towards national enterprise.

The historiography seems divided into two camps about the sources of merger gains in the Great Merger Wave and thus the driving factors. One camp, famously associated with Naomi Lamoreaux,[49] sees this M&A activity as driven by the need to control what otherwise would be ruinous competition because of economic structure of industrial enterprise: high fixed costs, much lower marginal costs. The Sherman Act

46. Figures 1A, 2A, and 3A in Appendix I show qualitatively the same pattern when M&A activity is adjusted to subtract out acquisitions of US target by foreign acquirors. The lower (gray) line eliminates foreign acquirors from the measure of M&A activity. This shows that post-2000 M&A persistence is not driven by new foreign entrants. Figure 4A, focusing exclusively on the post-1981 data, shows this is case using amounts paid (adjusted for inflation). Similarly the evidence is that entry by PE is not the driver of post-2000 persistence. Analyses by Bain & Company show the limited role of PE activity in large public M&A transactions over the post-2000 period. *See* Bain & Company, GLOBAL PRIVATE EQUITY REPORT 2019, at 7, fig. 1.5, https://perma.cc/C77F-7N4T (showing varying patterns of North American public-to-private deal activity and relatively low post-2007 PE acquisition of such firms); Bain & Company, GLOBAL PRIVATE EQUITY REPORT 2025, at 11, fig. 7, https://perma.cc/2W6B-YPB4 (showing a very small number of large public-to-private PE deals post-2008).

47. The idea of merger "waves" is contested by some; see, e.g., Michael Gort, *An Economic Disturbance Theory of Mergers*, 83 Q. J. ECON. 624 (1969), but nevertheless seems well-established in the literature. *See*, *e.g.*, Devra L. Golbe & Lawrence J. White, *Catch a Wave: The Time Series Behavior of Mergers*, 75 REV ECON. & STAT. 493 (1993). For a survey, see Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 2148 (2008).

48. *See generally* Jesse Markham, *Survey of the Evidence and Findings on Mergers*, in BUSINESS CONCENTRATION AND PUBLIC POLICY 156-157 (1955) (integration of transportation networks with resulting reduction in transportation costs enabled utilization of scale economies).

49. *See* Naomi R. Lamoureaux, THE GREAT MERGER MOVEMENT IN AMERICAN BUSINESS, 1895-1904 (1985); George Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. PAPERS PROCEEDINGS 23 (1950).

(1890) ruled out price-fixing agreements through cartels but pricing decisions internal to a single firm were not forbidden "contracts" or "conspiracies."[50] This in turn stimulated horizontal combinations. Indeed, it was initially unclear whether the Sherman Act applied to mergers.[51]

Another camp sees the transactions of the Great Merger Wave as efficiently pursuing economies of scale in light of the new opportunities opened up by the transportation network in particular[52] and the diffusion of the "general purpose technology" of electricity.[53] Alongside both camps is belief that M&A activity was driven by the promoters, fee-focused transaction intermediaries.[54] My assumption would be that all such factors are at work. In any event, the Great Merger Wave came to an end with the economic instability associated with gyrating stock markets and recessionary pressures in the 1900s. Also playing a role was the 1904 Supreme Court decision in *Northern Securities Co. v. U.S.*,[55] which held that the Sherman Act did indeed apply to mergers, especially those that had monopolization as a driving force.

A second merger wave arose in the 1920s, seemingly due to two primary factors. The first is the consolidation of manufacturing concerns into industry groups of limited players, what George Stigler has characterized as "merger for oligopoly."[56] The prevailing antitrust focus made it easier to aim for market power rather than monopoly and to seek efficiencies through vertical rather than horizontal acquisitions.[57] An alternative account describes such mergers as efficiently expanding

50. *See*, *e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 319, 369 (1897); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1897).

51. United States v. E.C. Knight Co., 156 U.S. 1, 34 (1895) (creating "interstate commerce" requirement for Sherman Act enforcement). *See also* George Bittlingmayer, *Did Antitrust Policy Cause the Great Merger Wave?*, 28 J. L. & ECON. 77, 86-92 (1985); *see generally* Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST J. 1, 6-7 (2003) (citing cases and secondary literature).

52. *See*, *e.g.*, Markham, supra note 48.

53. Boyan Jovanovic & Peter L. Rousseau, *Mergers as Reallocation*, 94 REV. ECON. & STAT. 765, 765 (2008).

54. *See* Malcom Salter & Wolf Weinhold, MERGER TRENDS AND PROSPECTS FOR THE 1980'S (1980) ("Many have noted that this merger wave accompanied a frenzied stock market and aggressive promotional activities by bankers and brokers. J. P. Morgan, for example, is estimated to have earned over $60 million for his efforts in the consolidation of U.S. Steel"), *quoted in* Ronald J. Gilson & Bernard S. Black, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 14 (2d ed. 1995).

55. 193 U.S. 197 (1904).

56. *See* Stigler, *supra* note 49.

57. Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880-1960*, 95 IOWA L. REV. 863, 879-80 (2010) (the original Clayton Act did not reach vertical transactions, especially if conducted through asset purchases); Carol Eis, *The 1919-1930 Merger Movement in American Industry*, 12 J. L. & ECON. 267, 285-89 (1969). Markham, supra note 47, at 169-72 (disputes the merger for oligopoly rationale); *see generally* J. Rody Borg, Mary O. Borg, & John Leeth, *The Success of Mergers in the 1920s*, 7 J. IND. ORG. 117 (1989)

the boundaries of the firm in light of changes in the relative costs of transacting across markets (or through long-term contracts) versus within a single firm, in light of prevailing technologies of production.[58] A second M&A driver of the 1920s wave is one that particularly related to financial firms, namely, the adoption of a legislative and regulatory pathway for the smooth merger of national banks.[59] To be sure, the speculative stock market activity of the 1920s fueled the wave, as it invariably does. That speculation came to an abrupt end in 1929.

The third wave, later known as the conglomerate wave that began in the 1950s and crested in the 1960s, arose under the influence of a particular antitrust strategy but more importantly in pursuit of economic theories about value creation through financial structure and scope economies through professional management. The Cellar-Kefauver Act of 1950 reached a broad range of M&A activity short of "dominance" and was used by aggressive antitrust enforcers to challenge vertical as well as horizontal transactions with considerable success in the courts.[60] Some argue that acquisitive CEOs therefore inclined to acquisitions of unrelated companies, creating conglomerates.[61]

The motives of empire-building CEOs, of course, played a large role in the story,[62] but there were particular economic logics as well. First was a finance-based logic—diversified firms are less risky than focused firms and therefore should trade at a higher price. Second was a scope-based logic—sophisticated headquarters management could monitor managerial performance at the subsidiary level and could allocate investment capital within the conglomerate better than external labor and

(rollback of antitrust enforcement; improved scope economies facilitate the 1920s merger wave).

58. *See*, *e.g.*, Oliver Williamson, MARKETS AND HIERARCHIES ANALYSIS AND ANTITRUST IMPLICATIONS (1975); Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

59. *See* Eugene Nelson White, *The Merger Movement in Banking, 1919–1933*, 45 J. ECON. HIST. 285 (1985).

60. William A. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 51-52 (2000).

61. This debate is surveyed in John G. Matsusaka, *Did Tough Antitrust Enforcement Cause the Diversification of American Corporations*?, 31 J. FIN. QUANTITATIVE ANALYSIS 283 (1996), which disputes the hypothesis on the basis of the composition of M&A activity in the period (no bias in favor of small vs. large horizontal mergers) and similar diversification patterns in countries not subject to US antitrust law). For a contemporaneous evaluation of the impact of antitrust enforcement on conglomerate mergers, see Harlan M. Blake, *Conglomerate Mergers and the Antitrust Laws*, 38 COLUM. L. REV. 555 (1973) (weak antitrust efforts against conglomerate mergers).

62. *See* Dennis C. Muller, *A Theory of Conglomerate Mergers*, 83 Q. J. ECON. 643 (1969) (analyzing this debate).

capital markets.[63] The conglomerate wave peaked in 1967–1969.[64] The conglomerate organizational experiment was subsequently deemed a failure because the economic logics failed.[65] Shareholders could build fully diversified portfolios of separate firms that provided superior risk-reduction without the performance overhang of headquarters management. Centralized oversight of many unrelated businesses commonly created negative synergies. In fact, external labor and capital markets were generally better at evaluating managers and allocating capital than the internal markets of a sprawling conglomerate.

The fourth merger wave, the so-called "Deal Decade" of the 1980s,[66] was triggered by a coalescence of several factors: (1) Deregulation at the end of the 1970s in transportation (trucking, railroads, and airlines), wholesale natural gas, and telecommunications; (2) dislocations from the oil price shocks of the 1970s; (3) the success of foreign competitors that suggested "slack" in the management of many US companies, and, most notably, (4) the negative synergies, including accounting manipulations, [67] of the preceding conglomerate wave that produced an unprecedented number of divestitures.[68] Another contributor was persistent capital market innovation that opened up new sources of debt finance for highly leveraged transactions.[69] The decade became known for hostile bids—nearly a quarter of large public companies received an unsolicited offer [70] —even though most actual

63. *See generally* Gilson & Black, supra note 54, at 310-57. *See also* Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices*, 59 STAN. L. REV. 1465, 1513 & nn.183-84 (2007).

64. *See* Claire A. Hill, Brian JM Quinn & Steven Davidoff Solomon, *Mergers and Acquisitions: A Cyclical and Legal Phenomenon*, in RESEARCH HANDBOOK ON MERGERS AND ACQUISITIONS 13, 21 (Steven Davidoff Solon & Claire A. Hill eds., 2016).

65. Gilson & Black, *supra* note 54 (citing and discussing literature). *See also* Andrei Schleifer & Robert W. Vishny, *The Takeover Wave of the 1980s*, 249 SCI. 745, 746 (Aug. 17, 1990).

66. Margaret Blair, THE DEAL DECADE: WHAT TAKEOVERS AND LEVERAGED BUYOUTS MEAN FOR CORPORATE GOVERNANCE (1993); Shleifer & Vishny, *supra* note 65.

67. *See* Peter Steiner, MERGERS, MOTIVES, EFFECTS, POLICIES 103-19 (1975), *quoted in* Gilson & Black, *supra* note 54, at 556-61.

68. *See* Gordon, *supra* note 63, at 1521-22; Ronald J. Gilson & Bernard S. Black, 2003-2004 SUPPLEMENT TO THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 16, Fig. 1-5; Gregor Andrade, Mark Mitchell & Erik Stafford, *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSP. 103, 108 (2001).

69. *See generally* Eric S. Rosengren, *The Case for Junk Bonds*, NEW ENGLAND ECON. REV. 40 (1990).

70. Mark L. Mitchell & J. Harold Mulherin, *The Impact of Industry Shocks on Takeover and Restructuring Activity*, 41 J. FIN. ECON. 193, 199 (1996). Looking at a broader market definition, Anrade et. al estimate that 14% of public firms received a hostile offer. Gregor Andrade, Mark Mitchell & Erik Stafford, *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSP. 103, 106 (2001).

transactions were "friendly."[71]

This wave was a powerful one. Measured as a ratio of M&A consideration to total stock market capitalization, the 1980s wave was greater than preceding waves except for the Great Merger Wave. This wave ended as the ambition to do deals exceeded common sense, as reflected in the extravagant bidder overpayment for RJR Nabisco[72] and in the collapse of a proposed leveraged buyout of United Airlines, an airline whose exposure to the business cycle was the antithesis of a steady cash flow to cover repayment of interest and principal.[73] The fourth wave came to a decided halt with the recession of 1990-91.

The fifth merger wave, starting roughly in 1993, was associated with the pursuit of scale in light of the rapid increase in the globalization of trade and finance, the invention and development of the internet, and a robust bull market that enabled an expansive use of equity as acquisition consideration.[74] Globalization in the production and trade of manufactured goods (versus commodities), deregulation, technological innovation, and optimism propelled "expansionary" acquisitions focused on growth.[75] Transactions in the internet space were fueled by "irrational exuberance"[76] in stock market valuations as well as a strong belief in the economics of first-mover advantage and increasing returns to scale. The bull market made stock an appealing acquisition currency.[77] As an illustrative example, the AOL-Time Warner acquisition announced

71. Often the difference between assessing a deal as "friendly" versus "hostile" is just a matter of when the proposed transaction became public. G. William Schwert, *Hostility in Takeovers: In the Eyes of the Beholder?*, 55 J. FIN. 2599, 2599 (2000).

72. *See* In re RJR Nabisco, Inc. Shareholders Litigation, 1989 WL 7036 (Del. Ch. Jan. 31, 1989); Floyd Norris, *Fund Books Loss on RJR: A Long Chapter Ends for Kohlberg Kravis*, N.Y. TIMES (Jul. 9, 2004).

73. Agis Salpukas, *Group Fails to Finish UAL Deal*, N.Y. TIMES (Oct. 14, 1989); Steven Mufson, *Breakdown of a Buyout*, WASH. POST (Oct. 28, 1989).

74. *See* Greg N. Gregoriou & Luc Renneborg, *Understanding Mergers and Acquisitions: Activity Since 1990*, in INTERNATIONAL MERGERS AND ACQUISITIONS ACTIVITY SINCE 1990 3-4 (2007); Bengt Holstrom & Steve Kaplan, *Corporate Governance and Merger Activity in the United States: Making Sense of the 1980s and the 1990s*, 15 J. ECON. PERSP. 121, 140 (2001).

75. Gregor Andrade & Erik Stafford, *Investigating the Economic Role of Mergers*, 10 J. CORP. FIN 1 (2002).

76. Alan Greenspan, Chairman, Fed. Res. Board, Remarks at the American Enterprise Institute for Public Policy Research: The Challenge of Central Banking in a Democratic Society (Dec. 5, 1996). Greenspan's efforts to use monetary policy to sustain financial stability led to the assumption of a "Greenspan put," after which "market participants expected the Fed to support asset prices by lowering the policy rate whenever markets tanked, but not try to prick a bubble." James A. Dorn, *Reflection on Greenspan's "Irrational Exuberance Speech" After 25 Years,* CATO INSTITUTE (Dec. 27, 2021), available at https://perma.cc/W4PE-35YW.

77. *See* Jarrard Harford, *What Drives Merger Waves?*, 77 J. FIN. ECON. 529, 532 (2005) (importance of access to external finance as well as industry shocks in merger wave); Andrei Shleifer & Robert Vishny, *Stock Market Driven Acquisitions*, 70 J. FIN. ECON. 295, 302

in January 2000, was the largest M&A deal in American business history. When it was announced that AOL stock was to be used as consideration, it was initially celebrated for its boldness.[78] Then came the bursting of the dot-com bubble, bringing the fifth wave to an end in 2000. The event led to a significant stock market decline, a follow-on recession, and the shock of the attack on the World Trade Center.[79]

C. Twenty-First Century M&A Persistence

What's notable and important, however, is that the fall off in the aftermath of the fifth wave was quite partial. M&A activity declined from $1.7 trillion in 2000 to $500 billion at the trough in 2002 (in 2005 dollars); in that same period, the number of acquisitions fell from approximately 9,000 to 7,000.[80] Yet these are M&A levels that would have signaled a "wave" in prior period. Moreover, M&A activity immediately rebounded to over $1.1 trillion just three years later. Even during the Global Financial Crisis in 2007–2009, M&A activity never dipped below $500 billion. The announced transactions during that period, even at the 2009 low point, clocked in at approximately $511 billion (in 2005 dollars). M&A momentum increased throughout the 2010s and remained high even during the COVID-19 pandemic (2020–2021), with over 12,000 deals and over $1 trillion (in 2005 dollars) in consideration. The post-2000 persistence of a high level of M&A activity is the change from the prior pattern of "waves."

II. THE TRANSFORMATION OF GOLDEN PARACHUTES FROM INSURANCE TO INCENTIVE (AND FROM GOLDEN TO PLATINUM)

A. History and Purpose of the Golden Parachute

A "golden parachute" is an element of CEO compensation that generally pays out upon the "double trigger" of the CEO's firm becoming subject to a "change in control" transaction followed by the CEO's departure, pursuant to a formal "request" or

(2003).

78. AOL and Time Warner Link, Salomon Smith Barney Report (Mar. 22, 2000) ("proposed merger . . . should create the defining media and communications company of the Internet era . . . and the world's leading combination of content, distribution, Internet experience and broadband assets") (on file with author). The value of the stock used as consideration was $182 billion! In the same period, WorldCom announced an acquisition of Sprint valued at $115 billion; that transaction ran afoul of antitrust enforcers and never closed.

79. Martynova & Renneboog, *supra* note 47.

80. The figures in this paragraph are drawn from Appendix II A. and B., which provide the Mergerstat data on deal values and volume over the 1981-2022 period.

otherwise (other than for cause).[81] Golden parachutes came into increasing use in CEO compensation during the 1980s, as hostile takeovers became increasingly common.[82] In the executive compensation literature, the "parachutes" have been rationalized on two different grounds. The first is an insurance rationale, a form of "efficient contracting." CEOs make large firm-specific investments. If the firm is taken over, those investments are written down, and it is likely that the CEO's next best job will be at much lower compensation. Although employees who are laid off in a merger may suffer similar losses (and do not get such insurance), the market for CEOs is much tighter. The alternative to such insurance would be much higher compensation on an annual basis, a form of CEO self-insurance.[83]

The second ground is a managerial agency cost rationale. At the time parachutes were inaugurated, CEOs had considerable power to resist an unsolicited bid. This stemmed from their relationship with the directors, most of whom, at the time, were selected by the CEO, and the costly uncertainty (to the acquiror) associated with an uncooperative CEO.[84] Moreover, over the course of the 1980s, the Delaware courts validated many far-reaching target defensive measures, culminating in judicial approval of the poison pill and the "just say no" defense.[85] Charitably, the parachute was an "incentive alignment" mechanism of the interests of the CEO and the

81. Early versions of the golden parachute were so-called "single trigger," meaning that a sale triggered the payment even if the target CEO remained in place. Later versions are typically "double trigger," requiring both the sale of the company *and* "termination without 'cause' or 'resignation for good reason.'" Stephen W. Fackler & Michael Collin, *Golden Parachute Practice Pointers*, HLS FORUM ON CORP. GOV. (Aug. 2, 2013), https://perma.cc/E8PP-U4JJ. But in a recent survey, single trigger provisions were found in 20% of the largest market capitalization firms. Alvarez & Marsal, 2023/2024 EXECUTIVE CHANGE IN CONTROL REPORT, https://perma.cc/LQ7L-AAN9.

82. *See*, *e.g.*, Craig E. Lefanowicz, John R. Robinson & Reed Smith, *Golden Parachutes and Managerial Incentives in Corporate Acquisitions: Evidence from the 1980s and 1990s*, 6 J. CORP. FIN. 215, 217 (2000) ("Although less than 20% of the managers of target firms had GPs in the early 1980s, almost 86% of the managers of target firms had GP contracts in 1995"). Rather remarkably, until the 1980s CEOs of most major corporations served "at will." Kenneth C. Johnsen, *Golden Parachutes and the Business Judgment Rule: Toward a Proper Standard of Review*, 94 YALE L. J. 909, 909 n. 5 (1985) (citing sources). This institutional fact, a testament to the fact of an Imperial CEO, is a baseline for measuring the shock of the hostile deal era that followed.

83. In the early 1980s, a different rationale was current: that the golden parachutes were a kind of settling up for prior periods of under-compensation, a deferred compensation payment. This was a rationale explicitly rejected in the Conference Committee Report associated with the legislation that effectively capped golden parachute payments. *See* H.R. Rep. No. 90-861, at 852 (2d Sess. 1984), https://perma.cc/M9LG-J7XM. Joint Tax Committee (1984) developed an efficiency-based rationale against parachutes.

84. *See*, *e.g.*, Johnsen, *supra* note 82 (writing as if the choice of whether to resist was the CEO's, not the board).

85. *See* Jeffrey N. Gordon, *Is Corporate Governance a First Order Cause of the Current Malaise?*, 6 J. BRITISH ACAD. 405, 417 (2018).

shareholders. Less charitably, the pill could be styled as the shareholder buyback of the takeover resistance endowment granted to managers by the Delaware courts, which were concerned that a more rigorous approach might trigger an exodus from Delaware to a more protective jurisdiction.[86]

Rather remarkably, the golden parachute was initially categorized as a management "entrenchment" device, included in the well-known corporate governance "G-index" of Gompers-Ishii-Metrick (2003),[87] and surviving a sophisticated lawyers' cut in the "E-index" of Bebchuk-Cohen-Ferrell (2008).[88] An extensive empirical literature debated whether adoption of golden parachute increased or decreased the value of the firm.[89] The literature now seems to have resolved in favor of the view that the presence of a golden parachute increases the likelihood of a takeover in a way that is economically measurable and statistically significant.[90]

86. *See* Wachtell, Lipton, Rosen & Katz Memo to Clients, "You Can't Say No in Delaware No More" (Dec. 17, 1988) (objecting to Chancery Court decisions that supported shareholder choice over board choice in responding to a hostile bid and threatening to "leave. . . Delaware for a more hospitable state of incorporation"), *quoted in* Gordon, *supra* note 15, 1959, n. 95.

87. Paul A. Gompers, Joy L. Ishii & Andrew Metrick, *Corporate Governance and Equity Prices*, 118 Q. J. ECON. 107, 148 (2003).

88. Lucian A. Bebchuk, Alma Cohen & Allen Ferrell, *What Matters in Corporate Governance?*, 22 REV. FIN. STUD. 783 (2009). I think there was some mingling of "entrenchment," which suggests augmentation of managerial power to resist a bid, and corporate governance "quality," which could include "slack" that doesn't impede a determined bidder.

89. *See*, *e.g.*, Damian J. Mogavero & Michael F. Toyne, *The Impact of Golden Parachutes on Fortune 500 Stock Returns: A Reexamination of the Evidence*, 34 Q. J. BUS. & ECON. 30 (1995) (finding significantly negative abnormal returns associated with the announcement of parachute adoption); Lane Daley & Chandra Subramanian, *Free Cash Flows, Golden Parachutes, and the Discipline of Takeover Activity* (Oct. 1995), available at https://ssrn.com/abstract=7113; Harbir Singh & Farid Harianto, *Management-Board Relationships, Takeover Risk, and the Adoption of Golden Parachutes*, 32 ACAD. MGMT. J. 7 (1989); James Wade, Charles A. O'Reilly III & Ike Chandratat, *Golden Parachutes: CEOs and the Exercise of Social Influence*, 35 ADMIN. SCI. Q. 587 (1990) (showing that entrenched managers adopt golden parachutes to thwart takeovers). Early golden parachutes consisted principally of a salary multiple.

90. *See* Jonathan M. Karpoff, Robert Schonlau & Eric Wehrly, *Which Takeover Provisions Deter Takeovers*?, 75 J. CORP. FIN. 102218, Tables 4, 7 & 8 (2022). Many researchers have found that takeover likelihood is positively related to the use of golden parachutes. *See*, *e.g.*, Anup Agrawal & Charles R. Knoeber, *Managerial Compensation and the Threat of Takeover*, 47 J. FIN. ECON. 219 (1998); Judith C. Machlin, Hyuk Choe & James A. Miles, *The Effects of Golden Parachutes on Takeover Activity*, 36 J. L. ECON. 861 (1993); Tatyana Sokolyk, *The Effects of Antitakeover Provisions on Acquisition Targets*, 17 J. CORP. FIN. 612 (2011); M. Sinan Goktan & Robert Kieschick, *A Target's Perspective on the Effects of ATPs in Takeovers After Recognizing Its Choice in the Process*, 18. J. CORP. FIN. 1088 (2012); Sattar Mansi, John K. Wald & Andrew Zhang, *Severance Agreements and the Cost of Debt*, 41 J. CORP. FIN. 426 (2016); Bebchuk, Cohen & Wang, *supra* note 44; M. Sinan Goktan, Robert Kieschnick &

B. Significance of the Golden Parachute

Analysis of the impact of the golden parachute on M&A begins with the observation that the golden parachute of the 1980s is quite different in substance and rationale from the golden parachute of the 2000s.[91]

The payoff of the original golden parachute was styled as a multiple of current salary and expected bonus. The parachute contract also called for the acceleration of unvested stock options, but since stock options were then such a minor part of compensation,[92] the parachute payment was framed almost entirely in terms of prior cash compensation. After public reaction to some large parachute payments, [93] Congress placed a soft cap of "less than 3x" prior compensation, prescribing that excess payments would not be deductible to the corporation and would be subject to a twenty percent excise tax on the recipient executive. Though excess payouts were legal, if more costly, the statutory provision became the conventional payout.[94] The

Rabih Moussawi. *Corporate Governance and Firm Survival*, 53 FIN. REV. 209 (2018). This itself reflects the different function that golden parachutes have come to play, as discussed below.

91. This is true of many devices fashioned as an anti-takeover devices. The poison pill, for example, adds the friction of needing to package a proxy contest threat alongside a cash tender offer, but in the absence of a classified board, see *Air Products/Air Gas*, will be insufficient to block a hostile bid. Instead, the poison pill now serves to give management control over the sale process in friendly transactions, preventing contending bidders from gun-jumping the company's structured auction process with cash tender offers. Managements are trying to repurpose the poison pill to fend off shareholder activists, a context quite different from the "boot-strapping bust-ups" of the 1980s that spurred their creation. *See* Jeffrey N. Gordon, *The Rejected Threat of Corporate Vote Suppression: the Rise and Fall of the Anti-Activist Pill*, 2022 COLUM. BUS. L. REV. 206 (2022).

92. Kevin J. Murphy, *Executive Compensation: Where We Are, and How We Got There*, 2 HANDBOOK OF THE ECON. FIN. 211, 278-82 (2013).

93. *See* Peer C. Fiss, Mark T. Kennedy & Gerald F. Davis, *How Golden Parachutes Unfolded: Diffusion and Variation of a Controversial Practice*, 23 ORG. SCI. 1077, 1079-1080 (2012); Murphy, *supra* note 92, at 269 (describing the golden parachute for William Agee following the 1982 Bendix takeover fight).

94. Some objected that the 3x cap now set a baseline which, in many cases, increased the payout that would otherwise have obtained (much like other excess compensation thresholds have set floors). *See, e.g.*, David I. Walker, *A Tax Response to the Executive Pay Problem*, 93 B.U. L. REV. 325, 332-34 (2013); Lucian A. Bebchuk & Jesse M. Fried, *Executive Compensation as an Agency Problem*, 17 J. ECON. PERSP. 71, 72 (2003). Indeed, Kevin Murphy reports that adoption of the golden parachute tax provisions triggered proliferation of golden parachute agreements. In the 1984-1987 period, prevalence increased from "rare" to 41% of the 1000 largest corporations. Murphy, *supra* note 92, at 270. Of course, the hostile takeover market was booming in the period, so that might have driven adoptions.

early empirical literature on golden parachutes used a 2.9x payout as the benchmark and largely ignored option exercises.[95]

Two important changes occurred over the 1990s that transformed the nature of golden parachutes. First, the composition of executive compensation became increasingly dominated by stock-based pay—stock options and restricted stock.[96] Executives entered into multi-year contracts with a large option or restricted stock component that vested over time, with the vesting often performance-based. Such compensation was promoted as better aligning management's interests with the shareholders' in the operation of the firm. This would ameliorate agency cost problems. The heavy use of stock options was also seen as competitively necessary to hold onto executives who otherwise would defect to the newly emerging dot-com companies, which were offering stupendous option grants since they were cash-poor.[97] Stock options also received favored regulatory treatment: As a tax matter, stock option-based compensation was regarded as "performance based," and, thus, not subject to the $1 million deductibility limit on cash compensation set in 1993.[98] As an accounting matter, stock options were initially "free"; until an accounting standard change in 2006, they could be issued without any charge to reported earnings.[99]

Second, paradoxically, golden parachutes became more entrenched over the 1990s despite the increasingly diminished capacity of managements to resist an unsolicited premium bid. The reduction in managerial prerogative resulted from internal corporate governance changes, as well as the increasing reconcentration of share ownership in institutional investor hands. Directors became increasingly independent-in-fact.[100] In part, this was spurred by doctrinal developments in Delaware law. Courts tied a target's entitlement to employ defensive tactics—including the "just say no" version of the poison pill—to approval by independent directors. "Independence" that had to withstand scrutiny militated for greater distance from the CEO and thus became less amenable to reflexive CEO objections to

95. *See* David Offenberg & Micah Officer, *The Totality of Change-in-Control Payments*, 29 J. CORP. FIN. 75, 76 (2014) (existing literature "is almost exclusively focused on traditional golden parachutes paid to departing CEOs (cash awards, usually as a fixed multiple of the CEO's final salary and bonus), ignoring other potentially important forms of change-in-control payments.").

96. Murphy, *supra* note 92. *See also* Brian J. Hall & Jeffrey B. Liebman, *Are CEOs Really Paid Like Bureaucrats*?, 113 Q. J. ECON. 653, 655, 662, 679-80 (1998).

97. Murphy, *supra* note 92.

98. *See* Kevin J. Murphy & Michael C. Jensen, *The Politics of Pay: The Unintended Consequences of Regulating Executive Compensation*, USC Law Legal Studies Paper No. 18-8 (Apr. 18, 2018), available at https://ssrn.com/abstract=3153147 (discussing impact of section 162(m) of the Internal Revenue Code.).

99. *See* Financial Accounting Standards Board SFAS 123(R) (2006).

100. Traced in more detail in Gordon, *supra* note 63, at 1520-23, 1531-33, 1539-40.

a premium offer.[101] Such independence-in-fact was also enhanced by the rise of institutional investor ownership of public companies.[102] Such investors held individual stocks as part of a diversified portfolio of equity securities. Firm-specific monitoring was not economically rational for these investors. So, their focus turned to directors: independence and quality. Better director monitoring of management would serve shareholders' interest at low cost.[103] Corporate governance information intermediaries—the proxy advisors like Institutional Shareholder Services—supplied a form of substituted monitoring of management and director performance.[104]

The combination of ownership reconcentration and greater director independence-in-fact should limit the CEO's power to turn down an unsolicited premium bid. The shareholders were watching. The directors were watching and knew that shareholders with clout were watching. Moreover, the shift to stock-based pay both substantially ameliorated the concern that a target CEO would be undercompensated in a merger transaction and closely aligned management and shareholder interests in responding to an unsolicited offer. In combination, a shift in board monitoring power and better incentive alignment through stock-based pay should have substantially eliminated the risk that the CEO would (or could) thwart an unsolicited premium bid.

C. Changes in and Expansion of Golden Parachutes

Yet, golden parachutes persisted and, as demonstrated by evidence discussed below, became increasingly rich—"platinum"—over the course of the 2000s and 2010s. Why? Persistence is not an uncommon feature, perhaps, of complex relationships. A term, like a parachute provision, becomes part of the "market" contract. So, eliminating it—even if it provides a gratuitous benefit—can be taken as a negative signal of enthusiasm as a board seeks to hire a new CEO. And to some extent the parachute became richer almost mechanically. Executive compensation, especially stock-based pay, ballooned over the period.[105] Since the parachute provided for the acceleration of unvested stock-based pay, as such grants increased, a change in control

101. *Id.* at 1526.

102. *See* Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 874-76, 886-88 (2013).

103. Jeffrey N. Gordon, *Systematic Stewardship*, 47 J. CORP. L. 628, 646 (2022).

104. *See*, *e.g.*, Dorothy Lund & Elizabeth Polman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2594-97 (2021).

105. Lawrence Mishel & Jori Kandra, *CEO Pay Has Skyrocketed 1,322% Since 1978*, ECON. POL'Y INST. (Aug. 10, 2021), https://perma.cc/Z23G-DPEX.

would quite commonly produce a large payout based on the immediate realization of stock-based claims.[106]

Moreover, the parachute payout was further inflated by another change over the period: An increase in the "pay slice" of the CEO (the CEO's share of the total compensation received by C-suite executives).[107] It was not only that management's compensation grew substantially over the 1990s, but that the CEO obtained an increasing fraction. Since compensation over the 1990s increasingly consisted of stock-based pay, the growing CEO slice, in interaction with the acceleration of unvested stock-based grants, would also contribute almost mechanically to a large parachute payout.

The incentive structure of parachutes became more high-powered as well over the 2000s and 2010s. The 2006 accounting rule change that required the expensing of executive stock options also led to the transformation of option grants away from plain vanilla "at the money" options[108] to options with exercise prices that were "out of the money."[109] This added an extra performance element to stock option grants. But it also increased the risk that options would expire out of the money.[110] Pursuit or acceptance of a premium bid would resolve that risk in a high payout way.[111]

Parachutes consciously became richer as well. The large payouts triggered the tax penalties of the 1984 golden parachute provisions. Yet firms absorbed the non-deductibility of the parachute payments. In many cases, parachute provisions were amended to provide recipients with additional compensation to cover the 20% excise

106. This is borne out in Table 1, *infra*, which shows as parachute payout increases, so does the fraction accounted for by the equity-based component. A 2023 survey by Alvarez and Marsal of "Change in Control" benefits for 100 firms in the S&P Composite 1500 Index drawn from four parts of the market capitalization distribution reports that approximately 60% of these benefits were attributable to accelerated vesting of equity awards. Alvarez & Marsal, 2023/2024 EXECUTIVE CHANGE IN CONTROL REPORT, *supra* note 81.

107. *See* Lucian Bebchuk & Yaniv Grinstein, *The Growth in Executive Pay*, 21 OXFORD REV. ECON. POL'Y 283 (2005); Lucian Bebchuk, K.J. Martijn Cremers & Urs C. Peyer, *The CEO Pay Slice*, 103 J. FIN. ECON. 199 (2011).

108. Meaning: The exercise price is the prevailing market price at the time of the grant. Before the 2006 rule change, "at the money" option grants (and only such grants) did not entail a charge to reported earnings.

109. *See* J. Carr Bettis, John Bizjak, Jeffrey Coles & Swaminathan Kalpathy, *Performance-vesting Provisions in Executive Compensation*, 66 J. ACCT. & ECON. 194, 196 (2018) (describing the effect of the adoption of FAS 123(R), which both required companies to expense options but which adopted a valuation formula that favored "out of the money" and other contingent strategies).

110. Mishel & Kandra, *supra* note 105.

111. Over the 2011-2022 period, for what might be called "platinum parachutes"—the top 20% of the parachutes—most of the value comes from the realization of equity (stock and options) as opposed to cash, a median equity-to-cash ratio of 3.3x as opposed to a median of 0.9x for the entire universe. *See infra* note 133, Table 1, and accompanying text.

tax on "excess" parachute payments, and yet more to cover the taxes owing on the excise compensation, a "gross-up."[112] Moreover, as shown by Choi et al. (2020), high-end parachute payments came to set the norm for "quasi-chute" compensation upon a change in control.[113] To explain further: In cases where a particular CEO's originally contracted-for parachute payment would not achieve a deemed "market" level—perhaps because the transaction came late in the stock-based vesting period, leaving not so many stock-based claims to accelerate—the parachute agreement would be amended in this final period to produce a better outcome.

The general increase in CEO compensation, especially in stock-based pay, and the accelerated vesting provisions produced the following result: A transaction that triggered a parachute would transform many CEOs from the merely wealthy to the quite rich.[114] Thus golden parachutes came to have a different function. The original function was to induce an incumbent CEO to stand aside in favor of a premium unsolicited bid or, perhaps, to be a fair evaluator of the bid, debiased by the compensation of a parachute payment. By the 2000s, the magnitude and structure of parachutes produced something different in the CEO's attitude and role. High payoff golden parachutes go beyond securing the CEO's willingness to consider a merger proposal; instead they provide inducement to pursue merger prospects in which the CEO's firm is the target.

Indeed, this change in function is reflected in the empirical work on golden parachutes. Recent work shows that parachutes are positively associated with the likelihood of becoming a target.[115] By contrast, the empirical work of the 1980s and early 1990s was focused on different questions: Whether golden parachutes resolved or exacerbated managerial agency problems associated with confronting an unsolicited bid.[116] As noted previously, the governance index literature initially marked parachutes as an entrenchment device. In contrast, more recent empirical work has a different conclusion: Parachute adoption is a good thing for shareholders,

112. IRC § 4999 imposes the excise tax on an "excess" golden parachute payment. The availability of gross-ups are increasing in deal size, which is not surprising since the value of the appreciated accelerated stock in large deals will commonly exceed the 2.99x salary/bonus threshold. *See* Mark Siciliano, *Analyzing Change-in-Control Payments Since the Enactment of Say-on-Pay*, 50 COMP. & BENEFITS REV. 82, 87, Fig. 3 (2018).

113. Albert H. Choi, Andrew C.W. Lund & Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting*, 73 VAND. L. REV. 223 (2020) [hereinafter Choi et al. (2020)] (discussed at *infra* note 118 and accompanying text).

114. I demonstrate this below with data drawn from the 2010-2022 period, per disclosures now required by the Dodd-Frank Act of 2010. *See infra* notes 132-135 and accompanying figures and text.

115. Eliezer M. Fich, Anh L. Tran & Ralph A. Walking, *On the Importance of Golden Parachutes*, 48 J. FIN. & QUANTITATIVE ANALYSIS 1717, 1718 (2013).

116. *See, e.g.*, Jocelyn Evans, Thomas H. Noe & John H. Thornton Jr., *Regulatory Distortion of Management Compensation: The Case of Golden Parachutes for Bank Managers*, 21 J. BANKING & FIN. 825 (1997); Bebchuk & Fried, *supra* note 94.

apparently through the channel of making a premium takeover more likely.[117] The pivot in the empirical work is not because we have collectively become smarter in understanding how parachutes work. Rather, the parachute today is just different.

The extent of the difference is reflected in a recent article on golden parachutes, *Golden Parachutes and the Limits of Shareholder Voting*.[118] There, Albert H. Choi, Andrew Lund & Robert Schonlau provide a detailed account of the increasing size and leverage of prospective parachute payments over the 2006 to 2016 period, specifically in the context of showing the lack of bite of a shareholder advisory vote on golden parachutes added in 2010 by post-financial crisis legislation. The article also documents how high golden parachute payouts have become a kind of target CEO success fee in connection with a merger.

Choi et al. (2020) exploits two different data sources. The first is the Execucomp compilation of data on Russell 3000 firms that became available beginning 2007 from newly required SEC disclosure, "Compensation Disclosure and Analysis" (CD&A").[119] Among the categories of required disclosure are the terms of golden parachute arrangements. The second source is detailed disclosure about realized golden parachute payments in connection with actual merger transactions. This requirement was added by post-financial crisis legislation, the Dodd-Frank Act (2010),[120] that required a target shareholder advisory vote on the golden parachute payments to be made in connection with a merger, so-called "Say on Golden Parachute ("SOGP").[121]

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117. This is also reflected in a sea of change in shareholder proposals regarding golden parachutes. Once a favorite target of shareholder proposals calling for repeal, by 2009-2010 such proposals had dramatically dwindled to only 11. *See* Karpoff et al., *supra* note 90, at Table 5.

118. Choi et al. (2020).

119. 17 C.F.R. § 229.402. *See* Jeffrey N. Gordon, *Executive Compensation: If There is a Problem, What's the Remedy? The Case for "Compensation Discussion and Analysis,"* 30 J. CORP. L. 675 (2005).

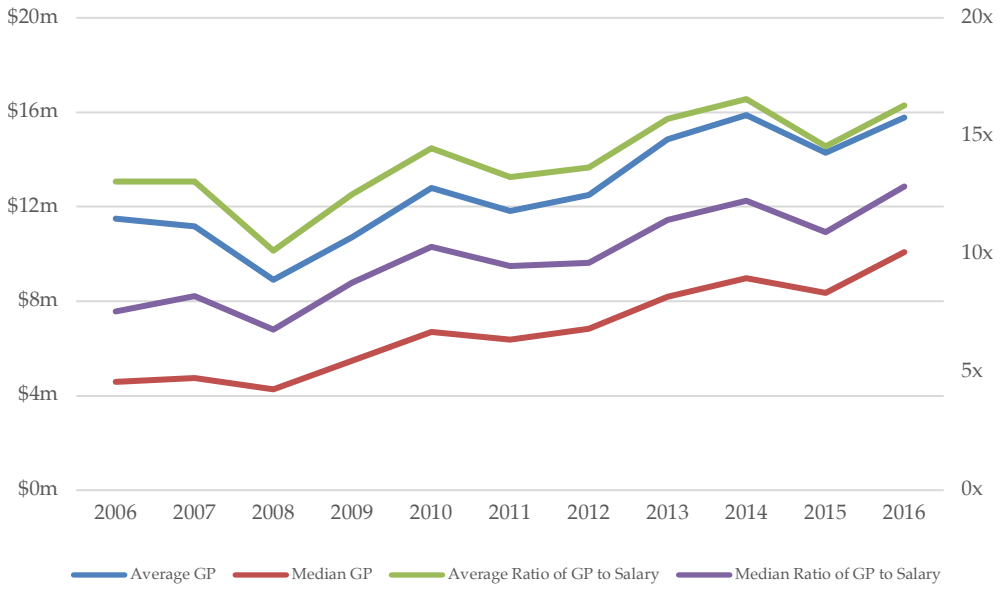
120. More formally, the Dodd-Frank Wall Street Reform and Consumer Protection Act., Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 15 U.S.C. (2012)).

121. *Id.* at § 951. The implementing regulation is Shareholder Approval of Executive Compensation and Golden Parachute Compensation, 76 Fed. Reg. 6010, 6027 (Feb. 2, 2011) (codified at 17 C.F.R. §§ 229, 240, 249). The laws and regulations include (i) Section 951 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat.1376, 1899 (2010) (codified at 15 U.S.C. § 78n-l(b) (2012)) (amending the Securities Exchange Act of 1934 by adding new Section 14A), which requires U.S. public companies to conduct a non-binding shareholder advisory vote on chute payouts in connection with mergers and other significant corporate transactions that are presented to the shareholders for approval, and (ii) Item 402(t) of Regulation S-K, 17 C.F.R. § 229.402(t) (2014), which requires disclosure of any agreement or understanding (written or unwritten) between the target or acquirer and named executive officers of each concerning any type of compensation (current, deferred, or contingent) based on or otherwise relating to the transaction.

So Choi et al. (2020) uses data on pro forma parachute values over the 2006-2016 period and "realized" parachute values over the 2011-2016 period.

The steady increase in the pro forma value of parachutes over the ten-year period 2006–2016 is reflected in Figure 5.[122] The average (mean) parachute value increases from $12 million to $18 million over the period. Also of significance is that the average multiple of parachute payment to salary increases from 14x to 18x. Recall that the initial triggering threshold for the adverse tax result was 3x.

Figure 5: Golden Parachute Values and Ratios



Adapted from Albert Choi, Andrew C.W. Lund, Robert Schonlau, *Golden Parachutes and the Limits of Shareholder Voting*, 73 VAND. L. REV. 224, 257 (2020).

The reported pro forma parachute value from the CD&A data understates a target CEOs expectation in two respects. First, for firms that became targets, Choi et al. (2020) uses the SGOP data to show that the *realized* parachute value was on average (mean) 16.9% higher than the earlier reported pro forma amount. This probably reflects the deal premium on the target stock in the stock-based pay package.[123]

Second, the authors also discover that nearly half the firms that entered into merger agreements in the post-2011 period (after adoption of SOGP) are firms with

122. Figure 5 is adapted from Choi et al. (2020), at 257, tbl. 1, fig. 1.

123. *Id.* at 249.

below average pro forma parachutes.[124] The firms amended their parachutes to bring them up at least to the value of non-amending firms; indeed, for the median firm, exceeding that value by 8%.[125] This suggests that there is such a strong market expectation of a target CEO's reward for a successful merger that, despite the absence of a contractual obligation, the target board enriches the CEO's parachute payout.[126]

Compensation consultant Alvarez & Marsal ("A&M") has produced biannual studies of change-in-control benefits since the advent of the CD&A that is limited to the top twenty firms in ten different business sectors, 200 in all.[127] Over the covered period (2007-2021), the average pro forma parachute is much higher than for the broader set of firms covered in Choi et al. (2020)—more than twice as large. The parachute payment-salary ratio is approximately 11x, slightly lower than for the broader sample. But the absolute value of the parachute is considerably larger, as shown through a comparison of Figures 5 and 6. The Avarez & Marsal data show that that the size of the pro forma parachutes for the largest companies has remained high throughout the post-financial crisis and post-Dodd-Frank SOGP-reform era, trending higher at the end, as the M&A market heated up. Moreover, A&M report in their 2021/2022 survey that 75% of the parachute value derives from the accelerated vesting of equity awards (up from 66% in 2019) and that half of this value derives from the accelerated vesting of performance-based awards.[128]

124. *Id.* at 261, Table 8 (279 targets over the 2011-16 period; the 138 targets that amended their golden parachute ("GP") had Benchmark Year -1 average GPs that were less than the equivalent year GP of the 141 targets that did not amend).

125. *Id.*

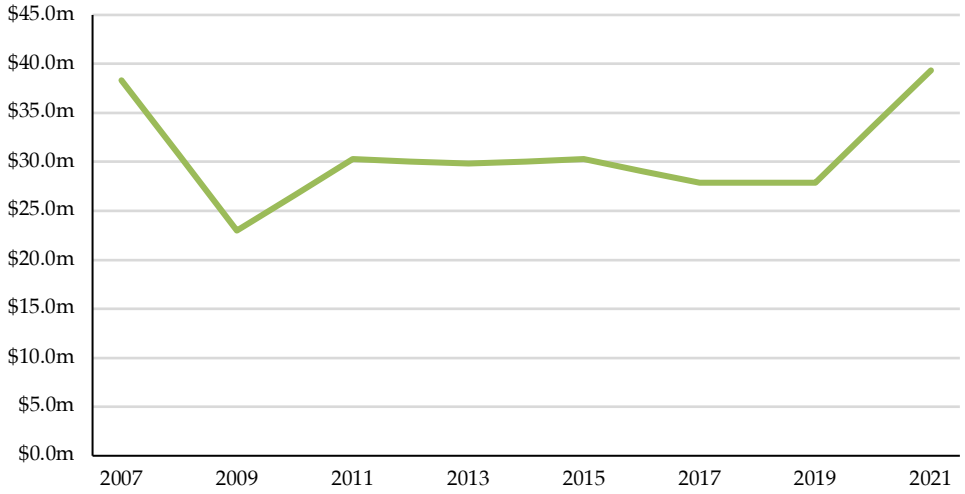
126. Similar observations have been made by public reports of compensation professionals. For example, a recent Alvarez & Marsal study of healthcare industry mergers in the 2013-2017 period showed that 16 of 107 (15%) amended golden parachute agreements in the course of merger negotiations to add tax gross-ups, and they were more structured to be more costly than the unamended version. *See* Alvarez & Marsal, 2017/2018 EXECUTIVE CHANGE IN CONTROL REPORT, https://perma.cc/T2A6-2LP7.

127. *See*, *e.g.*, Alvarez & Marsal, 2021/2022 EXECUTIVE CHANGE IN CONTROL REPORT, *supra* note 39**.** The "top" firms are determined through market capitalization.

128. *Id.*

A&M switches methodology in its 2023/2004 study, evaluating change-in-control benefits for 100 firms in the S&P Composite 1500 but selected into four size-graded buckets of 25 firms each.[129] The most important finding for our purposes is that the average pro forma benefit payout in 2023 for the entire sample is approximately $23 million, consistent with a steady increase in pro forma parachutes from the endpoint in Figure 5. A&M also find that the average pro-forma parachute for "mega-cap" firms in 2023 is approximately $42 million, an increase over the "large company" average in the 2021 biannual survey reflected in Figure 6.

Figure 6: CEO Change in Control Payments – Large Companies



Based on data from Alvarez & Marsal biannual surveys, 2007-2021; research assistant, Greg Zaffino calculations.

Choi et al. (2020) also presents evidence that takeover likelihood is increasing with the size of the target CEOs golden parachute. For firms that became targets in the post-2011 period, the CEO pro forma parachute was significantly higher than the non-target.[130] This is adds an incentive dimension to other recent empirical literature finding a positive influence of parachutes on takeover probability.[131]

The transformation in the golden parachute from its modest origins in the 1980s is perhaps best demonstrated through a close examination of the composition of

129. *See* Alvarez & Marsal, 2023/2024 EXECUTIVE CHANGE IN CONTROL REPORT, *supra* note 81.

130. Choi et al. (2020), at 249. The target proforma was $16.44 million (mean) and $11.53 million (median); for the non-targets, $12.67 million (mean) and $6.59 million (median).

131. *See supra* note 90.

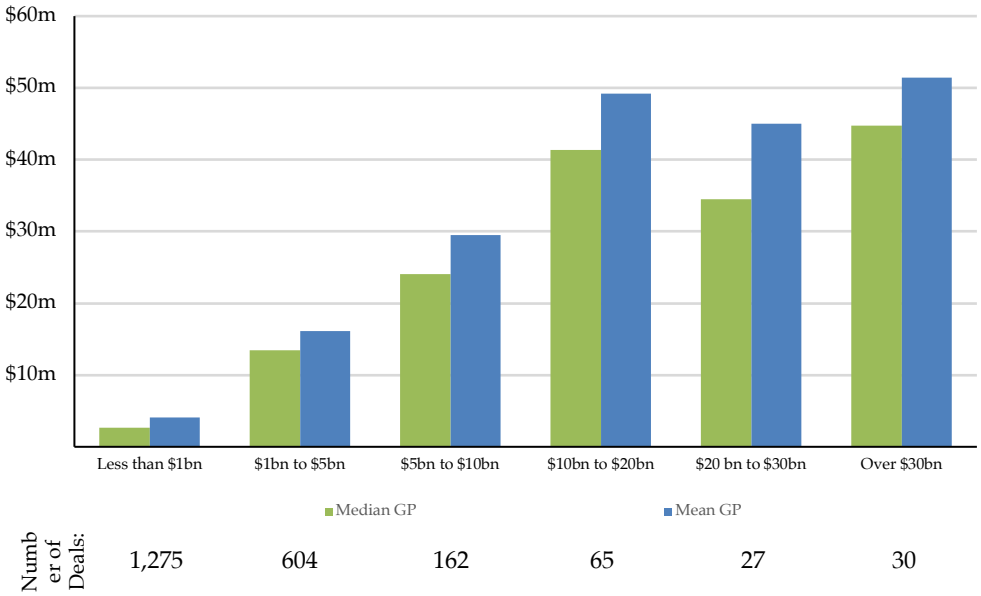
golden parachutes and tracking the very large differences in parachute payments conditional on the size of the M&A transaction. I obtained access to a database of public filings pursuant to the SOGP requirement of the Dodd-Frank Act.[132] The database provides detailed information on realized golden parachutes over the 2011–2022 period—a total of 2,163 transactions.

Per Figure 7, analysis of the data reveals some striking facts. First, the size of parachute payments varies directly with the size of the transaction, ranging from $4.1 million (mean) for transactions under $1 billion to $51.4 million (mean) for transactions of $30 billion or greater. Second, although means are higher than medians, the gap is relatively narrow, meaning that the means generally characterize the group rather than being driven by a few outliers.

Transactions under $1 billion (n=1,275) comprise 59% of all covered transactions during this period. For this group of transactions, golden parachutes were relatively modest, with a $4.1 million (mean). As transactions crossed the $1 billion threshold, the parachutes became meaningfully larger. For transactions ranging between $1 billion to $5 billion (n=604), average payouts were $16.1 million (mean); for transactions between $5 billion to $10 billion (n=162), the average payouts nearly doubled, to $29.5 million (mean). Transactions of $10 billion and above (n=122) seemed to be in a special class, with average payouts of approximately $48 million (mean).

132. The database is maintained by Mark Siciliano of the University of Alabama Culverhouse College of Business. *See* Siciliano, *supra* note 112.

Figure 7: Total Golden Parachute by Deal Size (2011-2022)



Drawn from database maintained by Professor Mark Siciliano ("CEO Golden Parachutes Actually Paid, 2011-2022") and research assistant Greg Zaffino calculations.

Another way to assess the incentive effects is to look at variation within the parachute payments directly. This is made particularly clear by Table 1, which shows the distribution of parachute payments by decile. The top 10% (90th decile) of parachutes (meaning, for 217 transactions) had payouts in the $29 million to $289 million range. For these largest payouts, the parachute included gross-ups (meaning: extra compensation to cover the excise tax associated with "excess" parachute payments) in 25% of the transactions.[133] The next decile (80th to 90th percentile) of parachutes, reflecting another 217 transactions, had payouts in the $18 million to $29 million range. Table 1 underscores the economically material extent of parachute payments for a significant number of transactions.

A central claim of this article is that without reflection, seemingly through inadvertence, we have given CEOs powerful incentives to promote their firm's becoming a target. Our theory of incentives would be embarrassed by the claim that payouts of this magnitude had no effect on CEO behavior in promoting own-firm

133. Notably, the average (and median) equity-to-cash ratio rises alongside the increase in golden parachute size. The golden parachute payments in the top 10% of the dataset, on average, are composed of over 80% equity.

M&A. Hall & Liebman once wondered if CEOs were paid like bureaucrats.[134] Today's question is, given that (many) CEOs are paid like investment bankers (or better!) if their firm becomes a target, what are the consequences on how firms are managed?

Table 1: Parachute Payments By Size of Payouts

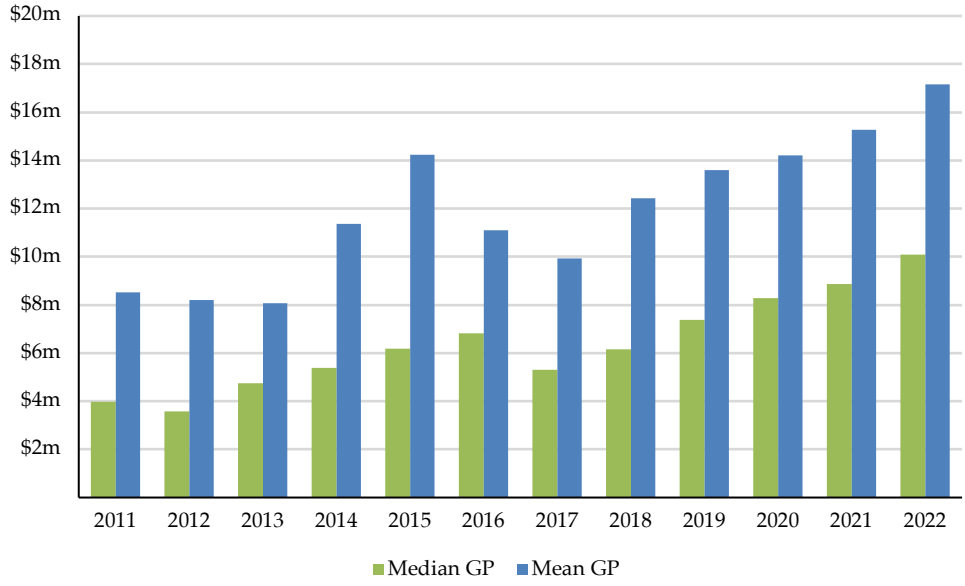
Decile	Golden Parachute Value Range (in $M)	Median Equity-to-Cash Ratio	Average Equity-to-Cash Ratio	Percent Receiving Gross-Up	Median Gross-Up (in $M)
Bottom 10%	0.0 to 0.8	0.0x	0.3x	0.9%	0.10
10-20%	0.8 to 1.5	0.2x	0.4x	0.5%	0.01
20-30%	1.5 to 2.6	0.5x	0.6x	3.2%	0.55
30-40%	2.6 to 4.1	0.7x	0.8x	5.1%	0.71
40-50%	4.1 to 6.0	1.2x	1.4x	8.3%	1.30
50-60%	6.0 to 8.6	1.3x	1.3x	7.9%	1.31
60-70%	8.6 to 12.5	1.7x	1.7x	12.4%	2.35
70-80%	12.5 to 18.0	1.9x	2.0x	17.1%	3.44
80-90%	18.0 to 28.7	2.7x	2.6x	10.6%	4.36
Top 10%	28.7 to 288.7	4.6x	4.3x	25.0%	10.09

Drawn from database maintained by Professor Mark Siciliano ("CEO Golden Parachutes Actually Paid, 2011-2022") and research assistant Greg Zaffino calculations.

134. Hall & Liebman, *supra* note 96, at 653-54.

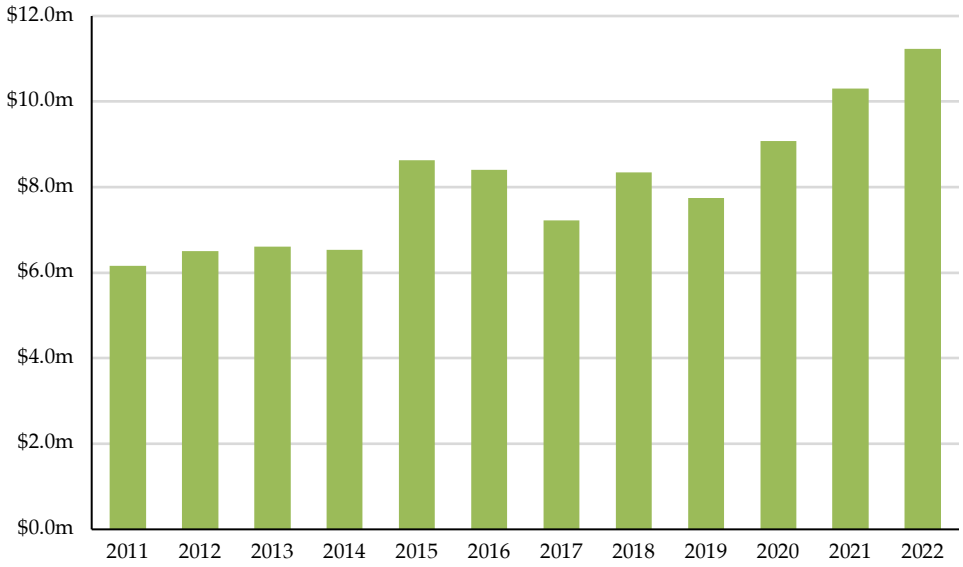
As Figure 8 illustrates, golden parachutes generally became larger over the post-2011 period, a steady increase especially beginning in 2017. Particularly striking is the source of this general increase in parachute size—the smaller deals, under $5 billion. As Figure 9 shows, the average (mean) of parachutes in such deals doubled over the period, from approximately $6 million to approximately $12 million. An increase in M&A deal size does not explain this growth; an unreported regression on this dataset shows that, even when controlling for deal size, the merger year has a statistically significant positive association with the size of the CEO's golden parachute. Thus throughout the post-Global Financial Crisis period, throughout the COVID-19 era, golden parachutes were getting larger, especially for non-mega-deals.

Figure 8: Golden Parachute Size



Drawn from database maintained by Professor Mark Siciliano ("CEO Golden Parachutes Actually Paid, 2011-2022") and research assistant Greg Zaffino calculations.

Figure 9: Golden Parachute Size
Deals Under $5 Billion (Mean)



Drawn from database maintained by Professor Mark Siciliano ("CEO Golden Parachutes Actually Paid, 2011-2022") and research assistant Greg Zaffino calculations.

D. Rethinking the Golden Parachute

The argument thus far has been that the function of golden parachutes as an internal governance device has transformed itself over the forty years since its introduction. An especially important favor has been the addition to CEO compensation packages of large awards of equity-based options that vest over time, with an exercise price commonly above the grant day price, and that increasingly condition vesting upon superior performance.[135] The triggering of the golden parachute by a takeover will accelerate the vesting of these options and will almost assuredly provide a deal price above the exercise and performance targets. The importance of this feature to the CEO's approach to M&A decision-making is well-understood by sophisticated courts that see many M&A transactions:

> "Option acceleration confers an additional benefit because the director receives consideration for unvested equity awards that might not vest in the fullness of time … and also confers an additional

135. *See supra* notes 107-111 and accompanying text.

> benefit because the director receives consideration for the unvested options at closing rather than at some future date.*** Option acceleration is thus broadly aligning, particularly for the purposes of creating an incentive to get the best price an acquirer will pay, but it can create misalignment regarding whether to approve a deal in the first place."[136]

The incentives now on offer have converted target-side CEOs from foot-draggers to promoters of M&A and this in turn helps explain the historically unprecedented persistence of a high-level of M&A in the post-2000 period. But why is this a concern? Target shareholders receive a substantial premium (generally 30% or more) and overwhelmingly vote in favor of the proposed transactions, well over 90% on average. Yes, the approval percentage for the golden parachute (SOGP) is sometimes less, in the 80s percent range, and the approving percentage may drop further, based on objection to particular provisions, like gross-ups,[137] but those are objections to CEO excess rather than to the transaction that the CEO has promoted.

In Part III, we turn to assessing the harm to shareholders through the distortion of project choice and a fall-off in CEO efforts to prepare a successor. In Part IV we also consider the harm to laid-off employees. More speculatively, we also consider the outcomes mismatch between laid-off employees and the golden parachute-receiving CEO as generating a particular kind of socio-political harm that may even have electoral consequences.

III. TRANSFORMED GOLDEN PARACHUTES ARE COSTLY TO SHAREHOLDERS

Assuming that golden parachutes give CEOs incentives to seek out M&A transactions in which their firm becomes a target, the question then becomes why such a setup may be undesirable from a shareholder perspective. Indeed, the statutory structure of decision rights that requires a target shareholder vote almost invariably results in a premium for target shareholders. Legal limits on target management's ability to "lock up" a friendly deal provide at least a basic market check on the consideration offered.[138] Where the CEO is looking to exit with a golden parachute rather than to stay as part of the acquiror's senior management, the CEO wants the same thing as the shareholders: "more." Target shareholders must vote in favor of a merger, which gives them veto rights over a transaction they regard as undesirable.

136. McRitchie v. Zuckerberg, *supra* note 19, at 554.

137. *See* Siciliano, *supra* note 112, at 88, Fig. 4 (showing differential SOGP approval rates).

138. *See*, *e.g.*, Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (1986); Paramount Commc'n, Inc. v. QVC Network Inc., 637 A.2d 34 (1994); Unitrin, Inc. v. Am. Gen. Corp., 651 A.2d 1361 (1995).

How, then, can they be harmed by an incentive device that generates a transaction for their consideration, that provides them with a put option on favorable terms?

The answer is that a CEO incentivized from the get-go to be on the lookout for an M&A exit will manage the firm differently—and less optimally—from a shareholder point of view. This manifests itself in three ways: (1) Pursuing projects more likely to result in near-term M&A; (2) the willingness to settle for an immediate M&A offer over a higher realization likely in the future; and (3) a fall-off in succession planning.

A. Project Choice

In some industries, such as tech or pharmaceuticals, the optimal shareholder value path may entail pursuing projects that will have greatest value through complementarities from subsequent M&A.[139] It makes sense for an established firm in those industries to outsource important aspects of the innovation process and then to acquire successful innovators through M&A.[140] Sometimes the critical element is a lack of fit between a high risk/high reward compensation structure best-suited for certain kinds of research and development (R&D) and the ongoing compensation pattern within the established firm. Sometimes uncertainty over the technology path means it is best to have multiple players competing, with the winner becoming an acquisition target of the established firm. There are many other cases in which a company can, as a first-best strategy, take on projects that can foreseeably create synergy gains in a merger.[141]

But the success fee of a golden parachute, which pays off if and only if the firm becomes a target, can also negatively distort project choice. The CEO might avoid projects that have highest expected value for the own-firm, but which would be much harder to fit into the business model of another firm. Rather than a home run for shareholders and a parachute that never pays off, the CEO may prefer a strategy that results in singles or doubles for the shareholders but a home run for the CEO -- because the parachute will pay off. The issue is not that project choice is shaped by short-termism versus long-termism, but is simply distorted in consequence of this special kind of managerial agency cost.[142] The shareholder veto over the proposed transaction

139. This is consistent with an unreported regression that shows a statistically significant positive association between the size of a CEO's golden parachute and the target in the healthcare sector. In this sector for many firms the business plan is exit through M&A and it makes sense to incentivize the CEO accordingly.

140. *See generally* Ronald J. Gilson, Locating Innovation: *The Endogeneity of Technology, Organizational Structure, and Financial Contracting*, 110 COLUM. L. REV. 885 (2010).

141. Recent antitrust literature has suggested that this strategic M&A exit planning may also serve anti-competitive effects; see, e.g., Cuningham, Ederer & Ma, *supra* note 2.

142. Professors Sepe and Whitehead have a different intuition about the effect of golden parachutes, which they see as encouraging managers to make "specific investments in innovation whose value may not be realized for some time—but which are essential to

is no check over this agency cost. The inherent information asymmetry in project choice makes ongoing monitoring difficult as well. If markets have trouble in valuing projects that are undertaken, the impounding of information about forsaken real options seems highly improbable.[143]

B. Settling

Another distortion of the golden parachute M&A success fee is the mismatch between the CEO's utility function and the shareholders' that may result in acceptance of a sub-optimal bid. The undiversified CEO may prefer a very large parachute payment today over the possibility of an even larger one later or could push through a transaction with a large parachute payoff despite a subjective belief that the value of the firm as a stand-alone exceeds the offer price. The recent Delaware case *Goldstein v. Denner*,[144] which involved the acquisition of a biotech company, provides a motivating case study of such a phenomenon. In *Goldstein*, a powerful director with a large short-term stock position in the company and a CEO with large golden parachute pushed the board to accept a takeover bid that was substantially below management's assessment of standalone value ($150/share versus $105/share). The CEO drove a process that reduced previous projections to provide a basis for a fairness opinion at the $105 valuation. With acceleration of unvested options, the CEO's golden parachute paid out $72 million, seven times his annual compensation. In such circumstances the CEO's utility function is likely to be different from the shareholders'. Diversified shareholders could well wait for full value; for the CEO, that much is enough. This problem will be particularly acute as the CEO approaches retirement age, since the present value of the parachute is likely to dwarf the present value of the foregone executive compensation even without hyperbolic discounting. In this case, *Goldstein v. Denner*, insider trading by a director brought the distortive effect of the golden parachute into the sunlight. Most "settling" cases—cases bad for shareholders—will not catch the glare.

sustaining long term performance." Thus "granting chutes tends to increase the value of innovative firms." Simone M. Sepe and Charles K. Whitehead, *Rethinking Chutes: Incentives, Investment, and Innovation*, 95 B.U. L. REV. 2027, 2028 (2015). This seems an unlikely defense of golden parachutes in the contemporary setting, given (1) the general shift to stock-based pay particularly in innovation-focused firms, (2) the uniquely highly benefits to the CEO from golden parachutes vs. other key employees, and (3) the fact that golden parachutes are now almost invariably triggered in "friendly" deals rather than the rare hostile takeover.

143. *See, e.g.*, Alex Triantis & Adam Borison, *Real Options: State of the Practice*, 14 J. APPLIED CORP. FIN. 8 (2001).

144. Goldstein, *supra* note 25.

Another example is *In re Columbia Pipelines Grp. Merger Litigation*,[145] where the CEO (also Chairman) and his CFO orchestrated a post-spinoff sale process of Columbia Pipeline exactly because they wanted to retire early "and [said the Court] both wanted to cash out through a merger that would trigger the change-in-control benefits."[146] The Chancery Court described the parties' motives this way: "The change-in-control agreements gave [the parties] reasons to secure a deal when disinterested shareholders might prefer a standalone option."[147] The Court found that the golden parachute gave the officers such eagerness to take a deal on the table that they neglected to strategize and maneuver with other prospective bidders for a higher offers, or even seriously to consider passing on the existing offer to wait for a favorable turn in the volatile natural gas market.

C. Fall-Off in Succession Planning

Another distortion that arises from the golden parachute M&A success fee is a fall-off in succession planning. The golden parachute era is notable for evidence and complaints about the lack of attention by CEOs and boards in succession planning.[148] There are two adverse consequences: (1) More M&A transactions that may not be optimal for shareholders, and (2) more inefficient successions without M&A.

1. Sub-Optimal M&A

One way that a prospective target CEO can sell an M&A transaction to the board is with a credible claim that there is no appropriate successor and therefore the safest way of avoiding a precipitous decline in shareholder value is to become a target. Such a pitch may be necessary because target directors will be generally worse off following a sale: They do not have golden parachutes and lose the stream of directors' fees. Yet a CEO departure without a strong successor in place leaves directors in an even worse place: needing to find a new CEO while facing downside risk.[149] Shareholders, too,

145. *In re Columbia Pipeline Grp.*, *supra* note 26.

146. *Id.* at *404.

147. *Id.* at *411.

148. *See* Heidrick & Struggles and (Stanford) Rock Center for Corporate Governance, *2010 Survey on CEO Succession Planning* (2010), https://perma.cc/2EKZ-TJ8E (noting the lack of attention by CEOs and Boards on succession planning); Eben Harrell, *Succession Planning: What the Research Says*, HARV. BUS. REV. (Dec. 2016), https://perma.cc/QR5N-RQ2H (summarizing studies showing shortfall in succession planning); Dragana Cvijanovic, Nickolay Gantchev & Rachel Li, *CEO Succession Roulette*, 69 MGMT. SCI. 5794 (2023) (consistent with prior studies showing shortfall in CEO succession planning, brings survey evidence covering 3,000 US public firms over 1994-2010 period to show that only 12.9% of CEO turnover events follow succession plans).

149. Thanks to Ed Rock for the exchange that developed this point. It has apparently become

would have been better off with a strong succession plan, but given these circumstances, board and shareholder approval of the proposed transaction will be best. Because of the leadership gap, a merger is now optimal. Strong information asymmetries may make it difficult to show systematic distorted project choice or "settling" for immediate M&A, but there is observable evidence in favor of the parallel claim: M&A timing has become increasingly tied to the CEO's retirement over the same period that the enriched golden parachute, the platinum parachute, has taken hold.

Coates & Kraakman studied the CEO turnover for CEOs over the 1992–2004 period, whether by firing, retirement, or exit through a deal.[150] Their initial conjecture was that "CEOs verging on retirement are exceptionally likely to search out deals in order to liquidate their personal holdings or extract a cash premium."[151] But they found, to their surprise, a lack of evidence indicating that "CEOs approaching retirement make *more* use of deals than young CEOs [below a median age of 56]. In fact, as mandatory retirement age approaches, the ratio of deals to retirements falls, suggesting that impending retirement is not a primary driver of deals."[152]

By contrast is evidence from Jenter & Lewellen that goes deeper into the post-2000 period.[153] Jenter & Lewellen observed a pronounced effect upon the CEO's impending retirement— an "age-65 effect" that is associated with a 32% increase in the chances of a becoming a target. They point out that this effect is not uniform across this period: It disappeared in the merger wave of the late 1990s.[154] But this is precisely the point. In response to a real economic shock -- the advent of the internet -- we see a wave of M&A to rearrange organizations and achieve scale and strategic advantage. A special target CEO incentive like the golden parachute is not pre-eminent. It is after the

more common to align directors' incentives line up with the CEO through the grant of unvested options that will similarly accelerate and make directors, too, the immediate beneficiaries of target-side M&A. In general, director compensation over the 2000-2020 period has significantly increased in absolute amount and in the fraction that is equity related, most typically in restricted stock. Lily Fang & Sterling Huang, *The Governance of Director Compensation*, 155 J. FIN. ECON. 103813, tbl. 2 (2024).

150. *See* Coates & Kraakman, *supra* note 20. Because of the way they coded the data, the deals they count in their turnover statistics occurred predominantly in the 1990s. *Id.* at 11. Their focus is on "manager" CEOs vs "owner" CEOs, defined in terms of whether the CEO owns 1% or more of the company's stock. *Id.* at 15, tbl. 1.

151. *Id.* at 24.

152. *Id.* at 29

153. Jenter & Lewellen, *supra* note 19.

154. *Id.* at 2829 (Panel A vs. Panel B). This is consistent with evidence that shows that a firm's propensity to issue "poison bonds"—bonds that permit the holder to obtain redemption at par upon a control change transaction—*declines* as the CEO approaches retirement. Rex Wang Renjie & Shuo Xia, *Poison Bonds* (Jun. 20, 2023), at 19, available at https://ssrn.com/abstract=4486434.

assimilation of the external shock that the CEO incentive has particular effect. The "wave" passes but the level of M&A activity persists.

2. Inefficient Succession Without M&A

Another serious downside of the contemporary golden parachute is the disincentive it provides to the CEO to undertake succession planning, a harm manifested in cases where target side M&A does not materialize. A recent empirical survey shows that firms without a succession plan suffer significantly greater shareholder welfare losses following CEO turnover than firms with a succession plan.[155] Succession plans minimize the negative effect of a forced CEO turnover and avoid the negative effect of a poor internal promotion. Widespread adoption of a succession plan is estimated to increase shareholder value by 3.1%.[156] Much of the resistance to succession planning seems because it is time-consuming for a board, but a CEO outfitted with a golden parachute has an independent incentive to encourage the board's procrastination.

D. Dubious Purpose of Golden Parachutes for Retiring CEOs

What is the point of a golden parachute for a retiring CEO? The "optimal contracting" view was that the golden parachute protected the CEO's firm specific investment, a kind of insurance for an on-going compensation. But on the retirement-linked M&A pattern revealed by Jenter & Lewellen, this insurance-based rationale has dissipated by the time of the transaction. The CEO could simply relinquish their job at retirement, which would mean preparing a successor. Alternatively, the CEO can sell the firm and collect on the insurance; surely, this reduces the incentives for succession planning.

The retiring CEO outfitted with a golden parachute is in the position of a homeowner occupying a well-insured house who, it turns out, cannot sell the house when they move to Florida on retirement. The only way to realize value on the house, then, is to burn it down and collect the insurance. This purple metaphor shows the distortive potential of the golden parachute: The CEO will pick projects and otherwise "dress up" the firm in a way that is timed to the CEO's intentional exit; will push for

155. Francesco Celantano & Antionio Mello, *Why Do Firms Often Not Have a CEO Succession Plan?* (European Corporate Governance Institute – Finance Working Paper No. 1023/2024, Nov. 16, 2024), available at https://ssrn.com/abstract=5033904 (CEO turnover without succession plans produces significant shareholder losses).

156. *See id*. at 42, Table 8 (col. 4) (based on a structural model of the costs, the board, and benefits, to the shareholders, of mandatory succession plan adoption). Cvijanovic, Gantchev & Li, *supra* note 148, also find significant shareholder benefits from succession planning measured through lower stock price volatility after announcement of a new CEO, a better CEO/firm "match," as reflected in longer tenure for the incoming CEO, and greater willingness of a board to fire an under- performing CEO.

the firm to "settle" for a sure-fire immediate exit rather than a potential higher-valued transaction later, and will avoid a successor in the wings who will lobby for continuation.[157] This distortive dynamic is evidenced by a showing in Jenter & Lewellen that most of the retirement age effect dissipates in the case of firms with strong governance.[158] This shows the golden parachute's effect in isolation.

The golden parachute changes the narrative of the ideal CEO career. Old story: "After a successful tenure as CEO, the executive left the company in the well-prepared hands of a successor." New story: "After a successful tenure as CEO, the executive arranged for a sale of the company at a great premium and received a well-deserved golden parachute." This new conception is highly likely to affect project choice—which real options to exercise amidst an array of possible investment requirements and time horizons. And it is likely to lead to M&A "settling." One of the contributions of behavioral finance is to show how these considerations play into economic decision-making.[159] This is not to say that CEO retirement planning is the only circumstance in which the golden parachute can influence M&A. Rather, it is a straightforward example how this incentive can distort ex-ante decision-making, so that, at the time of the proposed transaction, the merger looks desirable for shareholders.

E. Other Implications of the Golden Parachute

The impact of golden parachutes on M&A is also suggested by the interaction between the sharp increase in private equity M&A activity in the post-Global Financial Crisis period and the notable increase in the golden parachute size for transactions under $5 billion.[160] Gompers, Kaplan & Mukharlyamov (2023) document a surge in private equity transactions in the post-2010 period that includes smaller size public companies.[161] They show that in most cases, the incumbent CEO is customarily terminated. For a take-private of a public company, this invariably means the triggering of the CEO's golden parachute. Thus, the increase in private equity driven

157. Jenter & Lewellen treat a "succession problem" as an independent motivator of becoming a target, but of course an adequate successor is frequently endogenous. Jenter & Lewellen, *supra* note 19.

158. Jenter & Lewellen create an index consisting of significant stockholdings by the CEO, directors, and blockholders; small boards, independent directors, and CEO/chair duality and show its impact. *See* Jenter & Lewellen, *supra* note 19, at 2830-33.

159. Baker & Wurgler, *supra* note 22.

160. *See infra* Figure 9.

161. Paul A. Gompers, Steven N. Kaplan & Vladimir Mukharlyamov, *The Market for CEOs: Evidence from Private Equity* (Nat'l Bureau of Econ. Rsch., Working Paper No. 30899, 2023) available at http://www.nber.org/papers/w30899. *See especially* Gompers, Kaplan & Mukharlyamov, at 33, Table I, Panel A. This is consistent with the fact that 88% of the take-private deals by financial sponsors in the Siciliano dataset were for a deal value of $5 billion or less.

take-private transactions probably played a role in the decade-long increase in golden parachutes for small- and mid-cap acquisitions reflected in Figure 9. Indeed, in deals of $5 billion or less, the median golden parachutes in financial sponsor deals were 48% higher than those with strategic acquirers ($6.34 million versus $4.29 million).[162] The increase in golden parachute payouts for such targets is evidence that this exit option has become a feature of the CEO's operational planning.

Obviously, the incentives of a golden parachute do not invariably lead to M&A. But the potency of these incentives can produce M&A persistence even after the wave of economic drivers passes. The cost to shareholders is distortion in project choice to make the firm a more appealing target, settling for immediate M&A, and a reduction in succession planning so that "merger" may be the optimal decision to fill a leadership gap. These all reduce the value of the firm from a shareholder point of view in ways that may be hard to measure. Designed to control a set of agency costs, the golden parachute now creates a new set of them.

There is a final shareholder concern: "Golden" parachutes become increasingly "platinum" in deal size and yet it is the largest deals that present the greatest risk of value destruction from a diversified shareholder perspective.[163] Most of the causal focus has been on acquirer CEO incentives[164] in light of concerns about empire-building, hubris,[165] and over-confidence bias.[166] Target CEOs, however, have a vital facilitative role, especially in the largest transactions, in supporting the acquiring CEO's belief in the transaction's success. Their unique access to target-specific information gives target CEOs special capacity to feed the acquirer CEO's "illusion of control,"[167] a critical element of over-confidence. This will be particularly important in the "big deal," because of the large uncertainties in a massive combination. Here is where the modern golden parachute, keyed to the vesting of performance-based options, gives target CEOs—especially if near-retirement—the incentive to push for a

162. Based on research assistant Gregory Zaffino calculation. A follow-on regression shows that the impact of the financial sponsor variable on golden parachute size for deals in this size category, controlling for deal size and other factors, is statistically significant ($p = .035$).

163. *See*, *e.g.*, Sara B. Moeller, Frederik P. Schlingemann & Rene M. Stulz, *Wealth Destruction on a Massive Scale? A Study of Acquiring-Firm Returns in the Recent Merger Wave*, 60 J. FIN. 757 (2005) (acquirer losses in large firm mergers swamped general pattern of gains); Robert Bruner, DEALS FROM HELL: M&A LESSONS THAT RISE ABOVE THE ASHES (2005).

164. *See*, *e.g.*, David Hiller, Patrick McColgan & Athanasios Tsekeris, *Value Creation Around Merger Waves: The Role of Managerial Compensation*, 47 J. BUS. FIN. & ACCT. 132 (2020).

165. Richard Roll, *The Hubris Hypothesis of Corporate Takeovers*, 59 J. BUS. 197 (1986); Mathew L.A. Hayward & Donald C. Hambrick, *Explaining the Premiums Paid for Large Acquisitions: Evidence of CEO Hubris*, 42 ADMIN. SCI. Q. 103 (1997).

166. *See* Ulrike Malmendier & Geoffrey Tate, *Who Makes Acquisitions? CEO Overconfidence and the Market's Reaction*, 89 J. FIN. ECON. 20 (2008) (arguing overconfident CEOs are more likely to make acquisitions).

167. Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCH. 311 (1975).

once-in-their lifetime exit opportunity irrespective of the value creation that a diversified shareholder would care about.

This, too, shows how the golden and platinum parachute has become a catalyzing feature that transcends the economic logic of M&A and is part of the institutional framework that has produced a persistently high level of M&A.

IV. THE LABOR EFFECTS OF EXCESS M&A AND THE SPECIAL EFFECT OF GOLDEN PARACHUTES

The employment effects of M&A activity are extensively debated both as a positive and normative matter.[168] Certain stylized facts seem to emerge from the literature. Mergers of related businesses, typically "horizontal" in nature, commonly involve layoffs.[169] Acquirors frequently close acquired plants that are peripheral to its strategy.[170] Take-private acquisitions by financial buyers like private equity firms are commonly associated with major employment reductions.[171] These reductions often particularly affect employees who are performing routine or offshorable tasks.[172]

168. The previously cited compilation of Challenger, Gray & Christmas M&A-linked layoffs, see *supra* note 28, shows both the time-variability of disclosed layoffs but surely understates the phenomenon, if only because private acquirers have no interest in such disclosure. A critic of the M&A movement, including the associated layoffs, observes and objects to the absence of a "comprehensive database on merger-related mass layoffs" and then points to many media accounts of large layoffs. John N. Drobak, RETHINKING MARKET REGULATION 46-48 (2021).

169. Elimination of duplicated functions and selection for the highest quality workers performing similar function are important "synergies" that drive the transaction. See K.C. O'Shaughnessy & David J. Flanagan, *Determinants of Layoff Announcements Following M&As: An Empirical Investigation*, 19 STAT. MGMT. J. 989 (1998); M.J Conyon, S. Girma, S. Thomson & P.W. Wright, *The Impact of Mergers and Acquisitions on Company Employment in the United Kingdom*, 46 EUROPEAN ECON. REV 31 (2002) (showing data from the United Kingdom); Kyeon Hun Lee, David C. Mauer & Emma Qianying Xu, *Human Capital Relatedness and Mergers and Acquisitions*, 129 J. FIN. ECON. 111 (2018) (importance of "human capital relatedness" in successful M&A through curating for best employees and ideas).

170. Vojislav Maksimovic, Gordon Phillips & N. R. Prabhala, *Post-Merger Restructuring and the Boundaries of the Firm*, 102 J. FIN. ECON. 317, 327-28, Table 3 (2011) (within three years, acquirors sell or close 46% of the plants acquired through the M&A transaction; approximately 20% of the acquired plants are closed).

171. Steven J. Davis, John Haltiwanger, Kyle Handley, Ben Lipsius, Josh Lerner & Javier Miranda, *The (Heterogeneous) Economic Effects of Private Equity Buyouts* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26371, Apr. 2024), https://perma.cc/YCV3-YH2L (assessing 6000 buyouts 1980-201, employment falls 12 percent in buyouts of publicly listed firms in two and five year periods over extended period; see Davis et al., at 38, Table 2).

172. Martin Olsson & Joacim Tag, *Private Equity, Layoffs, and Job Polarization*, 35 J. LAB. ECON. 697 (2017) (showing data from Sweden).

Many other transactions, particularly in high premium deals where the acquiror needs to show cost savings as part of the rationale for the transaction, are associated with employee layoffs.[173]

Yet since the point of much M&A is to increase the rate at which firms can exploit new growth opportunities, the net effect over time should be to increase employment at the merged enterprise and, in general, to add dynamism to a growing economy that overall increases the demand for labor.[174]

Normatively, such layoffs might be defended as part of a process of redeployment of under-utilized assets. Long run productivity growth—the bedrock of economic advancement of a society—generally depends upon the efficient use of scarce resources, including scare labor inputs. Producing the same goods or services with fewer employees is part of that productivity story. The highest and best use of those laid-off employees' capacity is not at the consolidating firm, but at another establishment. The redundancy-driven layoff is just the first step in this productivity-enhancing story.[175]

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173. Hema A. Krishnan, Michael Hitt & Daewoo Park, *Acquisition Premiums, Subsequent Workforce Reductions and Post-Acquisition Performance*, 44 J. MGMT. STUD. 711 (2007). A recent paper demonstrates the importance of layoff possibilities to M&A through an empirical strategy that shows that the addition of "firing frictions" through state-adopted employment protection reduces the number and dollar volume of M&A for the adopting state. *See* Robert Chatt, Matthew Gustafson & Adam Welker, *Firing Frictions and the U.S. Mergers and Acquisitions Marke*t, 128 J. BANKING & FIN. 106138 (2021). The empirical strategy focuses on those states that adopt (via judge-made law) a "good faith" requirement to the usual at-will employment standard. Using headquarters as the location of a firm, not state of incorporation, Chatt et al. show that M&A activity by number and dollar volume declines following such adoption. A previous paper showed a similar "firing frictions" effect for an international cross section, but not convincingly so for the United States. *See* Olivier Dessaint, Andrey Golubpov & Paolo Volpin, *Employment Protection and Takeovers*, 125 J. FIN. ECON. 369 (2017). *See also* John Foley, *Merger "Synergies" Can't Just Be Code For Job Cuts*, REUTERS (Jun. 8, 2016), https://perma.cc/D2YV-GMC2.

174. This is reflected in, for example, the additional finding of Davis et al. that relative employment rises 15% in "private to private" transactions. Davis et al., *supra* note 171, at 2. Sometimes the motive for M&A is to acquire a skilled labor force. *See also* Paige Ouimet & Rebecca Zarutskie, *Acquiring Labor*, 10 Q. J. FIN. 1 (2020). A recent paper shows that even though employment at an acquiror may increase, this comes from external hires rather than transfers from the target; target employee turnover is high. The conclusion is "post-merger restructuring creates synergies at the cost of high employee turnover." Britta Gehrke, Ernst Maug, Stefan Obernberger & Christoph Schneider, *Post Merger Restructuring of the Labor Force,* ECGI Working Paper No. 753/2021 (April 2025), https://perma.cc/D3UN-G8H8.

175. *See*, *e.g.*, Kenneth J. McLaughlin, *General Productivity Growth in a Theory of Quits and Layoffs*, 106 J. LAB. ECON. 75 (1990); Kenneth J. McLaughlin, *A Theory of Quits and Layoffs With Efficient Turnover*, 99 J. POL. ECON, 1 (1991); Donald S. Siegel & Kenneth L. Simons, *Assessing the Effects of Mergers and Acquisitions on Firm Performance, Plant Productivity, and Workers: New Evidence from Matched Employer-Employee Data*, 31 STRATEGIC MGMT. J. 903,

This straightforward, normative claim is confounded by the reality of labor markets: This "market" hardly consists of frictionless planes. The employees laid off in the initial consolidation are unlikely to be the ones hired in the subsequent growth phase. Employees make firm-specific human capital investments, which are zeroed out by a layoff. Employees also make geographic investments that result in prohibitive relocation costs to obtain equivalent employment. The stylized fact is that the displacement effect of job loss is roughly 25% to 30% of the prior wage.[176]

Transaction-related layoffs have been famously criticized as opportunistically abrogating implicit contracts, capturing rents in particular transactions and imposing externalities by degrading trust.[177] This undercuts the capacity of other firms to encourage firm-specific investment protected by implicit contracts. This general line of reasoning has also been notably rebutted as confusing cause and effect: The layoffs occur precisely because the exogenous features, like advancing technology, have diminished the value of the firm- specific investments that underpin the implicit contracts. The layoffs are a realization event for the value loss that has been otherwise caused.[178]

Layoffs are, of course, not unique to M&A. The current willingness (and diminished reputational cost) of profitable firms to lay off employees is part of a cultural transformation that is commonly traced to Jack Welch at GE in the 1980s.[179]

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904 (2010) (creation of efficient matches between employees and firms). For evidence on the positive role of restructurings in productivity growth using U.K. data., see Azimjon Kuvandikov, *Corporate Governance Role of Mergers and Acquisitions: Does Post-Merger Workforce Rationalisation Improve Labour Productivity?* (2024) (on file with author).

176. Kenneth A. Couch & Dana A. Placzek, *Earnings Loss of Displaced Workers Revisited*, 100 AM. ECON. REV. 572 (2010) (finding initial income reductions of 30 percent and six years later, 15%); Louis S. Jacobson, Robert J. LaLonde & Daniel G. Sullivan, *Earnings Losses of Displaced Workers*, 83 AM. ECON. REV. 685, 685 (1993) ("high-tenure workers separating from distressed firm suffer long-term losses averaging 25 percent per year" and even workers who find new jobs in similar firms suffer large losses). Assessments of displacement losses are complicated by underlying labor market conditions. Losses are much greater if the economy is in recession than if not. *See* Steven J. Davis & Till M. von Wachter, *Recessions and the Cost of Job Loss* (Nat'l Bureau of Econ. Rsch., Working Paper No. 17638, Dec. 2011). Displacement losses can vary based on worker characteristics. *See* Nan L. Maxwell, *Labor Market Effects from Involuntary Job Losses in Layoffs, Plant Closings: The Role of Human Capital in Facilitating Reemployment and Reduced Wage Losses*, 48 AM. J. ECON. & SOCIO. 129 (1989). For a survey of factors that may contribute to earnings loss, see William J. Carrington & Bruce C. Fallick, *Why Do Earnings Fall with Job Displacement?*, 56 INDUS. RELS. 688 (2017). A complicating factor throughout this empirical literature is the noisiness in identifying specific causes of job loss, e.g., "business cycle" factors versus sector-specific factors, as well as the introduction of new technology.

177. Andrei Shleifer & Lawrence H. Summers, *Breach of Trust in Hostile Takeovers*, in CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES 33 (Alan J. Auerbach, ed., 1988).

178. Gilson & Black, *supra* note 54, at 620-22.

179. *See generally* David Gelles, THE MAN WHO BROKE CAPITALISM: HOW JACK WELCH GUTTED THE HEARTLAND AND CRUSHED THE SOUL OF CORPORATE AMERICA—AND HOW TO UNDO HIS

Before then, layoffs—except for the contracted-for layoffs that accommodate the slack periods of the business cycle in industries like automobiles[180]—were regarded as a negative signal of the firm's financial health because of a strong business norm against gratuitous dismissals.[181] IBM, for example, famously avoided layoffs during the Great Depression.[182] This enhanced its ability to recruit high quality employees and increased its capacity to enter into long-term equipment leases and service contracts––both factors contributed to its great success in the 1950s and 1960s.

Welch and others who followed,[183] including the hostile takeover entrepreneurs of the 1980s,[184] transformed the layoff signal. Layoffs no longer indicated a failing firm. To the contrary, it was an indicator of a firm responding smartly to a changing external environment.[185] A reflection of the change in practice was marked by the Census

LEGACY (2022); Rick Wartzman, THE END OF LOYALTY: THE RISE AND FALL OF GOOD JOBS IN AMERICA (2017). The changes are reflected in detailed empirical work. *See*, *e.g.*, Johanne Boisjoly, Greg J. Duncan & Timothy Smeeding, *The Shifting Incidence of Involuntary Job Losses from 1968 to 1992*, 37 INDUS. RELS. 207 (1998) (also discussing some of the methodological issues in quantifying the effect described in Jennifer M. Gardner, *Worker Displacement: A Decade of Change*, MONTHLY LAB. REV. 45 (1995). *See also* Henry S. Farber, *Job Loss and the Decline in Job Security in the United States* (Ctr. for Eur. Pol'y Stud., Working Paper No. 171, Jun. 2008) (showing long term employment has declined in the U.S. but data problems cloud measurement of the channels). For a survey, see Kevin F. Hallock, *Job Loss and the Fraying of the Implicit Employment Contract*, 23 J. ECON. PERSP 69 (2009); Lori G. Kletzer, *Job Displacement*, 12 J. ECON,. PERSP. 115 (1998). *See also* Deepak K. Datta, James P. Guthrie, Dynah Basuil & Alankrita Pandey, *Causes and Effects of Employee Downsizing: A Review and Synthesis*, 36 J. MGMT. 281 (2010).

180. Even without formal contract, business-cycle layoffs and recalls entail only minimal displacement loss. *See* Shiugeru Fujita & Giuseppe Moscarini, *Recall and Unemployment*, 107 AM ECON. REV. 3875, 3883 (2017).

181. *See generally* William Lazonick, *The Demise of the Old Economy Business Model*, in SUSTAINABLE PROSPERITY IN THE NEW ECONOMY?: BUSINESS ORGANIZATION AND HIGH-TECH EMPLOYMENT IN THE UNITED STATES 83-113 (2009).

182. *See* James W. Cortada, IBM: THE RISE AND FALL AND REINVENTION OF A GLOBAL ICON, Ch. 4, 91-102 (2019).

183. *E.g.*, Albert J. Dunlap, known as "Chainsaw Al" and also famously known for an accounting scandal at one of his turnaround "success" stories, Sunbeam Products. *Compare* Albert J. Dunlop, MEAN BUSINESS: HOW I SAVE BAD COMPANIES AND MAKE GOOD COMPANIES GREAT (1997) *with* John A. Byrne, CHAINSAW: THE NOTORIOUS CAREER OF AL DUNLOP IN THE ERA OF PROFIT-AT-ANY-PRICE (1999).

184. *E.g.*, Frank Lorenzo, the post-deregulation airline consolidator. For a critical view, see Aaron Bernstein, GROUNDED: FRANK LORENZO AND THE DESTRUCTION OF EASTERN AIRLINES (1990).

185. This change is reflected in event studies of firms undergoing layoffs. In the 1980s and 1990s, layoffs were associated with economically and statistically significant stock price changes. By the 2000s, when expectations about layoffs had become thoroughly embedded, layoffs did not produce such an effect. *See* Kevin F. Hallock, *supra* note 179, at 84-86, Table 2. *See also* Victor B. Wayhan & Steve Werner, *The Impact of Workforce Reduction on Financial Performance: A Longitudinal Perspective*, 26 J. MGMT. 341 (2000) (showing positive effects); Sandra J. Sucher & Shalene Gupta, *Layoffs That Don't Break Your Company*

Bureau's 1984 initiation of a "Displaced Worker Survey" to supplement its Current Population Survey[186] and the 1988 enactment of the Work Adjustment and Retraining Notification Act, which required employers to provide a 60-day notice period before a "mass layoff."[187]

Layoffs have particular social costs, because they disrupt the formation and durability of what the social capital literature describes as bridging social capital, the sense of connection to people who are not like oneself.[188] The workplace enforces a certain kind of sociability and dedication to working together for the common good.[189] By contrast, layoffs embody a transactional relationship, which is understandable from the perspective of the business firm, but is not a great lesson for a democratic spirit that transcends mere self-interest.

(2008), HARV. BUS. REV., https://perma.cc/R4LG-NNEU (tracing growth of layoffs from the 1970s, 5% of Fortune 100 companies, to 2008-2011, 65% of 2000 surveyed companies to today: a "default response to an uncertain future."). For a current example of large scale layoffs, see *Microsoft to Lay Off About 9,000 Workers*, WALL ST. J. (Jul. 2, 2025), https://perma.cc/ENU7-MSNZ (15,000 total announced over two months, almost 4% of global workforce).

186. Lori G. Kletzer, *Job Displacement*, 12 J. ECON. PERSP. 115, 116 (1998).

187. Worker Adjustment and Retraining Notification Act, Pub. L. 100-379, 102 Stat. 890. *See* Congressional Research Service, *Worker Adjustment and Retraining Notification (WARN) Act: A Primer* (last updated Jan. 2, 2013). A "mass layoff" is defined as either the layoff of (i) 50 or more employees representing at least 33% of employment at the site, or (ii) 500 or more employees at a single site. *See also* U.S. House of Representatives, Committee on Education and Labor, Legislative History of S. 2527, 100th Congress, Worker Adjustment and Retraining Notification Act, Pub. L. 100-379, 100th Cong., 2d Sess., Serial No. 101-K (Washington, DC: GPO, 1990). There are also state level WARN Acts with stricter standards. For detailed discussion of the empirics of job loss in the period, see Henry S. Farber, John Haltiwanger & Katherine Abraham, *The Changing Face of Job Loss in the United States, 1981-1995*, 1997 BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 55 (1997); David Neumark, Daniel Polsky & Daniel Hansen, *Has Job Stability Declined Yet? New Evidence from the 1990s*, 17 J. LAB. ECON. S29 (1999) (showing the effects on longer tenured employees).

188. A recent Robert Putnam interview highlighted the difference between "bridging" and "bonding" social capital. *See* Lulu Garcia-Navarro, *Robert Putnam Knows Why You Are Lonely*, N.Y. TIMES (Jul. 13, 2024), https://perma.cc/BH22-9MAW. These terms have an extensive history in the social capital literature. *See, e.g.*, Tristan Claridge, *What Is the Difference Between Bonding and Bridging Social Capital?*, INST. FOR SOC. CAP. (Jan. 2, 2018), https://perma.cc/AZH4-7C5N.

189. Professor Estlund puts this eloquently: "Over weeks, months, or years of working together, co-workers learn about each others' lives and develop feelings of affection, empathy, sympathy and loyalty for each other. They often become friends. They also experience friction and conflict, even anger and resentment. But, with a paycheck and everything that is at stake in a job, they often find ways to work through or around conflicts and to get the job done in spite of personal differences." Cynthia Estlund, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY 7 (2003).

The argument here is not that M&A should be subject to a special screen just because such transactions are often associated with layoffs, much less in favor of lifetime employment. [190] Rather, the argument is that the high-powered incentives of golden parachutes promote *excess* M&A and that the social costs are of high concern.

In particular, golden—and especially platinum—parachutes magnify those costs because of the linked disparity of fortune between the laid-off employees and the CEO who walks away with a super-bonus. The worsening fortune of the laid-off employees is directly and causally related to the super-improved fortune of the golden parachute-receiving CEO. One might think of this linkage as "inequality with privity."

The historian Robert Schneider tells us that ours is an age in which "resentment" has returned as a "political emotion."[191] The trade impact literature shows us that economic policies that, in a highly visible way, produce losers as well as winners have political effects. Specifically, these types of policies produce polarization in electoral outcomes and stir a turn to populism as well.[192] This underscores the importance of economic shocks in which the losers perceive that their losses are tied to others' gains. The leading work on the "China shock"—the rapid influx of Chinese manufactured goods after China's accession to the World Trade Organization in 2001—shows the distinctive effect of highly salient disparate outcomes on the socio-political dimension.[193] It can reshape politics. The "China-shock" authors compare the China import competition shock with general deterioration in economic conditions leading to layoffs and the 2006 housing-market collapse. The highly salient trade shock was unique in its large and persistent effects on electoral outcomes and polarization.

I hardly claim to have offered an empirical case for such powerful political effects associated with golden, especially platinum, parachutes. But in light of the structural similarity—the linked disparity of outcome, the "inequality with privity"—it is foolish to think this will come without sociopolitical costs.

190. I have argued elsewhere that the "transition costs of capitalism" or "the adjustment costs of economic change" should be addressed through appropriate social insurance that involves a reworking of the human capital development partnership between the State and business enterprise. Jeffrey N. Gordon, *Is Corporate Governance a First-Order Cause of the Current Malaise*, 6(s1) J. BRIT. ACAD. 405 (2018).

191. Schneider, *supra* note 33.

192. Notable contributions are Autor et al., *supra* note 34; Margalit, *supra* note 34. For a recent claim that trade deals, conjoined with racial and social priors, can produce broad political realignment, see Jiwon Choi, Ilyana Kuziemoko, Ebonya Washington & Gavin Wright, *Local Economic and Political Effects of Trade Deals: Evidence from NAFTA*, 114 AM. ECON. REV. 1540 (2024).

193. *See* Autor et al., *supra* note 35, at 41.

CONCLUSION

The golden parachute, which began as a contractual solution to managerial agency costs at a time of weak corporate governance in the 1980s and 1990s, has mutated into a powerful incentive for target CEOs to seek out an M&A transaction. This transformation has occurred with seemingly minimal awareness, with adverse consequences for shareholders via the distortion of firms' project choice, firms' settling for sub-optimal transactions, the fall-off of succession planning, and the heightened risk of value-destructive transactions.

This "excess" level of M&A also has social and political costs, primarily due to the loss of jobs associated with many M&A transactions. In particular, the radical disparity between the CEO's golden parachute super-bonus and the displacement shock for laid-off employees is bound to stir resentment, not just as private emotion but also as political emotion. Shareholders could well decide that populist anger will disrupt the economic dynamism that increases share values across their portfolio.

Shareholders are not powerless to change this golden parachute story. The Dodd-Frank Act requires a separate shareholder vote in merger transaction to approve the golden parachute in question. Although these Dodd-Frank votes reflect some shareholder objection to particular terms, target shareholders are highly unlikely to reject a golden parachute outright in the midst of approving a transaction that provides a substantial premium. One possible course for shareholder intervention is via firm-specific golden parachute review in the course of the annual review of executive compensation, the so-called "say on pay" vote. The incentive effects will vary depending on the option package, the CEO's age, and the triggering conditions, among other features. Moreover, this annual vote should be linked to a sufficient report on the company's CEO succession planning, the absence of which is a major distortion of golden parachutes.

Yet this technocratic approach of firm-specific tailoring is likely to become mired in its complexity. The best reform seems straight-forward: a rejection of the acceleration of unvested equity awards for the CEO. This element accounts for 75% of the value of the CEO's golden parachute for the largest firms[194] and its elimination would significantly reduce the parachute's distortionary effect. Given the dramatic shift towards equity-based compensation since the advent of the golden parachute, CEOs will still have strong incentives to accept an unsolicited premium bid for the firm and will be handsomely rewarded for their efforts to increase the value of the firm, whether as a stand-alone or as a target. There is no need for the special bonus of

194. Alvarez & Marsal, 2021/2022 EXECUTIVE CHANGE IN CONTROL REPORT, *supra* note 39. In a representative survey of firms throughout the S&P 1500, Alvarez & Marsal report that acceleration of unvested equity awards accounts for 60% of parachute value. *See* Alvarez & Marsal, 2023/2024 EXECUTIVE CHANGE IN CONTROL REPORT, *supra* note 81.

accelerated vesting. If shareholders do not act, it is easy to imagine that Congress might soon turn its attention to this issue, as it should.

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APPENDIX I

There does not appear to be a consistent time series documenting the number and value of US mergers and acquisitions spanning the 1890s—the period of the first merger wave in the US—through the present day. We stitched together a time series based on consideration amount drawn from several data sources and then scaled in terms of GDP and a composite stock market index compiled by Robert J. Shiller.

For M&A consideration:

- RALPH NELSON, MERGER MOVEMENTS IN AMERICAN INDUSTRY, 1895-1956 (1959) (manufacturing and mining sectors, 1895-1920, relying on weekly reports in the Commercial and Financial Chronicle checked against Moody's Manual, Poor's Manual, and government reports).
- Carl Eis, *The 1919-1930 Merger Movement in American Industry*, 12 J. L. & ECON. 271 (1969) (extending Nelson's 1895-1920 time series using similar data).
- Eugene White, *The Merger Movement in Banking 1919-1933*, 45 J. ECON. HIST. 285 (1985) (Comptroller of Currency reports, state comptroller reports, using target bank asset values).
- Federal Trade Commission, Bureau of Economics, *Report on Mergers* (1981) (manufacturing and mining).
- MergerStat, published by FactSet, in 20 year time periods. We accessed MergerStat 1987 (1967-87); MergerStat 2001 (1988-2001); MergerStat 2021 (2002-2019) and currently. FACTSET MERGERSTAT, FACTSET MERGERSTAT REVIEW, 2022 (2022).

We generally omit information on M&A volume (the number of deals) as our goal is measuring the economic impact of M&A, which is better done via consideration or alternative valuation terms. Nelson presents volume data post 1920, relying on data collected by Willard L. Thorp, who records deal volume from the *Standard Daily Trade*. *See*, *e.g.*, Willard L. Throp, *Recent Economic Changes in the United States* (Na'tl Bureau of Econ. Rsch., Vol. 1, 1929); Willard L. Thorp, *The Structure of Industry* (Temporary Nat'l Econ. Comm., Monograph No. 27, 1941). Thorp's volume series is picked up by the FTC using a similar methodology, Federal Trade Commission, *The Merger Movement: A Summary Report*, 1948; Federal Trade Commission, *Report on Corporate Acquisitions and Mergers*, 1955. And, more recently, Federal Trade Commission, *Current Trends in Merger Activity, 1971*, 1972, tbl. 2; Federal Trade Commission, *FTC Statistical Report on Mergers and Acquisitions*, 1979 (Table 10).

For GDP, after 1929 we relied on data tracked and published by the Federal Reserve. *See* https://perma.cc/5GVH-ZDB9. For 1895-1929, we relied on John W.

Kendrick, *Productivity Trends in the United States* (Nat'l Bureau of Econ. Rsch., No. 71, 1961).

For U.S. stock market capitalization beginning in 1900, we used the data compiled in Dmitry Kuvshinov & Kaspar Zimmermann, *The Big-Bang: Stock Market Capitalization in the Long Run*, 145 J. FIN. ECON. 527 (2022), Online Appendix, tbl. E.17, https://perma.cc/V825-XPKB.

For the Composite Stock Index, we use the composite stock index that dates to 1871 as compiled by Robert J. Shiller, who uses S&P generated data beginning in 1927 and for prior years, an index created by Alfred Cowles. *See* https://perma.cc/T6WV-AT4N.

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Fig. 1A

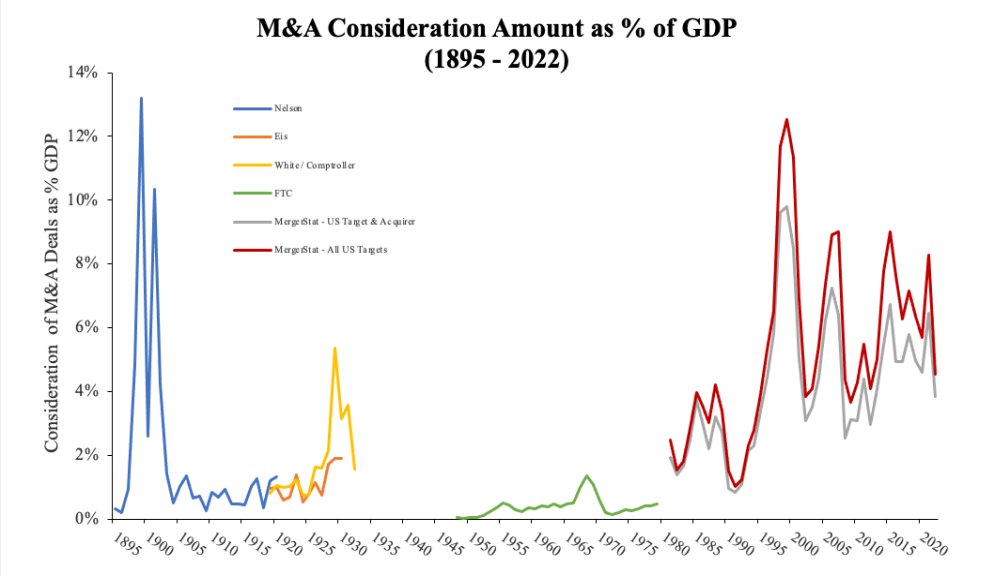


Fig. 2A

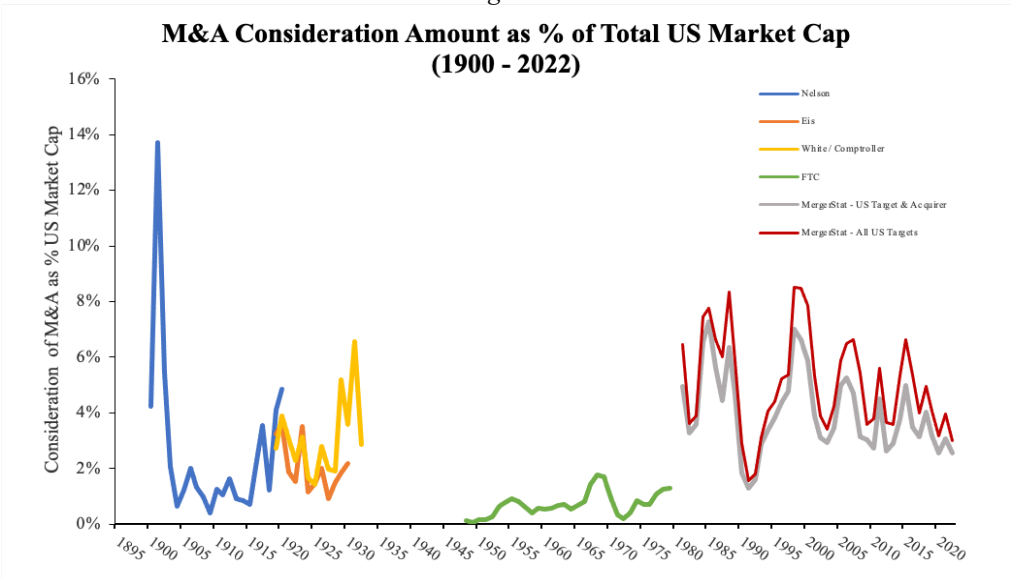
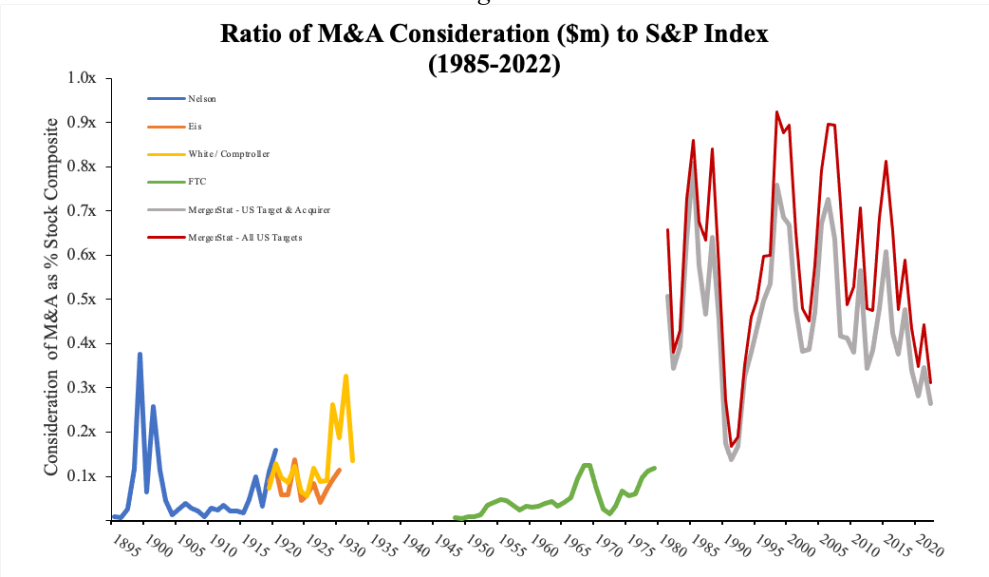
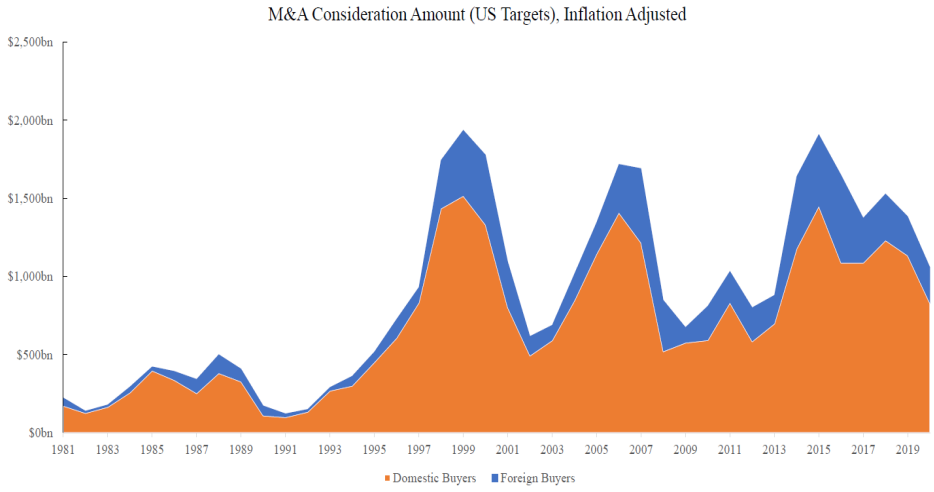


Fig. 3A



For all three figures, the red line reflects the acquisition of US targets net of acquisitions by foreign buyers. The high level of M&A activity after 2020 persists even when foreign buyers are subtracted from the totals. To similar effect is Figure 4A below, showing acquisition consideration amount, adjusted for inflation.

Fig. 4A



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APPENDIX II

A. Mergerstat: Historical Composition of Net M&A Announcements (Value)

Year	Publicly Traded Sellers ($M)	Divestitures ($M)	Private Owned Sellers ($M)	Total ($M)
1981	56,569.4	16,695.6	8,521.7	81,786.7
1982	31,501.8	16,050.3	5,916.9	53,469.0
1983	39,471.4	24,173.9	8,079.4	71,724.7
1984	82,731.0	29,379.0	8,734.8	120,844.8
1985	116,675.5	45,825.6	16,851.6	179,352.7
1986	89,866.2	59,926.9	22,025.4	171,818.5
1987	85,924.9	58,290.6	11,857.5	156,073.0
1988	156,112.9	69,614.9	19,405.0	245,132.8
1989	121,870.6	70,843.7	12,484.4	205,198.7
1990	48,214.9	42,179.8	9,343.8	99,738.5
1991	31,668.0	29,256.1	8,847.9	69,772.0
1992	31,171.5	50,400.0	10,257.2	91,828.7
1993	111,041.5	48,153.4	14,774.0	173,968.9
1994	109,101.3	84,892.1	27,430.3	221,423.7
1995	202,916.8	96,487.6	26,879.3	326,283.7
1996	285,185.0	117,629.7	63,199.8	466,014.5
1997	374,399.5	172,667.6	68,958.4	616,025.5
1998	884,713.7	191,460.7	74,010.5	1,150,184.9
1999	963,715.9	255,592.6	120,222.4	1,339,530.9
2000	831,388.3	276,548.1	164,804.7	1,272,741.1
2001	309,786.4	268,323.4	56,292.5	634,402.3
2002	145,589.4	209,001.2	63,203.3	417,793.9
2003	217,578.1	184,651.3	49,741.0	451,970.4
2004	380,867.7	248,036.8	78,897.4	707,801.9
2005	551,830.1	305,327.3	103,555.6	960,713.0
2006	683,350.4	342,246.3	110,491.2	1,136,087.9
2007	603,171.8	407,854.6	112,538.4	1,123,564.8
2008	382,206.4	218,254.3	57,955.2	658,415.9
2009	289,424.4	195,034.4	38,553.9	523,012.7
2010	259,717.4	287,459.5	83,039.0	630,215.9
2011	355,730.9	319,898.5	94,152.2	769,781.6
2012	205,412.9	378,190.5	130,492.9	714,096.3
2013	284,379.4	470,701.4	80,031.2	835,112.0
2014	641,341.4	533,343.5	164,944.0	1,339,628.9
2015	1,035,588.4	382,896.1	251,818.2	1,670,302.7
2016	907,768.5	289,753.2	285,444.5	1,482,966.2
2017	635,953.1	280,917.3	290,999.0	1,207,869.4
2018	687,921.5	349,172.0	290,317.9	1,327,411.4
2019	786,778.1	316,465.2	277,521.1	1,380,764.4

2020	495,911.8	286,719.3	504,885.4	1,287,516.5
2021	619,418.4	482,026.1	970,662.2	2,072,106.7
2022	701,588.0	228,776.3	286,198.2	1,216,562.5
2023	603,841.8	217,943.4	269,557.0	1,091,342.2

B. Mergerstat: Historical Composition of Net M&A Announcements (Volume)

Year	Publicly Traded Sellers	Divestitures	Private Owned Sellers	Total
1981	168	830	1,330	2,328
1982	180	875	1,222	2,277
1983	181	376	500	1,057
1984	204	401	445	1,050
1985	321	525	453	1,299
1986	352	543	548	1,443
1987	267	388	296	951
1988	436	445	251	1,132
1989	320	508	232	1,060
1990	175	409	243	827
1991	144	332	213	689
1992	178	393	314	885
1993	191	452	393	1,036
1994	291	469	514	1,274
1995	395	608	639	1,642
1996	454	887	1,142	2,483
1997	564	971	1,252	2,787
1998	590	944	1,289	2,823
1999	708	1,031	1,364	3,103
2000	636	1,178	1,647	3,461
2001	511	1,167	1,089	2,767
2002	366	1,267	1,030	2,663
2003	400	1,413	890	2,703
2004	315	1,413	1,181	2,909
2005	399	1,780	1,602	3,781
2006	433	1,495	1,424	3,352
2007	453	1,351	1,500	3,304
2008	275	879	881	2,035
2009	228	840	530	1,598
2010	302	1,099	933	2,334
2011	267	1,140	945	2,352
2012	294	1,106	970	2,370
2013	270	1,102	863	2,235
2014	311	1,332	1,318	2,961
2015	318	1,142	1,552	3,012

2016	302	1,044	1,371	2,717
2017	288	1,008	1,585	2,881
2018	287	868	1,420	2,575
2019	239	1,103	1,478	2,820
2020	157	1,032	1,339	2,528
2021	250	1,116	2,018	3,384
2022	217	897	1,129	2,243
2023	234	856	774	1,864