

CORPORATE LEGACY

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Many public companies have shed takeover defenses in recent years, on the theory that such defenses reduce share price. Yet new data presented here shows that practically all new public companies—those launching their initial public offering (IPO)—go public with powerful takeover defenses in place. This behavior is puzzling because the adoption of takeover defenses presumably lowers the price at which the pre-IPO shareholders can sell their own shares in and after the IPO. Why would founders and early investors engage in this seemingly counterproductive behavior? Building on prior attempts to solve this mystery, this Article claims that IPO firms adopt takeover defenses, at least in part, so that they can remain independent indefinitely and create corporate legacies that last for generations.

Throughout human history, people have sought to overcome the human condition and achieve the only form of immortality reasonably available to us: a legacy that “lives on” after we are gone. Legacies can be established in countless ways, including art (Leonardo da Vinci), literature (William Shakespeare), and athletics (Babe Ruth). The corporate form, though not previously recognized as such, can likewise serve as a vehicle for achieving an enduring legacy because corporations are endowed by the law with “perpetual existence.”

Publicly traded corporations in particular are well suited for this purpose, given the significant social and cultural role they play. Once a company goes public in an IPO, however, it suddenly becomes vulnerable to takeovers, which can end its corporate existence and thereby any hope of an enduring legacy. This unwelcome fate can be avoided, however, if a company goes public with powerful takeover defenses in place—which practically all do, according to the data. Mature public companies, by contrast, are controlled by people who joined the board long after the IPO. These directors lack the same passion for the company’s independent existence because, unlike the pre-IPO shareholders, their legacy is not tied to the company. Accordingly, a mature public company may be amenable to abandoning its takeover defenses.

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INTRODUCTION

The conventional wisdom among corporate law scholars is that the presence of corporate takeover defenses lowers the value of a public company because it insulates management from the disciplining effect of the market for corporate control. If this is correct, one would expect to see companies launch their IPOs with no such defenses in place.¹ The pre-IPO shareholders have a strong incentive to maximize the value of the shares to be sold in the IPO and are in position to control whether the corporation will adopt takeover defenses. Surprisingly, however, the data presented in this Article shows that essentially all modern companies go public with takeover defenses in place, and the vast majority of them adopt the most effective defense in the modern arsenal, the effective staggered board (ESB).

What can explain this seemingly incongruous behavior on the part of IPO firms and their shareholders? Building on previous attempts to solve this puzzle by Lucian Bebchuk, John Coates, Michael Klausner, and Lynn Stout, this Article makes the novel claim that takeover defenses at IPO firms are premised, in part, on the human quest for immortality and the perpetual nature of the corporate form.

It is impossible to overcome the human condition and live forever, but people can live on, in a sense, through the legacy they leave. In ancient Greece, warriors sought to fight gallantly on the battlefield so their names and exploits would be forever sung in epic poems like the *Iliad*. Thereby

¹ FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 204–05 (1991) [hereinafter *THE ECONOMIC STRUCTURE OF CORPORATE LAW*] (presuming that IPO companies “go public in easy-to-acquire form: no poison pill securities, no supermajority rules or staggered boards” so as to maximize the payout to the pre-IPO shareholders).

they might achieve immortality of a sort. In the modern world, people seek legacies in other ways, such as a scientist whose name is used as a unit of measurement, an athlete whose number is retired, or a movie star whose autograph is enshrined on the Hollywood Walk of Fame.

One important but previously unrecognized vehicle for leaving a lasting legacy is the corporate form, because corporations are endowed by law and charter with “perpetual existence.”² A corporation cannot get sick or injured; it has the capacity to live forever. Hence, one way to achieve an enduring legacy is to organize, promote, or invest in a corporation that continues to persist for generations.

Publicly traded companies are especially well suited for this purpose due to their special social and cultural significance. Coca-Cola, Ford, and Facebook are more than economic entities; they are part of the fabric of our society. A person who wants to make a mark on history would therefore be inclined to take her company public. But public companies, unlike private ones, are vulnerable to hostile takeovers, which can end a corporation’s existence and thus destroy its ability to advance a legacy. Takeover defenses can ameliorate this concern.

After a company has been public for some time, however, its board of directors will inevitably consist of people who joined the board long after the IPO. Such a board is less interested in the company’s continued existence because these later directors’ legacies are less intertwined with the company, unlike those of the directors at the time of the IPO. When pressured, or asked, they are understandably more willing to disarm the defenses. This Article’s explanation helps solve the mystery of why firms adopt takeover defenses at the IPO stage only to later abandon them.

This theory is also consistent with real world behavior. This Article presents and analyzes an original data set of all U.S. IPOs for the six-month period from October 2013 to March 2014. Every domestic operating corporation in the data set went public with takeover defenses in place, and eighty-three percent employed the stoutest defense in the modern arsenal—the ESB.³ This data is consistent with this Article’s core claim that those who launch an IPO do so in part to achieve immortality through perpetual renown, and therefore seek to ensure that the company can remain independent indefinitely.

The data also shows that only four percent of the sample companies went public with dual-class stock, which is generally designed to give the *founders* effective control over the company and the means to maintain its independence. In contrast, the prevalence of ESBs, which protect *corporate institutions* from takeovers, undermines the pervasive theory that takeover defenses are used at the IPO stage to provide founders with private benefits.

² See generally Andrew A. Schwartz, *The Perpetual Corporation*, 80 GEO. WASH. L. REV. 764 (2012).

³ See *infra* Part I.B.

The theory and data presented in this Article cast doubt on the wisdom of banning powerful takeover defenses at the IPO stage, an idea viewed with at least tentative favor by some shareholder advocates.⁴ If such a policy were adopted, it could have serious negative implications for the IPO market: by undermining the ability of the public corporation to act as a vehicle for perpetuating founders' legacies, such a ban could discourage private shareholders from taking their companies public in the first place.

This Article is organized as follows: Part I describes the mystery of takeover defenses at IPO firms and presents this Article's original empirical findings. Part II reviews the leading explanations for this mystery in existing literature, finding them not fully satisfactory. Part III presents the novel claim that the human quest for an enduring legacy can be achieved through a perpetual corporation, especially a public company. Part III also shows how this claim provides a new explanation for the mystery presented above: a public company can only reliably create a corporate legacy if it has the means to defend against hostile takeovers. Since it is practically impossible to add most defenses once public, the IPO presents a unique opportunity to adopt the full array of takeover defenses.

I. THE MYSTERY OF IPO TAKEOVER DEFENSES

Corporate takeover defenses like the "poison pill" and classified board of directors are out of fashion. Nearly all public companies have abandoned these and other takeover defenses under the advice and pressure of shareholder advocates. The conventional wisdom is that takeover defenses depress the value of the company by insulating the board from the pressure of a potential takeover. Consequently the absence of takeover defenses is presumed to raise the value of a company.

One would then surely expect that companies that go public would do so without takeover defenses in place and would call attention to this fact. The small group of pre-IPO shareholders wants to maximize the IPO price and is in a position to control whether or not to adopt defenses. And yet the data and findings presented in this Article (in line with previous studies) show that almost all companies go public with takeover defenses in place, even though this practice appears to reduce the IPO price to the detriment of pre-IPO shareholders. This is the mystery (or "puzzle"⁵) at which this Article is directed.

⁴ See Lucian A. Bebchuk, *Why Firms Adopt Antitakeover Arrangements*, 152 U. PA. L. REV. 713, 751 (2003) [hereinafter *Antitakeover Arrangements*] ("There are reasons to believe that . . . eliminating [for IPO firms] the (currently permitted) option of a staggered board would be desirable . . .").

⁵ See, e.g., Sharon Hannes, *The Market for Takeover Defenses*, 101 NW. U. L. REV. 125, 127 (2007) ("The results of recent empirical studies regarding antitakeover charter provisions in IPO-stage firms, however, do not support most existing theories and present a puzzle to corporate-law scholars."); Robert Daines & Michael Klausner, *Do IPO Charters Maximize Firm Value? Antitakeover Protection in IPOs*, 17 J.L. ECON. & ORG. 83, 111 (2001) ("These

Section A of this Part explains that effective takeover defenses at IPO firms are widely viewed as value-reducing, to the point that almost all public companies have shed them in order to raise their share prices. Section B presents new data showing that, in direct opposition to the common practice of most mature public companies, nearly all IPO firms go public with potent defenses in place. Part II will then present this Article's explanation for this perplexing behavior.

A. *Takeover Defenses Are Disfavored*

Takeover defenses are viewed with disfavor by many academic and practical commentators.⁶ This hostility arises because such defenses inhibit the “market for corporate control” which disciplines executives to work hard for the corporation and to increase the firm's value, rather than shirk their responsibilities.⁷

The “market for corporate control” idea is that poor and inefficient management of a public company depresses its stock price. And if the stock price is sufficiently low, a hostile outsider can buy a controlling block, even at a premium, and turn a profit by shifting control from the incumbent board to a new board selected by the outsider. That new board will likely terminate the incumbent senior executives—clearly a poor outcome for them. Executives are aware of this, and thus the market for corporate control incentivizes executives to work hard to keep the share price high and rising, so as not to end up a casualty of a hostile takeover.⁸ The disciplining effect of the threat of hostile takeover is widely viewed as a powerful way to align the interests of management with those of shareholders, a core issue at the heart of the public corporation.

Hostile takeovers are thought to be so valuable that some leading legal scholars have taken the position that the proper role of a takeover target's board is to be passive and allow it to happen.⁹ That view, however, has not

results pose a puzzle”); John C. Coates IV, *Explaining Variation in Takeover Defenses: Blame the Lawyers*, 89 CAL. L. REV. 1301, 1303 (2001) [hereinafter *Explaining Variation*] (describing the “IPO defense puzzle”).

⁶ See Coates, *supra* note 5, at 1327 (“[A]cademics have generally opposed takeover defenses.”). This Article does not take a position on the impact of takeover defenses as a general matter. Rather, it assumes that takeover defenses really do reduce firm value and thus the value of the shares. Operating under that assumption, the remainder of this Article attempts to grapple with the puzzling reality that the concentrated group of pre-IPO shareholders willingly foregoes the maximum share price available to them. *Accord* Michael Klausner, *Institutional Shareholders, Private Equity, and Antitakeover Protection at the IPO Stage*, 152 U. PA. L. REV. 755, 771–72 (2003) (“I adopt the conventional assumptions that takeover defenses in company charters are detrimental, and that the IPO market and secondary markets set share prices that reflect the presence of these defenses.”).

⁷ See, e.g., Schwartz, *supra* note 2, at 809.

⁸ “Hostile takeover” is defined for present purposes as the act of an outsider taking control of the corporation without the assent of the incumbent board of directors.

⁹ Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1194, 1201–04 (1981) (“Our thesis

found favor with the courts, which have scrutinized, but ultimately allowed, various types of “takeover defenses” adopted by public companies.¹⁰ Under current and long-standing doctrine,¹¹ public companies possess broad legal discretion to employ such takeover defenses.

Over time, many public companies have used these court-approved takeover defenses to delay or block hostile takeovers. The most important defense at present is probably a combination of a classified board and a poison pill, but many other takeover defenses exist, including supermajority voting provisions, dual-class stock (as with Google and Facebook),¹² state anti-takeover statutes, and many others.

Whatever their form, all takeover defenses are used to prevent hostile takeovers, even though such transactions are generally welcomed by shareholders because they offer the chance to sell their shares quickly and at a premium to market price.¹³ Thus, takeover defenses, especially when used to maintain a target’s independence, appear to harm shareholders. Moreover, a significant body of empirical research suggests that takeover defenses reduce shareholder returns, especially when the target remains independent, perhaps by as much as ten percent.¹⁴ There are studies that come to the contrary conclusion, that is, that takeover defenses actually enhance shareholder value,¹⁵ but most academics believe that powerful takeover defenses gener-

that managers of target companies should acquiesce when confronted with a tender [o]ffer has not been adopted by courts and state legislatures.”)

¹⁰ *Id.*

¹¹ *See, e.g.*, *Unocal v. Mesa Petroleum*, 493 A.2d 946, 957 (Del. 1985); *Paramount v. Time*, 571 A.2d 1140, 1153 (Del. 1989); *Third Point LLC v. Ruprecht*, No. 9469-VCP, 2014 WL 1922029, at *20–21 (Del. Ch. May 2, 2014) (upholding Sotheby’s poison pill).

¹² Steven D. Solomon, *New Share Class Gives Google Founders Tighter Control*, DEALBOOK (Apr. 13, 2012 9:17 AM), <http://dealbook.nytimes.com/2012/04/13/new-share-class-gives-google-founders-tighter-control/>.

¹³ Easterbrook & Fischel, *supra* note 9, at 1161.

¹⁴ *See, e.g.*, Lucian A. Bebchuk, *The Myth that Insulating Boards Serves Long Term Value*, 113 COLUM. L. REV. 1637, 1684–86 (2013) [hereinafter *The Myth*] (citing numerous studies showing that board insulation leads to lower firm value); Lucian A. Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887, 891 (2002) (finding that ESBs “reduced returns on the order of 8–10%”); Michael Klausner, *Fact and Fiction in Corporate Law and Governance*, 65 STAN. L. REV. 1325, 1354 (2013) [hereinafter *Fact and Fiction*] (“[R]emaining independent meant lower returns to shareholders as compared with companies that were acquired.”). *But cf.* Leo E. Strine, Jr., *Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*, 114 COLUM. L. REV. 449, 461 (2014) (“I will not pretend to have had sufficient time nor training in statistical ‘social science’ to evaluate whether Bebchuk’s review of the empirical evidence is convincing.”).

¹⁵ *See, e.g.*, K.J. Martijn Cremers, Lubomir P. Litov & Simone M. Sepe, *Staggered Boards and Firm Value, Revisited* 1–3, 34 (July 14, 2014) (unpublished), available at <http://ssrn.com/abstract=2364165>; Jillian Popadak, *A Corporate Culture Channel: How Increased Shareholder Governance Reduces Firm Value* 1–3, 38 (Oct. 25, 2013) (unpublished), available at <http://ssrn.com/abstract=2345384>; Jing Zhang, *Why Are Bad Loans Securitized, the Impact of Shareholder Rights in the Banking Industry* 2–5, 33 (Apr. 1, 2014) (unpublished), available at <http://ssrn.com/abstract=2416362>; *see also* Strine, *supra* note 14, at 463 n.41 (citing sources in support of this proposition).

ally harm shareholders by insulating management from the market for corporate control.¹⁶

This phenomenon creates an opportunity for quickly raising the value of any public company with takeover defenses in place. If a company's value is harmed by the presence of the defenses, it can enhance its value simply by shedding them—and this is precisely what has happened in many cases. The widespread view that takeover defenses reduce shareholder value by diminishing the disciplining effect of the market for corporate control has led nearly all public companies to dismantle their defenses, many in the past few years.

The Shareholder Rights Project (SRP) at Harvard Law School has led this charge. The SRP, along with numerous other scholars, investors, and institutions, has proposed shareholder resolutions, organized publicity campaigns, and generally lobbied the largest publicly traded corporations to remove their poison pills, de-stagger their boards, and otherwise make themselves vulnerable to hostile takeovers.

These efforts have proven highly effective: fifteen years ago, a majority of the S&P 500 companies had classified boards and poison pills. More than eighty percent of S&P companies have abandoned (or never adopted) these powerful takeover defenses in response to the pressure of the SRP and others.¹⁷

In short, contemporary discourse and market reality disfavor takeover defenses, in particular the classified board and the poison pill, and the vast majority of public companies have dropped them.¹⁸

B. Yet Nearly All Modern IPO Firms Adopt Powerful Takeover Defenses

If most public companies have abandoned takeover defenses on the theory that they lower stock prices, one way to increase an IPO share price would be to go public without any takeover defenses. At the time of an IPO, a company's shares are held by a small group of shareholders with close ties to (or overlapping with) management and a strong pecuniary interest in max-

¹⁶ See *supra* note 4.

¹⁷ Strine, *supra* note 14, at 470 n.66 (reporting that only 17% of the S&P 500 and 37% of the S&P 1500 have classified boards, and that only 12% of the S&P 1500 have a poison pill). The poison pill number is not as meaningful as it first appears because “a poison pill can be adopted unilaterally at any time by a board of directors. If a firm does not have a pill today, it can have one tomorrow (or even later today), and it certainly will have a pill if it receives a bid that it does not want to accept immediately. One study found that among targets of hostile takeover attempts, every company either had a pill in advance or adopted a pill once a takeover bid was made.” *Fact and Fiction*, *supra* note 14, at 1351 (citing John C. Coates IV, *Takeover Defenses in the Shadow of the Pill: A Critique of the Scientific Evidence*, 79 TEX. L. REV. 271, 286–91 (2000) [hereinafter *Shadow of the Pill*]). The de-classification movement, by contrast, is much more important. *Id.* at 1353 (“If a firm has a staggered board, no other defense is relevant—it will have no appreciable impact.”).

¹⁸ Strine, *supra* note 14, at 497 (Classified boards are “becoming rare and are on their way toward endangered species status.”).

imizing the price of shares about to be sold to the public.¹⁹ Given these premises, one might easily presume that companies would generally “go public in easy-to-acquire form: no poison pill securities, no supermajority rules or staggered boards” to maximize the payout to the pre-IPO shareholders.²⁰ This presumption, however, turns out to be mistaken.²¹ Numerous empirical studies—including this one—find that a significant percentage of firms do in fact employ takeover defenses at the time of their IPO.

Published studies of the classified board, a powerful takeover defense,²² show broad and generally increasing adoption of this structure among IPO firms. Professors Daines and Klausner found that more than forty percent of IPO firms during 1994–1997 went public with a classified board. Professor Coates found that 34% of IPO firms in 1991–1992 and 82% of IPO firms in 1998–1999 did so with a classified board.²³ Professor Johnson et al. found classified boards in sixty-four percent of firms that went public between 1997 and 2005.²⁴ The law firm Davis Polk & Wardwell found classified boards in seventy percent of IPO firms in 2011.²⁵ The present Article finds classified boards at eighty-nine percent of IPO firms.²⁶

This Article extends these studies with data from every U.S. IPO for the six-month period from October 2013 through March 2014, albeit with certain exclusions. As will appear, one hundred percent of these firms disclosed in their securities filings the existence of “Anti-Takeover Defenses” with

¹⁹ *Antitakeover Arrangements*, *supra* note 4, at 722 (“According to a widely held view, firms at the IPO stage have powerful incentives to adopt arrangements that benefit shareholders.”) (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 306 (1976) (discussing the incentives that those taking a firm public have to choose efficient corporate governance arrangements)).

²⁰ THE ECONOMIC STRUCTURE OF CORPORATE LAW, *supra* note 1; Klausner, *supra* note 6, at 769 (“[P]re-IPO shareholders both control the corporation and stand to reap the benefits of a higher share value, both in the IPO and in the secondary market. Pre-IPO shareholders’ incentive, therefore, is to maximize share value. Empirical studies have shown that takeover defenses reduce share value. Consequently, pre-IPO shareholders would be expected to adopt takeover-friendly charters.”); *Fact and Fiction*, *supra* note 14, at 1332–33.

²¹ *Fact and Fiction*, *supra* note 14, at 1332 (“IPO charters were expected to provide for value-enhancing governance mechanisms. . . . Takeover defenses, therefore, were not expected to be included in IPO charters. . . . Surprisingly, [however, empirical studies have] found that IPO charters commonly contain takeover defenses.”).

²² See generally Bebchuk, Coates & Subramanian, *supra* note 14.

²³ *Explaining Variation*, *supra* note 5, at 1303.

²⁴ *Fact and Fiction*, *supra* note 14, at 1333 (citing William C. Johnson, Jonathan M. Karpoff & Sangho Yi, *The Bonding Hypothesis of Takeover Defenses: Evidence from IPO Firms* 33 (Apr. 29, 2013) (unpublished manuscript), available at <http://ssrn.com/abstract=1923667>).

²⁵ Davis Polk & Wardwell LLP, *Governance Practices for IPO Companies: A Davis Polk Survey* (Oct. 31, 2011), http://www.davispolk.com/sites/default/files/012114_GovernancePracticesforIPOCompanies.html.

²⁶ *Infra* Table I.

eighty-three percent disclosing one of the most potent defenses in the modern arsenal, the ESB.²⁷

1. *Data and Collection Methods*

The data set consists of every company that filed a Form S-1 and was published in the *Wall Street Journal's* weekly list of IPOs over the six-month period of October 2013 through March 2014.²⁸ The sample firms are in a variety of industries, including biotechnology, oil and gas exploration, and manufacturing. The following are excluded: “blank check” corporations, foreign and non-Delaware corporations, and alternative entities (that is, LLCs, LPs, etc.). These exclusions allowed for focus on Delaware operating corporations with dispersed shareholders, leaving a total of eighty-one companies.

To launch an IPO, a company must file with the Securities and Exchange Commission an elaborate and detailed disclosure document called a Form S-1. The Form S-1 filed by each of the companies in the sample were reviewed, as were their certificates of incorporation and bylaws to the extent necessary, and the following data points were collected: corporation name; industry; expected date of IPO; disclosure of “Anti-Takeover” defenses;²⁹ presence of a classified board; whether shareholder action by written consent is permitted; whether shareholders can call special meetings; whether directors may be removed only for cause; whether shareholders can change the number of authorized directors; whether shareholders can fill board vacancies; whether the board may issue additional shares of undesignated preferred stock; whether the corporation provided for cumulative voting; whether a supermajority vote is required to amend or withdraw takeover defenses; whether the corporation had established an advance notice procedure for shareholder proposals or nominations; other anti-takeover defenses; and the law firm hired by the corporation to draft the S-1.

²⁷ See generally Bechuk, Coates & Subramanian, *supra* note 14, at 890 (describing the powerful antitakeover force of an ESB).

²⁸ More specifically, the data set consists of the IPOs listed in the *Wall Street Journal* between October 8, 2013 and March 27, 2014, and that actually priced by the end of March 2014.

²⁹ This data point reflects whether a company includes the disclosure on its Form S-1 of what it calls “anti-takeover” measures. For example, Auspex Pharmaceuticals’ Form S-1 states, “Anti-takeover provisions under our charter documents and Delaware law could delay or prevent a change of control which could limit the market price of our common stock and may prevent or frustrate attempts by our stockholders to replace or remove our current management.” Auspex Pharmaceuticals, Inc., Registration Statement (Form S-1) (Jan. 7, 2015). Similarly, Dipexium Pharmaceuticals’ Form S-1 provides, “Anti-takeover provisions in our charter documents and Delaware law could discourage, delay or prevent a change in control of our company and may affect the trading price of our common stock.” Dipexium Pharmaceuticals, LLC, Registration Statement (Form S-1) (Feb. 6, 2014).

Special attention was paid to the most powerful defense in common use today, namely the combination of an ESB and a poison pill.³⁰ This pairing of defenses can make a target corporation effectively impervious to a hostile takeover.³¹

A classified (or staggered) board is one in which the directors are divided into several classes and serve staggered multi-year terms (almost always three), with the effect that only one class is up for election at any given annual meeting.³² A classified board is an option that a corporation must elect.³³ The default is an unclassified board of directors whereby every director is up for election every year.

A poison pill, also known as a shareholder rights plan, is a device whereby the board issues to shareholders a right that allows them to purchase the company's stock at a discounted price—but only once someone acquires more than, say, twenty percent of that stock. However, the party that triggers the pill is, importantly, excluded from the offer. Finally, the board of directors has the power to redeem (cancel) the poison pill. The result is that if someone acquires shares above the threshold, her holdings will be severely diluted and she will suffer a disastrous loss. An acquirer can therefore only economically cross the threshold and gain control if the board of directors assents and redeems the pill. Finally, a poison pill can be adopted unilaterally at any time by a board of directors; so even if a company does not have a pill in place right now, "it can have one tomorrow (or even later today)."³⁴ The upshot is that every public company effectively has a poison pill in place,³⁵ and the focus moves to the classified board.³⁶

A classified board bolsters the poison pill by denying the bidder the ability to launch a single proxy fight to replace the incumbent board of a

³⁰ See *Fact and Fiction*, *supra* note 14, at 1350–52; Bebchuk, Coates & Subramanian, *supra* note 14, at 887.

³¹ See *Fact and Fiction*, *supra* note 14, at 1365 n.161 (citing *Air Prods. & Chems., Inc. v. Airgas, Inc.*, 16 A.3d 48, 105 (Del. Ch. 2011) (“[N]o bidder to my knowledge has ever successfully stuck around for two years and waged two successful proxy contests to gain control of a classified board in order to remove a pill.”)); Bebchuk, Coates & Subramanian, *supra* note 14, at 887.

³² See, e.g., DEL. CODE ANN. tit. 8, § 141(d) (2014) (authorizing classified boards with one, two, or three classes); CAL. CORP. CODE § 301.5 (2010) (authorizing classified boards for public companies).

³³ See, e.g., DEL. CODE ANN. tit. 8, § 141(d) (2014) (“The directors of any corporation organized under this chapter *may*, by the certificate of incorporation or by an initial bylaw, or by a bylaw adopted by a vote of the stockholders, be divided into 1, 2 or 3 classes”) (emphasis added).

³⁴ *Fact and Fiction*, *supra* note 14, at 1351. This assumes that the company already has a provision in its charter authorizing the board's issuance of blank check preferred stock, which is commonly the case among large public companies. See David Benoit, *Einhorn's Governance Fight: Data Points to Uphill Battle*, WSJ BLOG DEAL JOURNAL (Feb. 7, 2013, 12:24 PM), <http://blogs.wsj.com/deals/2013/02/07/einhorns-fight-with-apple-loaded-with-rare-occurrences/> (reporting that ninety-five percent of S&P 500 companies' charters have such a provision).

³⁵ See *Shadow of the Pill*, *supra* note 17, at 289.

³⁶ See *Fact and Fiction*, *supra* note 14, at 1353 (“If a firm has a staggered board, no other defense is relevant—it will have no appreciable impact.”).

target with one that would redeem the pill for her. If the target has a classified board in place, the acquirer will only be able to take majority control of the board and dismantle the poison pill after two consecutive annual meetings.³⁷ This process necessarily takes more than one year,³⁸ “a very long time indeed in the dynamic world of corporate acquisitions.”³⁹ In contrast, with an unclassified board, a party with a majority of the voting power will be able to replace the entire board all at once, either at the annual meeting or even sooner—for instance, at a special meeting or through written shareholder consent.

A thoughtful hostile acquirer can, however, make an end-run around a simple classified board and obtain control of the board without delay, and thereafter have that board redeem the pill. There are a number of ways to nullify the defensive effect of a simple classified board. For instance, a hostile acquirer can call a special meeting of shareholders to vote on a proposal to “pack the board” by more than doubling the number of directors and then filling the vacancies created, thereby obtaining a majority of the board in one fell swoop.⁴⁰

Aware of these workarounds,⁴¹ enterprising corporate attorneys have learned to buttress the classified board with other defensive features to create an ESB that is specifically designed to force a hostile acquirer to wait through two annual meetings to gain control of the board.⁴² To create an ESB, one begins with a classified board with at least three classes.⁴³ In addition, the corporation’s charter must deny shareholders the ability to act by written consent or through special meeting.⁴⁴ Furthermore, the charter must not permit directors to be removed without cause, and it must prevent shareholders from being able to pack the board in the manner described above.⁴⁵

Because an ESB is the most powerful and important defense against hostile takeovers today,⁴⁶ the data was collected and analyzed with an eye toward determining whether the sample IPO firms employed this particular defense.

³⁷ This assumes three classes of directors, which is the norm.

³⁸ Bebchuk, Coates & Subramanian, *supra* note 14, at 890, 903.

³⁹ *Id.* at 890.

⁴⁰ *Id.* at 910.

⁴¹ *Id.* at 911 (recounting high-profile case involving IBM and Lotus where latter’s classified board was shown to be an ineffective defensive measure).

⁴² *Id.* at 912–14 (defining concept of an ESB).

⁴³ *Id.* at 913.

⁴⁴ *Id.* at 910.

⁴⁵ *Id.*

⁴⁶ *Fact and Fiction*, *supra* note 14, at 1353 (“Other than dual-class stock, which is rarely used, a staggered board is the most powerful takeover defense available.”).

2. Findings

TABLE 1. ANTI-TAKEOVER PROVISIONS PRESENT IN SAMPLE FIRMS (%)

Type of Provision	% of Firms with Provision (n=81)
Anti-Takeover Provisions Detailed in S-1	100%
Effective Staggered Board (ESB)	83%
Classified Board	89%
Prohibit Stockholder Action by Written Consent	91%
Prohibit Stockholders from Calling Special Meetings	98%
Directors Removable Only For Cause	95%
Only Board May Change Number of Authorized Directors	100%
Vacancies on Board Fillable by Remaining Directors	99%
Board May Issue Blank Check Preferred Stock	84%
Advance Notice Requirements	99%
Dual-Class Stock	4%

The data is presented in abbreviated form in Table 1 above, and it reveals a number of powerful findings. We find that every firm in the sample specifically disclosed the existence of “Anti-Takeover” provisions of one type or another in their respective Forms S-1.⁴⁷ More importantly, we find that eighty-three percent of the companies went public with an ESB in place.⁴⁸ This key finding is consistent with the trend reported in previous studies of increasing incidence of takeover defenses at the IPO stage. Prior studies have found that the rate of classified boards at IPO firms increased from 34% in the early 1990s to somewhere between 64%–82% in the late 1990s and early 2000s, to 70% in 2011—though those studies did not limit their analyses to ESBs.⁴⁹ Comparing apples to apples and focusing just on the presence of a classified board, the present data shows a higher percentage today (89%) than ever before.

Although demand for takeover defenses at the IPO stage is seemingly increasing, this might mask a simpler reality that the desire for takeover defenses has always been there, but the need to adopt them at the IPO stage is a relatively new consequence of the success of shareholder advocates. As

⁴⁷ Note, however, that some of these provisions are really quite mild or can be easily dismantled, while others make good business sense apart from takeover defense, such as the board being empowered to amend the bylaws. So this statistic is perhaps not as impressive as it sounds.

⁴⁸ Indeed, this ESB finding is even more powerful than it first appears, for some of the firms (Santander Consumer USA Holdings, Aramark Holdings and Hilton Worldwide Holdings) that went public without a classified board in place were “controlled companies” with a majority owner holding more than fifty percent of the voting shares. By definition, a hostile takeover of a controlled company is impossible and it therefore has no need for takeover defenses. Excluding these controlled firms, eighty-six percent of contemporary companies have an ESB in place at the time of the IPO.

⁴⁹ See *supra* Part I.B; Coates, *supra* note 5, at 1377 fig.3.

of the early 1990s, public companies could adopt takeover defenses if and when they needed them. Over the ensuing two decades, however, shareholder advocates have made it increasingly difficult for a public company to adopt takeover defenses “midstream,” to the point that it is effectively impossible to classify a de-classified board in the current environment.⁵⁰ Recognizing this reality, management teams and the attorneys who advise them came to appreciate that the IPO stage is the only chance a public company has to adopt takeover defenses. This now-or-never attitude is at least as likely an explanation for the increased adoption of defenses at the IPO stage from the 1990s to today as is the idea that IPO firms are now more interested in defenses than they were in the past.

Finally, we find that only four percent of the sample firms employed dual-class stock as a takeover defense. This is also consistent with previous studies. Coates, for instance, finds that eight percent of firms employed dual-class stock in the 1990s, and, at the time of his study, the use of dual-class stock was declining.⁵¹

As this latest data presented in this Article shows, an overwhelming majority of contemporary IPO firms go public with takeover defenses in place: 89% of IPO firms adopt classified boards and 83% adopt ESBs. This finding seems strange, as it appears to be contrary to the pecuniary interest of the very people making the decisions to go public. These decision-makers are often sophisticated repeat players, such as venture capitalists and private equity investors. If takeover defenses are thought to reduce the value of a public company—and thus the value of the pre-IPO owner’s exit, either in the IPO or shortly thereafter—why do many companies at the IPO stage adopt them?⁵² This is the mystery on which this Article is focused, but it is not the first attempt to resolve it, as will be seen in the next Part.

II. EXISTING EXPLANATIONS FOR IPO TAKEOVER DEFENSES

The data presented in this Article shows that the overwhelming majority of newly public companies adopt powerful takeover defenses, including the ESB, in advance of their respective IPOs.⁵³ At the same time, most public companies have done precisely the opposite and de-staggered their boards, opting for annual elections.⁵⁴ Leading scholars have put forth a number of theories to explain this seemingly contradictory behavior, and while these theories have some significant explanatory power, they have not defin-

⁵⁰ Bebchuk, *supra* note 4, at 727 (“[S]hareholders’ midstream opposition to staggered boards is . . . practically universal.”); *id.* at 716 (“[S]hareholders can be expected to vote against [takeover defenses] in midstream.”).

⁵¹ Coates, *supra* note 5, at 1357, 1383.

⁵² Steven M. Davidoff, *The Case Against Staggered Boards*, N.Y. TIMES, Mar. 20, 2012 (“If the staggered board is really so bad . . . then why are all of these companies going public with one?”).

⁵³ See *supra* Part I.B.1.

⁵⁴ See *supra* Part I.A.

itively resolved the question. This Part briefly reviews some of the leading theories and shows why they do not fully explain the confounding reality we face. As of yet, the puzzle remains unsolved.⁵⁵

The first type of explanation found in the literature, coming from notable commentators including Professor Stout, is simply that takeover defenses are generally good for corporations and shareholders. Such a position “would suggest all companies should adopt defenses prior to an IPO.”⁵⁶ This conclusion is in line with this Article’s findings that all modern IPO firms disclose the presence of takeover defenses, and that the overwhelming majority of firms go public with powerful defenses in place, such as an ESB. On the other hand, this theory has difficulty explaining why almost all existing public companies have de-staggered their boards and otherwise dismantled defenses.⁵⁷ One might reply that such behavior represents mistakes caused by short-term pressures and a myopic market⁵⁸—but such a reply would be hotly contested.⁵⁹

A second group of explanations are based on the so-called “private benefits” that accrue to the founders or other owner-managers by insulating the company from hostile takeovers.⁶⁰ Many commentators have suggested that the real purpose of takeover defenses is to provide private benefits for these pre-IPO owner-managers, either by ensconcing them in rent-producing sinecures for the rest of their working lives, or by providing “psychic benefits of control.”⁶¹

A problem with this theory, however, is that many pre-IPO shareholders are not themselves managers, so they would neither benefit from any rents that an entrenched management team would receive nor would they receive any psychic benefits of control.⁶² It is possible that these non-management pre-IPO shareholders are simply not paying attention and do not realize that their shares are being undervalued so that management can enjoy personal benefits.⁶³ Yet if the share price difference between a company with

⁵⁵ *Fact and Fiction*, *supra* note 14, at 1370.

⁵⁶ *Explaining Variation*, *supra* note 5, at 1327–28 (2001); Lynn A. Stout, *The Shareholder as Ulysses: Some Empirical Evidence on Why Investors in Public Corporations Tolerate Board Governance*, 152 U. PA. L. REV. 667, 699–701 (2003) (asserting that public shareholders’ “revealed preference” is for enhanced board authority).

⁵⁷ *Antitakeover Arrangements*, *supra* note 4, at 728 (“The view that IPO charters simply seek to satisfy shareholders’ wishes to have companies governed by antitakeover provisions is inconsistent with the persistent opposition that existing firms’ shareholders have to such provisions.”).

⁵⁸ *See, e.g.*, LYNN STOUT, *THE SHAREHOLDER VALUE MYTH* (2012).

⁵⁹ *See, e.g.*, *The Myth*, *supra* note 14.

⁶⁰ *Explaining Variation*, *supra* note 5, at 1305 (“[D]efenses are generally good for pre-IPO owner-managers.”); *Antitakeover Arrangements*, *supra* note 4, at 746 (referring to “the manager who is going to obtain private benefits of control” due to takeover defenses).

⁶¹ Klausner, *supra* note 6, at 779 (describing Daines & Klausner, *supra* note 5, at 108–10).

⁶² *See Explaining Variation*, *supra* note 5, at 1343.

⁶³ *But see Antitakeover Arrangements*, *supra* note 4, at 740–42 (discussing “bounded attention at the IPO stage”).

and without takeover defenses is really as significant as many commentators think,⁶⁴ this explanation is not fully satisfying.

Moreover, empirical evidence appears to undermine theories premised on “psychic benefits of control.”⁶⁵ Daines and Klausner, for instance, examined whether IPO firms were more likely to use takeover defenses when their CEO was a founder of the firm. They started with the assumption that “founder-CEOs would derive relatively high psychic benefits from retaining control of the firm [after the IPO] and would therefore derive greater private benefits overall than would other managers.”⁶⁶ They expected that “firms in which founders were still CEOs at the time of the IPO [would be] more likely to have takeover defenses than firms whose founders had been replaced as CEO.”⁶⁷ To their surprise, however, they found “no statistically significant difference in takeover defenses with and without founder-CEOs.”⁶⁸

Furthermore, the non-management pre-IPO shareholders are often sophisticated parties, such as venture capitalists, angel investors, or private equity funds—and they commonly hold the majority of voting power at the time of the IPO. One would think that these sorts of shareholders would refuse to give up value, allowing the insiders to receive private benefits in which they will not share. Yet empirical studies have shown no statistical difference in the adoption of takeover defenses at IPO firms with and without private equity ownership.⁶⁹ These findings cast further doubt on explanations premised on private benefits for owner-managers.

Klausner offers a theory as to why private equity owners would allow their shares to be sold in an IPO for less than they could be in the absence of takeover defenses. He suggests that takeover defenses function as gifts to managers so that private equity firms can maintain reputations as management-friendly and thereby help to ensure future deal flow.⁷⁰ This theory has resonance, but it may prove too much, for it would suggest that private equity funds should always give in to the wishes of their managers—such as for a corporate jet or extended vacation time—and yet they apparently do not. Something is special about takeover defenses.

Coates has suggested that the adoption of takeover defenses at IPO firms is driven by their choice of attorney.⁷¹ He calls this the “law firm hypothesis” and published an empirical study in 2001 in which he found

⁶⁴ See *supra* Part I.A. This is the operating assumption for present purposes.

⁶⁵ See Klausner, *supra* note 6, at 779.

⁶⁶ *Id.* (describing Daines & Klausner, *supra* note 5, at 108–10).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 769 (addressing the “widespread presence of takeover defenses in the charters of [IPO] firms with private equity fund investment”).

⁷⁰ *Id.* at 770–75.

⁷¹ Coates, *supra* note 5; see Davidoff, *supra* note 52 (making apparent reference to Coates’s work).

strong evidence to support it.⁷² In his sample from the 1990s, many IPO firms adopted takeover defenses and many did not, and the data showed that the “takeover experience, size, and location of law firms strongly correlate[d] with the number and strength of pre-IPO takeover defenses adopted by companies they advise[d].”⁷³ In today’s world, however, as shown by the more current data presented in Table 1, practically all IPO firms adopt very strong takeover defenses. Admittedly, the sample size of the present study is likely too small to definitively test the law firm hypothesis, but the overwhelming adoption of strong defenses by nearly all IPO firms appears to undermine Coates’s theory, since there is no longer significant variation in IPO practice.⁷⁴

It is possible that Coates’s explanation that lawyers are the driving force in adopting takeover defenses still holds, but we see little variation because practically all law firms now provide the same advice. Assuming that to be the case, however, this practice likely reflects broad client preferences. If clients generally rejected takeover defenses at the IPO stage when properly advised that they were leaving money on the table by using these defenses, and yet law firms still generally advised their use, this would seem to represent an unstable equilibrium. The standard would flip if just one firm broke rank and advised IPO clients not to use anti-takeover defenses. This has not happened, however, which makes it seem that the simple answer—clients get what they want—is correct.

Professor Bebchuk has canvassed the theoretical landscape in his writings on the mystery of takeover defenses at IPO companies.⁷⁵ He has acknowledged that there may be efficiency rationales for this practice—for instance where “the benefits of rent protection obtained by the founders through the anti-takeover provisions are, at least at the IPO stage, greater than the resulting reduction in share price that the provisions cause.”⁷⁶ He has also considered explanations including agency costs, asymmetric information, bounded attention, and others, without coming to any clear conclusions.⁷⁷ Based on the potential merit of these theories, however, Bebchuk suggests that the notion that IPO charters represent “optimal arrangements” is “often unwarranted.”⁷⁸ So, despite the overwhelming popularity of takeover defenses at the IPO stage, Bebchuk opposes them as contrary to share-

⁷² Coates, *supra* note 5.

⁷³ *Id.* at 1301, 1304.

⁷⁴ Some of the raw data supports the law firm hypothesis, while other aspects oppose it. For example, Wilson Sonsini Goodrich & Rosati advised nine IPO firms, all of which had ESBs. On the other hand, Davis Polk & Wardwell LLP advised eleven IPO firms in the sample; nine had ESBs and two did not, which is about in line with the overall group.

⁷⁵ *Antitakeover Arrangements*, *supra* note 4.

⁷⁶ *Id.* at 716.

⁷⁷ *Id.* at 730–45.

⁷⁸ *Id.* at 753.

holder interests.⁷⁹ As such, he would tentatively support legal restrictions on the ability of firms to include takeover defenses at the time of IPO.⁸⁰

Some, including Professor Michal Barzuza, believe that once takeover defenses become part of the IPO boilerplate their overwhelming use can “provide camouflage to insiders with a strong preference for entrenchment.”⁸¹ Barzuza’s explanation is consistent with this Article’s data, which show that takeover defenses have indeed become a routine, boilerplate part of the IPO process. Indeed, firms generally disclose them, which, according to Barzuza, provides cover for any that wish to employ defenses for nefarious purposes.⁸² But her theory does not clearly respond to the fact that most public companies have dropped their defenses over time. Once the IPO firm is public, it will find itself with thin camouflage, and its signal will be much clearer as a member of a small minority of public firms with defenses in place.⁸³

Similarly, the “diversion” theory of Professor Sharon Hanes posits that public companies can make themselves into attractive takeover targets by declining or dropping takeover defenses.⁸⁴ But this is only effective if most of the alternative targets are themselves shielded. While this is clearly the case when an IPO launches, once an IPO firm joins the pool of all public companies, this differentiator will disappear because the overwhelming majority of public companies lack effective takeover defenses.

The “bonding” hypothesis presented by Professor Johnson and co-authors holds that takeover defenses can be value-enhancing for IPO firms with substantial contractual commitments to business partners because they encourage relationship-specific investments by those partners. Takeover de-

⁷⁹ *Id.* at 751 (“More empirical evidence . . . is needed before definite conclusions can be reached The available state of knowledge, however, does justify a reasonable measure of skepticism toward claims of unlimited contractual freedom to adopt antitakeover charter provisions [at the IPO stage]. For now, when public officials attach substantial likelihood to the undesirability of some arrangements, it would be sensible not to include them in the menu of permissible choices for charter provisions.”); Bebchuk, *supra* note 4, at 751 (“There are reasons to believe that . . . eliminating the (currently permitted) option of a staggered board would be desirable.”).

⁸⁰ *Id.* at 750–52 (2003).

⁸¹ Michal Barzuza, *Noise Adopters in Corporate Governance*, 2013 COLUM. BUS. L. REV. 627, 627, 657–61 (2013). Since some firms adopt takeover defenses “for reasons having little to do with firm operations or strategy, these choices send only a noisy signal, and in turn result in only a partial market discount of firm value. Entrenchment-seeking managers can achieve their desired level of entrenchment without paying a full price.” *Id.* at 627.

⁸² *See id.* at 632–33.

⁸³ This may explain the seemingly strange behavior of a company like Visa, which went public in 2008 with a classified board, and then de-classified the board in 2010. *See* Visa, Inc. PRE 14A Preliminary Proxy Statement (Nov. 19, 2010), <https://www.sec.gov/edgar/searchedgar/companysearch.html>.

⁸⁴ *See* Hanes, *supra* note 5, at 160 (“The essence of the takeover diversion argument is that, in the absence of ample M&A opportunities, targets compete among themselves for the prospects of a takeover, while bidders compare among different targets in search of the best alternative. Consequently, all things being equal, an unshielded target is more attractive to a bidder if its peers are shielded and therefore harder and more expensive to acquire.”).

fenses should therefore be seen at those types of firms but not others.⁸⁵ The data in Table 1 undermines this theory, however, as it shows the overwhelming use of defenses by the vast majority of contemporary IPO firms, not just those with the characteristics on which they focus.

In conclusion, there has been significant scholarly attention devoted to the mystery of why we see extensive use of takeover defenses at the IPO stage at the same time as the broader pool of public companies have eschewed them. A number of the theories here provide some explanation, but the mystery has yet to be convincingly resolved.⁸⁶ The next and final Part presents this Article's novel explanation for this phenomenon.

III. CORPORATE LEGACY

Over the past decade or so, many scholars have analyzed the prevalence of takeover defenses at IPO firms. And yet "[t]his phenomenon remains a mystery," as a pre-eminent expert in the field recently acknowledged.⁸⁷ In an attempt to help fill this gap in our understanding, this Part claims that the literature to date has failed to appreciate one possible rationale for apparently self-destructive behavior on the part of pre-IPO shareholders: the desire for an enduring legacy through a perpetual public company.

This Part asserts that one reason people form corporations and take them public is to attempt to achieve the only form of immortality reasonably available to human beings: a legacy that lasts beyond one's earthly lifetime. Immortality of this sort has been a goal of countless people at least since ancient Greece, where Homer's *Iliad* immortalized the hero Achilles, whose song is still sung today. Similarly, Charlie Chaplin, Max Planck, and Stonewall Jackson all attained immortality by creating a legacy that survived them through outstanding achievements in film, science, and war, respectively. Others have achieved immortality of this sort through art (Vincent Van Gogh), athletics (Babe Ruth), music (Mozart), and other forms.

Previously unrecognized is the possibility that the corporation is yet another form through which a mortal person can leave an enduring legacy. Corporations are generally endowed by the law with perpetual existence.⁸⁸ Public companies, in particular, can have profound social and cultural significance, making a perpetual public company an effective method for perpetuating one's legacy.

But public companies have a special vulnerability that private companies do not share. Once a company goes public in an IPO, it is at risk of a hostile takeover, which could mean the end of the corporation as an enduring, independent institution, thus undermining its ability to perpetuate a leg-

⁸⁵ *Fact and Fiction*, *supra* note 14, at 1334–35 (discussing Johnson, Karpoff & Yi, *supra* note 22).

⁸⁶ *Id.* at 1370.

⁸⁷ *Id.*

⁸⁸ Schwartz, *supra* note 2.

acy for the pre-IPO shareholders. Takeover defenses, such as a staggered board, can be used to avoid this outcome and ensure that the company will remain independent for a long time—and thus perpetuate the legacy of the pre-IPO shareholders (e.g., founders, early investors, and employees) for many years to come. Furthermore, contemporary public companies face strong resistance to adding takeover defenses midstream, with the effect that the only chance for a public company to adopt such defenses is at the IPO stage.⁸⁹ And this is precisely what we see in practice.⁹⁰

To summarize: the corporate form, especially in its publicly-traded variant, has the power to perpetuate a lasting legacy for the mortal humans affiliated with it. Yet this power can be extinguished through a hostile takeover, making takeover defenses an attractive option for those who hope to perpetuate their legacy through the company. The pre-IPO shareholders are closely affiliated with the company and recognize that their only realistic chance to adopt effective takeover defenses is at the IPO stage. This novel theory helps solve the mystery of takeover defenses at IPO firms.

This Part is organized as follows: Section A explains the human quest for immortality and the idea that an enduring legacy can help fulfill that goal. Section B sets forth the novel claim that a perpetual corporation, especially a public one, can create and promote an enduring legacy. Based on that claim, Section C presents this Article's solution to the mystery of takeover defenses at IPO firms: pre-IPO shareholders hope, among other things, that the corporation will carry their legacy far into the future, but defenses are needed because a hostile takeover could put an end to the corporation's independent existence. Section D also contrasts this Article's novel theory with the existing explanations in the literature reviewed in Part II. Finally, Section E responds to some important challenges to this Article's analysis.

A. *The Quest for Immortality Through an Enduring Legacy*

To be human is to appreciate and understand one's inevitable mortality.⁹¹ From the moment we are born we are fated to die and—unlike other animals—we are cursed to have the sophisticated mental faculties that allow us to ponder this fact.⁹² This is a core feature of the human condition that has occupied thinkers, poets, artists, and philosophers throughout the ages.⁹³

⁸⁹ See *supra* Part I.B.1.

⁹⁰ *Supra* Part I.B.2.

⁹¹ See, e.g., HANNAH ARENDT, *THE HUMAN CONDITION* 18 (1958) (Mortality is “the hallmark of human existence.”).

⁹² See, e.g., ERNEST BECKER, *THE DENIAL OF DEATH* xvii (1973) (“[T]he fear of death is indeed a universal in the human condition.”); ALDOUS HUXLEY, *ISLAND* 101–02 (1962) (addressing “the sorrow inherent in the human condition, the price we must pay for being sentient and self-conscious organisms . . . subject to the laws of nature and under orders to keep on marching, through irreversible time . . . toward decrepitude and the certainty of death”).

⁹³ See, e.g., WILLIAM SHAKESPEARE, *MACBETH* act 5, sc. 5, l. 24–26 (Nicholas Brooke ed., 1990) (“Life’s but a walking shadow, a poor player / That struts and frets his hour upon the

Immortality is impossible, and yet we yearn for it.⁹⁴ Throughout history, ambitious people have sought out immortality in its literal sense, the ability to live forever.⁹⁵ One example is the sixteenth century Spanish explorer, Ponce de Leon, who searched modern-day Florida for a “fountain of youth” that would allow him to live forever.⁹⁶ Another is the “Holy Grail,” a cup that, according to medieval legend, was present at Jesus Christ’s last days on earth.⁹⁷ The legend holds that the Holy Grail has the power to heal injuries and sickness, and to extend life.⁹⁸

But this is not merely a matter of ancient history, for people continue to search for a way to live forever. Ted Williams, the famous baseball slugger, had his body frozen after his death in 2002 with the goal of resurrection at some point in the future.⁹⁹ Somewhat less dramatically, much attention has been lavished lately on scientific studies of “anti-aging” medical techniques, such as a cellular enzyme called “telomerase” that is said to “reverse” certain aspects of the aging process.¹⁰⁰ Finally, consider the concept of “the Singularity”—so popular among Silicon Valley billionaires—whereby “human beings and machines will so effortlessly and elegantly merge that poor health, the ravages of old age and even death itself will all be things of the past.”¹⁰¹

stage / And then is heard no more.”); THE FLAMING LIPS, *Do You Realize??*, on YOSHIMI BATTLES THE PINK ROBOTS (Warner Bros. Records 2002) (“Do you realize that everyone you know some day will die?”); BOB DYLAN, *It’s Alright, Ma (I’m Only Bleeding)*, on BRINGING IT ALL BACK HOME (Columbia Records 1965) (“He not busy being born is busy dying[.]”).

⁹⁴ See, e.g., MARK W. EDWARDS, HOMER: POET OF THE ILIAD 138 (1987) (“Mortals hate death and old age, and long for immortality.”).

⁹⁵ *Id.* (“This longing [for immortality] appears in the literature from the earliest times.”).

⁹⁶ See, e.g., RICHARD WORTH, PONCE DE LEÓN AND THE AGE OF SPANISH EXPLORATION IN WORLD HISTORY 7–12 (2003).

⁹⁷ See, e.g., ARTHUR EDWARD WAITE, THE HOLY GRAIL: THE GALAHAD QUEST IN THE ARTHURIAN LITERATURE 18 (1961) (“[T]he Holy Grail is represented invariably . . . as that Vessel in which Christ either celebrated the Last Supper or consecrated for the first time the Elements of the Eucharist . . . and, according to the Legend, its next use was to receive the Blood from the Wounds of Christ when His body was taken down from the Cross.”); ALFRED LORD TENNYSON, *The Holy Grail*, in IDYLLS OF THE KING 232 (1870) (poetic rendition referring to “The Cup, the Cup itself, from which our Lord / Drank at the last sad supper[.]”).

⁹⁸ See, e.g., SANDRA NESS IHLE, MALORY’S GRAIL QUEST: INVENTION AND ADAPTATION IN MEDIEVAL PROSE ROMANCE 34 (1983); WAITE, *supra* note 94, at 18 (recounting legend of a “Warden” of the Holy Grail whose “life was prolonged through the centuries.”); TENNYSON, *supra* note 97, at 233 (“[I]f a man Could touch or see [the Holy Grail], he was heal’d at once, By faith, of all his ills.”); INDIANA JONES AND THE LAST CRUSADE (Paramount Pictures 1989) (featuring twentieth-century parties recovering and using Holy Grail to heal character who had received a seemingly fatal wound).

⁹⁹ BEN BRADLEE JR., THE KID: THE IMMORTAL LIFE OF TED WILLIAMS 11–12 (2013).

¹⁰⁰ See, e.g., Mariela Jaskelioff, et al., *Telomerase Reactivation Reverses Tissue Degeneration in Aged Telomerase-deficient Mice*, 469 NATURE 102, 102 (2011) (reporting on experimental finding that “telomerase reactivation reversed neurodegeneration”). See generally MICHAEL D. WEST, THE IMMORTAL CELL: ONE SCIENTIST’S QUEST TO SOLVE THE MYSTERY OF HUMAN AGING (2003).

¹⁰¹ Ashlee Vance, *Merely Human? That’s so Yesterday*, N.Y. TIMES, June 10, 2010, at BU1 (reporting that Sergey Brin, Peter Thiel, and others have contributed substantial sums to the “Singularity University”). See generally RAY KURZWEIL, THE SINGULARITY IS NEAR: WHEN HUMANS TRANSCEND BIOLOGY (2005).

All such attempts to literally live forever have come to naught, however.¹⁰² The history of the human species has been that every living person has died or will die. Indeed, this has become the defining aspect of the human condition.¹⁰³ Hence, a deep question for poets and philosophers throughout the ages has been how to live a meaningful life despite the certainty of death.¹⁰⁴

Among the first and most important Western responses to this profound question is offered in the ancient Greek epic, the *Iliad*. The *Iliad* was composed around the eighth century B.C. by Homer.¹⁰⁵ Thousands of years later, the *Iliad* remains one of the most important texts in the world. It has been performed, read, translated, and analyzed continuously throughout Western history. The *Iliad* remains compelling to modern readers far removed from the time and place it describes because the themes it addresses—including, most notably, the need to accept human mortality—are timeless.

The answer provided by the *Iliad* is that humans are surely mortal, but that they can achieve a form of immortality through being remembered and talked about, even after their time on earth comes to an end.¹⁰⁶ A warrior who fights gallantly and dies a noble death will have his story recounted by poets and bards for generations to come. This is called *kleos aphthiton* in Greek, translated as everlasting fame, eternal glory, or perpetual legacy.

¹⁰² ADAM LEITH GOLLNER, *THE BOOK OF IMMORTALITY: THE SCIENCE, BELIEF, AND MAGIC BEHIND LIVING FOREVER* 5 (2013) (“No examples of anything immortal have ever been found by science.”).

¹⁰³ *Id.* at 6 (“[D]ying is ineluctable, devastating, *real*.”). Christianity and other religions believe in the concept of an immortal human soul, but they also accept that the physical human body must perish. *See id.* at 5–6.

¹⁰⁴ This may be a distinct concern of Western culture, as opposed to a universal aspect of humanity. One core belief of Hinduism, for instance, is that people will be reincarnated after their deaths, thus undermining the premise of this Article that human death is final. *See, e.g., BHAGAVAD GITA* ch. 2 v. 12–13 (A. Mahâdeva S’âstri, trans.) (1897). That said, the understanding that humans are mortal yet nonetheless seek immortality is clearly not unique to the West, for it is also the driving theme of *Gilgamesh*, an ancient tale from the Middle East. *See, e.g., STEPHEN MITCHELL, GILGAMESH: A NEW ENGLISH VERSION* 1 (2004) (describing the ancient Mesopotamian epic as a story in which Gilgamesh’s best friend dies, leading Gilgamesh to undertake “a desperate journey to find the one man who can tell him how to escape death”). Finally, to the extent that this concept is a Western phenomenon, the purpose it serves in this Article is found in its relation to IPO companies in the contemporary United States, itself an aspect of Western culture.

¹⁰⁵ It is a matter of scholarly debate—known as the “Homeric Question”: whether “Homer” was a single poet or some sort of collective effort of many poets or bards. *See, e.g., HOMER, THE ILIAD* 8–10 (Barry B. Powell, trans.) (2014). Without attempting to wade into that issue, this Article will simply refer to the author of the *Iliad* as “Homer.” *Id.* at 3 (“By ‘Homer’ . . . I mean the composer of the *Iliad*.”).

¹⁰⁶ *Id.* at Book XII: 288–93 (“[I]f escaped from battle it were possible for the two / of us never to grow old and never to die, I would not myself / fight among the foremost, not would I send you into the fight / where men win glory. But as it is, the fates of death / stand over us, ten thousand of them—no man can flee or escape / from them—so let us go forward and give glory to another, / or to ourselves.”).

The “most urgent need of all” for a Homeric hero is thus “to perpetuate one’s status in the form of continuing fame after death.”¹⁰⁷ The Homeric hero is willing “to risk an early death in battle, striving for ‘imperishable glory’ (*kleos aphthiton*) in the form of poetic remembrance as heroes of songs that will keep alive their names and achievements and so endow their ephemeral lives with significance that transcends death.”¹⁰⁸

Achilles, the protagonist of the *Iliad*, provides the ultimate example of achieving immortality through creating a perpetual legacy. His goddess mother tells him that he has to choose between two fates. On the one hand, he can withdraw from the Trojan War and live a long, quiet life back at home, but nobody will remember him after he is gone. On the other, he can fight and die in battle at a young age, but achieve immortality through everlasting glory.¹⁰⁹ Achilles chose glory, of course, and was rewarded by the fact that Homer’s epic poem about his exploits is still sung today, thousands of years later.¹¹⁰ Achilles, like other Homeric heroes, achieved the only form of immortality available to mortals, perpetual legacy.¹¹¹ The *Iliad* charted a course for people to follow to achieve immortality: fight gallantly on the battlefield and your name will be remembered forever.

Alexander the Great represents a prototype of immortalizing oneself in this way. Alexander, who lived just a few centuries after Homer, slept with a copy of the *Iliad* under his pillow and claimed Achilles as an ancestor.¹¹² He fought for and won an empire that stretched from Greece to India, and did so with the goal of eternal renown. Hence, “when he set sail, Alexander made

¹⁰⁷ Michael Clarke, *Manhood and Heroism*, in *THE CAMBRIDGE COMPANION TO HOMER* 74, 77 (Robert Fowler ed., 2004); Irene J.F. de Jong, *The Homeric Narrator and His Own Kleos*, 59 *MNEMOSYNE* 188, 195 (2006) (“Because of their interest in *kleos*, Homeric characters very much think, indeed worry about how they will appear in the eyes of future generations.”).

¹⁰⁸ Seth L. Schein, *Introduction*, in *READING THE ODYSSEY* 3, 7 (Seth L. Schein ed., 1996); M.S. SILK, *HOMER: THE ILIAD* 61 (2d ed. 2004) (“Death is inescapable and final; therefore life is of irreplaceable value; yet certain acts, especially those that risk or incur death, can achieve the glory that outlives finite life . . . [W]e thus reclaim a kind of immortality from the clutches of mortality itself.”); cf. STEPHEN CAVE, *IMMORTALITY: THE QUEST TO LIVE FOREVER AND HOW IT DRIVES CIVILIZATION* 6 (2012) (“The Greeks believed that culture had a permanence and solidity that biology lacked; eternal life therefore belonged to the hero who could stake a place for himself in the cultural realm” through inclusion in a renowned epic like the *Iliad*.); GREGORY NAGY, *THE BEST OF THE ACHAEANS: CONCEPTS OF THE HERO IN ARCHAIC GREEK POETRY* 177 (rev. ed. 1999) (“[D]eath and immortality are presented in terms of nature and culture respectively.”).

¹⁰⁹ HOMER, *THE ILIAD* IX:406–13 (Bairry B. Powell trans., Oxford University Press 2014).

¹¹⁰ NAGY, *supra* note 108, at 184–85 (“For the Achilles of our *Iliad*, the *kl[e]los [a]p[ht]iton* of epic . . . offers . . . heroic immortality.”); Charles Segal, *Kleos and its Ironies in the Odyssey*, in *READING THE ODYSSEY* 201, 201 (Seth L. Schein ed., 1996) (“In the *Iliad* a warrior’s *kleos* is more important than life itself, as Achilles’ ultimate choice makes clear.”).

¹¹¹ See JAMES M. REDFIELD, *NATURE AND CULTURE IN THE ILIAD: THE TRAGEDY OF HECTOR* 35 (1975) (“In song events acquire a kind of permanence which confers on them something approaching immortality. A place in the tradition of song is the greatest prize the society can award its heroes.”); cf. NAGY, *supra* note 108, at 176–77 (contrasting “the mortality of Achilles and the immortality conferred by the songs” of epic poetry).

¹¹² Cave, *supra* note 108, at 202–03.

sure that his entourage included the scribes, historians and sculptors who would do for him what Homer did for Achilles,” that is, endow him with everlasting glory.¹¹³ And he succeeded, for he has been consistently famous and his name recounted for the past 2300 years.¹¹⁴

In the United States, we have long embraced the tradition of memorializing the names of soldiers killed in combat. Many towns have monuments to local soldiers who have died defending their country. The monuments commonly include the names of each individual etched in stone or cast in metal so that their names survive long after their mortal bodies are gone. On a grander scale, the Vietnam War Memorial in Washington, D.C., consists primarily of nearly 60,000 names, each one laser-etched into stone. This practice of honoring war casualties by recording their names in a permanent fashion is very much in line with the Homeric concept of everlasting glory through killing and dying on the battlefield.

Everlasting glory can endow a mortal human with a form of immortality. And while the *Iliad* shows that such fame can be achieved through heroics on the battlefield, this is not the exclusive means of winning that prize, as demonstrated by the *Iliad* itself. The poet’s name—“Homer”—is remembered long after his mortal body perished from this earth.¹¹⁵ By composing an epic that continues to be read thousands of years after he perished, Homer achieved a form of immortality.¹¹⁶ He also showed that a person can win everlasting glory in ways that have nothing to do with combat.

Countless other writers and artists have followed Homer in this quest over the millennia, seeking their place in posterity through the cultural artifacts they leave behind.¹¹⁷ Many have been self-conscious of this goal. For example, the Roman poet Horace, writing in the first century B.C., said that by publishing a great poem, “I have finished a monument more lasting than bronze . . . I shall not wholly die, and a large part of me will elude the goddess of death.”¹¹⁸ John Milton, author of *Paradise Lost*, expressed a similar sentiment in 1637.¹¹⁹

In the academic or scientific setting, scholars of every type publish their research not only to advance knowledge but also for the prospect of everlasting glory.¹²⁰ To have one’s name attached to a theory—like Euclid or Ein-

¹¹³ *Id.* at 207.

¹¹⁴ *See id.* at 202.

¹¹⁵ *See de Jong, supra* note 107.

¹¹⁶ *See id.* at 188 (“Homer is the most famous poet of ancient literature[.]”).

¹¹⁷ CAVE, *supra* note 108, at 210 (“[T]he attempt to impress posterity is a powerful productive impulse that has given us some of the pinnacles of human achievement.”). *But cf.* THE STROKES, *What Ever Happened, on Is This It* (RCA Records 2001) (“I want to be forgotten . . .”).

¹¹⁸ Horace, *Ode* 3.30.1–7.

¹¹⁹ CAVE, *supra* note 108, at 210–11 (“The Spanish poet and philosopher Miguel de Unamuno put it pithily when he wrote that ‘the man of letters who shall tell you that he despises fame is a lying rascal.’”).

¹²⁰ *Cf.* Barney Tobey, Cartoon, *THE NEW YORKER*, Sept. 13, 1982, at 53 (One elderly professor tells another, “Too bad about old Ainsworth. Published and published, but perished

stein—or to have a standard measure called by one’s name—like Planck’s constant or the Watt—is a crowning achievement precisely because it immortalizes the scholar.¹²¹ Her name will be spoken for generations to come.

This is not just a matter for the professionals, as millions of people use the Internet to post their writings and images, in part for the goal of perpetual renown. On Facebook, for instance, tens of millions of people post text, photos, or videos—mostly of and about themselves—every single day, not to mention the countless people publishing blog posts. These digital etchings are even more powerful than their stone counterparts, as they have the capacity to last essentially forever.¹²² Indeed, an entire industry has arisen to preserve such a “digital legacy” in perpetuity.¹²³

The lesson of the *Iliad* is not even limited to those who publish. Socrates taught that this was a feature of all of us, from Achilles to the common person. He argued that all people are “stirred by the love of an immortality of fame,” leading them “to run all risks greater far than they would have run for their children, and to spend money and undergo any sort of toil and even to die, for the sake of leaving behind them a name which shall be eternal.”¹²⁴

In contemporary America, movie stars epitomize the human quest for immortality through perpetual legacy. They work in a medium that is designed for posterity. Their likeness is captured on film, thus allowing them to live forever, in a sense.¹²⁵ And to help their glory persist beyond their mortal lifetimes, leading actors have their names cast in bronze and embedded in concrete on the Hollywood Walk of Fame.¹²⁶ The actor James Dean was quoted as saying, “To me, the only success, the only greatness, is immortality.”¹²⁷ And, sure enough, although he died at twenty-four, he achieved a

all the same.”). For an ironic take, see Glenn Collins, *Obituary: Barney Tobey*, 82, *a Cartoonist in The New Yorker for 5 Decades*, N.Y. TIMES, Mar. 28, 1989, at B6 (“Until his death [Barney] Tobey was a contract artist for [The New Yorker], which published more than 1,200 of his cartoons and four of his cover illustrations.”).

¹²¹ In a similar vein, “the motto of the preeminent French learned society, the Académie Française, is ‘à l’immortalité,’ and members are known as ‘the Immortals.’” CAVE, *supra* note 107, at 210.

¹²² Cf. WALL-E (Walt Disney Studios 2008) (video recording of a 1960s musical film is viewed 900 years later).

¹²³ See, e.g., JOHN ROMANO & EVAN CARROLL, YOUR DIGITAL AFTERLIFE: WHEN FACEBOOK, FLICKR AND TWITTER ARE YOUR ESTATE, WHAT’S YOUR LEGACY? 3–4 (2010) (“[D]eath is certain. When you pass away you will leave behind your digital content . . . your digital legacy. . . . [T]here’s [] a huge opportunity that’s never been available to ordinary people—a permanent archive of your life that could exist beyond your physical life. While the Internet can’t make you immortal, with a little planning, your legacy could have a glorious afterlife.”).

¹²⁴ CAVE, *supra* note 108, at 211.

¹²⁵ THE KINKS, *Celluloid Heroes, on EVERYBODY’S IN SHOW-BIZ—EVERYBODY’S A STAR* (RCA 1972) (“Celluloid heroes never really die.”).

¹²⁶ See *id.* (“You can see all the stars as you walk along Hollywood Boulevard, / Some that you recognize, some that you’ve hardly even heard of, / People who worked and suffered and struggled for fame, / Some who succeeded and some who suffered in vain.”).

¹²⁷ CAVE, *supra* note 108, at 211; accord IRENE CARA, *Fame, on THE ORIGINAL SOUNDTRACK FROM THE MOTION PICTURE FAME* (RSO 1980) (“Fame! / I’m gonna live forever! / Baby, remember my name.”).

form of immortality, as evidenced by his star on Hollywood Boulevard.¹²⁸ Professional athletes similarly devote their lives to their sport and risk bodily injury to make their mark so that they may achieve perpetual renown. This can be seen by the keeping of all-time records or when a number is retired in homage to a great player.

In sum, a perpetual legacy can be, and has been, sought and achieved in many different ways, from science to the silver screen. One method that has not been previously identified, however, is through affiliation with a perpetual corporation, as discussed in the next section.

B. A Perpetual Corporation Can Provide an Enduring Legacy

The last section recounted some of the many ways that a person can achieve a form of immortality through everlasting glory, but it omitted one important method that has not been previously recognized in the literature: through a perpetual corporation. A defining feature of the corporate form is that the law endows corporations with “perpetual existence,”¹²⁹ making corporations superb vehicles for mortal humans to achieve a form of immortality through perpetual renown. Homer, Alexander the Great, and James Dean are remembered and continue to live on, in a sense. The people behind IPO firms likewise seek to endow their life with significance that will live on beyond their lifetimes—otherwise they could avoid the IPO and sell to private buyers. By launching public companies, they become a part of an immortal entity that can have historical and lasting significance. This connection between the corporate form and everlasting glory has not been explained until now.

In Homer’s day, the way to immortalize yourself was to fight gallantly and die such a noble death that your story would be memorialized in an epic poem and your name sung by bards through the ages. In recent centuries, the law has established a seemingly perfect vehicle for mortal humans to achieve the everlasting glory we seek, namely the perpetual corporation.¹³⁰ Much has been written about the various forms through which people have sought undying fame—war, athletics, art, poetry, engineering, and many others. This Article suggests that the corporate form be added to that list.

What is the corporate form? A corporation is a legal entity possessing four key attributes: limited liability, centralized management, alienable shares, and perpetual existence.¹³¹ The last of these is the most important for present purposes. The corporate code of every state expressly provides for

¹²⁸ *Hollywood Star Walk*, L.A. TIMES, <http://projects.latimes.com/hollywood/star-walk/list/> (last visited February 8, 2015).

¹²⁹ DEL. CODE ANN. tit. 8, §§ 102(b)(5), 122(1) (2015). See generally Schwartz, *supra* note 2.

¹³⁰ See generally Schwartz, *supra* note 2.

¹³¹ See, e.g., *id.* at 768.

corporate perpetuity, including the Delaware General Corporation Law, which declares that “the corporation shall have perpetual existence.”¹³²

This perpetual nature of the corporate form endows each corporation with a form of immortality.¹³³ Blackstone called the corporation “a person that never dies.”¹³⁴ Chief Justice John Marshall of the United States Supreme Court explained that through the corporate form “a perpetual succession of individuals are capable of acting . . . like one immortal being.”¹³⁵ In other words, a corporation endowed by law with perpetual existence is, in a sense, immortal.¹³⁶

Humans have long sought to immortalize themselves by creating something—a poem, an empire—that would lead to later generations to remember them. The creation of a perpetual corporation is a particularly compelling vehicle for achieving this goal.¹³⁷ By creating a corporation with perpetual life, a mortal human can, in a sense, live forever through that entity.¹³⁸

Consider, for example, the entrepreneurs of Silicon Valley, perhaps the most powerful engine of corporate creation in the country today. Their keen interest in immortality is no better evidenced than by their support for research into the Singularity,¹³⁹ which enables humans to embed their consciousness into a computer. Adherents of the Singularity believe that they can achieve immortality by merging themselves with a computer.¹⁴⁰ To advance the study of this phenomenon, Larry Page, the co-founder of Google,

¹³² DEL. CODE ANN. tit. 8, § 102(b)(5) (2015). A shorter term may be stated in the certificate of incorporation, *id.*, but this almost never occurs in practice. *See* Schwartz, *supra* note 2, at 774.

¹³³ *See generally* Schwartz, *supra* note 2.

¹³⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES 468 (St. George Tucker ed. 1803).

¹³⁵ *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 636 (1819).

¹³⁶ *See* Schwartz, *supra* note 2, at 804 (responding to the challenge that nearly all corporations, despite their perpetual existence under law, cease to exist after a short time).

¹³⁷ *Cf.* Tom C.W. Lin, *CEOs and Presidents*, 47 U.C. DAVIS L. REV. 1351, 1409 (2014) (“While CEOs are mortal individuals, corporations can be immortal entities.”).

¹³⁸ Alternatively, a person can found and fund a charitable foundation, trust, or other non-profit entity to ensure that their fame persists when they are gone. By creating foundations, Rockefeller and Carnegie succeeded in perpetuating their names. In many ways, foundations are similar to business corporations, and may be endowed with perpetual existence. However, such foundations are inferior to a corporation for achieving the type of immortality that everlasting glory provides. Without profits, foundations may not be as sustainable as ordinary corporations. Moreover, there is a significant movement afoot to create foundations designed to be exhausted by the time the donor passes away. Veronica Dagher, *The Rise of Spend-Down Philanthropy*, WALL ST. J., Apr. 13, 2014, <http://www.wsj.com/articles/SB10001424052702304017604579447562412564966> (reporting that the philanthropists behind one-quarter of the fifty largest foundations in America today “are choosing to donate all of their foundations’ assets within their lifetimes”). *Id.*

¹³⁹ Vance, *supra* note 101, at BU1 (“Some of Silicon Valley’s smartest and wealthiest people have embraced the Singularity.”).

¹⁴⁰ *Id.* (“‘We will transcend all of the limitations of our biology,’ says Raymond Kurzweil, the inventor and businessman who is the Singularity’s most ubiquitous spokesman and boasts that he intends to live for hundreds of years and resurrect the dead, including his own father. ‘That is what it means to be human—to extend who we are.’”); *id.* (“Some of the Singularity’s adherents portray a future where . . . humans . . . can live for hundreds of years.”).

and others established the “Singularity University” in Silicon Valley.¹⁴¹ The enthusiasm that Silicon Valley entrepreneurs show for the Singularity and for the founding of perpetual corporations go hand in hand: they are both methods of transcending our human lifetimes and achieving immortality.

While practically every corporation is perpetual, and thus an appropriate vehicle for achieving perpetual renown, one type is particularly well suited to this purpose: the public corporation. Public companies, defined as companies whose shares trade on a stock exchange and are available to be purchased by anyone,¹⁴² have special significance in our economy and society.¹⁴³ There are tens of millions of privately owned companies in the United States, with considerable economic significance, yet it is the few thousand public companies that dominate the social and cultural sphere.¹⁴⁴ Hence, for people interested in fame and glory, it is important that their corporation go public. The IPO signifies that the company is socially significant and thereby enhances the fame and glory of all those associated with it.

There was a time when the public markets were the only place for a company to obtain massive amounts of capital. These days, by contrast, private markets are much larger than public ones.¹⁴⁵ Hence a growing company that needs capital, or whose early shareholders seek to exit, often has the choice to sell itself in a private transaction.¹⁴⁶

This Article claims that the decision between the two is not purely financial because an IPO offers the non-monetary reward of becoming a company of cultural consequence that is well placed to perpetuate the fame of its pre-IPO shareholders. As such, those who seek to make a mark on history are more likely to choose an IPO rather than a private sale. They recognize

¹⁴¹ *Id.*

¹⁴² *See, e.g.*, MODEL BUS. CORP. ACT § 1.40(18A) (2008) (defining public corporation as “a corporation that has shares listed on a national securities exchange or regularly traded in a market maintained by one or more members of a national securities association”). *But cf.* Hillary Sale, *Public Governance*, 81 GEO. WASH. L. REV. 1012, 1015 (2013) (arguing that “[A]ll corporations are subject to publicness regardless of their legal status as ‘publicly’ or ‘privately’ held.”).

¹⁴³ JAMES D. COX & THOMAS LEE HAZEN, *BUSINESS ORGANIZATIONS LAW* 45 (3d ed. 2011) (“The great bulk of this nation’s productive property is controlled by a few hundred giant, publicly held corporations.”).

¹⁴⁴ *Id.* (“[P]ublicly held corporations have far greater economic significance” than closely held ones.); ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 6 (1932) (noting that large and significant private companies do exist, “[b]ut these instances are so exceptional as to prove the rule” that public companies dominate.)

¹⁴⁵ Vlad Ivanov & Scott Bauguess, *Capital Raising in the U.S.: The Significance of Unregistered Offerings Using the Regulation D Exemption 3* (Feb. 2012), available at http://www.sec.gov/info/smallbus/acsec/acsec103111_analysis-reg-d-offering.pdf; *see also* Brian Broughman & Jesse M. Fried, *Carrots and Sticks: How VCs Induce Entrepreneurial Teams to Sell Startups*, 98 CORNELL L. REV. 1319, 1322 (2013) (“[T]rade sales are actually much more common than IPOs.”).

¹⁴⁶ William W. Bratton, *Venture Capital on the Downside: Preferred Stock and Corporate Control*, 100 MICH. L. REV. 891, 898 n.20 (2002) (describing various private exits for venture capital firms).

that by selling out in a private transaction, their company will no longer be independent, and its existence can be terminated at the whim of the new owner. Therefore, their preference would be an IPO accompanied by powerful takeover defenses, which is precisely what the data shows.¹⁴⁷ People who want their company, and themselves, to be famous and remembered—those who seek the form of immortality promised by perpetual renown—are clearly inclined to launch an IPO rather than sell out in a private transaction.¹⁴⁸ The executives and pre-IPO shareholders at these firms make the same choice as did Achilles. Like Achilles, they eschew certain wealth and a life without distinction and choose to charge into danger in the hope of obtaining everlasting glory.¹⁴⁹

Of course, many private companies choose to sell themselves in private transactions, with recent examples including Instagram (acquired by Facebook),¹⁵⁰ WhatsApp (acquired by Facebook),¹⁵¹ YouTube (acquired by Google),¹⁵² and Skype (acquired by eBay).¹⁵³ But examples abound of companies that are acquired in a private transaction, only to have their business shut down shortly thereafter. Cisco Systems acquired Pure Digital Technologies,¹⁵⁴ the maker of the once-popular “Flip Video” cameras, in 2009; the business was shut down in 2011.¹⁵⁵ Similar stories could be told about Slide,¹⁵⁶ Ness,¹⁵⁷ Bump,¹⁵⁸ and countless others.

¹⁴⁷ See *supra* Part I.B.2.

¹⁴⁸ Alternatively, an entrepreneur with dreams of eternal glory may sell an early company in the private market and use the proceeds to found a second, or third, company that she then takes to an IPO.

¹⁴⁹ See Claire Cain Miller, *Start-Up Leaders Recall Choice to Cash In or Stay Independent*, N.Y. TIMES, Nov. 17, 2013 (“When we chose that independent path, for me that was like, ‘All right, it’s go time’”) (quoting the CEO of Yelp).

¹⁵⁰ Evelyn M. Rusli, *Facebook Buys Instagram for \$1 Billion*, DEALBOOK (Apr. 9, 2012, 2:02 PM), <http://dealbook.nytimes.com/2012/04/09/facebook-buys-instagram-for-1-billion/>.

¹⁵¹ David Gelles & Vindu Goal, *Facebook Enters \$16 Billion Deal for WhatsApp*, DEALBOOK (Feb. 19, 2014, 5:18 PM), <http://dealbook.nytimes.com/2014/02/19/facebook-to-buy-messaging-start-up/>.

¹⁵² DealBook Staff, *Google to Buy YouTube for \$1.65 Billion in Stock*, DEALBOOK (Oct. 9, 2006, 4:23 PM), <http://dealbook.nytimes.com/2006/10/09/google-to-buy-youtube-for-165-billion-in-stock/>.

¹⁵³ Press Release, eBay, Inc., *eBay Completes Acquisition of Skype* (Oct. 14, 2005), available at <http://investor.ebayinc.com/releasedetail.cfm?releaseid=176402>.

¹⁵⁴ Ashlee Vance, *Cisco Flips Over Pure Digital*, BITS (Mar. 9, 2009, 9:07 AM), <http://bits.blogs.nytimes.com/2009/03/19/cisco-flips-over-pure-digital/?dbk>.

¹⁵⁵ Evelyn M. Rusli, *Cisco Shuttters Flip, Two Years After Acquisition*, DEALBOOK (Apr. 12, 2011, 12:12 PM), <http://dealbook.nytimes.com/2011/04/12/cisco-shuttters-flip-camera-maker/>.

¹⁵⁶ Claire Cain Miller, *Google to Shut Down Slide Apps as Slide Founder Departs*, BITS (Aug. 26, 2011, 5:39 PM), <http://bits.blogs.nytimes.com/2011/08/26/google-to-shut-down-slide-apps-as-slide-founder-departs/>.

¹⁵⁷ Ryan Lawler, *After Acquisition, OpenTable Plans to Shut Down Ness on April 21*, TECHCRUNCH (Mar. 21, 2014), <http://techcrunch.com/2014/03/21/opentable-ness-shutdown/>.

¹⁵⁸ Catherine Shu, *Google to Close Bump and Flock, Its Recently Acquired File Sharing Apps*, TECHCRUNCH (Dec. 31, 2013), <http://techcrunch.com/2013/12/31/google-to-close-bump-and-flock-its-recently-acquired-file-sharing-apps/>.

Founders and early-stage investors are well aware of this history, and many are willing to turn down great sums of money to remain independent and make their mark on society. This awareness helps explain why Yelp declined a \$500 million offer from Google in 2009 in favor of an IPO in 2012, Box turned down hundreds of millions of dollars in 2011 and went for an IPO in 2014, and Snapchat turned down a \$3 billion offer from Facebook, presumably for an IPO sometime in the future.

Moreover, founding a successful public corporation as a means to achieve perpetual renown can be particularly effective in modern times because our culture often elevates entrepreneurs to the same level as artists, politicians, and humanitarians.¹⁵⁹ This can be seen clearly in corporations named after their founder, whose name lives on in corporate form, such as Disney or Ford. But other corporations are also closely tied to their founder even though they do not share a name, examples of which include Apple (Steve Jobs) and Facebook (Mark Zuckerberg).

After Apple founder Steve Jobs passed away, his memory was honored with cover tributes on *People*,¹⁶⁰ *Rolling Stone*,¹⁶¹ and *Time*¹⁶²—in addition to *Time* featuring Jobs on the cover seven other times during his life.¹⁶³ In addition, Jobs was featured as one of *Time*'s "100 Most Influential People" five times,¹⁶⁴ and as one of *Time*'s "20 Most Influential Americans of All Time."¹⁶⁵ Walter Isaacson's Jobs biography was the top-selling book of 2011 on Amazon.com¹⁶⁶ and was later adapted into a feature-length film.¹⁶⁷ Jobs has achieved perpetual renown through affiliation with Apple, a public corporation.

A second example is Facebook CEO and founder Mark Zuckerberg, who was named *Time*'s "2010 Person of the Year" and featured on that issue's cover.¹⁶⁸ Zuckerberg was also named to *Time*'s 2011 "100 Most Influential People" list¹⁶⁹ and was featured on the cover of *New York Magazine*.¹⁷⁰

¹⁵⁹ The 2014 *Time* "The 100 Most Influential People in the World" list includes the following profession categories: Activism, Arts, Business, Government, Religion, Sports, and Science. *The 100 Most Influential People in the World*, TIME.COM (May 29, 2014), <http://time.com/time100-2014/>.

¹⁶⁰ PEOPLE, Oct. 24, 2011, at cover.

¹⁶¹ ROLLING STONE, Oct. 27, 2011, at cover.

¹⁶² TIME, Oct. 27, 2011, at cover.

¹⁶³ TIME, Apr. 1, 2010, at cover; TIME, May 17, 2007, at cover (pictured alongside other influential people); TIME, Oct. 24, 2005, at cover; TIME, Jan. 14, 2002, at cover; TIME, Oct. 18, 1999, at cover; TIME, Aug. 18, 1997, at cover; TIME, Feb. 15, 1982, at cover.

¹⁶⁴ *The 100 Most Influential People in the World*, TIME, May 10, 2010, at 115; *The Time 100*, TIME, May 12, 2008, at 41; *The Time 100*, TIME, May 14, 2007, at 160; *The Time 100*, TIME, Apr. 18, 2005, at 49; *The Time 100*, TIME, Apr. 26, 2004, at 75.

¹⁶⁵ TIME: THE 100 MOST INFLUENTIAL PEOPLE OF ALL TIME 48 (Kelly Knauer ed., 1st ed., 2012).

¹⁶⁶ Press Release, AMAZON.COM, INC., Amazon.com Announces Best-Selling Books of 2011, <http://phx.corporate-ir.net/phoenix.zhtml?c=176060&p=irol-newsArticle&ID=1638619&highlight> (last visited Feb. 8, 2015).

¹⁶⁷ JOBS (Endgame Entertainment 2013).

¹⁶⁸ TIME, Dec. 27, 2010, at cover.

¹⁶⁹ April Capone, *The 100 Most Influential People in the World*, TIME, May 2, 2011, at 46.

In 2010, a feature-length film chronicling Zuckerberg, and his creation of Facebook found critical acclaim and success.¹⁷¹

Jobs and Zuckerberg were founders, but the perpetual renown that a public corporation can provide is not limited to founders or even to CEOs. Non-founding pre-IPO shareholders, such as friends and family, early employees, angel investors, venture capitalists, and private equity investors, can also seek an enduring legacy through their perpetual public corporation. Their chances of actually achieving such an outcome may be slimmer than that of founders, but as discussed below, we cannot all be Alexander the Great; the best that most can do is to say that they marched with him.

The connection between an IPO and immortality can be seen in the way that the IPO is so commonly referred to as the “Holy Grail” for the founder and other pre-IPO shareholders. As discussed above, the Holy Grail is an ancient relic believed to confer immortality on its keeper.¹⁷² In a similar vein, the launching of an IPO can, in a sense, confer immortality on its founders and early (pre-IPO) shareholders. This connection is demonstrated by the link that countless commentators make between an IPO and the Holy Grail.¹⁷³ For example, Vojdani and Lamb write, “I-P-O [is] the Holy Grail that impels impassioned entrepreneurs to pursue their dreams and create the

¹⁷⁰ NEW YORK, May 14, 2012, at cover.

¹⁷¹ THE SOCIAL NETWORK (Columbia Pictures 2010). Awards include eight Academy Award nominations, including Best Picture, four Golden Globe nominations, and many more. *Accolades*, THE SOCIAL NETWORK, <http://www.thesocialnetwork-movie.com/awards/#/accolades> (last visited Feb. 8, 2015). The film grossed \$224,920,315 as of May 13, 2014. The Social Network, BOXOFFICE.COM, <http://www.boxoffice.com/statistics/movies/the-social-network-2010> (last visited Feb. 8, 2015).

¹⁷² See *supra* note 97.

¹⁷³ WILLIAM D. BYGRAVE, THE PORTABLE MBA IN ENTREPRENEURSHIP 434 (2004) (“Many entrepreneurs look to the prospect of an IPO as the ‘holy grail’ of their career.”); DIMITRIS DOGRAMATZIS, HEALTHCARE BIOTECHNOLOGY: A PRACTICAL GUIDE 160 (2010) (“The IPO has been biotechnology’s Holy Grail”); THEODORE M. HAGELIN, TECHNOLOGY INNOVATION LAW AND PRACTICE: CASES AND MATERIALS 1327 (2012) (“An initial public offering of stock is considered the Holy Grail for most early-stage companies.”); JUSTIN LONGENECKER ET AL., SMALL BUSINESS MANAGEMENT: LAUNCHING AND GROWING ENTREPRENEURIAL VENTURES 393 (Cengage Learning 16th ed. 2011) (“Many entrepreneurs consider the prospect of an initial public offering as the ‘holy grail’ of their career.”); JOHN L. NESHEIM, HIGH TECH START UP, REVISED AND UPDATED: THE COMPLETE HANDBOOK FOR CREATING SUCCESSFUL NEW HIGH TECH COMPANIES 5 (2000) (“The IPO . . . is the holy grail.”); STEFAN POVALY, PRIVATE EQUITY EXITS: DIVESTMENT PROCESS MANAGEMENT FOR LEVERAGED BUYOUTS 251 (2007) (“IPOs are regarded as the private equity industry’s ‘holy grail,’ seen as an ultimate form of exit, to which all aspire.”); ROBERT T. SLEE, PRIVATE CAPITAL MARKETS: VALUATION, CAPITALIZATION, AND TRANSFER OF PRIVATE BUSINESS INTERESTS 419 (2011) (“[G]oing public remains the holy grail for a large percentage of private business owners.”); Mark J. Graffagnini, *Corporate Strategies for Nanotech Companies and Investors in New Economic Times*, 6 NANOTECHNOLOGY L. & BUS. 251, 252 (2009) (“IPOs for venture-backed companies” are “considered the holy grail of venture-backed exits”); Edmund L. Andrews, *Are IPOs Good for Innovation?*, STANFORD GRADUATE SCHOOL OF BUSINESS (Jan. 15, 2013), <https://www.gsb.stanford.edu/news/research/ipos-good-innovation> (“For many entrepreneurs, [an IPO] is a dream on par with finding the Holy Grail.”); Suzanne McGee, *Venture Capital Investment Climbs to Dotcom-Era Levels*, THE FISCAL TIMES (Apr. 18, 2014), <http://www.thefiscaltimes.com/Columns/2014/04/18/Venture-Capital-Investment-Climbs-Dotcom-Era-Levels> (“[F]or venture investors, . . . IPOs are the holy grail of exit strategies. . . . The

next great thing that will revolutionize the world, joining the *storied pantheon* of stars gone public.”¹⁷⁴ By equating an IPO to the Holy Grail, these writers demonstrate—admittedly, perhaps unwittingly—the connection between going public and achieving a form of immortality.

Going public thus provides the upside of creating a company of cultural significance. But it also has a downside, namely that the corporation suddenly becomes susceptible to a hostile takeover, which can spell the end of its existence, via liquidation, merger, or other means. Hostile takeovers are simply not possible for a private company. They are a function of the market for corporate control, which is a unique phenomenon of public companies. Unlike a private company, which is by definition under the control of one or just a few people who can decide for themselves the fate of their company, a public corporation’s existence can be ended at any time by anyone with sufficient funds to purchase a controlling stake.¹⁷⁵

The IPO thus has advantages and disadvantages for those who seek to perpetuate their legacy. On one hand, the company now has the ability to make a significant social impact that can outlast those who brought it public and provide them with perpetual renown. On the other hand, the company suddenly becomes vulnerable to being taken over against its will the moment it goes public. A public corporation can be liquidated or merged out of existence by someone who comes to control a majority of its stock. Obviously, a corporation can only bring renown to its pre-IPO founders if it continues to exist as an independent entity.

To offer an analogy, a corporation going public is like Bambi stepping out of the forest and into the meadow.¹⁷⁶ The meadow is full of excitement and delicious food for a deer like Bambi. And to be a deer of consequence (a “Great Prince of the Forest” like Bambi’s father), one must venture out into the meadow. But it is also a place of danger: it is wide open with no trees or bushes behind which to hide from predators. Similarly, for a corporation to have its greatest impact, it must go public, but in the public markets, as in the meadow, there is no place to hide from hostile investors.

Anheuser-Busch provides an example: The beer-brewing company was founded in St. Louis in the nineteenth century and went public in the twentieth, becoming a cultural icon. For a while, it kept strong defenses in place, including a classified board and poison pill, and it remained independent and protected from potential predators.¹⁷⁷ In 2004, however, it let its poison pill

alternative—selling the startup company via an M&A transaction—is decidedly second best.”).

¹⁷⁴ Masood Vojdani & Katrina Lamb, *The Anatomy of an IPO*, MV FINANCIAL GROUP, INC. (June 1, 2012), <http://mvfinancial.com/research-insights/market-commentary/the-anatomy-of-an-ipo> (emphasis added).

¹⁷⁵ See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

¹⁷⁶ See *BAMBI* (RKO Radio Pictures 1942).

¹⁷⁷ JULIE MACINTOSH, *DETHRONING THE KING: THE HOSTILE TAKEOVER OF ANHEUSER-BUSCH, AN AMERICAN ICON* 233–34 (2011).

expire, and in 2006, it dismantled its classified board, both moves taken “in response to a trend in corporate America toward increased shareholder rights.”¹⁷⁸ Shortly thereafter, in 2008, Anheuser-Busch found itself the subject of a successful hostile takeover by the global brewing giant, InBev.¹⁷⁹ Today, Anheuser-Busch exists as a mere appendage to the larger company.¹⁸⁰

Anheuser-Busch thus demonstrates the upside and downside of being a public company. On the one hand, Anheuser-Busch, through Budweiser, its famous Clydesdale horses, and its ubiquitous advertising, achieved the type of lasting social significance available to a public company. On the other hand, its status as a (defenseless) public company left it vulnerable to being taken over and subsumed by a deep-pocketed acquirer who ended the company’s long-held independence.

Similar outcomes can be avoided and independence maintained by public companies that adopt and maintain powerful takeover defenses. These companies may thereby fulfill their role as perpetual representatives of the legacies of their pre-IPO shareholders. This is not purely theoretical; one empirical study specifically found that takeover defenses at the time of IPO are associated with “longer-run firm independence” to a statistically significant degree.¹⁸¹

C. *Corporate Legacy as a Rationale for Takeover Defenses at IPO Firms*

The theory just presented helps resolve the mystery of why companies adopt takeover defenses at the time of IPO but drop them as the companies mature. Contemporary notions of good governance have led almost all existing public companies to shed takeover defenses. Most notably, the movement to de-stagger public company boards of directors has accelerated to the point that less than twenty percent of major corporate boards remain classified. For the same reason, it is effectively impossible for an already-public company to adopt a classified board. The data in Table 1, combined with previous literature, shows an increasing use and intensity of takeover defenses at IPO firms precisely at the time that already-public companies have abandoned takeover defenses.

This mystery is explained by the novel claim presented in the last section. The pre-IPO shareholders care deeply about the corporation continuing its independent existence for generations to come, thereby enhancing and

¹⁷⁸ *Id.* at 234.

¹⁷⁹ Andrew Ross Sorkin, *InBev’s Bid for Anheuser Turns Hostile*, DEALBOOK (June 26, 2008, 2:54 PM), <http://dealbook.nytimes.com/2008/06/26/inbevs-bid-for-anheuser-turns-hostile/>.

¹⁸⁰ Anheuser-Busch InBev, <http://ab-inbev.com> (last visited Feb. 20, 2015) (indicating that the Anheuser-Busch name lives on, for now, as InBev changed its name to Anheuser-Busch InBev as part of the acquisition).

¹⁸¹ Laura Casares Field & Jonathan M. Karpoff, *Takeover Defenses of IPO Firms*, 57 J. FIN. 1857, 1877 (2002).

elongating their own legacies. Since they recognize that a hostile takeover can destroy this prospect, and are in close control of the board of directors, they are keen to armor the company with powerful defenses.

One important piece of evidence that supports this theory is that the amount of private capital raised in contemporary America is more than double the amount raised in the public markets.¹⁸² The upshot is that most private companies these days have the choice between going public or remaining private and raising capital in the private markets. So a company that chooses the IPO route does so not only to raise capital, but also to make a statement: this company is a socially and historically important institution.¹⁸³

Years later, however, the board of directors will likely be populated entirely with people who joined the board long after the IPO. Those directors likely lack the same passion for the company's independent existence because their legacy is not as intertwined in it as was the founding board's legacy. When presented with even the slightest bit of pressure from shareholder advocates, they are likely more than willing to give up the company's takeover defenses and ultimately let it lose its independence.¹⁸⁴

The empirical data presented in Table 1 is consistent with this explanation, and future empirical studies could further test this Article's thesis. One could study the relationship between dropping defenses and the number of years since the IPO. The legacy theory would predict a positive correlation. In other words, the more time has passed, the less connection the current board has with the pre-IPO shareholders, so the more willing they would be to allow the company to be taken over. Another useful empirical analysis would be to compare defenses in IPO firms bearing the founders' names with those that do not. If there is no statistical difference, this would support the thesis that a non-founder pre-IPO shareholder has a significant legacy interest, on par with that of a founder.¹⁸⁵

To summarize this Article's novel explanation for the mystery of takeover defenses at IPO firms¹⁸⁶: the age-old quest for immortality through an enduring legacy can be realized through affiliation with a perpetual corporation, especially a public one. Because public companies are vulnerable to

¹⁸² Ivanov & Bauguess, *supra* note 145, at 5.

¹⁸³ Of course, the relative valuations between the two forms—public and private—also play a role in this decision.

¹⁸⁴ See MACINTOSH, *supra* note 177, at 263 (reporting that the grandson of the company founder was "a seller from day one").

¹⁸⁵ Another idea would be to analyze IPO firms where the pre-IPO shareholders establish personal foundations at the time of the IPO or shortly thereafter. The implication is ambiguous, however. On the one hand, this Article's theory might predict that IPO firms in which the pre-IPO shareholders formed foundations would be less likely to adopt defenses because the pre-IPO shareholders have an alternative channel to advance their legacy. On the other hand, the present theory might predict that IPO firms in which the pre-IPO shareholders formed foundations would be more likely to adopt defenses because the pre-IPO shareholders apparently have an exceptionally strong interest in perpetuating their legacy.

¹⁸⁶ There may be multiple mechanisms, including those suggested in prior literature, behind the mystery of takeover defenses at IPO firms. See *supra* Part II; *infra* Part III.C.

hostile acquisition, which can put an end to corporations' independent existences, the pre-IPO shareholders favor armoring the company with powerful takeover defenses. They also know that takeover defenses must be adopted at the IPO stage, because shareholder rights advocates have made it practically impossible to add the most potent defenses to an already-public company. Finally, directors of companies that are already public are willing to dismantle takeover defenses in part because their personal legacy is not bound up in the company.

D. *The Claim in Contrast with Prior Explanations*

This section contrasts this Article's legacy-based explanation with the existing literature on the mystery of takeover defenses at IPO firms.¹⁸⁷

Consider first the idea, suggested by Stout and others, that takeover defenses are found at IPO firms because they are generally good for corporations and shareholders, and are mistakenly abandoned by later boards under pressure to deliver short-term results to a myopic market. This explanation has much to commend to it, but the legacy thesis presented in this Article has the benefit of not relying on a myopic market to explain the different behaviors at the IPO stage and later stages.

Second, many previous explanations for the mystery of takeover defenses at IPO firms have presumed that their purpose is to provide the pre-IPO "owner-managers"¹⁸⁸ with private benefits, at the apparent expense of pre-IPO shareholders who lack a managerial position, such as angel investors or venture capitalists. This Article's claim, namely that an IPO company acts as a perpetual vehicle for advancing the legacy of all its pre-IPO shareholders whether managers or not, provides an explanation that better fits the observed behavior. Hence, this Article's focus on legacy is distinct from the rent-seeking interest discussed in the existing literature.

Similarly, if private benefits for owner-managers were the goal, we would expect to see a significant use of dual-class stock as a takeover defense. Dual-class stock directly benefits the founders who hold it, and only secondarily serves the company by empowering those founders with the means to defeat hostile takeovers. An ESB, by contrast, empowers the board to defend the corporate institution without handing control to the founders. The data shows extensive use of ESBs, but only four percent incidence of dual-class stock. This suggests that the goal of takeover defenses at the IPO stage may not be private benefits for the founders, as Klausner and others suggest,¹⁸⁹ but rather the protection of the institution as "defenders of the corporate bastion."¹⁹⁰

¹⁸⁷ See *supra* Part III.

¹⁸⁸ *Explaining Variation*, *supra* note 5, at 1305.

¹⁸⁹ Klausner, *supra* note 6, at 770-75 (2003).

¹⁹⁰ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986). Admittedly, another explanation for the infrequent use of dual-class stock is that it is thought

Moreover, this Article's suggestion that takeover defenses benefit not only pre-IPO owner-managers, but all pre-IPO owners, regardless of their managerial role, helps explain why sophisticated non-management pre-IPO shareholders allow them, filling an important gap in the literature. Professional early-stage investors, such as angel investors or venture capitalists, may see the company as, among other things, a way to perpetuate their legacies beyond their lifetimes. These non-founder pre-IPO owners therefore have their own interest in giving the corporation the means to remain its own independent entity in perpetuity.

Angel investors and venture capitalists could probably have success investing in other types of companies, or even in other types of work. But the fact that they choose to spend their professional lives investing in startup companies with the goal of having them blossom into large and important companies with lasting social significance—as opposed to trading metals futures, for instance—may show that they are especially interested in their legacies. They want to be known as the earliest supporter of something great. While many pre-IPO shareholders, especially venture capitalists, frequently sell much or all of their shares relatively soon after the IPO, this does not change the analysis. Their legacy is based on having brought great and lasting firms to an IPO. The fact that they no longer continue as shareholders does not affect this role. Indeed, it is necessary for such shareholders to sell so that they have capital to invest in other early-stage companies.

This Article's theory helps explain an unexpected finding in the literature regarding the “psychic benefits of control.”¹⁹¹ Daines and Klausner discovered that IPO firms whose founders were CEOs at the time were no more likely to adopt takeover defenses at the IPO stage than other firms.¹⁹² To Daines and Klausner, this finding undermined the hypothesis that large private benefits may explain the use of anti-takeover provisions at the IPO stage.¹⁹³ In light of this Article's novel claim, however, Daines and Klausner were ultimately correct when they observed that founders do not, in fact,

to have a materially negative impact on stock price. See Scott B. Smart & Chad J. Zutter, *Control as a Motivation for Underpricing: A Comparison of Dual- and Single-Class IPOs*, 69 J. FIN. ECON. 85, 86 (2003) (“[D]ual-class firms trade at lower valuations relative to fundamentals.”); *id.* (“[I]nitial returns on single-class IPOs exceed those of dual-class offers by about three percentage points.”); Jeffrey N. Gordon, *Ties that Bind: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 3, 33–36 (1988). See generally Tian Wen, *You Can't Sell Your Firm and Own It Too: Disallowing Dual-Class Stock Companies from Listing on the Securities Exchanges*, 162 U. PA. L. REV. 1495, 1516 (2014) (“Dual-class structures run counter to public policy [and companies financed as such] should be disallowed from listing on the U.S. stock exchanges.”). But see Tamara C. Belinfanti, *Shareholder Cultivation and New Governance*, 38 DEL. J. CORP. L. 789, 832 (2014) (claiming that a dual-class share structure can be beneficial to public investors “because it helps them maintain control over the company's vision and future trajectory after the IPO”).

¹⁹¹ Klausner, *supra* note 6, at 779.

¹⁹² *Id.* (describing Daines & Klausner, *supra* note 5, at 108–10).

¹⁹³ See Daines & Klausner, *supra* note 5, at 111 (finding no support for the private benefits hypothesis).

reap greater private benefits than do nonfounders.¹⁹⁴ All the pre-IPO shareholders have a shared interest in perpetuating their legacy, and so they all reap this reward collectively.

This Article's explanation also answers another specific challenge put forth by Klausner. He asks why IPO firms adopt takeover defenses that will "remain in effect *in perpetuity*."¹⁹⁵ Why do companies go public with a classified board of "perpetual duration"?¹⁹⁶ Why not include a "sunset" provision or a requirement that shareholders approve them after some set time?¹⁹⁷ The answer is that all pre-IPO shareholders have a shared interest in establishing their legacies through the corporate form. They seek to give the company the tools it needs to survive forever as an independent entity, something that a takeover defense with a sunset provision could not provide.

Bebchuk, for his part, has tentatively argued that corporate law should consider banning the use of powerful takeover defenses at IPO firms,¹⁹⁸ specifically the classified board.¹⁹⁹ Based on the core claim of this Article, if such a policy were adopted, it could have serious negative implications for the IPO market. This Article has claimed that pre-IPO shareholders elect to launch an IPO in part to achieve a lasting legacy, and that powerful takeover defenses are necessary to accomplish this goal. If Bebchuk's (admittedly tentative) advice were followed, and pre-IPO shareholders were denied any assurance that their company could remain independent after going public, they might respond by abandoning the IPO. They may exit the investment through other means, for instance a sale to a private equity buyer. If their company could be taken over from day one as a public company, it might be totally ineffectual as a means to create a legacy. Without this benefit of public company status, pre-IPO shareholders would be less likely to bring the company public in the first place. The expected effect would be to reduce the number of IPOs even further than the already-depressed levels that have caused concern.²⁰⁰

¹⁹⁴ *Id.*

¹⁹⁵ *Fact and Fiction*, *supra* note 14, at 1335 (emphasis added).

¹⁹⁶ *See id.* at 1339.

¹⁹⁷ *See Antitakeover Arrangements*, *supra* note 4, at 751 (suggesting that "even if staggered board provisions were permitted, one might want to consider having them lapse after, say, seven years from the date of their last approval by shareholders").

¹⁹⁸ *Id.* ("More empirical evidence . . . is needed before definite conclusions can be reached The available state of knowledge, however, does justify a reasonable measure of skepticism toward claims of unlimited contractual freedom to adopt antitakeover charter provisions [at the IPO stage]. For now, when public officials attach substantial likelihood to the undesirability of some arrangements, it would be sensible not to include them in the menu of permissible choices for charter provisions.")

¹⁹⁹ *Id.* ("There are reasons to believe that . . . eliminating the (currently permitted) option of a staggered board would be desirable")

²⁰⁰ *See, e.g., The Endangered Public Company: The Big Engine that Couldn't*, THE ECONOMIST, May 19, 2012, available at <http://www.economist.com/node/21555552> (reporting that the number of public companies has fallen dramatically over the past decade, providing "reasons to worry"); Graham Bowley, *Wall Street, the Home of the Vanishing I.P.O.*, N.Y. TIMES, Nov. 17, 2010, at B1 (reporting that "the number of companies listed on the nation's major

This unintended potential consequence provides a good reason to be cautious before following the trend in the market for mature public companies and banning, or requiring sunsets for, strong takeover defenses at the IPO stage. This appears to be what has happened in practice. Klausner reported a decade ago that a nascent movement among institutional investors to discourage takeover defenses at IPO firms was immediately quashed,²⁰¹ and there is no indication that there has been any attempt to resuscitate it.

Even shareholder advocates committed to the dismantling of takeover defenses, including the SRP, do not appear to have trained their sights on IPO-stage firms, and have passively allowed them to continue to employ powerful defenses such as the ESB. At least one commentator, in an unpublished working paper, has argued that institutional investors are “hypocrites” for accepting takeover defenses at IPO firms while opposing them at already-public firms.²⁰² But that paper appears to be the exception that proves the rule.

In short, the freedom to adopt takeover defenses at the IPO stage may be more important than previously understood, and all parties should continue to be very hesitant to alter this state of affairs.

E. Challenges to the Claim

This section will address four important challenges to this Article’s explanation for the mystery of takeover defenses at IPO firms. First, while corporations may be perpetual in theory, the average company ceases to exist within ten years of going public.²⁰³ Second, even when a corporation survives for a long time, most people who were affiliated with it at the time of its IPO will have been forgotten by history. Third, many corporations voluntarily merge or liquidate out of existence. Fourth, a takeover does not necessarily imply the end of the corporate existence. Each of these challenges is considered, and responded to, in turn.

1. Most Corporations Cease to Exist After a Few Years

The first challenge to the claim is that nearly all corporations, despite their perpetual legal existence, do not actually persist forever, so people affiliated with a pre-IPO corporation cannot reasonably expect that the company will provide them with an enduring legacy. There are, to be sure, a few examples of corporations that have managed to persist for many generations, and whose names persist in the public consciousness, such as IBM, which

exchanges has plummeted” and “[s]ome economists warn the economy will suffer if innovative private companies cannot or will not turn to the public markets”).

²⁰¹ See Klausner, *supra* note 6, at 763–69.

²⁰² Brandon S. Gold, *Agents Unchained: The Determinants of Takeover Defenses in IPO Firms* 54–56 (2013), available at <http://nrs.harvard.edu/urn-3:HUL.InstRepos:10985171>.

²⁰³ See *The Endangered Public Company: The Big Engine that Couldn’t*, THE ECONOMIST, May 19, 2012, available at <http://www.economist.com/node/2155552>.

went public in 1915, or Proctor & Gamble, which was incorporated in 1890. Thus, it is possible for a corporation to outlive its human founders—but the odds are strongly against it.

Only seventeen percent of the largest United States companies in 1912 were still in existence in 1995.²⁰⁴ One-third of large company IPO firms are no longer listed on an exchange five years later.²⁰⁵ The life expectancy of a contemporary Fortune 500 company is only fifteen years (and declining).²⁰⁶ And if this is the case for the largest, most established companies, surely the survival rate for smaller companies is much lower. Indeed, one recent study found that only fifty-five percent of small IPO firms remain listed on a public exchange five years after the IPO.²⁰⁷

Furthermore, many seasoned public companies abandon takeover defenses, as discussed above.²⁰⁸ However strong the takeover defenses adopted at the IPO stage may be, they cannot promote a legacy if they are later dismantled. The fact of the matter is that nearly all IPO firms will cease to exist within a few years or decades, at which point they will no longer be able to perpetuate the legacy of the pre-IPO shareholders.

But the same can be said for every other form through which people have sought perpetual fame. For the poets, architects, academics, and others who have sought and continue to seek to leave an eternal mark on the world, most of their marks will fade away sooner or later—probably sooner. Books go out of print; museums and libraries burn; architectural creations fall down or are razed.

We constantly improve these imperfect forms to make them more permanent. Consider the *Iliad* itself. The epic originally existed only in oral form, making its survival tenuous. Later, it was written down to help ensure its survival, and ultimately was printed and mass-produced, helping to ensure that at least some copies would survive. More recently, the *Iliad* has been preserved in a time capsule designed to last thousands of years²⁰⁹ and uploaded to the Internet,²¹⁰ further enhancing its chance at surviving in perpetuity.

²⁰⁴ Leslie Hannah, *Marshall's "Trees" and the Global "Forest": Were "Giant Redwoods" Different?*, in *LEARNING BY DOING IN MARKETS, FIRMS, AND COUNTRIES* 253, 263 tbl.7.2 (Naomi R. Lamoreaux et al. eds., 1999).

²⁰⁵ Steven D. Solomon & Paul Rose, *The Disappearing Small IPO and the Lifecycle of the Small Firm* (July 3, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2400488>.

²⁰⁶ Lynn A. Stout, *The Toxic Side Effects of Shareholder Primacy*, 161 U. PA. L. REV. 2003, 2021 (2013).

²⁰⁷ Solomon & Rose, *supra* note 205.

²⁰⁸ *Supra* Part III.C.

²⁰⁹ WILLIAM E. JARVIS, *TIME CAPSULES: A CULTURAL HISTORY* 141–44 (2003) (describing the Crypt of Civilization, a time capsule buried in 1940 at Oglethorpe University in Atlanta and designed to preserve its contents, including the *Iliad*, for more than 6000 years).

²¹⁰ See, e.g., *The Iliad*, THE INTERNET CLASSICS ARCHIVE, <http://classics.mit.edu/Homer/iliad.html> (last visited Feb. 8, 2015).

Yet even our best attempts at achieving true permanence are likely doomed to failure. This is not news. As Marcus Aurelius, then-emperor of Rome, wrote in his journal: “Soon you will have forgotten the world [in death]; and soon the world will have forgotten you.”²¹¹ And the great nineteenth-century poem *Ozymandias* powerfully brings this truth home by describing a modern explorer who finds a piece of a statue out in the middle of the desert.²¹² Next to the ruins he sees a plaque saying that “this mighty city” was built by the “great Ozymandias” to stand for all time as a testament to his greatness.²¹³ The city has been ruined and Ozymandias has been forgotten, just like almost everybody who tries to make a permanent mark on the world will be.

Most poets are not Edgar Allen Poe. Rather than achieve immortality through undying fame, once gone, they will be forgotten. Even many of the “stars” on the Hollywood Walk of Fame are largely obscure.²¹⁴ Achilles and Alexander the Great are exceptions.²¹⁵ Of the billions of people who have inhabited the planet, close to none are remembered forever.

Yet this did not stop James Dean and countless others from seeking fame. Young actors arrive in Hollywood every day hoping to become the next Brad Pitt, but it is a practical certainty that most will fall short. In every field, from biology to baseball, people continue to strive for greatness that will carry their names down through generations—even in the face of extremely unfavorable odds.

This is but a specific instance of “optimism bias,” that broad tendency of people to be systematically over-optimistic. We regularly overestimate the likelihood of experiencing positive events and underestimate the likelihood of experiencing negative ones.²¹⁶ For example, 93% of drivers believe they are better than average, even though this can only be mathematically true for 50% of them.²¹⁷ This optimism bias, found in the overwhelming majority of people, regardless of age, gender, race, or socioeconomic status,²¹⁸ can easily lead a person to believe that, even though most corporations are short lived,

²¹¹ CAVE, *supra* note 108, at 224. Marcus Aurelius was wrong in the specific instance, as the world has not actually forgotten him, but his broader point holds true.

²¹² See Horace Smith, *Ozymandias*, in HUNT’S THE EXAMINER (Feb. 1, 1818) (“In Egypt’s sandy silence, all alone, Stands a gigantic Leg, which far off throws The only shadow that the Desert knows:—‘I am great OZYMANDIAS,’ saith the stone, ‘The King of Kings; this mighty City shows ‘The wonders of my hand.’—The City’s gone,—Nought but the Leg remaining to disclose The site of this forgotten Babylon.”).

²¹³ *Id.*

²¹⁴ See THE KINKS, *supra* note 125 (“You can see all the stars as you walk along Hollywood Boulevard, / Some that you recognize, *some that you’ve hardly even heard of*, / People who worked and suffered and struggled for fame, / Some who succeeded and *some who suffered in vain*.”) (emphasis added).

²¹⁵ And even they will only be remembered so long as Western civilization continues to value their deeds. CAVE, *supra* note 108, at 224.

²¹⁶ TALİ SHAROT, THE OPTIMISM BIAS XV (2011).

²¹⁷ *Id.* at 15.

²¹⁸ *Id.* at xiv, 192.

her corporation will be akin to the giant redwood that exists for centuries (or at least beyond her lifetime).

Thus, a corporation can serve as a vehicle for perpetual renown, even though it is likely to survive only briefly, and almost certainly not forever. Indeed, even those who succeed and become famous—Buddy Holly, for instance—will not really be remembered *forever*. Our history only goes back a few thousand years (although we know that the earth has been inhabited by humans for millions of years). It seems the real goal is for one's fame to outlive one's mortal life, hopefully by a healthy stretch.²¹⁹

In short, the mere fact that almost all corporations will cease to exist within a few years of their founding does not undermine their ability to serve as a vehicle for everlasting glory. The same is true of paintings, poems, athletic records, and other traditional methods of achieving that type of immortality.

2. *Most Pre-IPO Shareholders Will Be Forgotten to History*

A second challenge to this Article's claim is that even when a company actually survives for several generations, most of the pre-IPO shareholders will be lost to history, thus undermining the premise that they seek to advance their fame through corporate affiliation.

Consider the example of an IBM shareholder and board member at the time of its 1915 IPO. His name has been long forgotten. Were his efforts to associate himself with a perpetual public company pointless? Perhaps not; while his name is not remembered in the history books alongside Abraham Lincoln and Cornelius Vanderbilt, his fame and glory likely do persist at the company—where his signature may be found on early corporate documents—as well as among his descendants, who are likely proud of their forbearer's accomplishments. This level of renown, while seemingly modest, is actually quite impressive. Nearly everyone is completely forgotten one hundred years after their deaths, even by their own descendants. So his efforts were fruitful after all, and contemporary pre-IPO shareholders hope to achieve what he did.

But that IBM board member may be an exception. Most people affiliated with a company at the IPO stage do not experience such success in their pursuit of immortality. Do they genuinely think that corporate affiliation will help preserve their names through the ages? There are two responses to this challenge. First, the optimism bias affects these people too.²²⁰ They may be convinced that although most people are forgotten, they themselves will somehow be remembered.

²¹⁹ Cf. THE ODYSSEY (Achilles, in the afterlife, laments having chosen eternal glory instead of a long life.).

²²⁰ See *supra* Part III.E.1.

Second, we cannot all be Alexander the Great or an iconic public CEO. Most people—nearly all—must be content with achieving some level of fame through an association with such an exceptional person, such as by marching with Alexander’s army, editing Shakespeare’s work, or investing in Google before its IPO. While the level of fame and glory that these affiliations can provide may be modest, it is more than most people ever achieve.

So, it is true that most pre-IPO shareholders will not obtain a lasting legacy, even if the corporation itself does. This does not preclude attempting to use the corporate form to achieve a legacy due to the optimism bias. Playing a supporting role for a perpetual entity may be the closest thing to immortality most people can hope to achieve.

3. *Voluntary Mergers and Liquidations*

A third challenge is that both public and private corporations commonly engage in voluntary mergers and liquidations that bring about the end of the corporate existence, and that this behavior conflicts with the claim that those affiliated with a corporation seek to perpetuate its existence. Why would a company ever allow itself to be taken out of existence if its continued existence is the key to perpetual fame? The first answer is the one given above, namely that once the board of directors is comprised of people who joined the board long after the IPO, those directors are amenable to ending the corporate existence because their legacy is not bound up in it.²²¹

The second answer is that perpetual renown has its value, and it also has its price. Sometimes the amount of money that those affiliated with a corporation are offered to end the corporation’s independent existence is simply worth more than the chance at perpetual renown that corporate affiliation offers. WhatsApp’s handful of owners received \$19 billion in exchange for handing their company over to Facebook.²²² Perhaps part of that amount went to compensate the private owners for never being able to do an IPO and potentially achieving eternal glory. In contrast, the owners of Snapchat declined a multi-billion dollar offer, presumably because they are highly optimistic and dead-set on perpetual renown.

This is not to say that those behind a company such as WhatsApp that sells itself in a private transaction are disinterested in perpetual renown.²²³ The fabulous windfall paid to private owners like them can be used to seek lasting fame in other ways. With their newfound wealth, they could take up

²²¹ See *supra* Part III.C.

²²² See Gelles & Goal, *supra* note 151.

²²³ Some private sellers rue the day they sold out and wished that they had held on to their corporations. Miller, *supra* note 149 (“I spent eight years, all day every day, trying to build this thing, and all of a sudden it’s gone, it’s just over. . . . It’s a little bit like something dies. . . . On the surface it looked good, but I tell you after I sold the company I had total seller’s remorse.”) (quoting founder of Opsware, who sold the company in 2007 to Hewlett-Packard for \$1.6 billion); *id.* (“I should not have sold. . . . That was my biggest regret.”) (quoting founder of cc:Mail).

painting or poetry, or try to write a book that will be remembered for ages. They could start a foundation or support a charity where their name will be recounted for many years to come. Or they could even use the money to start another company and take that company public. For example, Evan Williams sold an early company to a private buyer, followed by an IPO for Twitter, the latter of which may well provide him with perpetual renown through corporate affiliation.²²⁴

For public companies, the board of directors ordinarily serves as the “defender[] of the corporate bastion” and can defend against a hostile takeover that threatens the corporation’s independent existence.²²⁵ If the board has a devised a long-term business plan, it has the authority to thwart a takeover attempt, even one that most shareholders might favor.²²⁶ Maintaining the corporation’s independence in this way advances the perpetual renown of those affiliated with it.

But the board of directors of a public company likewise has the power to decide that the corporation’s long-term potential is less than the price offered by an acquirer and permit the shareholders to sell out. If the value available through merger or liquidation is sufficiently great, the desire for perpetual renown may simply be overcome by the wish for immediate returns.

Moreover, business realities cannot be wished away, and a company that ends up being merged or liquidated out of existence is unlikely to be the type of company that had the option of continuing an independent existence for generations to come. The United States Leather Company, an original member of the Dow Jones Industrial Average, was liquidated in 1952.²²⁷ Pullman Company, the last American company to manufacture train cars, was acquired in 1980.²²⁸

This Article does not claim that immortality through perpetual renown is the only or overriding factor regarding how a corporation is founded and managed, but merely that this is one factor that is particularly important at the IPO stage. So, while it is true that many public corporations voluntarily end their existence via merger or liquidation, this does not undermine the primary claim of this Article.

²²⁴ See Alyson Shontell, *Evan Williams Reportedly Owns 15% of Twitter, and He’s Positioned to Become a Multi-Billionaire*, BUSINESS INSIDER (Sep. 25, 2013, 3:07 PM), <http://www.businessinsider.com/evan-williams-largest-twitter-shareholder-at-15-2013-9>.

²²⁵ *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

²²⁶ *Paramount v. Time*, 571 A.2d 1140, 1148 (Del. 1989).

²²⁷ Hannah, *supra* note 204, at 278.

²²⁸ See Lydia Chavez, *Pullman’s Owner to Stop Producing Passenger Car*, N.Y. TIMES, Feb. 4, 1982, available at <http://www.nytimes.com/1982/02/04/business/pullman-s-owner-to-stop-producing-passenger-car.html>.

4. A Takeover Does Not Necessarily End the Corporate Existence

The final challenge to be taken up is that a hostile takeover of a public company does not necessarily end the corporate existence. The target corporation could, for instance, retain its corporate form and become a wholly owned subsidiary of the acquirer. This is true, but a takeover ends the target's existence as an independent company, meaning one whose destiny is controlled by its own board of directors.²²⁹

Public corporations are called independent until they succumb to an acquisition, and a company that successfully fends off an attempted takeover is said to “remain independent” or “maintain its independence.”²³⁰ The concept of independence has tremendous value and cachet in America. Our country was founded with a “Declaration of Independence” and our national holiday is called “Independence Day.” Clearly independence is an important and cherished concept in our society.

In the corporate context, once a company loses its independence and is acquired by another company, it is but a step away from oblivion, whether it retains its corporate shell or not. Without an independent board of directors to serve as “defenders of the corporate bastion,” the corporation exists at the pleasure of its controlling party.²³¹ The ultimate owner could make a business decision at any time to use a short-form merger and bring an end to the now-subsidary corporation.

Finally, consider the relevance of trade names. Anheuser-Busch was acquired by InBev, but its name lives on as part of the re-named company, “Anheuser-Busch InBev.” Similarly, Tropicana orange juice continues to be sold decades after the independent company was acquired by PepsiCo. And trademarks have perpetual duration, so it is possible for the fame and glory of a brand to continue to grow even once its original owner is acquired. But these brand names are tenuous because, after a takeover, it is up to the new owner whether to maintain the brand or to end it and thereby extinguish its

²²⁹ See Bebchuk, Coates & Subramanian, *supra* note 14, at 890.

²³⁰ See, e.g., *Ivanhoe Partners v. Newmont Min. Corp.*, 535 A.2d 1334, 1344 (Del. 1987) (finding that deployment of takeover defenses allowed target corporation to “maintain the company’s independence”); *id.* at 1340 (stating that use of takeover defenses by target “assur[ed] its] continued independence”); see also Michal Barzuza, *Delaware’s Compensation*, 94 VA. L. REV. 521, 542 (2008) (“remain independent”); Bebchuk, Coates & Subramanian, *supra* note 14, at 889 (“maintain the target’s independence”); Easterbrook & Fischel, *supra* note 9, at 1174 (“maintain[] its independence”); Ronald L. Gilson, *The Case Against Shark Repellent Amendments: Structural Limitations on the Enabling Concept*, 34 STAN. L. REV. 775, 776 n.5 (1982) (“remain independent”); *id.* (“maintain their independence”); Martin Lipton, *Pills, Polls, and Professors Redux*, 69 U. CHI. L. REV. 1037, 1039 (2002) (“remain independent”); Edward B. Rock, *Adapting to the New Shareholder-Centric Reality*, 161 U. PA. L. REV. 1907, 1925 (2013) (“remaining independent”); Michael Rosenzweig, *Target Litigation*, 85 MICH. L. REV. 110, 127 (1986) (“maintain . . . independence”); Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 633 (2003) (“remain[] independent”); *Explaining Variation*, *supra* note 5, at 1302 (“remain independent”).

²³¹ See Miller, *supra* note 149 (suggesting that in most acquisitions in Silicon Valley, the acquirer “choke[s]” the target).

ability to advance a legacy. Anheuser-Busch and Tropicana aside, there are many other instances where a company is acquired and its defining brand names are put out to pasture. This was the case with Kinko's, acquired by Federal Express and renamed "FedEx Office." The ability of Kinko's to propel its legacy was put to an end.

In short, to effectively retain and perpetuate a legacy, a corporation must remain independent. Once it loses independence, even if its corporate form or trade names appear to remain intact, either or both can be destroyed if the new owner so chooses, thus severely undermining the corporation's ability to perpetuate a legacy.

CONCLUSION

Using a new data set, this Article attempted to solve the mystery of why we see widespread takeover defenses at the IPO stage at the same time as widespread disarmament by seasoned public companies. The novel explanation put forth is that the public corporation, as a perpetual and socially significant entity, is a powerful vehicle for advancing the legacy of the pre-IPO shareholders as a group. But because a hostile takeover can end the corporation's independent existence (and thus its ability to perpetuate legacy), the pre-IPO shareholders favor armoring the company with powerful takeover defenses, a step that is effectively available only at the IPO stage. Finally, because their personal legacy is not bound up in the company, boards of mature public companies are relatively willing to dismantle takeover defenses.