A View of the Dutch IPO Cathedral

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Initial public offerings ("IPOs") are an exercise in asymmetrical valuation. One mechanism for bridging these asymmetries is a private financial intermediary to conduct price discovery by meeting with preferred investors. An alternate mechanism is an auction, such as a descending-bid or Dutch procedure, to conduct price discovery by soliciting bids from all prospective investors. Recent disenchantment with the relationship between issuers and intermediaries has prompted some to hail (online) auction-based IPOs. This switch, however, incurs a variety of legal costs that may justify broader mandatory disclosure and state intervention.

The legal costs of auction-based IPOs can be gleaned from examining various international regulatory regimes. To comparatively evaluate these regimes, this article introduces a paradigmatic framework derived from the classic tri-tiered schema that Guido Calabresi and A. Douglas Melamed formulated for legal entitlements. By conceptualizing IPOs as a problem of asymmetrically-valued shares, different kinds of regulations can assume the form of property, liability, and inalienability rules. The distinctions between these rules explain variations within the regulatory schemes of France, Israel, and Taiwan, the last bastions of auction-based IPOs, and evince the legal price that must be paid for the United States to offer an auction-based alternative to bookbuilding.

I. INTRODUCTION

Going public is an exercise in asymmetrical valuation. To raise equity successfully, a firm must calibrate its offering price and size. This calibration is a function of market demand, which reflects prospective investors' appraisals of the firm, its industry, and the general climate. Information exchanges between a firm and its prospective investors, however, are obstructed because these appraisals are realized through

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aftermarket transactions; the less accurately a firm gauges market demand, the more an investor stands to gain by selling its holdings.

One way to bridge these asymmetries is via an auction.[1] Prospective investors submit bids for their preferred price and quantity of shares.[2] These bids permit the issuer to determine the lowest, or clearing, price that results in a fully-subscribed offering.[3] If demand matches supply, everyone who submitted bids above the clearing price will receive shares; if demand exceeds supply, all qualifying bids receive shares on a *pro rata* basis.[4]

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[1] Classically defined, an auction is "a market institution with an explicit set of rules determining resource allocation and prices on the basis of bids from the market participants." R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LIT. 699, 701 (1987); *see also* R. Preston McAfee & John McMillan, *Bidding Rings*, 82 AM. ECON. REV. 579, 581 (1992) ("The distinctive feature of an auction is asymmetric information; if the seller knew the bidders' demands, he would simply post a price."). For an extended period of time auctions were not regarded as an allocative mechanism because they "committed the cardinal sin in economics of not being theoretically convenient to study in terms of the traditional neoclassical theory." Andrew Schotter, *Auctions and Economic Theory*, *in* BIDDING AND AUCTIONING FOR PROCUREMENT AND ALLOCATION 3, 4 (Yakov Amihud ed. 1976). Schotter believes this is attributable to auctions being "exchange mechanisms without a *tâtonnement* or recontracting provision in which the seller is relatively passive and goods are often indivisible." *Id.*; *see also generally* LEON WALRAS, ELEMENTS OF PURE ECONOMICS (William Jaffe, trans., 1954) (seminally analyzing *tâtonnement*).

[2] The auction can, but need not, be conducted online. The first online (direct) public offering in the United States was conducted in 1996. *See, e.g.*, William K. Sjostrom, Jr., *Going Public Through an Internet Direct Public Offering: A Sensible Alternative for Small Companies?*, 53 FLA. L. REV. 529, 531-32 (2001) (describing internet DPO of Spring Street Brewing Company). *See also infra* notes 112-113 and accompanying text. And the first online Dutch IPO in the United States was conducted in 1999. *See* W.R. Hambrecht + Co., OpenIPO: Completed Auctions, http://www.wrhambrecht.com/ind/auctions/completed.html (last visited July 1, 2007). Issuers, however, have been conducting Dutch IPOs internationally for over four decades. *See, e.g.*, John G. McDonald & Bertrand C. Jacquillat, *Pricing of Initial Equity Issues: The French Sealed-Bid Auction*, 47 J. BUS. 37, 37 (1974) ("In France all initial issues of common stock since 1964 have been priced and allocated in a sealed-bid auction procedure . . . ."). *See also infra* Part II.B-C.

[3] *See, e.g.*, Lucas C. Townsend, Comment, *Can Wall Street's "Global Revolution" Prevent Spinning? A Critical Evaluation of Current Alternatives*, 34 SETON HALL L. REV. 1121, 1163-64 (2004) ("[T]he bid that depletes the shares in the offering . . . determines the 'clearing price,' which is the price that the accepted bidders will pay for their shares."). When the offering fails to be fully-subscribed, the clearing price should be the lowest price within a range pre-announced by the issuer, but can be—and often is—a matter of discretion. *See infra* note 144 and accompanying text.

[4] *See generally* W.R. Hambrecht + Co., *OpenIPO: Frequently Asked Questions*, http://www.wrhambrecht.com/ind/auctions/openipo/faq.html (last visited July 1, 2007) (describing W.R. Hambrecht + Co.'s Dutch IPO platform, known as OpenIPO, as being "[b]ased on an auction system designed by Nobel Prize-winning economist William Vickrey"). OpenIPO is the only auction-based platform available to U.S.-based IPOs. *See, e.g.*, Christine Hurt, *What Google Can't Tell Us About Internet Auctions (And*

This procedure, known as a Dutch IPO,[5] presents theoretical advantages over bookbuilding, another method for bridging asymmetrical valuations in public offerings.[6] Dutch IPOs promise to wean, if not eliminate, the need for private financial intermediaries to conduct price discovery and build books of orders through meetings with prominent prospective investors.[7] As a result, issuers are spared intermediary fees while the equity pool is expanded to include anyone willing to submit a bid.[8] Moreover, as the auction purports to measure actual demand, the offering price should reflect accurately the stock's market value;[9] this enables the issuer to avoid an appreciable increase, or "pop," in price during the first-day of trading, and thus, raise equity efficiently.

Dutch IPOs, however, also present unique problems. The procedure can be manipulated by submitting bids for a reduced number of shares,[10] and can be circumvented by exchanging bid information or

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What It Can), 37 TOLEDO L. REV. 403, 412 (2006) ("[O]f the firms that developed online auction systems during the 1999-2000 Boom, only W.R. Hambrecht + Co. eurrently maintains an online lPO platform.").

[5] The name derives from the use of a descending-bid, or Dutch, auction to conduct price diseovery and share alloeation, whieh earned its name through the flower markets in Holland. *See, e.g.*, Paul Klemperer, *Auction Theory: A Guide to the Literature*, 13 J. ECON. SURVEYS 227, 266 n.13 (1999). Unlike the English or Japanese auetions, the price in a Dutch auction (and its international variants) descends successively until a winner is deelared. *See id.* at 267 (delineating the eosmopolitan array of auetion types, all of which are equally optimal selling mechanisms pursuant to the Revenue Equivalenee Theorem).

[6] *See generally* Katrina Ellis *et al.*, *A Guide to the Initial Public Offering Process*, 3 CORP. FIN. REV. 14 (1999).

[7] *See, e.g.*, William R. Hambreeht, *Request for Comment on the Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings*, http://www.wrhambreeht.eom/ind/strategy/bill_pov/200401/wrheo20040107.pdf 6 (Jan. 7, 2004) (touting the Dutch lPO as a method that "replac[es] arbitrary pricing and preferential alloeation [by bookbuilding] with a system that objeetively establishes the full demand curve for an lPO and allocates to those investors willing to pay the highest priee"). *See also* John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 BUS. LAW. 1195, 1200 (1997) (terming the "relative disappearanee, or at least downsizing, of traditional finaneial intermediaries" as "disintermediation"); Donald C. Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 HARV. L. REV. 747, 755 (1985) (noting that "computers would readily permit investors to bypass broker-dealers," but identifying eertain signifieant policy eonsequenees).

[8] Bids frequently are, but need not be, submitted online. *Cf. Securities Offering Reform*, 70 Fed. Reg. 44,722, 44,783 (2005) (promulgating an "aeeess equals delivery" model in which "investors are presumed to have access to the Internet").

[9] In this respeet, a pure Duteh lPO may be viewed as an analogue to the strong-form of the Efficient Capital Markets Hypothesis. *Cf.* West v. Prudential Securities, Inc., 282 F.3d 935, 938(1988) (Easterbrook, J.) ("No one these days aeeepts the strongest version of the efficient capital markets hypothesis . . .").

[10] *See generally* Mira Ganor, *A Proposal to Restrict Manipulative Strategy in Auction IPOs* (July 2004) (delineating reduced allocation strategy for manipulating Dutch

forming a collusive bidding ring.[11] Moreover, these strategies can be employed not only by prospective investors, but issuers. As a result, Dutch IPOs may stimulate countervailing valuations and thereby exacerbate asymmetries.

These asymmetries can be redressed in a myriad of ways. In the United States, select bidding data are withheld and suspect bids can be rejected by an issuer or an intermediary on a discretionary basis.[12] In France and Israel, the collection, monitoring, and processing of bids are charged to a central quasi-public authority that may publish bidding data.[13] In Taiwan, these tasks are handled by a central governmental agency as well as supplemented with various eligibility and allocation restrictions.[14]

Each type of counter-measure to fraud or manipulation reflects different portfolios of common considerations. The American approach minimizes regulatory involvement in apparent favor of private dispute resolution;[15] this coheres with a domestic emphasis on the Dutch IPO's purported ability to mitigate, if not eliminate, underpricing.[16] The French and Israeli approaches feature intermediate regulatory involvement in apparent favor of consistency and transparency;[17] this coheres with those countries' emphasis on the Dutch IPO's purported ability to provide egalitarian access to all institutional and retail investors.[18] The Taiwanese

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IPOs), *available at* http://ssrn.com/abstract=52243. *See also* Peter B. Oh, *The Dutch Auction Myth*, 42 WAKE FOREST L. REV. 853, 899-901 (2007) (critically examining Ganor's proposal and delineating bidding ring strategy).

[11] *See* Oh, *supra* note 10, at 901-09.

[12] *See infra* Part II.A.

[13] *See infra* Part II.B.

[14] *See infra* Part II.C.

[15] *See infra* Part II.A.

[16] *See, e.g.*, Shane Kite, *Google Goes Dutch, Rocking IPO Sector*, 17 BANK TECH. NEWS 27, 27 (Aug. 2004) ("Dutch auctions, say supporters, offer a truer price based on more accurate demand of a wider market, because the issuance is open to any potential shareholder with an Internet connection, instead of select institutional accounts favored by individual underwriters."). *See also* Google, Inc., *Amendment No. 9 to Form S-1 Registration Statement* 31 (filed with SEC on Aug. 18, 2004) (justifying decision to go public with an auction-based IPO because it would generate "a share price that reflects an efficient market valuation of Google") (Letter from the Founders: "An Owner's Manual" for Google's Shareholders) [hereinafter Google, *Amended Form S-1*], *available at* http://www.sec.gov/Archives/edgar/data/1288776/000119312504142742/ds1a.htm.

[17] *See infra* Part II.B.

[18] *See, e.g.*, John C. Coffee, Jr., *IPO Underpricing and Dutch Auctions*, N.Y.L.J., Sept. 16, 1999, at 5; (arguing that "individual investors should prefer Dutch Auctions, and a significant 'democratization' of the IPO process can be envisioned"); William Hambrecht, *Fixing the IPO Process*, http://www.wrhambrecht.com/ind/strategy/bill_pov/200209/report.pdf 3 (Sept. 2002) (advocating greater access to all institutional and retail investors through IPOs that "would provide a broader universe of potential buyers" and "create a level playing field to match supply and demand").

approach includes stringent regulatory restrictions in apparent favor of nationalistic interests;[19] this coheres with that country's emphasis on the Dutch IPO's purported ability to advance select equitable goals.[20]

These variations in regimes have an implicit, but unexamined, logic. Over three decades ago, Guido Calabresi and A. Douglas Melamed introduced their elegant three-tiered legal entitlements framework.[21] These distinctions between property, liability, and inalienability rules clarify what and when state intervention may be justified in enforcing and restricting rights. Undergirding these rules is a set of common considerations: efficiency, equality, and equity.[22]

This article derives from the legal entitlements framework a schema for examining and assessing different Dutch IPO regulatory regimes. Part I establishes this framework, which conceptualizes valuation as a form of legal entitlement,[23] but with the object being allocation of shares rather than of rights.[24] Specifically, IPO methods can be differentiated on the basis of if and how they utilize a financial intermediary to resolve informational inefficiencies and advance other considerations. Part II examines the various international approaches to asymmetrical valuation in Dutch IPOs as property, liability, and inalienability regulatory regimes.[25] Specifically, the regimes in France, Israel, and Taiwan, the last

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[19] *See infra* Part II.C.

[20] *See, e.g.*, Christine Hurt, *Moral Hazard and the Initial Public Offering*, 26 CARDOZO L. REV. 711, 765 n.300 (2005) (citing Carolyn Said, *Quattrone's Trial: A Catalyst for Change*, S.F. CHRON., Oct. 26, 2003, at 11 (describing Google's Dutch IPO as reflective of the shift in Silicon Valley to "a new world order," and not the "favoritism and cronyism" of 1999). *See also* W.R. Hambrecht + Co., *OpenIPO: How It Works*, http://www.wrhambrecht.com/ind/auctions/openipo/index.html# (last visited July 1, 2007) ("Shares are allocated in an equal and impartial way by the auction process. There is no preferential allocation. . . . All individual and institutional investors pay the same price per share.").

[21] *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). *See also generally* Symposium, *Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective*, 106 YALE L.J. 2081 (1997) [hereinafter Symposium].

[22] *See infra* notes 39-45 and accompanying text.

[23] This is hardly the first article to make such a connection. *See generally* Saul Levmore, *Self-Assessed Valuation Systems for Tort and Other Law*, 68 VA. L. REV. 771 (1982). But while replete with applications to contract, property, and tort, the literature appears to lack any explicit conception of how this entire framework might apply to corporate law, and particularly to (Dutch) IPOs.

[24] *See infra* Part I.A. This article is not concerned with the specific components of shares. *See* Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993) (distinguishing the Hohfeldian "jural relations" typology as an account of entitlements' components from the property, liability, and inalienability rule typology as an account of entitlements' forms) (citing Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913)).

[25] As with the approach of Calabresi and Melamed, this article presents merely one way to view (Dutch IPO) legal regimes. *See* Calabresi & Melamed, *supra* note 21, at 1090

three bastions of Dutch IPOs,[26] are classified with the United States to elicit their comparative regulatory costs.

This schema for viewing different IPO regulatory regimes yields a set of valuable insights. First, the current property regulatory regime in the United States is suitable for bookbuilding and perhaps selecting financially disintermediated Dutch IPOs. Second, all Dutch IPOs suffer from unique problems that militate in favor of a costly switch to a liability regulatory regime. Finally, the analysis here of Dutch IPO regulatory regimes demonstrates the utility of this proposed schema for evaluating a variety of securities laws.

II. FROM LEGAL ENTITLEMENTS TO REGULATORY REGIMES

Derived from the Coase Theorem, Calabresi and Melamed's tri-tiered legal entitlements framework has enjoyed widespread application.[27] While refined significantly over time, the original framework remains a useful way to conceptualize and evaluate different approaches to resolving rights-based disputes. To date, however, no one has recognized the applicability of legal entitlement rules and their common set of considerations to the IPO process.

This Part culls from the Calabresi and Melamed framework a tri-tiered schema for conceptualizing and evaluating Dutch IPO regimes. Specifically, the different regulatory approaches to Dutch IPOs can be organized as a sliding-scale of property, liability, and inalienability regimes. The variations between these regimes then can be analyzed in terms of efficiency, equality, and equity; not only are these the three ways that Dutch IPOs are purportedly superior to bookbuilding, but they also are the very considerations identified by Calabresi and Melamed for choosing between different legal entitlement rules.

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n.2 ("As Professor Harry Wellington is fond of saying about many diseussions of law, this article is meant to be only *one* of Monet's paintings of the Cathedral at Rouen.") (emphasis in original). *Cf.* CHARADE (Universal 1963) (Reggie Lampert: "You're blocking my view." Peter Joshua: "Oh, which view would you prefer?" Reggie Lampert: "The one you're bloeking.") (Audrey Hepburn as Reggie Lampert, and Cary Grant as Peter Joshua).

[26] *See infra* notes 98-101 and aeeompanying text.

[27] *See, e.g.*, Symposium, *supra* note 21. The brief synopsis provided here certainly does neither justiee to the original elegant eontribution by Calabresi and Melamed nor the numerous valuable refinements; the objective is merely to delineate a skeleton of the framework for the purposes of demonstrating its applieability to and utility for sifting through Dutch IPO regulatory regimes.

A. *Externalities, Entitlements, and Auctions*

The enforcement of legal entitlements traces back to the Problem of Social Cost.[28] To the extent market activity generates externalities, they are compounded by undue social "attention on particular deficiencies in the system" and an instinctive "belief that any measure which will remove the deficiency is necessarily desirable."[29] Instead, when state intervention is resituated on a sliding-scale with administrative, enforcement, and transaction costs, the initial assignment of rights becomes irrelevant and private bargaining can produce efficient results.[30]

Legal entitlements flow from this reasoning in reverse. Within a State of Nature, private conflicts necessitate first-order legal decisions about what should be a matter of power versus that of right.[31] According to Calabresi and Melamed, adjudicating such decisions requires "a minimum of state intervention,"[32] not only to compensate for harm but to protect awards that reflect distributional judgments.[33] This, in turn, entails second-order legal decisions about how to confer such protection and when to allow its voluntary exchange.[34]

These decisions assume the form of a tri-tiered legal entitlements schema.[35] One tier comprises property rules that govern voluntary exchanges of entitlements by private parties and thus "give[ ] rise to the least amount of state intervention."[36] Another tier comprises liability rules

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[28] *See, e.g.*, James E. Krier & Stewart J. Sehwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 440 (1995) ("Ronald Coase's essay on 'The Problem of Soeial Cost' introdueed the world to transaetion eosts. . . . And of all the law-and-economics scholarship built on Coase's insights, perhaps the most widely known and influential eontribution has been Calabresi and Melamed's discussion of what they called 'property rules' and 'liability rules.'").

[29] Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 42-43 (1960).

[30] *Id.* at 2-15.

[31] Calabresi and Melamed make no explicit reference to the hypothetical Social Contraet, but the parallels with their example of physieal mismateh are unmistakable. *See, e.g.*, lan Ayres & Eric Talley, *Distinguishing Between Consensual and Nonconsensual Advantages of Liability Rules*, 105 YALE L.J. 235, 236 n.3 (1995) (referencing "Calabresi and Melamed's account of the nonconsensual -or so-called 'Hobbesian'-ease"). The pair, however, does make elear that they envision soeial judgments and state intervention to be justified in a much broader range of disparate relationships. *See* Calabresi & Melamed, *supra* note 21, at 1091 n.5 ("'Bigger' obviously does not refer simply to size, but to the sum of an individual's resources.").

[32] Calabresi & Melamed, *supra* note 21, at 1090.

[33] *Id.* at 1091.

[34] *Id.* at 1092.

[35] *Cf.* Morris, *supra* note 24, at 841 n.44 (justifying interchange of 'form of entitlement' and 'entitlement rule' on the basis that, while "the term 'form of entitlement' more precisely conveys the intended meaning, the use of two terms is necessitated by the fact that . . . that terminology has eome into eommon usage").

[36] Calabresi & Melamed, *supra* note 21, at 1092.

that shift the task of valuing voluntary exchanges to a public authority.[37] The final tier comprises inalienability rules that establish a range of transactions deemed impermissible by a public authority.[38]

The relationships between these rules are governed by multiple considerations. Consistent with the Coase Theorem,[39] allocative efficiency provides one class of reasons for adopting a particular rule;[40] for instance, justification for a property or liability rule may turn on whether administrative, enforcement, and transaction costs are prohibitively high.[41] Wealth distribution preferences supply another class of reasons for adopting a particular rule;[42] for instance, justification for an inalienability rule may turn on whether endowments of certain goods are ensured.[43] Equitable concerns may suggest an additional class of reasons for adopting a particular rule;[44] for instance, justification for a particular rule may turn on idiosyncratic moral reasons not grounded in efficiency or wealth distribution.[45]

Since its introduction over three decades ago, this legal entitlement framework has undergone significant refinement.[46] Economic analysis has

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[37] *Id.*; *see also* Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2093 (1997) (noting that the shift to a liability rule "requires some level of state intervention in *each and every* transaction to set the appropriate value for the parties") (emphasis in original).

[38] Calabresi & Melamed, *supra* note 21, at 1092.

[39] *Cf.* Ayres & Talley, *supra* note 31, at 706 n.9 ("Just as Coase never formally stated the Coase Theorem in [Coase, *supra* note 29], Calabresi and Melamed never succinctly stated what has been taken to be their primary normative conclusion.").

[40] Calabresi & Melamed, *supra* note 21, at 1093-98.

[41] *But see infra* note 47 and accompanying text.

[42] Calabresi & Melamed, *supra* note 21, at 1098-1101.

[43] *Id.* at 1100.

[44] *Id.* at 1102-05.

[45] *Id.* at 1123-24. *See also generally* Lee Anne Fennell, *Property and Half-Torts*, 116 YALE L.J. 1400 (2007) (examining Calabresi and Melamed's entitlements framework from the standpoint of moral intuitions).

[46] One area disproportionately sidestepped by the derivative entitlements literature, particularly by efficiency-based analyses, is inalienability rules. *See, e.g.*, Lucian Arye Bebchuk, *Property Rights and Liability Rules: The Ex Ante View of the Cathedral*, 100 MICH. L. REV. 601, 602 n.2 (2001) ("This Article will focus . . . as much of the literature has done, on alienable rights that parties may sell or waive."). *But see, e.g.*, Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985). *Cf.* Michael Abramowicz, *On the Alienability of Legal Claims*, 114 YALE L.J. 697, 703 (2005) ("It is both surprising and revealing that no commentator appears to have considered whether bars on transfer of legal claims cohere with other restraints on alienability."). While the specific relationship between efficiency and inalienability is beyond the scope of this article, the framework presented here does utilize all three types of entitlement rules to examine different Dutch IPO regimes. *See infra* Part II.C.

reevaluated legal entitlement rules in terms of transaction costs and risks.[47] Options analysis has reconfigured the relationship between different rules as well as reared new ones.[48] Corrective justice accounts have reinterpreted legal entitlements as securing autonomy.[49]

An intriguing refinement is to view legal entitlements as a species of auctions. Building on options analysis, Ian Ayres and Jack Balkin frame the problem of valuing entitlements as "a classic case of asymmetric information."[50] Specifically, they contemplate a class of inefficient transactions that result from parties maintaining private or sealed appraisals of their legal entitlements.[51]

The classic problem, however, has a classic solution: an auction.[52] According to Ayres and Balkin, disputing parties can express their

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[47] *See, e.g.*, Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 720 (1996) ("[W]hen transaction costs are low, parties tend to bargain under liability rules as well as under property rules and may reach outcomes superior to those reached under property rules; and when transaction costs are high and bargaining is impossible, property rules may lead to better outcomes than do liability rules."). *See also* Epstein, *supra* note 37, at 2095 (evaluating different rules on the basis of which one "minimizes the sum of the costs associated with extraction and undercompensation, the signature risks of property rules and liability rules respectively.").

[48] *See, e.g.*, Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027 (1995). *See also generally* Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269 (2004); Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1 (2002); Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399 (2005).

[49] *See, e.g.*, Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 (1986).

[50] Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 706 (1996) (citing Ayres & Talley, *supra* note 48, at 1032-36).

[51] *See* Ayres & Balkin, *supra* note 50, at 707-10.

[52] There are documented instances of auctions dating back to 500 B.C. in Babylonia. *See* RALPH CASSADY, JR., AUCTIONS AND AUCTIONEERING 26-40 (1967) (providing a comprehensive historical account of auctions) (citing HERODOTUS, THE HISTORIES OF HERODOTUS 77 (Henry Cary, trans., 1899)). *But cf.* Martin Shubik, *Auctions, Bidding, and Markets: An Historical Sketch*, *in* AUCTIONS, BIDDING, AND CONTRACTING: USES AND THEORY 33 (Richard Engelbrecht-Wiggins *et al.*, eds., 1983) ("Auctions . . . have only appeared in the comparatively civilized societies after the necessary conditions for their existence were fulfilled . . . . Thus, before the seventeenth century there were few regularly scheduled auction sales."). One of the most famous (English) auctions was conducted by the Praetorian Guard; after the assassination of Emperor Pertinax, the Guard sold off the entire Roman Empire in 193 A.D. and the winner, Didius Julianus, assumed the role of Caesar for a mere two months before being overthrown and executed. *See id.* at 42-3. *See also* Klemperer, *supra* note 5, at 267 n.21 (dryly observing this was "an early and sad case of the winner's curse," or a feeling of regret for having paid more than anyone else).

respective valuations of a legal entitlement through an "internal auction";[53] bids submitted to a third-party serve as a basis for allocating legal entitlement proceeds.[54] The auction thus serves as an information-forcing device about the parties' demand functions. The nonconsensual nature of the third-party's control over the bidding and allocation processes promises greater stability and structure than private negotiations.

B. *The Cathedral of Dutch IPO Law*

This progression in reasoning about legal entitlements parallels the evolution of the Dutch IPO's appeal in the United States. Recently, at the request of the Securities and Exchange Commission ("SEC"), the New York Stock Exchange ("NYSE") and National Association of Securities Dealers ("NASD") formed an advisory committee composed of prominent representatives from the academic, financial legal, and securities sectors.[55] Among the committee's resultant recommendations was to explore the viability of "auction systems, such as the Dutch auction system . . . to

[53] Ayres and Balkin define an "internal" auction as a procedure in which "the proceeds are distributed among the bidders rather than to a third party." Ayres & Balkin, *supra* note 50, at 707. In contrast, an "external" auction is a procedure in which "winning bidders pay a third party (i.e., the seller), and not eaeh other . . . ." *Id.* at 712.

[54] *Id.* at 712. When conducted only once, the auction involves a calculus between property rules and what Ayres and Balkin term "first-order" liability rules. *Id.* at 712-13; *see also* Kaplow & Shavell, *supra* note 47. The auction, however, can feature multiple rounds of bidding in whieh the parties take and re-take entitlements pursuant to higher-order liability rules, with the effect that "[t]he more rounds we add . . . the more it appears to mimie bargaining between the partieipants." Ayres & Balkin, *supra* note 50, at 713. Bargaining would continue in "a theoretically endless array of sequence of liability . . . until one side or the other retreats, its willingness to pay exhausted." Epstein, *supra* note 37, at 2095.

Kaplow and Shavell have advanced rather compelling objections to this auction-based legal entitlements seheme. *See generally* Louis Kaplow & Steven Shavell, *Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley*, 105 YALE L.J. 221 (1995). *See also generally* Ayres & Talley, *supra* note 48 (replying to Kaplow and Shavell's objections). There are also a variety of other auction-related complications, such as the "Winner's Curse." *See, e.g.*, William Viekrey, *Counterspeculation, Auctions, and Competitive Sealed Tenders*, 16 J. FIN. 8, 21-22 (1961) (delineating the "Winner's Curse" dynamie). *But see generally* James C. Cox & R. Mark Isaae, *In Search of the Winner's Curse*, 22 ECON. INQ. 579 (1984) (contending that the "Winner's Curse" generally oeeurs when bidders are not utilizing *ex ante* optimal strategies). The merits of this debate are beyond the scope of this article except to the extent that that the eonneetion between entitlements and auetions remains sound.

[55] *See* NYSE/NASD IPO ADVISORY COMM., REPORT AND RECOMMENDATIONS OF A COMM. CONVENED BY THE NYSE, INC. AND NASD AT THE REQUEST OF THE U.S. SECURITIES AND EXCHANGE COMMISSION A-1 (May 2003), http://www.nasd.com/web/groups/rules_regs/doeuments/rules_regs/nasdw_010373.pdf [hereinafter IPO ADVISORY COMM.].

collect indications of interest to help establish the final IPO price."[56] Indeed, during the early stages of the 1999-2000 internet bubble period, an SEC Commissioner suggested that "[i]f the IPO frenzy continues, perhaps the Dutch auction concept will get more IPO shares in the hands of retail investors."[57]

These comments' proximity to the bubble is hardly coincidental. From 1999 to 2000 mean underpricing for all IPOs rose at a "hyperbolic rate" to 63.3% and issuers left a "staggering" $62.4 billion on the table.[58] The bursting of the internet bubble only served to magnify scrutiny of underpricing and its role within the public offering process.[59] Although competing positive accounts exist, underpricing is best understood as a species of asymmetrical information.[60] On the one hand, issuers may withhold valuable information about themselves or underprice their shares

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[56] NASD, *NASD Approves Rules to Reform IPO Process* (Nov. 24, 2003), *available at* http://www.nasd.com/web/idcplg?IdcService=SS_GET_PAGE&ssDocName=NASDW_002817 (last visited July 1, 2007).

[57] Laura S. Unger, *Raising Capital in Bits and Bytes* (June 11, 1999), http://ftp.sec.gov/news/speech/speecharchive/1999/spch283.htm. The idea, however, has been entertained for some time. *See generally* Katina J. Dorton, Note, *Auctioning New Issues of Corporate Securities*, 71 VA. L. REV. 1381 (1985). Indeed, France has given its issuers the option of an auction-based IPO since 1964. *See, e.g.*, John G. McDonald & Bertrand C. Jacquillat, *Pricing of Initial Equity Issues: The French Sealed-Bid Auction*, 47 J. BUS. 37, 37 (1974) ("In France all initial issues of common stock since 1964 have been priced and allocated in a sealed-bid auction procedure . . . ."). And American corporations have been conducting stock repurchases via a Dutch auction format since 1981. *See, e.g.*, Anita I. Anand, *Regulating Issuer Bids: The Case of the Dutch Auction*, 45 MCGILL L.J. 133, 137 (2000) ("The Dutch Auction is a popular method of share buy-back in the United States. This popularity originated in 1981 when the first Dutch auction was completed in the U.S. by Todd Shipyards.").

[58] Coffee, *supra* note 18, at 5; Jay R. Ritter, *Some Factoids About the 2006 IPO Market* 10 tbl. 8 (May 2, 2007), http://bear.cba.ufl.edu/ritter/IPOs2006%20Factoids.pdf. By reference, underpricing, or the spread between a stock's initial offering price and closing price after the first day of trading, has averaged 17.5% and issuers have left approximately $120 billion on the table over the past 26 years. *Id.* at 2 tbl. 1. Meanwhile, during the bubble, the median age of firms going public dropped from 7.5 to 5 years, and internet firms accounted for 67.3% of all IPOs. *Id.* at 6 tbl. 4.

[59] To be sure, the internet bubble did prompt concern about abusive allocation practices such as laddering and spinning. *See, e.g.*, Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583 (2004). But this has been mitigated, in part, by recent regulations as well as a cooling off of the public equity market and self-reformation of its practices. *See, e.g.*, Oh, *supra* note 10, at 870-71.

[60] *See, e.g.*, Catherine M. Daily *et al.*, *IPO Underpricing: A Meta-Analysis and Research Synthesis*, 27 ENTREPRENEURSHIP: THEORY & PRACTICE 271, 275-76 (2003) (citing various competing positive accounts of IPO underpricing); Alexander Ljungqvist, *IPO Underpricing*, *in* HANDBOOKS IN FINANCE: EMPIRICAL CORPORATE FINANCE 1, 2 (2004) (noting that the "best established of these [theories of underpricing] are the asymmetric information based models.").

to mitigate potential liability.[61] On the other hand, prospective investors may possess imperfect information or prefer to profit from their valuations via aftermarket trades.[62] Under this account, inaccurately priced shares are symptomatic of informational inefficiencies.

One way to mitigate these inefficiencies is via a private intermediary. An issuer can signal the relative quality of its offering merely by retaining an underwriter and disclosing whether their arrangement is of the firm-commitment or best-efforts variety.[63] Further, through meetings, an underwriter disseminates information about an issuer to prominent prospective investors while collecting their reputationally-bonded valuations and building a book of orders.[64] This combination of valuable underwriting services, however, does not come without a price. Underwriters charge a substantial underwriting commission fee.[65] Underpricing can be understood as an additional expense for insuring against potential shareholder lawsuits and for compensating prominent, repeat investors for their advance commitments.[66]

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[61] *See, e.g.*, Lawrence M. Benveniste & Paul A. Spindt, *How Investment Bankers Determine the Offer Price and Allocation of New Issues*, 24 J. FIN. ECON. 343, 344 (1989) (observing that "investors have no incentive to reveal positive information before the stoek is sold").

[62] *See, e.g.*, IPO ADVISORY COMM., *supra* note 55, at 20 ("Roadshows have traditionally been eonsidered a key opportunity for large, primarily institutional, investors to gather additional information about IPO issuers, enjoy face-to-face exposure to senior management and learn management's view of the most important aspeets of the company and the offering. . . . Many large investors will not participate in IPOs unless they are provided an opportunity to meet and evaluate management during the roadshow."); *see also* Kevin Roek, *Why New Issues Are Underpriced*, 15 J. FIN. ECON. 187, 187 (1986) (suggesting investors may be asymmetrically well-informed about extra-firm faetors).

[63] *See generally* Craig S. Galbraith et al., *Offering Prospectuses, Competitive Strategies, and the Pricing of Initial Public Offerings*, 6 J. PRIVATE EQUITY 31, 31-32 (2003). There is, however, a risk of an adverse-selection problem. *See, e.g.*, James C. Spindler, *Conflict or Credibility: Analyst Conflicts of Interest and the Market for Underwriting Business* (July 2004), *available at* http://ssrn.com/abstract=564381 ("If issuers and underwriters may have positive information about themselves that they eannot diselose in the prospectus due to overbearing liability, they face an adverse-selection, or 'lemon,' problem in marketing the issuer's seeurities to investors . . . ."); *see also generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

[64] *See, e.g.*, Daily et al., *supra* note 60, at 274 ("The road show is designed to gauge the antieipated demand for the firm's stoek and serves as a key input in the investment banker's final determination of the price at which the firm's stock will initially trade.").

[65] *See infra* note 123 and aeeompanying text.

[66] *See generally* Janet Cooper Alexander, *The Lawsuit Avoidance Theory of Why Initial Public Offerings Are Underpriced*, 41 UCLA L. REV. 17 (1993). *See also* Franeesea Cornelli et al., *Investor Sentiment and Pre-IPO Markets* 2 (2003), *available at* http://ssrn.eom/abstraet=548683 ("In the literature, the exelusion of retail investors from bookbuilding has typically been justified by arguing that retail investors are

Intermediaries, however, are believed to be inferior to pure Dutch IPOs in three principled respects.[67] First, Dutch IPOs should produce a more efficient price because bids directly express market demand.[68] Second, Dutch IPOs should provide more egalitarian access because individual and institutional investors can submit bids.[69] Finally, Dutch IPOs should generate more equitable results because all bids at or above the clearing price receives shares at a uniform price.[70]

These reasons track the criteria for evaluating legal entitlements. By eliminating the need for an intermediary or a third-party source, and thus avoiding any sort of commission or transactional premium, a Dutch IPO theoretically should minimize the extent to which "we are in an area where by hypothesis markets do not work perfectly [because] there are transaction costs" and approximate the point where "market transactions or collective fiat is most likely to bring us closer to the . . . result the 'perfect' market would reach."[71] Further, by opening bids to anyone with a brokerage account instead of a select circle determined by the issuer, a Dutch IPO reflects a desire "to maximize the chances that individuals will

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uninformed and it is optimal to restriet the partieipation in bookbuilding to the (informed) institutional investors.")

[67] To an extent, this is a purely theoretieal eomparison sinee Duteh IPOs invariably involve some kind of intermediary of either the private or public variety. *See infra* note 132 and aeeompanying text.

[68] *See, e.g.*, IPO ADVISORY COMM., *supra* note 55, at 20 (describing Dutch IPO as a meehanism by whieh "prieing and alloeation are removed from the realm of issuer and underwriter discretion. . . . IPOs conducted through a true auction model should not experienee the enormous aftermarket priee spikes that fueled the abuses of the bubble period.").

[69] *See, e.g.*, Shane Kite, *Google Goes Dutch, Rocking IPO Sector*, 17 BANK TECH. NEWS 27, 27 (Aug. 2004) ("Duteh auetions, say supporters, offer a truer priee based on more accurate demand of a wider market, because the issuance is open to any potential shareholder with an Internet eonneetion, instead of seleet institutional aeeounts favored by individual underwriters."). *See also* Hurt, *supra* note 20, at 769 ("If the bookbuilding approaeh is eliminated, all of the abuses of that system will be eliminated as well. The underwriter would have no ability to underprice and no ability to handpick benefieiaries of built-in profit.").

[70] *See, e.g.*, William R. Hambrecht, *Request for Comment on the Proposed Rule Governing Allocations and Distributions of Shares in Initial Public Offerings*, http://www.wrhambrecht.com/ind/strategy/bill_pov/200401/wrhco20040107.pdf 6 (Jan. 7, 2004) (touting the Duteh IPO as a method that "replae[es] arbitrary prieing and preferential allocation with a system that objectively establishes the full demand curve for an IPO and alloeates to those investors willing to pay the highest priee").

[71] Calabresi & Melamed, *supra* note 21, at 1097. *Cf. generally* Clifford W. Smith, Jr., *Alternative Methods for Raising Capital*, 5 J. FIN. ECON. 273 (1977) (demonstrating that rights offerings involve significantly lower costs than financially intermediated offerings, a result that eomports with "simple finanee theory [whieh] suggests that listed firms should use rights offerings to raise additional equity capital").

have at least a minimum endowment of certain particular goods . . . ."[72] By utilizing a mechanical pro rata allocation formula that awards shares indiscriminately and uniformly, a Dutch IPO expresses "justice notions [that] adhere to efficient and broad distributional preferences as well as to other more idiosyncratic ones."[73]

To be sure, one glaring difference is that legal entitlements concern the allocation of *rights* whereas public offerings involve the allocation of *priced shares*. But in the way that liability arises from the establishment of rights,[74] priced shares generate potential liability in the form of shareholder remedies. For instance, sections 11 and 12 under the Securities Act of 1933 ("Securities Act") and Rule 10b-5 under the Securities Exchange Act of 1934 ("Securities Exchange Act") can be understood as conferring duties upon issuers and underwriters in the offering and pricing of shares.[75] Indeed, one well-established justification for underpricing of shares is precisely to avoid liability.[76]

Another potential difference concerns whether IPOs generate externalities of the sort that may arise from disputes over assets. Considerable disagreement exists over the extent to which mandatory disclosure is justified by or responsible for informational externalities.[77] There is, however, considerable consensus that IPOs do generate positive externalities.[78] And, as a practical matter, IPOs are subject to a myriad of

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[72] *Id.* at 1100. More preeisely, Calabresi and Melamed use the term "wealth distribution preferences," which they define as "covering *all* the reasons, other than effieieney, on the basis of whieh we might prefer to make [one party] *wealthier* than [another]." *Id.* at 1104 (emphasis in original). While they reservedly note that "the term 'distribution' is often limited to relatively few broad reasons, like equality," *id.* at 1105, the egalitarian feature of Dutch IPOs thus clearly qualifies as an analogous type of wealth distribution preferenee.

[73] Calabresi & Melamed, *supra* note 21, at 1105.

[74] *But see* Morris, *supra* note 24, at 828-29 ("The *opposite* of a right, in Hohfeld's seheme is a no-right, that is the absenee of a duty on the part of the other party. . . . The correlative of a power, Hohfeld maintains, is liability.") (emphasis in original).

[75] *See, e.g.*, Ian Ayres, *Back to Basics: Regulating How Corporations Speak to the Market*, 77 VA. L. REV. 945, 951 (1991) ("10b-5 damages may represent a 'liability rule' proteeting eorporate shareholders' entitlement to honest statements, but not giving market participants property protection.").

[76] *See, e.g.*, Alexander, *supra* note 66.

[77] *See, e.g.*, John C. Coffee, Jr., *Market Failure and the Economic Case for a Mandatory Disclosure System*, 70 VA. L. REV. 717 (1984); Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669 (1984); Merritt B. Fox, *Retaining Mandatory Securities Disclosure: Why Issuer Choice Is Not Investor Empowerment*, 85 VA. L. REV. 1335 (1999); Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L.J. 2359 (1998).

[78] *See, e.g.*, Vietor Fleiseher, *Brand New Deal: The Branding Effect of Corporate Deal Structures*, 104 MICH. L. REV. 1581, 1600 n.68 (2006) (characterizing IPO-related branding effeets as a form of "positive externalities"). *See also generally* THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 3.12[2], at 104-05 (5th ed. 2005)

disclosure requirements that function to protect third-party interests and reflect social judgments.[79]

(Dutch) IPOs thus can inhabit the legal entitlements framework quite comfortably. As Ayres and Balkin have demonstrated, auctions can bridge information asymmetries in a variety of contexts. Accordingly, there is no need to restrict this reconceptualization of property, liability, and inalienability rules only to legal entitlements. In the way that Calabresi and Melamed's schema can determine the extent of and justifications for state intervention to govern legal entitlements, the schema can illuminate the role of financial intermediaries within IPOs. Moreover, the considerations in play for evaluating legal entitlements also apply to IPOs, and indeed exactly so for the Dutch variety.

C. *Property, Liability, and Inalienability Dutch IPO Regimes*

Grafting the legal entitlements framework onto Dutch IPOs illuminates whether and when regulatory measures may be justified. Pursuant to the Coase Theorem, the initial presumption for Dutch IPOs is that purely private bargaining may produce efficient results.[80] Further, at least in theory, Dutch IPOs purport to operate in a manner that exhibits egalitarian and equitable features.[81] Different Dutch IPO regulatory regimes, however, are possible to the extent that there are financial intermediaries or trade-offs between competing considerations.

Property-based Dutch IPO regimes are characterized by a minimal level of non-specific public intervention. Such regimes feature uniform disclosure-based regulations that seek to ensure a minimum level of

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(delineating certain non-rivalrous advantages to going public, such as generating positive publicity). *But see* Jay R. Ritter & Ivo Welch, *A Review of IPO Activity, Pricing, and Allocations*, 57 J. FIN. 1795, 1796 (2002) ("Nonfinancial reasons, such as increased publicity, play only a minor role for most firms" in their decision to go public.).

[79] *See, e.g.*, Sharon Hannes, *Comparisons Among Firms: (When) Do They Justify Mandatory Disclosure?*, 29 J. CORP. L. 699 (2004) (examining comparative firm benefits and social value as justifications for mandatory disclosure). *See also* Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 757-66 (2006) (asserting an alternate justification based upon investments being a public good). Laws prohibiting insider trading also are frequently justified on the basis of such interests and judgments, and thus could be understood as a form of inalienability. *See, e.g.*, Leo Katz, *Harm v. Culpability: Which Should Be the Organizing Principle of the Criminal Law?*, 1994 J. CONTEMP. LEGAL ISSUES 217, 233 ("[M]ost of the criminal law can be construed as giving individuals 'rights' in the claim-sense . . . which is why inalienability runs so deeply through the criminal law, and even unanimous bargains like those I described in the . . . argument against insider trading are invalid.").

[80] *See supra* notes 28-30 and accompanying text.

[81] *See supra* notes 16-18 and accompanying text.

material information for prospective investors.[82] For instance, all issuers face common registration eligibility rules and filing requirements.[83] These rules and requirements apply regardless of whether an issuer chooses a bookbuilt or Dutch IPO.[84] Accordingly, either method triggers certain formal disclosure duties that are enforced via various shareholder remedies.

The choice of a specific IPO method is manifest in different orders.[85] Pure Dutch IPOs can be understood as an example of a first-order property-based regime, or an allocation and pricing process involving only the consensual input of an issuer and prospective investors. IPOs with a private intermediary can be understood as an example of a second-order property-based regime or an allocation and pricing process involving mediated consensual input from the issuer and prospective investors.[86] Included within this stratum are not only bookbuilt IPOs but also those in which an issuer enlists an underwriter to conduct a Dutch IPO.

Different regulatory orders reflect different considerations. In their purest form, Dutch IPOs trigger no additional method-specific regulations.[87] On the one hand, these offerings are democratically accessible to all prospective investors, who equitably receive a uniform price and, in the event of an oversubscription, a proportionate allocation.[88] On the other hand, however, these offerings are susceptible to inefficient returns, as the offering price may not reflect fully the valuations of informed investors, who may abstain from such IPOs without an assurance of quality or preferred treatment.[89] The significance of attracting such investors as well as the natural risks of an IPO often leads issuers to retain a private financial intermediary, which triggers additional regulations.[90] On the one hand, a private intermediary not only provides its network of

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[82] *See infra* notes 102-104 and accompanying text.

[83] *See infra* notes 105-106 and accompanying text.

[84] This also includes fixed-price offerings. For an excellent analysis of fixed-price offerings, see, e.g., Sean Griffith, *The Puzzling Persistence of the Fixed Price Offering: Implicit Price Discrimination in IPOs* (2005), *available at* http://ssrn.com/abstract=797865.

[85] These orders within a particular regime are distinct from, but analogous to, the orders Calabresi and Melamed identify with respect to legal entitlements. *See* Ayres & Balkin, *supra* note 50, at 710-11 (introducing the distinction between a "first-order" and "second-order" liability rule).

[86] *See, e.g.*, W.R. Hambrecht + Co., *OpenIPO: Frequently Asked Questions*, http://www.wrhambrecht.com/ind/auctions/openipo/faq.html (last visited Feb. 8, 2008) (reserving discretion for issuers and Hambrecht to set a final offering price different than the clearing price determined via the OpenIPO bidding process). *Cf. generally* Ayres & Talley, *supra* note 48.

[87] There are, however, different regulations that may apply by virtue of the offering medium or size. *See infra* notes 110-114, 118-119, and accompanying text.

[88] *See supra* note 7 and accompanying text.

[89] *See supra* note 66 and accompanying text. *See also infra* note 195 and accompanying text.

[90] *See infra* notes 119-122 and accompanying text.

prominent investors and frequently assumes an issue's entire risk, but also lends its reputational capital to generate efficient returns.[91] On the other hand, the use of a private intermediary may necessitate discriminate access or allocations.[92]

The complexities presented by an intermediated Dutch IPO have led some jurisdictions to adopt a liability-based regime, which is characterized by a moderate level of specific public intervention. Such regimes feature disclosure-based regulations that seek to redress certain method-specific problems.[93] Specifically, the use of an auction implicates the possibility that investors, as well as issuers, may utilize fraudulent or manipulative bidding strategies.[94] To guard against such problems, regulatory bodies may assume control of the price discovery and allocation processes.

Liability-based regimes can assume a variety of forms. One class of variations concerns the type of financial intermediary. In contrast to its property-based counterpart, a liability-based regime utilizes either a quasi-public financial intermediary such as a stock exchange or a pure public governmental body.[95] This shift from private to public typically reflects an emphasis on non-efficiency considerations, such as ensuring broader access to all kinds of prospective investors or protecting the integrity of the Dutch IPO bidding process. Another class of variations concerns the allocation of tasks. Some regimes may leave the responsibility for collecting and processing bids, as well allocating shares, entirely to the issuer while charging a financial intermediary with the publication of data and enforcement of regulations;[96] other jurisdictions may shift this responsibility, either in part or whole, to a public financial intermediary.[97] Again, the decision of how to mete out responsibility reflects an emphasis on various non-efficiency considerations, such as an equitable and transparent bidding process.

Beyond protecting the integrity of allocation and bidding, some jurisdictions choose to have an inalienability-based regime, which is characterized by a high level of specific public intervention. Such regimes feature disclosure-based regulations that reflect certain unilaterally-determined social judgments and preferences. For instance, to prevent the outflux of control and equity to foreign investors, such regimes may impose national quotas on the allocation and transferability of priced shares; or, to generate confidence within the market, such regimes may institute various types of bidding or price controls. Not surprisingly, given the coercive

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[91] *See supra* notes 63-64 and accompanying text.
[92] *See supra* note 66 and aecompanying text.
[93] *See infra* Part II.B.
[94] *See infra* notes 137-142 and aceompanying text.
[95] *See infra* Part II.B.
[96] *Id.*
[97] *Id.*

nature of these judgments and preferences, the responsibility for the bidding and allocating processes is entirely placed within the control of a governmental entity.

III. IMPORTING DUTCH IPO LAW

For over four decades countries have experimented with Dutch IPOs, and the results are quite clear. As one prominent finance scholar has observed, "[a]round the world, auctions have fallen out of favor" with issuers as a public offering method.[98] Of the twenty-three countries that have permitted Dutch IPOs, five countries no longer do so and thirteen effectively have abandoned the method.[99] Further, among the remaining countries, Dutch IPOs are the dominant method in only one, Israel, which did not make bookbuilding an option for issuers until this year.[100] Countries instead have increasingly turned to bookbuilding.[101]

This Part deploys the tri-tiered schema to evaluate comparatively the Dutch IPO regulatory regimes within four countries. The United States exemplifies a property regulatory regime in that Dutch IPOs are subject to a minimum amount of state intervention in the form of disclosure-based requirements that essentially apply to all types of IPOs. Fraudulent and manipulative bidding strategies, however, pose significant potential external costs to certain prospective investors. Both France and Israel exemplify a liability regulatory regime in that Dutch IPOs are subject to an intermediate amount of state intervention in the form of centralized control of pricing and allocation processes. Broad social interests, however, may

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[98] Ruth Simon & Elizabeth Weinstein, *Investors Eagerly Anticipate Google's IPO -- Dutch Auction-Type Process May Give Smaller Bidders a More Level Playing Field*, Apr. 30, 2004, WALL ST. J., at C1 (quoting Alexander Ljungqvist, Assoeiate Professor of Finance, New York University Leonard N. Stern School of Business).

[99] *See* Ravi Jagannathan & Ann E. Sherman, *Why Do IPO Auctions Fail?* 56-7 tbl. 1 (Mar. 2006) (identifying Argentina, Australia, Germany, Italy, and Sweden as no longer permitting auetion-based IPOs), *available at* http://www.nber.org/papers/w12151 [hereinafter Jagannathan & Sherman, *IPO Auctions Fail*]. *See also* Ravi Jagannathan & Ann Sherman, *Supplement to "Why Do IPO Auctions Fail?"* (Mar. 2006), *available at* http://ssrn.com/abstract=892026 [hereinafter Jagannathan & Sherman, *Appendix D*]. This is espeeially notable in that underpriеing appears to be an even more pervasive problem within international equity markets. *See, e.g.*, Craig S. Galbraith et al., *Offering Prospectuses, Competitive Strategies, and the Pricing of Initial Public Offerings*, 6 J. PRIVATE EQUITY 31, 31-2 (2003) ("Within world markets the underpriеing averages tend to be somewhat higher–a result that is often explained by differences in the perceived risk between domestic and international markets."). *See also generally* Thomas J. Boulton et al., *International IPO Underpricing and Investor Protection* (2006) (finding mean first-day return of 30.5% for 4,698 IPOs in twenty-four eountries from 2000-2004 examining eorporate governanee variables), *available at* http://ssrn.com/abstract=928526.

[100] Jagannathan & Sherman, *IPO Auctions Fail*, *supra* note 99, at 56-7.

[101] *See id.* at tbl. 1; *see also* Jagannathan & Sherman, *Appendix D*, *supra* note 99.

conflict with the internal objectives of issuers. Taiwan exemplifies an inalienability regulatory regime in that Dutch IPOs are subject to a high amount of state intervention in the form of restrictive eligibility requirements and stiff price controls for the bidding and reselling of shares. Rather than utilizing the traditional scheme based on offering size, this Part examines different layers of regulations according to different IPO methods as a way to assess their relative merits.

A. *United States*

All efforts to raise equity publicly in the United States are subject to the registration requirements of the Securities Act.[102] The overarching purpose of these requirements is to "provide full and fair disclosure of the character of securities sold in interstate and foreign commerce and through the mails, and to prevent frauds in the sale thereof . . . ."[103] This disclosure-based approach is premised on an express preference to implement specific rules that "promote efficiency, competition, and capital formation."[104]

As a preliminary matter, the Securities Act provides broad civil and criminal penalties for fraudulent or manipulative conduct in connection with a purchase or sale of securities. One layer comes in the form of section 17(a),[105] the Securities Act's general antifraud provision that applies to whatever method an issuer chooses to raise equity via a security. Another layer comes in the form of sections 11 and 12(a)(1), whose private remedies also apply irrespective the offering method.[106]

Sections 11 and 12(a)(1), however, do differentiate implicitly between offering types. By virtue of whether registration requirements apply to an offering, certain classes of individuals may or may not be

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[102] This does not include firms that arrange for financing from bank loans. Firms seeking to avoid the registration requirements of the Securities Act, however, still must qualify under one of its exemptions. Certain transactions also may be subject to state blue sky laws, but they are not discussed here. *Cf.*, *e.g.*, HAZEN, *supra* note 78, § 1.0, at 3 ("[F]ederal law clearly has the most significant impact on securities regulation.").

[103] 15 U.S.C. § 77a (2004); *see also* S. REP. NO. 47, 73d Cong. 1st Sess. 1 (1933), *reprinted in* 2 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 item 17, at 1 (comp. by Jack S. Ellenberg & Ellen P. Mahar 1973) ("The basic policy is that of informing the investors of the facts concerning securities to be offered for sale in interstate and foreign commerce and providing protection against fraud and misrepresentation."); *see also* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

[104] 15 U.S.C. § 77b(b) (2004) (providing that the SEC, whenever "required to determine whether an action is necessary or appropriate in the public interest," "shall also consider, in addition to the protection of investors, whether action will promote efficiency, competition, and capital formation.").

[105] 15 U.S.C. § 77q(a) (2004). *Cf.* 15 U.S.C. § 78o(b) (codifying § 10(b)); 15 U.S.C. § 78j (2004) (codifying Rule 10b-5).

[106] 15 U.S.C. § 77l(a)(2) (2004).

subject to liability for material misstatements or omissions. Specifically, the express categories of section 11 potential defendants are premised on their role in preparing or filing a registration statement.[107] In contrast, for exempt or unregistered offerings, privity determines a range of individuals and entities that may constitute an offeror or seller under section 12(a)(1).[108]

These differences comport with certain variations between offering methods. For instance, Regulation A[109] and Rule 504 of Regulation D[110] afford smaller offerings an exemption from the costly registration process.[111] Issuers conducting these smaller offerings often are unable to attract an underwriter or favorable terms from venture capitalists.[112] One viable method is for such issuers to conduct a direct public offering ("DPO").[113]

In terms of regulation, DPOs represent a minimalist offering method. As a preliminary matter, this method is not subject to any specific

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[107] *See, e.g.*, Bernard Black, Brian Cheffins, & Michael Klausner, *Outside Director Liability*, 58 STAN. L. REV. 1055, 1077 (2006) (describing "a claim under section 11 of the Securities Act" as providing "that those responsible for a registration statement issued in connection with a public offering may be liable if there is a material misstatement or omission in the registration statement or related documentation"). *See also* Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 14 (2006) (observing that "[s]ection 11 of the Securities Act names the underwriter, unlike the lawyer, as a potential defendant in a private lawsuit if a registration statement is misleading").

[108] *See, e.g.*, Patricia A. O'Hara, *Erosion of the Privity Requirement in Section 12(2) of the Securities Act of 1933: The Expanded Meaning of Seller*, 31 UCLA L. REV. 921 (1984). *See also* Douglas M. Branson, *Collateral Participant Liability Under the Securities Laws—Charting the Proper Course*, 65 OR. L. REV. 327 (1986).

[109] 17 C.F.R. § 230.254 (providing a qualified registration exemption for offerings up to five million dollars in a 12-month period by American and Canadian issuers); *cf. generally* C. Steven Bradford, *Securities Regulation and Small Business: Rule 504 and the Case for an Unconditional Exemption*, 5 J. SMALL & EMERG. BUS. L. 1 (2001).

[110] 17 C.F.R. § 230.504 (providing a registration exemption for offerings up to one million dollars in a 12-month period).

[111] *See, e.g.*, Jay R. Ritter, *The Costs of Going Public*, 19 J. FIN. ECON. 269, 272 (1987) (presenting evidence that direct expenses average 5.36% for firm commitment offerings and 7.48% of total gross proceeds). *See also* C. Steven Bradford, *Transaction Exemptions in the Securities Act of 1933: An Economic Analysis*, 45 EMORY L.J. 591, 603 (1996) ("In an initial public offering, these costs directly associated with the preparation of the registration statement could total from $200,000 to $500,000.").

[112] *See, e.g.*, William K. Sjostrom, Jr., *Going Public Through an Internet Direct Public Offering: A Sensible Alternative for Small Companies?*, 53 FLA. L. REV. 529, 531 (2001) ("The logic of Internet DPOs is straight forward; a company that cannot convince an underwriter to take it public can get around this obstacle by going public through an Internet DPO . . . .").

[113] *See generally* Anita Indira Anand, *The Efficiency of Direct Public Offerings*, 7 J. SMALL & EMERG. BUS. L. 433, 438-54 (2003). Direct offerings can be conducted in a variety of ways, most commonly as a private placement or an offering to existing security holders. The case for minimal regulation arguably applies most forcefully to DPOs, and so other variations of direct offerings are not discussed here.

regulations relating to registration.[114] Further, by marketing their own shares to a discrete group of investors or the general public, issuers not only eliminate the costs of a financial intermediary but also the risk of associated liability from underwriters under section 12(a)(1).[115] And, for smaller DPOs, issuers can avoid the financial and legal burdens associated with registration.[116]

The justifications for such limited regulation are quite clear. In essence, DPOs comprise a contract by which an issuer directly sells shares to prospective investors. While the contract is unilateral, the terms reflect private negotiations based on market demand; accordingly, DPOs generate relatively limited external risk. Moreover, in practice, DPOs tend to implicate the rationales supporting the small offering exemptions. DPOs, particularly those conducted online, are typically registered under Regulation A and its $5 million cap, or the Small Company Offering Registration and its $1 million cap;[117] an offering within either cap would be of a size for which traditional registration would be disproportionately costly.[118]

A more complex regulatory order governs financially intermediated offerings.[119] For instance, issuers that retain an investment bank to

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[114] Indeed, the registration regulations do not differentiate between a direct or auction-based publie offering. DPOs have beeome far more feasible due to the internet, whieh has introduced a new layer of regulations, but these are not specific to an issuer's ehoiee of method. *See, e.g.*, 17 C.F.R. § 230.504; See. Aet Rel. No. 33-7644 (SEC Feb. 25, 1999). *See also* Jill E. Fisch, *Can Internet Offerings Bridge the Small Business Capital Barrier?*, 2 J. SMALL & EMERG. BUS. L. 57 (1998).

[115] *See generally*, Ritter, *supra* note 111 (presenting evidenee that firm eommitment offerings average 21.22% and best efforts offerings average 31.87% of the realized market value of seeurities issued).

[116] *See supra* notes 109-110 and accompanying text.

[117] *See* Stewart-Gordon Assoes., Ine., *Some Points for Professional Consideration*, *available at* http://www.scor-report.com/professionals/proffesionals.htm (last visited Feb. 7, 2008). *See also* Sjostrom, *supra* note 112, at 530-31 ("As a general rule . . . no underwriter will take a company public unless the company has, at a minimum: (1) annual revenue of $20 million, (2) net ineome of $1 million, and (3) 'the potential to achieve and sustain significant growth rates (i.e., 20% or greater in revenues) for the next five to ten years.") (quoting General Aeeounting Offiee, *Report to the Chairman, Comm. On Small Business, U.S. Senate, Small Business Efforts to Facilitate Equity Capital Formation*, 21-22 (2000)). From 1990 to 2000 there were a total of 4,028 DPOs (or 366.2 per a year); by comparison, during that same time period, there were a total of 4,531 IPOs (or 411.9 per a year).

[118] *See, e.g.*, Securities Act Release No. 6339, [1981-1982 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 83.014, at 84,457 (Aug. 7, 1981) (delineating the rationales for enaeting Rules 504 and 505 of Regulation D). *See also* Bradford, *supra* note 111, at 611-18 (surveying eeonomies of seale literature for registered offerings).

[119] Indeed, complex standards can transform a party into an underwriter by virtue of its involvement in a eertain type of transaetion. *See, e.g.*, 17 C.F.R. § 230.144(d)(4)(D); SEC v. Guild Films Co., 279 F.2d 485 (2d Cir. 1960) (finding participation in

underwrite an offering must submit their registration statement to the National Association of Securities Dealers ("NASD") and negotiate its specific underwriting compensation standards.[120] Moreover, these underwriters are subject to not only various antifraud provisions within the Securities Act,[121] but also potentially elevated standards for a due diligence defense.[122]

These regulatory costs are justified by the benefits that financial intermediaries offer.[123] In addition to substantive services an underwriting syndicate provides its network of prominent investors, which enables efficient price discovery and substantial advance orders.[124] This is possible because retaining underwriters essentially represents a lease on their reputational capital to signal an offering's relative value to prospective investors.[125] Moreover, as most underwriters operate on a firm commitment basis, they assume the full risk of marketing and selling the securities.[126]

In theory and in practice, financially intermediated offerings do not entail a specific method. By far the most dominant method, particularly for sizable offerings, is bookbuilding.[127] Since the internet bubble burst in 2001, however, dissatisfaction with bookbuilding and some of its adherent

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distribution and registration process justified conversion of non-profit assoeiation into an inadvertent underwriter).

[120] *See, e.g.*, NASD Rulc 2710.

[121] *See supra* notes 105-106 and accompanying text.

[122] *See, e.g.*, Eseott v. BarChris Constr. Corp., 283 F. Supp 643, 692-97 (S.D.N.Y. 1968) (holding managing underwriter liable for failing to conduct independent, rather than mcrely rcasonable, investigation).

[123] Thc justified bcncfits also cxeced undcrwriting fecs, whieh typieally rangc between 5-10% of an IPO's aggregate value. *See, e.g.*, Richard Mann et al., *Starting From Scratch: A Lawyer's Guide to Representing a Start-Up Company*, 56 ARK. L. REV. 773, 839 (2004). *See also* Hsaun Chi Chen & Jay R. Ritter, *The Seven-Percent Solution*, 55 J. FIN. 1105 (2000) (finding undcrwriters invariably chargc a 7% commission for IPOs between $20 million and $80 million).

[124] *See generally* Franecsca Cornclli & David Goldreich, *Bookbuilding and Strategic Allocation*, 56 J. FIN. 2337 (2001).

[125] *See, e.g.*, Lawrenec M. Benveniste & Paul A. Spindt, *How Investment Bankers Determine the Offer Price and Allocation of New Issues*, 24 J. FIN. ECON. 343 (1989); Craig S. Galbraith ct al., *Offering Prospectuses, Competitive Strategies, and the Pricing of Initial Public Offerings*, 6 J. PRIVATE EQUITY 31 (2003).

[126] *See, e.g.*, Alcxander, *supra* notc 66, at 68 n.190 (obscrving firm-eommitment underwritings "make up over 95% of IPOs"). *But cf.* HAZEN, *supra* note 78, § 2.1, at 71 ("Thc term 'firm eommitmcnt' is somcwhat misleading sincc it is common practiec to have a 'market out' clause which excuses the underwriters from the obligation to purehasc in thc evcnt of a substantial change in the issuer's finaneial eondition.").

[127] *See, e.g.*, Hurt, *supra* note 20, at 733 ("In the United States, the dominant method of distributing IPO shares is the bookbuilding mcthod."); Ritter, *supra* note 58, at 14 (observing that, since their 1999 debut within the United States, auction-based IPOs havc aecountcd for only 1.07% of all IPOs). *See also* Oh, *supra* notc 10, at 881-82 tbls. 3A, 3B.

practices by financial intermediaries has intensified.[128] That has coincided with the emergence of (online) auctions as a legitimate alternative for going public.[129] Since 1999, a small but steady stream of issuers has utilized a descending-bid, or Dutch,[130] auction to conduct their IPOs,[131] and invariably they have involved financial intermediaries.[132]

From a regulatory standpoint, Dutch IPOs represent a hybrid offering method. On the one hand, like DPOs, Dutch IPOs are not subject to any specific regulations.[133] On the other hand, like bookbuilding, Dutch IPOs that involve financial intermediaries trigger additional compensation and liability concerns.[134] While not integral, all of the Dutch IPOs in the United States have utilized some form of online bidding, which implicates internet-based securities regulations.[135]

Dutch IPOs, however, do present some unique regulatory challenges. Because pricing and allocation are a function of bidding, Dutch IPOs are susceptible to manipulative and fraudulent practices.[136] For instance, bidders can submit reduced orders to depress the price of shares and then to realize their full value in the aftermarket.[137] Similarly, bidders can form a collusive bidding ring that intermingle phantom and sincere bids to exert market-making control over allocation and pricing of shares.[138]

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[128] *See, e.g.*, *supra* note 55 (attributing eroding public confidence in bookbuilding to "the widespread pereeption that IPOs are pareeled out disproportionately to a few, favored investors, be they large institutions, powerful individuals or 'friends and family' of the issuer"). *See also generally* Sean J. Griffith, *Spinning and Underpricing: A Legal and Economic Analysis of the Preferential Allocation of Shares in Initial Public Offerings*, 69 BROOK. L. REV. 583 (2004).

[129] *See generally* Oh, *supra* note 10 (eritieally assessing the theoretieal and empirieal case for auction-based lPOs).

[130] *See supra* note 5 and aeeompanying text.

[131] *See* Oh, *supra* note 10, at 881-82 tbls. 3A, 3B.

[132] *See, e.g.*, Christine Hurt, *Initial Public Offerings and the Failed Promise of Disintermediation*, 2 ENTREPREN. BUS. L.J. 703, 708 (2008) ("Part of the failure of auetion lPOs is explained by the inability of the online auetion to eliminate the need for demand intermediaries generally and reputational intermediaries specifically.").

[133] *See supra* note 114 and aeeompanying text.

[134] *See supra* notes 115-116 and accompanying text.

[135] *See supra* note 114.

[136] And, in the case of online Dutch lPOs, technology facilitates such strategies. Prospeetive investors easily ean identify eaeh other to exehange bidding information and coordinate their demand. *See, e.g.*, Oh, *supra* note 10, at 906-07.

[137] *See generally* Mira Ganor, *A Proposal to Restrict Manipulative Strategy in Auction IPOs* 13 (July 2004), *available at* http://ssrn.com/abstract=572243; *see also* Bruno Biais & Anne Marie Faugeron-Crouzet, *IPO Auctions: English, Dutch, . . . French, and Internet*, 119 J. FIN. INTERMEDIATION 9, 13 (2002) ("ln [the Dutch] auction, bidders can taeitly eollude by plaeing demand funetions sueh that the market elearing priee is very low, and such that, any attempt to bid more aggressively, to gain market share, would push priees too high to be attraetive.").

[138] *See* Oh, *supra* note 10, at 901-05.

Perhaps most troubling is that both of these strategies are available and attractive not only to prospective investors, but also to issuers.

Moreover, the means for combating these strategies are limited. As a preliminary matter, fraudulent and manipulative bidding can be extremely difficult to detect, particularly within larger auction pools.[139] There are, however, private countermeasures, which range from an issuer exercising opaque discretion in reviewing bids to setting reserve prices to compress profit margins.[140] The problem is that most such countermeasures require implementation by the issuer, and thus fail to prevent fraud or manipulation perpetuated on bidders. One possible solution might be to implement public regulations to deter or redress fraud or manipulation by either bidders or issuers. Examples of such regulations, however, are scant, perhaps because they do not seem to be terribly effective.[141]

Even mandatory disclosure is a complex proposition at best.[142] Despite their apparent materiality,[143] Dutch IPO pricing and allocation data presently are available on only a select basis.[144] On the one hand, disclosing such data not only would inform prospective investors about an IPO's quality but also guard against issuer fraud or manipulation. On the other hand, disclosing such data would equip bidders with the capacity to engage in collusive or fraudulent bidding.

Dutch IPOs within the U.S. thus present a gamut of tough questions. For smaller offerings, Dutch IPOs can assume the form of a DPO that is not subject to any method-specific regulations and eligible for a variety of exemptions from registration. For larger offerings, Dutch IPOs tend to approximate bookbuilding, whose use of financial intermediaries justifies specific regulations and liability provisions. The unique auction-

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[139] *See id.* at 903, 907.

[140] *See id.* at 905.

[141] *See id.* at 904-05.

[142] A separate, albeit more fundamental, question not addressed here is the effieieney of any sort of mandatory disclosure. *See, e.g.*, Henry G. Manne, *Economic Aspects of Required Disclosure Under Federal Securities Laws*, *in* WALL STREET IN TRANSITION: THE EMERGING SYSTEM AND ITS IMPACT ON THE ECONOMY (Henry G. Manne & Ezra Solomon eds., 1974); Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1 (1983).

[143] *See generally* Basie, Ine. v. Levinson, 485 U.S. 224, 231-32 (1988) ("[T]o fulfill the materiality requirement 'there must be a substantial likelihood that the disclosure of the omitted faet would have been viewed by the reasonable investor as having signifieantly altered the 'total mix' of information made available.") (quoting TSC Indus., Inc. v. Northway, Ine., 426 U.S. 438, 449 (1976) ("The general standard of materiality . . . is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would eonsider it important in deeiding how to vote.") *Id.* at 449.

[144] Specifically, Hambrecht releases only the initial bid range and final offering price while issuers retain the diseretion to release alloeation data. W.R. Hambreeht + Co., *OpenIPO: How It Works*, http://www.wrhambrecht.com/ind/auctions/openipo/index.html# (last visited January 28, 2008). Hambreeht onee published alloeation data, but no longer does so on the basis that such data are proprietary.

based problem of fraudulent or manipulative bidding presents difficulties for both private and public prophylactics.

B. *France and Israel*

A liability approach to regulating Dutch IPOs may be gleaned from the more mature French and Israeli regimes. Dutch IPOs have been permitted in France since the 1960s and in Israel since 1993 Like the United States, both countries feature a disclosure-based system.[145] But unlike the United States, in both countries Dutch IPOs are a sufficiently common and viable public offering method to justify a comprehensive, specific regulatory framework.

Within France, Dutch IPOs are referred to as an *Offre à prix minimal* or *Mise en Vente*. For this auction-based variant, the issuer utilizes an underwriter to set an offering amount and reserve price approximately a week before the IPO.[146] Prospective investors then submit bids for their preferred price and quantity of shares, which are in turn used to calculate the final offering price; oversubscribed shares result in the IPO's postponement or allocation on a *pro rata* basis at a uniform price to clear the market.[147] When the issue debuts on the market, the underwriter assumes the role of a price stabilizer by purchasing or selling shares.[148]

Two regulatory bodies police and oversee France's Dutch IPOs. The first body is the *Autorité des Marchés Financiers* ("AMF"), which monitors and enforces the disclosure of material information generally;[149] a

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[145] *See, e.g.*, Amir N. Licht, *David's Dilemma: A Case Study of Securities Regulation in a Small Open Market*, 2 THEORETICAL INQ. L. 673, 691 (2001) ("Israel's Sceuritics Law and the regulations thereunder should be similarly familiar to an American lawyer in tcrms of the diselosurc and anti-fraud regime thcy prcscribe."); Marc I. Stcinberg & Lee E. Michaels, *Disclosure in Global Securities Offerings: Analysis of Jurisdictional Approaches, Commonality and Reciprocity*, 20 MICH. J. INT'L L. 207, 218 (1999) ("As in the U.S. system, regulation of public offerings of securities in France is based on information disclosure.").

[146] *See, e.g.*, Bruno Biais et al., *An Optimal IPO Mechanism*, 69 REV. ECON. STUD. 117, 118 (2002) (deseribing *Mise en Vente* proecss, in whieh "thc firm scts a rcservation price and investors submit bids").

[147] Bruno Husson & Bertrand Jacquillat, *French New Issues, Underpricing and Alternative Methods of Distribution*, *in* A REAPPRAISAL OF THE EFFICIENCY OF FINANCIAL MARKETS 349, 351 (Rui M. C. Guimarãcs ct al., cds., 1989) (finding 20 out of 99 *Mise en Ventes* from 1992 to 1998 were postponed due to excessive demand).

[148] *See* François Dcrricn & Kent L. Womaek, *Auctions vs. Bookbuilding and the Control of Underpricing in Hot IPO Markets*, 16 REV. FIN. STUD. 31, 35 (2003); Bertrand C. Jaequillat et al., *French Auctions of Common Stock: New Issues, 1966-1974*, 2 J. BANKING & FIN. 305, 307 (1978).

[149] The AMF was formcd in August, 2003, from a triad of public entitics to "improve the coordination and efficiency of France's financial regulatory system and to raise the Frcneh rcgulator's international profile." Autorité dcs Marehés Finaneiers, *Press Kit*, at 3, *available at* http://www.amf-france.org/documents/general/5152_1.pdf; *see also id.*

self-described "gatekeeper,"[150] AMF oversees and regulates IPOs with the purpose of "ensur[ing] [companies] provide comprehensive and reliable information on a timely basis and in an equitable manner to the public at large."[151] The second body is Euronext Paris,[152] part of a recently formed European integrated stock exchange that processes the daily transactions of French stock;[153] while not a pure governmental entity, Euronext Paris's regulations explicitly state: "The auction process is highly structured and is made transparent for the market since as many parties as possible participate in this process."[154] Euronext Paris thus adheres to policies that reflect a clear public interest dimension.

At the same time, Euronext Paris also performs many of the functions handled by private intermediaries within the United States.[155] Significantly, Euronext Paris actually operates all *Mise en Ventes*. Unlike their United States counterparts, prospective French investors submit *non-*

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at 3 (delineating the AMF's express purposes as being to "safeguard investments in financial products, ensure that investors receive material information, maintain orderly financial markets").

[150] Autorité des Marchés Financiers, *Annual Report 2004: Introduction to the AMF and Overview of Operations in 2004*, at 18, *available at* http://www.amf-france.org/documents/general/6393_1.pdf; *see also* Autorité des Marchés Financiers, *supra* note 149, at 3 (describing AMF as a "public entity . . . justified by the policing powers it exercises on behalf of the State," but that "[u]nlike France's other independent administrative authorities . . . , the AMF is a legal person separate from the State. It can therefore file suit . . . in a civil action. As a legal person in its own right, it can levy fees (taxes) and receive revenue directly.").

[151] Autorité des Marchés Financiers, *supra* note 150, at 16.

[152] Euronext Paris is a branch of NYSE Euronext, which was formed in September, 2000, from a merger of the Amsterdam, Brussels, and Paris stock exchanges, and subsequently acquired interests in the London International Financial Futures and Options Exchange as well as the Lisbon stock exchange. Prior to the formation of Euronext Paris, the *Société des Bourses Françaises*, or France's equivalent to the SEC, processed investors' bids and converted them into a demand curve. *See, e.g.*, Husson & Jacquillat, *supra* note 147, at 351.

[153] Although Euronext's markets are integrated, they remain legally separate and subject to their respective country's laws. EURONEXT, EURONEXT RULE BOOK, BOOK 1, *in* STOCK EXCHANGES OF THE WORLD: SELECTED RULES & REGULATIONS 39, 39 (Robert C. Rosen ed., 2002).

[154] *Id.* at 82.

[155] Indeed, Euronext Paris sees auctions, at least from a pricing and allocation standpoint, as a substitute for private intermediaries:

> The auction method does not use bid and offer prices. Instead, there is one price at which buy and sell orders are executed. . . . There is no spread because the investors are, in a certain way, trading with each other. . . . *The auction method is therefore a way of avoiding intermediaries* and removing unnecessary links from the trading chain. Ultimately, end investors trade directly with end investors.

Id. at 96 (emphasis added). *But see infra* note 62.

binding bids to Euronext Paris,[156] which in exchange provides estimated offering prices based on the current participating pool. Euronext Paris then sets the final offering price, which is determined by the express objective of producing the "highest executable order volume."[157] Finally, Euronext Paris proceeds to execute the final orders and allocate the shares.

The comparative efficiency of the *Mise en Vente* is mixed. Two prominent studies of the *Mise en Vente* have found first-day means that range from 9.7% to 20.7%,[158] or close to if not above the 10% percent underpricing standard advocated for Dutch IPOs.[159] Further, these studies compared the *Mise en Vente* with bookbuilding and reached split conclusions about which method featured higher rates of underpricing.[160] According to the authors of one prominent French study, the *Mise en Vente* experiences underpricing "very similar to those [levels] observed in the United States in the context of the Book Building procedure."[161] Indeed, French issuers appear to be quite evenly split in the choice of method, with 162 *Mise en Ventes* and 160 bookbuilt IPOs from 1983-1998.[162]

Unlike France, only one public body, the Israeli Securities Authority ("ISA"), regulates all of the country's IPOs. Akin to the SEC, the ISA has the express objective of "protect[ing] the interests of the public

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[156] *Id.* at 69 ("Each auction shall begin with a call phase in which orders are automatically recorded without giving rise to Transactions. During such call phase, Members may enter new orders as well as modify or cancel existing orders.").

[157] *Id.* at 70 ("The auction price shall be . . . the price which produces the highest executable order volume.").

[158] *See* Oh, *supra* note 10, at 893 tbl. 6A (citing François Derrien & Kent L. Womack, *Auctions v. Bookbuilding and the Control of Underpricing in Hot IPO Markets*, 16 REV. FIN. STUD. 31, 35 (2003); Benoît F. Leleux, *Post-IPO Performance: A French Appraisal*, 14 FIN. 79, 85 (1993) (citing Bernard Belletante & Remy Paliard, *Does Knowing Who Sells Matter in IPO Pricing? The French Second Market Experience*, 14 CAHIERS LYONNAIS DE RECHERCHE EN GESTION 42 (1993). There are two other prominent studies of the *Mise en Vente*, but they concern only the *Second Marché*, an intermediary securities tier with less stringent listing requirements than the *Cote Officielle* that are featured in the studies mentioned here. *See* Biais et al., *supra* note 146, at 117; Husson & Jaequillat, *supra* note 147, at 351. None of these studies, however, examines the *Mise en Vente*'s performance since France joined Euronext.

[159] *See, e.g.*, Hurt, *supra* note 4, at 428 (attributing to Bill Hambrecht, founder of W.R. Hambrecht + Co., a standard that "an auction with a first-day pop of 10% or more is a failure"). Arguably the proper benchmark should be the commission rate. *Cf.* Tim Loughran & Jay Ritter, *Why Has IPO Underpricing Changed over Time?*, 33 FIN. MGMT. 5, 8 (2004) ("[G]iven the use of bookbuilding, the joint hypothesis that issuers desire to maximize their proceeds and that underwriters act in the best interests of issuers can be rejected whenever average underpricing exceeds [the standard commission rate of] seven percent."). *See also supra* note 123.

[160] *Compare* Derrien & Womack, *supra* note 158, at 35, *with* Leleux, *supra* note 158, at 85.

[161] Biais & Faugeron-Crouzet, *supra* note 137, at 16.

[162] Oh, *supra* note 10, at 895 tbl. 6C.

investing in securities."[163] Pursuant to that objective, the ISA controls the grant of permits to publish a prospectus and regulates all stock exchanges.[164]

Until this year, Israeli issuers had no choice but to go public via an auction.[165] With or without financial intermediaries, issuers conduct their Dutch IPO in two stages.[166] First, twenty-four hours before the prospectus is published, shares are auctioned off to only institutional investors; in smaller IPOs the amount of shares available at this stage is capped at 50%, but that rises to 75% in IPOs exceeding $50 million.[167] Eight days later, the remaining shares are auctioned off to the general public.

Dutch IPOs in Israel experience only slightly more efficient results than those in France. The most comprehensive Israeli study, which is the only one that excludes data from the Tel Aviv Stock Exchange's crash in 1994, found a mean first-day return of 12.0%.[168] Notably, a significant portion of Israeli issuers experienced negative first-day returns, with larger IPOs resulting in greater underpricing.[169] These results comport with various studies that found more informed investors made superior decisions about when to participate and how to capitalize at the expense of their less informed peers.[170]

The French and Israeli IPO data collectively suggest two significant insights. On the one hand, even mature Dutch IPO regimes experience

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[163] Securities Law, 5728-1968, Ch. 2 § 2 (Isr.).

[164] Currently Israel has only one exchange, the Tel Aviv Stock Exchange. The ISA is responsible for "[e]nsuring fair and orderly trade on securities exchanges," which entails "review[ing] proposals to amend the stock exchange's bylaws . . . approv[ing] the stock exchange's directives and rules and amendments," as well as "supervis[ing] trade on the exchange". Israeli Securities Authority, *Functions of the ISA*, *available at* http://www.isa.gov.il/Default.aspx?Site=ENGLISH&ID=-3,1519.

[165] Israeli issuers do have a choice of offering shares at a fixed-price or via an auction. *See* Yakov Amihud et al., *Allocations, Adverse Selection, and Cascades in IPOs: Evidence from the Tel Aviv Stock Exchange*, 68 J. FIN. ECON. 137, 141 (2003). That study, which examined 284 IPOs from 1989 to 1993, found that "[a]uction is by far the preferred method as it is used in 86% of the sample's IPOs." *Id.*

[166] Until 1993, Israeli issuers had the option of announcing either a minimum price or an acceptable price range prior to the auction. *See* Shmuel Hauser et al., *Initial Public Offering Discount and Competition*, 49 J.L. & ECON. 331, 332 (2006). Beginning December, 1993, issuers were no longer permitted to impose a price ceiling. Amihud et al., *supra* note 165, at 141.

[167] Shmuel Kandel et al., *The Demand for Stocks: An Analysis of IPO Auctions*, 12 REV. FIN. STUD. 227, 230 (1999).

[168] Amihud et al., *supra* note 165, at 145 tbl. 2.

[169] *See* Kandel et al., *supra* note 167, at 245. Smaller successful bids also experienced negative first-day returns. *See, e.g.*, Hauser et al., *supra* note 166, at 341-42.

[170] *See, e.g.*, Amihud et al., *supra* note 165, at 155 (finding relatively unsophisticated investors could improve their performance by discerning other investors' strategies); Hauser et al., *supra* note 166, at 341 (finding investors can benefit by avoiding weaker issues and being more selectively with price). *See also generally* Ivo Welch, *Sequential Sales, Learning, and Cascades*, 47 J. FIN. 695 (1992).

significant underpricing, with their issuers expressing no clear preference for an auction-based method over bookbuilding.[171] On the other hand, the assumption of an intermediary role by a quasi- or governmental public entity in these liability regulatory regimes does not seem to incur any real efficiency cost.[172]

At the same time, these public intermediaries provide greater distributional and equitable benefits. In France, bidders enjoy superior consistency and transparency, manifest in projected prices prior to the first-day of trading unlike the discretionary black box reserved for issuers in the United States.[173] In Israel, bidders enjoy guaranteed access to an IPO by virtue of a two-stage process with allocation ceilings unlike the indiscriminate auction process conducted in the United States.[174] In both regimes, public collection and processing of bids would seem to be an effective guard against the possibility of fraudulent or manipulative bidding, particularly by issuers.

C. *Taiwan*

Taiwan illustrates a type of inalienability regulatory regime. As a preliminary matter, IPOs are extremely rare in Taiwan. This is attributable to the extremely intense scrutiny by and strict regulations from Taiwan's central agency, the Securities Exchange Committee.[175] For instance, unlike the routine six-month period in the United States, issuers in Taiwan face a compulsory lock-up period of at least two years, with constraints relaxed in

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[171] *See, e.g.*, Oh, *supra* note 10, at 893 tbl. 6A.

[172] *See, e.g.*, *id.* at 895 tbl. 6C.

[173] *See supra* note 144 and accompanying text. Interestingly, Euronext views bookbuilding in very mueh the same way:

> The main advantage of book-building is that it can be used to influence thc transparcney of the allotmcnt (wherc the seeurities ultimately end up). This transparency is very important, particularly when making an initial public offering. By allotting to cnd investors, unilateral intervention in the market to bring the price up to standard after a large-sealc offering (priec stabilization), is no longer necessary. Another advantage of the system is that it enables a policy of invcstor-oricntcd relations to be devclopcd.

EURONEXT, *supra* note 153, at 260. For these reasons, over the past decade, bookbuilding has bcen gaining increasing popularity with French issuers and thosc around the world. *See, e.g.*, Jagannathan & Sherman, *supra* note 99, at 56-7 tbl. 1. The point hcrc is not to argue that bookbuilding is eomparable or supcrior to auetion-based IPOs, but that intermediaries – whether private or public – can function to provide grcatcr transparcney. With regards to transparency, cqually if not more significant than the choice of method is whether the pricing or allocation process is clear and consistent.

[174] *See supra* notc 144 and aceompanying text.

[175] *See, e.g.*, Ann E. Sherman, *Global Trends in IPO Methods: Book Building vs. Auctions with Endogenous Entry* (Dce. 2004), *available at* http://ssrn.com/abstract=276124.

stages that take an additional eighteen months for insiders to liquidate their holdings completely.[176] To sidestep these onerous regulatory restrictions, issuers reportedly raise capital by conducting private placements to existing shareholders, who in turn resell the shares to third-parties.[177]

Moreover, Taiwan imposes restrictions on the choice of IPO method. As with the United States, France, and Israel, auctions and bookbuilding comprise the two most prominent methods for going public in Taiwan. Bookbuilding, however, is available exclusively for primary offerings while auctions are available exclusively for secondary offerings.[178]

More significantly, Taiwan also imposes strict eligibility requirements for bidders. First, eligible bidders are restricted to a pool essentially consisting of Taiwanese nationals, qualified foreign institutional investors, and certain select foreigners.[179] Second, allocations are restricted to no more than 6% of the total offering available to outside parties.[180] Finally, the Taiwanese Stock Exchange reserves the right to suspend or restrict trading of any securities for a firm with substantial litigation or transactional liability or continuous rises or declines in market price.[181]

Auction-based IPOs in Taiwan are conducted in two stages. At the outset, the issuer announces the number of available shares, a reserve price,

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[176] *See, e.g.*, Dar-Hsin Chen et al., *The Effect of Multiple IPO Lockup Expiration Dates on Stock Prices: An Empirical Analysis on the Taiwan Stock Exchange* (Nov. 2003) (manuscript at 9), *available at* http://www.fma.org/NewOrleans/Papers/7201074.pdf. Perhaps even more fundamentally, Taiwanese law does not afford any exemptions from registration, regardless of the offering method or size.

[177] *See, e.g.*, Yao-Min Chiang, Yiming Qian, & Ann E. Sherman, *Underpricing, Overbidding and the Effects of Entry on IPO Auctions: Evidence from Taiwan* (June 2007) (manuscript at 17 n.22), *available at* http://ssrn.com/abstract=990929 ("We have been told that issuers in Taiwan believe that they will reeeive more regulatory serutiny if they sell new shares in their IPO, and so it is common practice, when funds are needed, for the eompany to issue more shares to existing shareholders who then sell those shares in the lPO itself.").

[178] Yenshan Hsu & Chung-Wen Hung, *Why Have IPO Auctions Lost Market Share to Fixed-Price Offers? Evidence from Taiwan* (Aug. 2005) (manuscript at 2), *available at* http://www.fma.org/Chieago/Papers/IPO_methods.pdf ("Taiwan restriets [bookbuilding] in the way [that the method is] valid only for distributing primary shares. However, most Taiwanese firms issue seeondary shares in their IPOs, resulting in the fact that only a few Taiwanese IPOs are distributed under the method of book-building.").

[179] An-Sing Chen et al., *Price Support in Taiwan IPO Stock Auctions* (Jan. 2005) (manuseript at 8), *available at* http://www.fma.org/Chieago/Papers/PrieeSupport13.pdf.

[180] Ji-Chai Lin et al., *Why Have Auctions Been Losing Market Shares to Bookbuilding in IPO Markets?* (June 2003) (manuseript at 8), *available at* http://ssrn.com/abstract=410183.

[181] *See Taiwan Stock Exchange Materials*, *in* STOCK EXCHANGES OF THE WORLD: SELECTED RULES & REGULATIONS Appx. C 35, 39 (Robert C. Rosen ed. 2006).

and a four-day window for submitting bids.[182] In the first stage, only certain preferred investors are permitted to submit bids for up to 50% of the total issue.[183] Winning bids are priced on a discriminatory basis, so shares are awarded at their submitted, rather than a uniform, price.[184] When this stage has completed, the Taiwan Securities Association, a government agency, publishes the average winning and clearing prices.[185] The second stage then commences, in which the general public is permitted to submit bids for the remaining shares.[186] Winning bids are subject to a price ceiling that is 1.3 times the reserve price.[187] No party is allowed to purchase more than 3% of the total IPOs shares.[188]

Unfortunately, additional price controls obscure any assessment of Taiwan's auction-based IPOs. Most significantly, Taiwan imposes a 7% limit on any daily price fluctuations,[189] which is in addition to the cap imposed on the second stage of an auction-based IPO.[190] Further, the offering price tends to be approximately 20% lower than the weighted average of the price for winning bids.[191] The limit and price thus restrict

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[182] *See, e.g.*, Lin et al., *supra* note 180, at 8. The reserve, or base, priee is ealeulated by the Securities and Futures Commission (SFC) in Taiwan based on a weighted average of four faetors:

> (1) the average earnings per share in the past three years multiplied by the P/E ratio of eomparable firms in the same industry (40% weight); (2) the net wealth (i.e., book equity value) per share (20% weight); (3) the estimated dividend per share in the eurrent year divided by one-year deposit interest rate (20% weight); and (4) the average dividend per share in the past three years divided by the dividend yield of comparable firms in the same industry (20% weight). However, the base priee annouueed to the publie may deviate from the priee set by the formula, eontingent on a satisfactory explanation to the SFC.

Id.

[183] *See, e.g.*, Chen et al., *supra* note 176, at 8.

[184] *See, e.g.*, *id.*

[185] *See, e.g.*, Chiang, Qian, & Sherman, *supra* note 177, at 15

[186] *See, e.g.*, Lin et al., *supra* note 180, at 8.

[187] *See, e.g.*, Chen et al., *supra* note 176, at 7-9. In 2000 the multiplier changed from 1.5 to 1.3. Chiang, Qian, & Sherman, *supra* note 177, at 16.

[188] *See, e.g.*, Lin et al., *supra* note 180, at 8 ("Under the bidding rules, no bidder shall be allowed to win more than three pereent of the IPO shares (or six pereent of the shares designated for auction). This feature encourages more bidders to participate and eompete in auetions.").

[189] *See, e.g.*, Anlin Chen, Sue L. Choiu, and Chinshun Wu, *The Effect of IPO Characteristics on Long-Run Performance of Taiwan's IPOs: Evidence from Efficiently Learning Markets*, *in* INITIAL PUBLIC OFFERINGS: AN INTERNATIONAL PERSPECTIVE 29, 30 (Greg N. Gregoriou ed. 2006) ("Stoeks traded in Taiwan are confined within price limits. The range of such limits is calculated based on the preeeding day's elosing priee. Most of the time the range is within 7% above and 7% below the preceding closing price.").

[190] *See supra* note 187 and aeeompanying text.

[191] *See, e.g.*, Lin et al., *supra* note 180, at 14.

the possible amount of underpricing, while the depressed offering price tends to encourage some degree of underpricing.[192] According to one study, when first-day returns are measured against a market index, the variation is a positive 21.1%,[193] which suggests that the lower offering price tends to outweigh the limit and cap.

Taiwanese regulations, however, do seem to have certain distributional and equitable benefits. The severe allocation limits on bids has had the apparent effect of diminishing the presence of institutional investors. Unlike the 70% international average for bookbuilt IPOs, Taiwanese IPOs average merely 19% institutional allocation.[194] To an extent, this is attributable to specific procedural features of Taiwan's Dutch IPOs. Like France and Israel, Taiwan publishes certain pricing data, such as the clearing and reserve prices from earlier auction rounds. However, Taiwan also publishes the allocation, bidding price, and total dollar amount for each winner in the institutional round, which provides retail investors an advantage in fraudulent or manipulative bidding.[195] As a result, institutional investors have less incentive to participate in these IPOs.[196]

This effect seems to comport with Taiwan's distributional and equitable goals. The disincentive for institutional investors to submit bids essentially widens the door for retail investors. Because of the strict eligibility requirements, most of these retail investors appear to be Taiwanese nationals. Taiwan's Dutch IPO regulations thus express a preference to minimize foreign ownership, even at the expense of foregoing valuable sources of equity.

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[192] Nevertheless, according to one study, "[e]ven though the price limits prohibit the stock prices to reflect their fair prices, . . . [an Efficient Learning Market] still holds even under price limits." Chen, Choiu, and Wu, *supra* note 189, at 30 (citing Anlin Chen, Sue L. Chiou, and Chinshun Wu, *Efficient Learning Under Price Limits: Evidence from IPOs in Taiwan*, 85 ECON. LETTERS 373 (2004)). *See also generally* Yong H. Kim & J. Jimmy Yang, *The Effect of Price Limits: Initial Public Offerings vs. Seasoned Equities* (Oct. 2004), *available at* http://www.fma.org/NewOrleans/Papers/7202015.pdf.

[193] Chiang, Qian, & Sherman, *supra* note 177, at 16.

[194] Lin et al., *supra* note 180, at 5.

[195] Gwohorng Liaw, Yu-Jane Liu & K.C. John Wei, *On the Demand Elasticity of Initial Public Offerings: An Analysis of Discriminatory Auctions* (July 2000) (manuscript at 5), *available at* http://ssrn.com/abstract=241905 ("[T]he underwriters in Taiwan also announced the information on the bidding price, quantity and total dollar amount for each winner. This means that the public can also estimate the demand elasticity based on the winning bid schedules."). *But see* Lin et al., *supra* note 180, at 4 (finding that "institutional investors are collectively better informed than retail investors" and that "[c]onsequently, retail investors are more likely to overbid and suffer a winner's curse, or underbid and lose the opportunity in winning shares in hot IPOs").

[196] *See id.* at 30 (finding that, although there was no actual Winner's Curse, there is nevertheless "an incentive [for informed investors] to shade their demand").

IV. CONCLUSION

Let us now track back to the United States' property Dutch IPO regulatory regime. For a variety of reasons, importing an inalienability IPO regime such as Taiwan's is a remote proposition. Certainly any sort of attempt to restrict foreign equity from the United States would be met with substantial resistance. Further, the significant role of institutional investors in IPOs here makes any sort of allocation or pricing caps highly unlikely. A system of differential pricing might seem not only suspicious to retail investors, but also antithetical to the Dutch IPO's appeal as an egalitarian method.

Far more instructive are the liability Dutch IPO regulatory regimes of France and Israel. Both countries charge a quasi- or fully public intermediary with the responsibility of collecting, processing, and allocating bids. This type of intervention does not appear to incur a substantial efficiency cost, either absolutely or relative to the levels experienced by Dutch IPOs in the United States. In France, a regulatory body utilizes a straightforward formula to generate estimated offering prices that provide bidders with a reliable and transparent view of IPOs; and in Israel, the sequencing of an institutional bidding round followed by a retail bidding round ensures diverse and equitable access to IPOs. Finally, while there is no concrete evidence from either country, the insertion of a quasi- or fully public intermediary would seem to complicate the ability of issuers to engage in fraudulent or manipulative bidding.

Importing these liability-based benefits into the United States, however, seems imprudent. Instead of allowing a private intermediary, such as Hambrecht, to regulate the allocation and bidding process, that control would be shifted to either the SEC or one of the stock exchanges. While a remarkable agency in many respects, the SEC arguably has been most effective as an independent regulatory body, and not one that is actively engaged in the mechanics of the public offering process. Moreover, inserting the SEC into the Dutch IPO process potentially could drive issuers to opt for bookbuilding or some alternative process, as has been the case in Taiwan, due to the costs and inconvenience of public regulation. To be sure, none of this is worth contemplating seriously until, or if, the Dutch IPO emerges as a prominent competing method.

As a result, we are left with the somewhat surprising conclusion that not all intermediaries are alike within the Cathedral of Dutch IPO Law. From an efficiency standpoint, Dutch IPOs have failed to distinguish themselves from bookbuilding. Accordingly, the strongest case for Dutch IPOs must present concrete distributional and equitable considerations to be truly justified. To do so, private Dutch IPO intermediaries should disclose more information about their bidding processes, specifically the prices and quantities submitted by institutional and retail investors. And private Dutch IPO intermediaries should provide greater transparency about their pricing

processes, specifically the reasons why issuers choose to depart from a clearing price supposedly determined by bids. Only then can we begin to assess fully how Dutch IPOs should be regarded within our property Dutch IPO regulatory regime.