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# MAKING (CORPORATE) LAW IN A SKEPTICAL WORLD

LYMAN P. Q. JOENSON\*

## INTRODUCTION

Just when a learned judge finally confesses what many legal scholars have insisted on for years—that “[j]udges make rather than find law, and they use as inputs . . . their own ethical and policy preferences”<sup>1</sup>—we hear dissent from the academy. Professor Scott Altman wonders whether candor about the ticklish business of judicial lawmaking is the better course,<sup>2</sup> suggesting a little self-deceit might be more efficacious.<sup>3</sup> Professor Pierre Schlag proposes a more radical course.<sup>4</sup> He wants to “destabilize”<sup>5</sup>—perhaps call an indefinite time-out on—the larger enterprise of normative legal

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1. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 457 (1990). “The judge is not merely an interpreter of legal materials. He is not only a finder but a *maker* of law. . . .” *Id.* at 29 (emphasis added).

Judge Richard Posner is not the first judge to recognize (or concede) the judicial power to create law. Professor Levinson places Judge Posner’s latest work in the tradition of another trenchantly outspoken judge, Justice Oliver Wendell Holmes, Jr. Sanford Levinson, *Strolling Down the Path of the Law (and toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1227-28 (1991) (book review). Posner himself claims Justice Benjamin Cardozo as a judicial soul mate, and Cardozo unreservedly acknowledged a judge’s influence in forming (not just “finding”) law. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113-15, 167-80 (1921). And although Posner slights the legal realists, certainly Judge Jerome Frank—before turning to “natural law”—emphasized the importance of personal belief to judicial lawmaking. JEROME FRANK, *LAW AND THE MODERN MIND* 100-17 (1930). See Levinson, *supra*, at 1231 n.48. Notwithstanding these distinguished forerunners, the decided tendency among judges appears to be either an indignant denial of, or an embarrassed silence about, such authority.

2. Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296, 296 (1990).

3. Strictly speaking, Professor Altman states that he takes up the issue of judicial *introspection* more than that of judicial *candor*. *Id.* at 297. Occasionally, though, he writes as though *candor* itself is an issue for judges. *Id.* at 350-51. For scholars, as opposed to judges, Altman recognizes that the predicament is more pointedly one of candor: By frankly insisting that judges be introspective about how they fashion law do we damage the lawmaking process? *Id.* at 347-51 & n.156. Altman believes the answer might be “yes.” For a critical response to Altman’s argument, see Gail Heriot, *Way Beyond Candor*, 89 MICH. L. REV. 1945 (1991).

4. Pierre Schlag, *Normativity And The Politics Of Form*, 139 U. PA. L. REV. 801 (1991) [hereinafter *Normativity*]; Pierre Schlag, *Normative And Nowhere To Go*, 43 STAN. L. REV. 167 (1990).

5. Schlag, *Normativity*, *supra* note 4, at 932.

thought, believing it to be a shield deflecting attention from the “dubious” ends to which such work is often put.<sup>6</sup>

Judge Richard Posner unflinchingly concedes the force of modern jurisprudential critiques of law and lawmaking. In some ways, his recent work actually bolsters and extends those critiques. And his ten years on the bench not only make him an unlikely candidate for launching such a powerful reproach to conventional legal thought, they enrich and enliven a subject that can suffer from an overly abstract, speculative, or politically charged treatment.<sup>7</sup>

Recent critiques of judicial lawmaking are multifaceted, but at a minimum they are deeply skeptical of “objective” or determinate answers to legal issues.<sup>8</sup> Too, they reject any foundationalist view of law as a body of autonomous rules “containing” pre-ordained (and so authoritatively pedigreed) meaning, or as being derived from an apolitical and timeless sector of the universe sealed off from other realms of human experience. Posner joins that chorus (to a point),<sup>9</sup> but responds with his own “antifoundationalist”<sup>10</sup> answer to the resulting dilemma of judicial legitimacy. His answer—appearing in chapter 15 as a “manifesto”—is what he calls “pragmatism,” something he describes as “an attitude rather than a dogma ;”<sup>11</sup> an attitude that, after he’s done pummeling other approaches to law, Posner believes will “emerge as the natural alternative.”<sup>12</sup> The pragmatic “attitude” preferred by Posner is one which

embraces the scientific virtues (open-minded, no-nonsense inquiry), elevates the process of inquiry over the results of inquiry, prefers ferment to stasis, dislikes distinctions that make no practical difference . . . is doubtful of finding ‘objective truth’ in any area of inquiry, is uninterested in creating an adequate philosophical foundation for its thought and action, likes experimentation, likes to kick sacred cows, and—within the bounds of prudence—prefers shaping the future to maintaining continuity with the past.<sup>13</sup>

6. *Id.* at 805.

7. I wish to emphasize the word “overly” in the text. I see nothing wrong with legal writing that is abstract, speculative, or politically charged, provided that not *all* of the work in that area displays those qualities or that *any* work displays them to excess.

8. Posner states that legal rules “may be so much putty.” Posner, *supra* note 1, at 52. For elaboration of the critical perspective, see David Millon, *Objectivity And Democracy*, 66 N.Y.U. L. REV. (forthcoming 1992); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

9. Although Posner criticizes those who naively seek autonomy and objectivity in law, he also rejects certain critical stances toward those quests: “Efforts in this scientific and pluralistic age to regain a confident sense in the law’s autonomy and objectivity seem futile. Yet the radical skepticism and vague communitarian yearnings of critical legal studies are a dead end too.” POSNER, *supra* note 1, at 458. See Levinson, *supra* note 1, at 1226 n.23.

10. POSNER, *supra* note 1, at 29.

11. *Id.* at 28.

12. *Id.*

13. *Id.*

Put another way,

[p]ragmatism in the sense that I find congenial means looking at problems concretely, experimentally, without illusions, with full awareness of the limitations of human reason, with a sense of the "localness" of human knowledge, the difficulty of translations between cultures, the unattainability of "truth," the consequent importance of keeping diverse paths of inquiry open, the dependence of inquiry on culture and social institutions, and above all the insistence that social thought and action be evaluated as instruments to valued human goals rather than as ends in themselves.<sup>14</sup>

Whatever the merits of Judge Posner's proposal to lead us out of the contemporary jurisprudential thicket, he insists that we scrap our decrepit illusions about law and unblinkingly acknowledge our whereabouts. Only then, he claims, can we fruitfully rethink our notions of law and lawmaking. What could more succinctly capture the nub of the problem we can't avoid grappling with than the following statement?

[I]f we give a difficult legal question to two equally distinguished legal thinkers chosen at random, we may well get opposite answers.<sup>15</sup>

There is, in other words, no singularly right or pre-existing solution to legal questions patiently awaiting judicial discovery. This is necessarily so because there are "no overarching concepts of justice that our legal system can seize upon to give direction to the [lawmaking] enterprise."<sup>16</sup> Thus, according to Posner, the usual methodology of picking up the legal scent on a given issue and doggedly following it to the hoped-for destination of our quarry (the uniquely right answer) is misguided. There isn't any answer "out there;" consequently, Posner contends that the "pragmatist's real interest is not in truth at all but in belief justified by social need."<sup>17</sup> For many, this assertion introduces an unnerving, possibly treacherous, latitude into the task of judicial lawmaking. Judges seem unconstrained, free to interpret "social need" (and how it is best achieved) as they choose, and so free to decide with enormous discretion. Posner is not disturbed. With the glee of one knowingly breaching standard protocol, he embraces the fact that a "judge in the difficult case . . . may be as freewheeling as a legislator."<sup>18</sup> Furthermore, Posner insists, we are troubled by such assertions only because we in the profession make too much of law as a unique set of problem-solving techniques, whereas in fact "there is no such thing as 'legal reasoning.'"<sup>19</sup> Nor should law be regarded as a set of mental concepts at all. It is more properly understood, Posner argues, in instrumental terms,

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14. *Id.* at 465.

15. *Id.* at 428.

16. *Id.* at 460.

17. *Id.* at 464.

18. *Id.* at 131.

19. *Id.* at 459.

that is, as an ongoing "activity" wherein change should be expected and often will occur not because of logic, but instead will "come about as a result of a non-rational process akin to conversion."<sup>20</sup>

Posner's book is laced with such arresting and sacred cow-kicking assertions. No purpose is served here in trotting them out to demonstrate his larger claim that franker, less occluded discourse about lawmaking is all to the good. The key point here is that these uncommonly blunt words come from a person whose own livelihood is judging. We wouldn't be surprised by—indeed, we may have come to expect—such a forceful plea for candor from the legal academy.<sup>21</sup> During the past fifteen years or so, critical legal scholars have extended the critique of earlier legal realists and have assailed those other scholars (and judges and practicing lawyers) who continue to speak and think about law in highly doctrinal or "formal" terms. Although now fairly deeply penetrated into the thinking and vocabulary of many scholars,<sup>22</sup> to hear such a learned, influential and "conservative"<sup>23</sup> judge as Richard Posner make a similar entreaty is quite startling. One can only wonder what other judges say about such things at their various klatches where, being among peers, they can let their judicial hair down. Do they really speak to each other about their common tasks in the formalist lexicon Judge Posner assails, or is that stilted mode of discourse reserved for the case reports? At a minimum, Posner's brethren and sisters on the bench cannot ignore the man, however fraught with peril Professor Altman might regard such widespread judicial grappling. Posner's book, in effect, offers an occasion for deciding either to broaden the conversation about such essential matters to include the practicing profession, or to sequester it within the halls of academia.

With the hope that Professor Schlag will not rebuke for posing the wrong questions,<sup>24</sup> one might ask: What have such seemingly rarified jurisprudential matters to do with corporate law? What have they to do with Justice Lewis Powell? Regarding the first question, legal scholars of various stripes struggle with the implications of jurisprudential skepticism for their own special areas. Most of the hand wringing has been done by "public law" types.<sup>25</sup> Corporate law scholars have largely stayed out of the fray, preferring to huddle together in their own corner of the field. This cannot go on much longer. If contemporary corporate law's somewhat narrow

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20. *Id.*; *see id.* at 148-53.

21. *But see* Altman, *supra* note 2.

22. Perhaps the risk now is that certain critical ideas have become so much a part of the vocabulary that they become commonplace and lose their "bite." Recently, I heard a presentation of what was basically an empirical study of the proliferation of legal symposia that was couched—to no great purpose or advantage, in my view—in some of the language of critical legal studies.

23. As Professor Levinson rightly notes, Posner's book may usefully cause some rethinking of the meaning of this word and of the phrase "critical legal studies." Levinson, *supra* note 1, at 1248-52.

24. Schlag, *Normativity*, *supra* note 4, at 804-05.

25. *See* Millon, *supra* note 8.

intellectual province—the study of the shareholder-manager relationship—is not especially earth-shaking, the institutions forming its subject matter—large “private” multinational businesses—are increasingly and disturbingly vital to everyone’s well-being. Shouldn’t the jurisprudential underpinnings, methodologies, mindsets, and professional rhetoric of those who study these social institutions be subjected to a full-barreled, candid and deeply skeptical examination? I think so, and I think just as Posner understands (like Holmes before him) the social situatedness of law and lawmaking, so it may take an “external” sociological critique of corporate law’s insular and highly individualistic normative premises to broaden its scope.<sup>26</sup>

I expect that such a task will not bear fruit “internally” until the latest attraction—fascination with institutional shareholders—turns out to be an interesting side road but ultimately a dead end insofar as coming to grips with deeper issues that plague contemporary corporate law is concerned. Although pockets of discontent as to the very definition of corporate law are increasingly apparent even within the community of corporate law scholars, the mainstream continues to examine (with imagination, to be sure) more traditional concerns. Not expecting significant change in the dominant compass guiding modern corporate law for the foreseeable future, I hope, nonetheless, to emphasize in this essay my own preference for greater transparency about what is at stake in the manifold inquiries that constitute corporate law. In doing so, I hope to make clear my willing acceptance of the messier rhetoric flowing out of a plain-spokenness of the sort Posner now advocates, but which he himself may have ignored (or even hindered) in some of his earlier writing on law that trumpeted overmuch the determinative value of tidy “scientific” economic analysis.<sup>27</sup> At the same time, I have a nagging doubt as to whether today’s judicial lawmakers can so deftly ride the pragmatic route out of a postmodern divide in world outlook that goes well beyond law, and which threatens only to deepen, not abate.<sup>28</sup> Openness about the source of inputs into decisionmaking may only make the depth of “cosmological” disagreement about bedrock matters—*e.g.*, the dispute over the enduring versus provisional quality of human thought and awareness—that much more visible. Let’s also be candid, then, about *why* formalism in (corporate) law and elsewhere, by masking (and thus evading) deep normative conflict, continues to be such an attractive refuge.

As to Justice Powell, during his tenure on the Supreme Court he wrote two opinions which spoke to a burning corporate law issue of the 1980s—hostile corporate takeovers.<sup>29</sup> He did so in two quite different discourses.

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26. Recent examples include ROBERT BELLAH ET AL., *THE GOOD SOCIETY* 82-110 (1991); ALAN WOLFE, *WHOSE KEEPER?: SOCIAL SCIENCE AND MORAL OBLIGATION* (1989).

27. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986). See *infra* note 61. Cf. POSNER, *supra* note 1, at 387 (stating that: “we should be cautious in pushing wealth maximization; incrementalism should be our watchword”).

28. See *infra* notes 66-68 and accompanying text.

29. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982); *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

The first opinion, a concurring opinion written in 1982, was brief and somewhat tentative and undeveloped, but it was far more cut from the free-speaking and pragmatic mold espoused by Judge Posner, probably because it expressly advocated the propriety of factoring state law solicitude for nonshareholder interests into the constitutional assessment of state antitakeover legislation, hardly an orthodox corporate law position. The opinion thus stood as a quiet admonition to a developing swagger in certain free-market quarters of corporate law. The second, a majority opinion written in 1987, was more elaborate, reached a decidedly antishareholder result, but spoke in a conventional, narrow and formalistic (if not downright disingenuous) proshareholder discourse. To use Professor Altman's terminology, the lack of candor seemed to "work" well in the latter opinion, reaching an unorthodox (from corporate law's vantage point) result, but doing so behind a veil of wholly conventional terminology.

In periods of intellectual transition, does altered, more capacious *rhetoric* always candidly lead (as Powell's earlier opinion seemed to portend)—or does it sometimes bashfully trail (as seen in the semantic pretense of Powell's later opinion)<sup>30</sup>—genuine innovation in lawmaking? In a world both skeptical and splintered, which is the preferred approach to making law, here corporate law, but applicable elsewhere as well? The subject of this brief Essay is to use Justice Powell's two opinions as a window into a larger debate, a debate rightly seen by Judge Posner as affecting all fields of law, a debate corporate law should acknowledge and join, a debate (not seen by Posner) implicating very fundamental matters lying "outside" what today we call law.

#### TWO TAKEOVER CASES

The 1980s witnessed an accelerating level of hostile takeover activity. These transactions—essentially *en masse* stock sales by existing shareholders to third party offerors—took place on national capital markets. They yielded immense wealth for investors who, understandably, delighted in both the wealth and enhanced stature in corporate governance brought by these transactions. The salutary effect of these transactions for corporate governance (as that field is traditionally defined) cannot be overestimated. For decades, corporate law had struggled with the problem of shareholder powerlessness in displacing or disciplining incompetent or underperforming managers. Takeover bids—being aimed directly at shareholders rather than being mediated through management, as is the case with most corporate

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30. Writing in 1921, Judge Cardozo recognized that often the transition from an outdated legal notion to a newer idea was "bridged by the pious fraud of a fiction." *CARDOZO, supra* note 1, at 116. But he spoke prematurely when he said:

Today the use of fictions has declined; and the springs of action are disclosed where once they were concealed.

*Id.* at 117. Perhaps Cardozo, in 1921, was not so much describing prevailing practice as he was doing what Posner was doing in 1990—exhorting.

decisions—offered a simple and efficient remedy for this dilemma. Unhappy shareholders simply sold their stock at a premium to someone who, acquiring a majority position, had every incentive to exercise legal power to replace incumbent management with faithful hand-picked agents.

For various reasons, however, state legislators were strongly opposed to what they regarded (rightly or wrongly) as disruptive enterprise-busting events and, accordingly, they enacted statutes aimed at curbing hostile takeovers.<sup>31</sup> In terms of interest group analysis, the interests of largely out-of-state shareholders were sacrificed for the benefit of politically preferred (and influential) in-state nonshareholder considerations.

*Edgar v. MITE Corp.*<sup>32</sup>

In 1982, one such statute was ruled unconstitutional by the Supreme Court because it impermissibly burdened interstate commerce.<sup>33</sup> Neither the design of the Illinois statute at issue in the case, nor the commerce clause analysis of Justice White's majority opinion, are important to this Essay. Instead, I wish to focus on Justice Powell's concurring opinion. This opinion, brief though it is, is wrongly slighted by those wishing to understand—or simply see—the subsurface turmoil in corporate law. Moreover, it nicely displays Powell's larger centrist and localism-leaning tendencies; it is transparently candid; and although he joined the majority in striking down the Illinois law, Powell's unhidden sympathy for the aims of antitakeover legislation served pragmatically to inspire a new breed of what would later prove to be *successful* anti takeover statutes.

Powell first stated that he agreed with Justice Marshall that the issues in *Edgar v. MITE Corp.* were moot, but that, because a majority of the court had reached the merits, he joined Justice White's indirect commerce clause analysis only.<sup>34</sup> He joined it because its "reasoning leaves some room for state regulation of tender offers."<sup>35</sup> He went on to state why such public regulation was beneficial, noting that the early 1980s were a period "marked by conglomerate corporate formations essentially unrestricted by the anti-trust laws."<sup>36</sup> A regulatory vacuum in the antitrust arena, coupled with what Powell perceived as an offeror's often superior capital resources and professional personnel, "may seriously disadvantage a relatively small or regional target corporation."<sup>37</sup>

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31. See Lyman Johnson & David Millon, *Missing The Point About State Takeover Statutes*, 87 MICH. L. REV. 846, 846 (1989).

32. 457 U.S. 624 (1982).

33. *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

34. White and two other Justices considered the Illinois law also to be preempted, and White and three other Justices found the law to be a *direct* burden on interstate commerce as well.

35. 457 U.S. at 646.

36. *Id.*

37. *Id.*



In fact, Powell's survey of the takeover landscape was faulty. True, the deregulation movement of the early 1980s led to the formation of some large businesses through merger and acquisition. But these consensual transactions did not typify what was happening in "hostile" overtures. The takeover activity of the early 1980s was not marked by the joinder of behemoth companies (as in the 1960s), or the assault of large upon small, but by the dismantling or "busting up" of conglomerate target companies into smaller, more focused units. Often this was done by bidders who, far from being representatives of the corporate establishment, basically operated as lone wolves, empowered to do so by the awesome money-raising powers of the now-despised junk bond. It was, in fact, the splintering and uprooting of local enterprises, not their enlargement, that concerned state lawmakers. Antitrust law had never spoken to the shrinking or exportation of businesses, and so its desuetude was of no particular moment on this issue.

And yet target companies were, Powell was correct to note, still at a "disadvantage," even if from a source other than a suspension in antitrust enforcement. What precisely was the disadvantage which troubled Powell? Was it the same two matters of shareholder vulnerability that so bothered many corporate law scholars, viz, that target company shareholders might face unaided the difficult choice presented by then-common two-tier bids meant to stampede shareholders into tendering their stock at an unreasonably low price, or the possibility that incumbent management would rebuff the overture altogether rather than extract the maximum share price for investors? These shareholder-centered issues were not Powell's concerns. Instead, he described the "adverse consequences" of unregulated takeover activity as being those to the "general public interest. . . ."<sup>38</sup> Especially upsetting to the general public interest, according to Powell, is the disruptive effect "when corporate headquarters are moved away from a city and State."<sup>39</sup>

Powell elaborates on this last point in a footnote describing how the "headquarters of the great national and multinational corporations tend to be located in the large cities of a few States."<sup>40</sup> When a headquarters is moved to one of those cities, Powell notes (or maybe "speculates" is a more accurate word) that "the State and locality from which the transfer is made inevitably suffer significantly."<sup>41</sup> This occurs because the target company management's important leadership role in community affairs is lost and contributions to "cultural, charitable, and educational life . . . also tend to diminish . . . ."<sup>42</sup>

Powell's greatest familiarity with city life was with Richmond, Virginia, where before going on the bench he had lived, practiced law, and played a significant role in civic and cultural life. He was president of the Family

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38. *Id.*

39. *Id.*

40. *Id.* at 646 n.\*.

41. *Id.*

42. *Id.*

Service Society, a local agency that provided assistance to needy people. He was elected to the Special Charter Commission, which recommended the city manager form of government for Richmond. He was active in the Richmond Bar Association long before he became president of the American Bar Association, he wrote occasional columns for the *Richmond Times Dispatch*, and he both chaired the Richmond School Board during the stormy school desegregation era of that city and was a member of a group called the Virginia Industrialization Commission which, among other activities, worked to end the practice of massive resistance in Virginia. By his own efforts he vouched for the importance of active involvement in community life.

No doubt, too, as a corporate lawyer Powell knew firsthand the enormous contributions of time and energy his clients had made to the civic life of Richmond. Powell's notion of what counts for the "general public interest," and how the business and professional elites of a city can and should contribute to it, surely reflect his patrician bent and may be too genteel and narrow for some people's likes. Moreover, Richmond's unique role in southern history and culture might by itself lead to the harboring of suspicion about persons who "take over"—in other words, are not invited to have an interest in—another company. But the larger point is that Powell had a pivotal experiential context for his belief that state law could rightly play a role in preserving those enterprises and endeavors that contributed to his understanding of community interests, interests at once more localized and broader than those of shareholders. In short, whether self-consciously or not, Powell looked at the issue of takeover regulation with what Posner describes as elements of the pragmatic attitude: that is, to look at problems with "a sense of the 'localness' of human knowledge, the difficulty of translations between cultures, . . . [and] the dependence of inquiry on culture and social institutions. . . ." <sup>43</sup>

Powell displayed here an instinct deeply protective of those business and civic institutions he knows well and the leadership of which he largely trusts and respects. In substance, this may not be Posner's cold-eyed judicial pragmatism as much as it is a strain (with a Virginian tinge) of an old-line conservatism showing through, the kind that manifests "a serious interest in institutions like the family, church, the local community, the private sector for their value as buffering or mediating forces and for their role in preserving a more diverse and pluralistic social order."<sup>44</sup> It is a kind of conservatism quite different than the libertarian "free-market" brand that many corporate scholars, buoyed by the Reagan revolution, believed robust takeover activity should both reflect and hasten along. Their vision, in fact, prevailed in *MITE* because the decision, after all, did strike down the Illinois market-clogging law; and it did so by an embarrassingly naive and enthu-

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43. POSNER, *supra* note 1, at 465.

44. Robert Nisbet, *The Present Age And The State Of Community*, CHRONICLES, June 1988, at 11, 17.

siastic recitation of the evil that would allegedly befall interstate commerce were the Illinois law upheld:

Shareholders are deprived of the opportunity to sell their shares at a premium. The reallocation of economic resources to their highest valued use, a process which can improve efficiency and competition, is hindered. The incentive the tender offer mechanism provides incumbent management to perform well so that stock prices remain high is reduced.<sup>45</sup>

Sandwiched between the two sentences describing how takeovers help investors is White's unsupported statement attempting to connect takeovers to the economic interests of society at large. In this sense, to use Professor Scot Powe's terminology,<sup>46</sup> *MITE* was a "nationalizing" decision, even though it was reached in 1982, not in the broader nationalizing era of 1937-73. It is a sort of judicial outlier, a seeming stray that used federal law to drum out state regulation of large-scale stock transfers so as to create an unfettered national market for corporate control. What is extra odd about the case is that the nationalizing effort does not, as in the earlier 1937-73 era, originate from the political left, but comes instead from the political right. The right (as in libertarian deregulatory right), because of its free-market bent, needed potent legal weaponry to displace market-gumming state and local laws, just as, in an earlier day, substantive due process and the contract clause shielded commercial activity from state intrusion.<sup>47</sup> The only weaponry of sufficient constitutional stature for this task was federal law, and so its formidable path-clearing force was invoked. The result, post-*MITE*, was a sweeping away of the constitutional obstacles so that hostile takeovers could proceed relatively unhindered. The mid-1980s, in fact, brought forth an astounding upsurge in such activity.

From corporate law's limited vantage point, this was all to the good because shareholders benefitted immensely. Powell could not have failed to know this. Speaking in *MITE* to the question of whether the singularly pro-

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45. 457 U.S. at 643.

46. L.A. Powe, Jr., *The Court Between Hegemonies*, 49 WASH. & LEE L. REV. 31 (1992).

47. Today, adherents of this outlook appear to center their arguments around the issue of whether excessive regulation amounts to a "taking" requiring just compensation under the Fifth Amendment. See *Lucas v. South Carolina Coastal Council*, 60 U.S.L.W. 3371 (U.S. Nov. 19, 1991). To the extent this succeeds—and at least Justices Scalia and Thomas are probably receptive to it—the ability of governments (whether federal, state, or local) to "regulate" property and business activity may be dramatically reduced. One upshot is that at least some commercial activity, being less bounded, may tend toward an expansive and "nationalizing" reach. Here, then, the *judicial* hegemonic shift identified by Professor Powe, *supra* note 46, may have an ironic counter-shifting *economic* effect. This raises in new form a paradox evident at least since John Stuart Mill: Those on the political left value libertarianism for personal freedoms, while those on the right value it for economic freedoms. Sometimes, therefore, federal law is deployed to mount an assault on public regulation from the political left, sometimes from the right.

investor focus of the federal Williams Act preempted state law that might protect corporate enterprises for the civic reasons he had earlier mentioned,<sup>48</sup> Powell stated he did not read that Act to “necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater *protection to interests that include but often are broader than those of incumbent management.*”<sup>49</sup> Here he not only spurns as fanciful a libertarian, nationalizing and uniform policy on stock transfers as achieved through a misreading of federal law, he rejects—because he is skeptical of—the very core premise of corporate orthodoxy that the corporate world has but two important parties—shareholders and managers—and that to disfavor the former in hostile takeovers is to be a lackey of the latter. Such a cramped bi-polar view of corporate activity and corporate law, to Powell, leaves out other nonshareholder, nonmanagement “interests” and the “general public interest” as being entirely proper—however awkwardly expressed—ingredients for state policy toward takeovers.

Powell’s concurrence, much more than White’s opinion, speaks the language of deference to “localism” that marks the court’s larger direction in 1982, a transitional time.<sup>50</sup> Much more than the other four Justices who joined him in the result, he strove to connect this apparently deviant nationalizing decision to the Court’s overall orientation. Thus, although the immediate effect of the holding in *MITE* was to unleash a wave of takeover activity, the longer term outcome of Powell’s special concurrence was to inspire state lawmakers to return to the drawing board to design laws that could more artfully do what Powell had invited. Eventually, those efforts succeeded.<sup>51</sup>

Another trait of Powell’s opinion in *MITE* is its directness and candor. Perhaps this is a virtue of writing a concurring or dissenting opinion; one can speak one’s mind freed of the necessity—often found in majority opinions—of having to write to induce others to join.<sup>52</sup> In any event, Powell spoke honestly as to why he thought state law could regulate takeovers, and he did not house it in the cant of shareholder welfare. He bluntly expressed his concern about the disruptive effects of takeovers on a broader network of corporate constituents. This more candid language had, ultimately, a very pragmatic outcome. Coming in a decision widely regarded as a stinging defeat for state law, it powerfully signalled state lawmakers, target companies, and their legal advisors of a lurking judicial receptivity to their enterprise-protecting concerns. The trick, of course, for those crafting such laws was to produce the desired effects constitutionally.

Doing so led, ironically and regrettably, to a retreat from candor about motives to a sort of disingenuousness. This is because, after *MITE*, to

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48. See *supra* notes 38–42 and accompanying text.

49. 457 U.S. at 647 (emphasis added).

50. See Powe, *supra* note 46.

51. See *infra* notes 57–60 and accompanying text.

52. I thank my colleague Denis Brion for this insight.

preserve a constitutional role for state law in the regulation of hostile takeovers that law had to be peddled as something squarely within the competence of state lawmaking authority. It turns out that corporate law itself is that "something." The making of corporate law had always been within the province of state rather than federal law.<sup>53</sup> Thus, antitakeover laws, in order to follow up on Powell's strong signal, were lodged in corporate statutes themselves.

The problem is that the deep structure and rhetoric of corporate law operated on a different (latent) predicate, namely, that it ordered only the shareholder-manager relationship, not a wider network of interactions, and that it did so toward the end of shareholder wealth maximization, not the well-being of other groups. Seeking the constitutional safety of state corporate law to protect interests traditionally alien to the very subject matter and thrust of that law required one of two outcomes. First, the scope of corporate law itself might genuinely be expanded to encompass more than the shareholder-manager relationship. Second, the advancement of non-shareholder interests (including managerial interests) through antitakeover laws might dishonestly be described within the straitjacket of traditional rhetoric as being, of all things, good for shareholders. Although I believe the first is the better course and will, over the longer term, be the eventual outcome in corporate law, that tack was a bit too radical for many defenders of state regulation even in the near-desperate period just after *MITE*. Instead, the traditional shareholder-centered rhetoric was drawn on, and what was undoubtedly anti-shareholder legislation was advanced as investor friendly.<sup>54</sup> In many quarters, this was done, however, solely to win the constitutional fight, not to genuinely reform corporate law.<sup>55</sup> Ultimately, the constitutional strategy worked.

#### *CTS Corp. v. Dynamics Corp. of America*<sup>56</sup>

In 1987, one of the retooled anti-takeover statutes (Indiana's) was challenged and upheld by the Supreme Court.<sup>57</sup> Justice Powell wrote the majority opinion, one of his last on the bench. Unlike his concurring opinion in *MITE*, Powell's opinion in *CTS Corp. v. Dynamics Corp. of America* was replete with references to the manner in which the statute's requirement of a shareholder plebiscite on transfers of voting control

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53. See Lyman Johnson, *Sovereignty Over Corporate Stock*, 16 DEL. J. CORP. L. 485 (1991).

54. This is an example of how a change in legal thought is, as Cardozo put it, sometimes "bridged by the pious fraud of a fiction." See *supra* note 30.

55. Whether those allies of management who defended antitakeover legislation on behalf of nonshareholder interests can easily distance themselves from the full force of their rhetoric remains to be seen. For an effort to take seriously the nonshareholder aspects of anti-takeover legislation, see David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991).

56. 481 U.S. 69 (1987).

57. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987).

purportedly benefitted investors and thereby served the same “investor protection” goal as the Williams Act:

[T]he statute now before the Court protects the independent shareholder against both of the contending parties. . . .

. . . By allowing such shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers. . . .

. . . The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.<sup>58</sup>

The thrust of Powell’s analysis was that Indiana’s statute was not preempted by the Williams Act precisely because, supposedly, it protected shareholder interests. This line of reasoning simply ignored the troubling fact that it was shareholder inability to discipline management for its perceived failings by traditional legal means—*e.g.*, proxy contests or corporate derivative actions—that made a market-based mechanism like takeovers such an attractive governance instrument.

The dominant theme of Powell’s Commerce Clause analysis was also shareholder protection:

The primary purpose of the Act is to protect the shareholders of Indiana corporations. . . .

. . . In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana’s decision to promote the autonomy of independent shareholders. . . .

. . . .

. . . It only provides regulatory procedures designed for the better protection of the corporation’s shareholders.<sup>59</sup>

Focusing on shareholder well-being, Powell only obliquely acknowledged, as he did much more forthrightly in *MITE*, the disruptive effect of takeovers on a state’s economy. He pointed out, with no elaboration, the interest of states “in promoting stable relationships among parties involved in the corporations it charters, *as well as* in ensuring that investors in such corporations have an effective voice in corporate affairs.”<sup>60</sup> Here Powell was struggling to reconcile investor welfare with a more organic, inclusive conception of corporate relationships. Lacking any corporate law vocabulary for doing so, he was less than clear in stating exactly what weight state efforts to protect “stable relationships”—presumably, a veiled reference to noninvestor interests—should be given in Commerce Clause analysis. Moreover, by ultimately making the myth of shareholder protection the central part of his constitutional analysis, he simply sidestepped the harsh reality

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58. 481 U.S. at 82-83 & n.7.

59. 481 U.S. at 91-93.

60. 481 U.S. at 91 (emphasis added).

that many states, acting out of perceived (rightly or wrongly) self-interest, have sought to impair the free workings of the interstate capital markets to hurt, not help, shareholders. Perhaps framing the matter in terms of investor welfare was necessary to corral enough votes to command a majority, but that is simply a basis for sharing the blame for insincerity; it is no answer to it.

*CTS*, in upholding Indiana's anti-takeover statute, sent the law of takeovers back to the states. It rebuffed efforts to use either a relatively modest piece of federal legislation (the Williams Act) or the Commerce Clause to nationalize corporate law through the back door. In this respect, *CTS* rejects the "nationalizing" tilt of *MITE* and achieves a more deferential "localizing" effect consistent with the court's larger—and by 1987, more pronounced—hegemonic shift. It transfers the *locus* of decisionmaking about the shape and function of corporate law at a price, however, both for the field of corporate law and for the larger task of judicial lawmaking.

Within corporate law, takeovers seemed to bring resolution—"closure" might not be too strong a word for the sense of hopefulness it conveys—to decades of perplexity, and were much prized as a result. And yet the jolting effect on large numbers of people put takeovers on everybody's minds, thereby drawing the concerns of corporate law out of the margins of cultural awareness squarely into the center. Once drawn out—however, briefly—corporate law's exclusive and little-known fascination with investor well-being was viewed by many as possibly inconsistent with other considerations. Thus, for corporate law in the 1980s, takeovers initially represented great promise but ended by bringing deep challenges to that field's core premises.

The *outcome* (if not language) of *CTS* was a sensitivity to widely held reservations about the value of high levels of takeover activity. As a resulting constitutional matter, corporate law's traditional pro-shareholder focus was not immune to the blunting influence of non-shareholder considerations. And yet, by achieving this constitutional outcome within the traditional mode of shareholder-centered discourse, post-*CTS* the legacy of hostile takeovers for corporate governance continues to be fussed over by a specialized (quite small) interpretive community of scholars operating within the confines of certain categories of thought that state takeover regulation had successfully challenged in the larger society. Powell reinforced that continuing use of a narrow lens and a frail lexicon in *CTS* by speaking as though Indiana's statute were truly pro-shareholder when it was designed to be quite the opposite. Had he addressed the workings of that statute in the candid fashion he had adopted in *MITE*, the rhetoric of corporate law could have been usefully stretched—quite in line, I believe, with larger social currents—while the same constitutional outcome would have been reached.

#### DEALING WITH DISSONANCE

At critical junctures—and the 1980s were such for corporate law—it is sensible to encourage experimentation in thought and practice rather than

uniformity. Whatever Judge Posner's particular thoughts on the social utility of takeovers,<sup>61</sup> I believe his pragmatic sentiments are fully sympathetic to this assertion. Localism makes inclusive approaches to problem solving more probable, though at the ever-present risk of fractiousness. But critical junctures arrive (or are recognized) only because of widespread dissatisfaction with, if not outright breakdown in, accepted ways of thinking and talking about specific sets of problems. The very existence of dissatisfaction with prevailing practices can create enormous impatience and discomfort in those who deeply believe in the inherent "rightness" of conventional modes of thought. And such persons will not be cheered by recalling Posner's uncloaked view on the matter: "The pragmatist's real interest is not in truth at all but in belief justified by social need."<sup>62</sup>

In working through such discomfort, not only are accommodative institutional arrangements important, but so are the attitudes of those in a position (like judges) to address that discomfort. It is best to listen carefully, to be candid, to confess shortcomings and doubts, to welcome an exchange of divergent views, and to appreciate what in law appears to be the necessarily tentative treatment of inquiries increasingly recognized as quite open-ended. That means the customary vocabulary, range of permissible considerations, prevailing paradigmatic mindsets and frameworks, and the very citizenry of the interpretive community, all of which are only provisional intellectual brackets anyway, are drawn into question. In short, the way we think about legal problems at times of doubt in a skeptical world—a world in which "bounded" orthodoxy of any sort, whether or not grounded in a philosophically foundationalist view, is under siege—demands both candor and a certain Janus-like tolerance for a high level of ambivalence.

This way of thinking and talking can exact a toll. Both psychological dissonance and social discord may mount. Its full play might lead to enormous "difficulty drawing and defending . . . line[s] . . ." <sup>63</sup> But it is also less daunting and more accessible because it reveals more clearly what is at stake—an "examination of . . . consequences in the world of fact."<sup>64</sup> The stakes—the consequences—both constitute the daily concern of practicing lawyers and judges and transcend descriptive depictions of larger epochal movements in the law of the sort offered by Professor Powe. But this is

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61. Judge Posner wrote the appellate opinion that the Supreme Court reversed. *Dynamics Corp. of America v. CTS Corp.*, 794 F.2d 250 (7th Cir. 1986), *rev'd*, 481 U.S. 69 (1987).

62. POSNER, *supra* note 1, at 464; *see supra* note 17 and accompanying text. Cardozo put it similarly: "The final cause of law is the welfare of society." CARDOZO, *supra* note 1, at 66; as did Holmes: "[T]he first requirement of a sound body of law . . . [is] that it should correspond with the actual feelings and demands of the community, whether right or wrong." OLIVER HOLMES, *THE COMMON LAW* 36 (Mark DeWolfe Howe ed. 1963).

63. POSNER, *supra* note 1, at 467.

64. *Id.* "[T]ime's criticism is irrefutable, since it is reality's criticism: it sets the evidence before us without any need to offer whys and wherefores." OCTAVIO PAZ, *THE OTHER VOICE: ESSAYS ON MODERN POETRY* 67 (1991).



where Posner's tough-minded pragmatism may founder. Real argument over the terms of debate on normative issues (normativity being inevitable, Schlag notwithstanding)—and on whether civil debate can even take place—may have only begun, now that doubt about a wide range of old verities is seeping (rushing?) into vast regions of social experience; not just in legal society but in that of society at large. Responses to this full working out of post-Enlightenment angst create conflict at the most basic level,<sup>65</sup> that of cosmological outlook. Posner would leave this debate behind, but it continually eludes finessing and seems distressingly unbridgeable. Here is how Alan Wolfe describes the split:

At war are two fundamentally different visions of man in the world. Modernists, inspired by life rather than revelation, begin with the everyday and tailor their creed to adjust to its pressures. Fundamentalists, who reverse the priority, begin with an ethic and are determined to shape modern life to fit its requirements. For the orthodox, authority is external to the individual. For the progressive, it is internal to the individual.<sup>66</sup>

Posner is, in these terms, a legal "modernist" launching a heretical broadside against an array of legal "fundamentalists," and his book—and other critiques like it—may best be understood in terms of this deeper, culture-wide chasm. Powell's concurrence in *MITE* is, much more modestly to be sure, also "modernist" vis à vis corporate law orthodoxy. *CTS* moves in that direction, while clinging to the traditional creed. Posner may be naive to believe his brutal honesty will be widely embraced—formalism, after all, is alive and well—or his pragmatic path followed by persons who believe his philosophical account (for all its rich appreciation of the social situatedness of law) ultimately does what the poet Octavio Paz described democratic liberalism (for all its strengths) as doing: "[I]t leaves unanswered half the questions human beings ask themselves about fraternity, about origins and final ends, and about meaning and the value of existence."<sup>67</sup> And in rejecting foundational accounts of law, Posner utterly neglects another enduring element in the very social landscape to which he refers the law—the moral demands of faith and spirituality, and how they speak to the age-old question that people won't put away: "But what is the foundation of virtue?"<sup>68</sup> Perhaps in a sort of tiny microcosm of how to deal with this wider and loftier quest, Powell is the cagier one here, reverting in *CTS* to a traditional discourse; and perhaps there is less abruptness, and

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65. PAZ, *supra* note 64, at 2-3, 59-74.

66. Alan Wolfe, *Politics By Other Means*, THE NEW REPUBLIC, Nov. 11, 1991, at 39, 40 (reviewing JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991)).

67. PAZ, *supra* note 64, at 69.

68. *Id.* See Irving Kristol, *The Future of American Jewry*, 92 COMMENTARY 21, 25 (Aug. 1991) (asking "[I]f God is really dead, by what authority do we say any particular practice is prohibited or permitted?").

so greater regenerative value, in momentarily couching new turns in old language.

This surely points to the importance of language, more accurately, of rhetoric, and the way in which problems—whether scientific, cultural, or legal—are cast. Many will shy away from Posner's call to plunge into the icy water of skepticism, preferring to step off one ice floe only when another one (equally tenuous in the end perhaps, but temporarily more secure) comes within reach, hoping thereby to avoid the intermediate phase of cold skepticism. But who will bring the new outlook within reach? Rhetoric, the vocabulary—frail, precarious and underinclusive as it always is—in which and by which the activity of lawmaking takes place (whether in the courtroom, law office or classroom) matters immensely,<sup>69</sup> and is the means by which a new sighting takes place. Does it precede and make it possible, or follow and make it visible? In the roily world of corporate law, the sentiments expressed in Powell's few sentences in *MITE* will endure, and someday possibly be recognized as the true (if somewhat narrowly articulated) basis for the deference to local experimentation found in *CTS* but there expressed in "a carapace of falsity and pretense [that] surrounds law and is obscuring the enterprise."<sup>70</sup> For now, there is an emerging sense of deficiency in speaking about matters the old way, while a new way is yet to be devised. We want to get off our ice floe but aren't sure how.

So what *is* at stake in corporate law? That subject is beyond this Essay but, very briefly, I note three points. First, after the collapse of despotic command economies, a more mature and refined critique of the drawbacks of unfettered market economies is more, not less, urgent. Over the past decade, corporate law has benefitted from the insights of economic analysis. But infatuation with and complacency about the supposedly unqualified value of market mechanisms is no more in order in law than in the larger political-economic sphere. A more tempered appreciation is needed.

It is impossible to fight, I know, against the market economy, or to deny its benefits. But now that totalitarian socialism, by all indications, is falling apart and has ceased to be a threat to democratic societies, a new political and social way of thinking may perhaps permit less onerous forms of exchange. This is my ardent hope. Now that the cruel utopias that bloodied our century have vanished, the time has come at last to begin a radical, more human reform of liberal capitalist society.<sup>71</sup>

Second, a sense of the corporation as a social institution, not merely an intersection of atomistic contracting individuals, must be made more prominent. Sociology as well as economics must inform the study of

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69. See Denis Brion, *Rhetoric And The Law Of Enterprise*, 42 SYRACUSE L. REV. 117 (1991).

70. POSNER, *supra* note 1, at 469.

71. PAZ, *supra* note 64, at 144.

corporations.<sup>72</sup> Individual initiative is not unleashed, and material advancement does not occur, in an institutional vacuum. Corporate activity surely *shapes* individual preferences and behavior as well as being *shaped* by them. The "point of convergence between [individual] liberty and [social] fraternity"<sup>73</sup> must be found in, first, the vocabulary of discourse about business activity and, second, actual patterns of commercial interaction.

Third, the creation and maintenance of productive enterprises in a healthy sustainable manner serving the needs of a broad range of people should always be an intensely local endeavor,<sup>74</sup> even in, perhaps especially in, the dawning era of corporate restructuring and "scaling down." *Some* of the growing tensions of life and thought in the post-modern bureaucratic world might dissolve were there some sense that a shared "foundationalist" moral compass is less critical, at least as a beginning point, than a scale or patterning of activity that allows the hearing of voices of those many groups of persons affected by that activity.<sup>75</sup> As seemingly inexorable forces propel us toward "international" and "global" interactions, and possibly away from a shared (articulable) moral framework, the deep human longing for a meaningful say about matters that affect one's work life should not be forgotten by—indeed it should be central to—those who write about corporate law, as well as those judges who make it.

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72. Lyman Johnson, *The Corporate Institution*, 92 COLUM. L. REV. (forthcoming 1992).

73. PAZ, *supra* note 62, at 73.

74. WENDELL BERRY, *HOME ECONOMICS* (1987); WENDELL BERRY, *WHAT ARE PEOPLE FOR?* (1990).

75. See e.g., BELLAH, *supra* note 26, at 108 (stating: "For maximum productivity as well as maximum job satisfaction, full participation by all in the corporation as a learning community is essential.").