The Delaware Judiciary and the Meaning of Corporate Life and Corporate Law

Lyman P.Q. Johnson
Washington and Lee University School of Law, johnsonlp@wlu.edu

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Lyman Johnson*

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* Associate Professor of Law, Washington and Lee University School of Law. B.A. 1973, Carleton College; J.D. 1978, University of Minnesota. The author wishes to thank David Millon and Brian Murchison for their comments on earlier drafts of this Article. Financial support was generously provided by the Frances Lewis Law Center of Washington and Lee University.
I. Introduction

The most important and fundamental questions are the toughest to answer. Questions like 'When does human life begin?' and 'Who can terminate life, and under what circumstances?' confound and bedevil to no end. The most basic question of all—'What is the meaning of life?'—evokes especial anguish, for although it readily yields contingent and provisional answers, it steadfastly defies fixedness and closure. Many consider this question, if at all, only at times of personal crisis, when long-held convictions come under serious challenge and must withstand severe scrutiny or be discarded. It is perfectly understandable why people struggle with foundational matters so rarely: few of us can function effectively while lingering over such vexing questions for prolonged periods. Inasmuch as everything we do flows from and vitally depends on our stance toward root issues, however, the lack of contemplation is odd.

These observations apply with even greater force to collective organisms. The presence of so many parties, each with a potentially different vision of collective purpose as a substantive matter, and each possibly claiming parity of voice as a procedural matter, further complicates inquiry into ultimate institutional meaning. Indeed, much American law...
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dealing with large bureaucratic organizations—be they governmental bodies or business corporations—deals less with what should be done than with how or by whom key matters should be decided. This focus on second-order process matters works tolerably well, provided there exists at least some implicit consensus on the basic thrust of collective action.

Yet, as in an individual's life, occasions arise when those involved in an organization must do more than head in the same assumed direction pursuant to some seemingly agreed-upon division of responsibility. There are times when they must attend more explicitly to the reason for their union. Even then, however, the question of the essential meaning of the organization's existence may quickly be transmuted into a question of process—not What do we do? but Who decides what we do? An even prior question is—Who decides who decides?

Today, one particular form of organization—the publicly held business corporation—confronts the most basic question of all, the question of its reason for being. Deliberation over the meaning of corporate existence is being forced into the open for a simple reason: the current hostile-takeover climate makes it inescapable. Whether for good or bad, the hostile-takeover phenomenon profoundly and undeniably disrupts the activities of many large corporations. The disruption affects not only those companies that are actually taken over, but also those that succeed in resisting, and even those that only suspect they might become targets of takeover bids. Few corporations escape untouched. As a result, all per-


5. Professor Frug emphasizes that courts seek to control discretion by policing the procedures rather than the substance of bureaucratic decision making. See id. at 1343-53. For a description of how insistence on procedural fastidiousness has come to characterize judicial review of corporate decision making, see Branson, Intracorporate Process and the Avoidance of Director Liability, 24 WAKE FOREST L. REV. 97, 99-103 (1989). For an argument that courts use the rhetoric of procedural care to conduct higher substantive review of corporate-director conduct, see Palmeter, Reshaping the Corporate Fiduciary Model: A Director's Duty of Independence, 67 TEXAS L. REV. 1351, 1389-94 (1989).

6. Professor James Q. Wilson's study of bureaucracies concludes that successful bureaucracies know exactly what their mission is while unsuccessful bureaucracies work toward ill-defined or even nonexistent objectives. See J. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 109-10 (1989).

7. In another context, Professor Stanley Fish has recognized the importance of who gets to decide answers to legal questions: "After all, the crucial question, which returns the original problem to center stage, still has to be asked: Who gets to make the rules? And once that question is answered, another question (it is really the same) waits behind it: Who gets to say who gets to make the rules?" Fish, Force, 45 WASH. & LEE L. REV. 883, 884 (1988).

8. Professor Coffee has asserted that "the more important impact of the takeover phenomenon may well be on those firms and managers who are not taken over, but who change their behavior as a result of the general deterrent threat of a takeover." Coffee, Shareholders Versus Managers: The Strain in the Corporate Web, 85 MICH. L. REV. 1, 41 (1986). For evidence supporting that assertion, see id. at 41-60.
sons associated with these organizations—whether as senior managers, employees, creditors, suppliers, customers, or recipients of tax revenues or corporate largesse—must remain mindful of how swiftly and thoroughly a takeover might alter the enterprise and destabilize their lives. 9 Because they are such a powerful force, takeovers have generated an unending torrent of controversy. 10 For many years, members of a diverse but relatively small group have hotly disputed the causes, impact, and value of takeovers. 11 Two interesting features suffuse this debate. First, while most people affected by takeovers no doubt have strong opinions on the subject, they are not direct participants in this discussion. Instead, the debate has been confined to the ranks of corporate executives, 12 economists, 13 legislators, 14 institutional investors, 15 lawyers, 16

9. For a brief account of how William Farley's recent takeover of West Point-Pepperell jarring the town of West Point, Georgia and its residents, see Bruck, The World of Business, The New Yorker, Aug. 7, 1989, at 76, 83-84. RJR Nabisco made substantial cuts in its work force following its leveraged buyout. Morris, RJR, in Long-Awaited Move, to Dismiss About 12% of Workers at Tobacco Unit, Wall St. J., Aug. 11, 1989, at A3, col. 2. Even defensive "victors" in takeover battles lay off employees. For example, Prime Computer, Inc. announced that "it would lay off 2,500 employees, or nearly 20 percent of its work force, as part of a restructuring designed to put the company back on its feet following a 10-month anti-takeover battle." Pugh, Prime Computer to Lay Off 20% of Staff in Restructuring, Wash. Post, Oct. 24, 1989, at D4, col. 1. Evidence of job loss associated with hostile takeovers, although scant, is emerging. See Halverson, First the Merger, Then the Job Cuts, Christian Sci. Monitor, Aug. 4, 1989, at 9, col. 2. Empirical evidence of the effects of takeover activity on nonshareholders other than employees is lacking.


14. See infra notes 171-72 and accompanying text.

15. The Council of Institutional Investors, a coalition of pension funds, has adopted a shareholder "bill of rights" to reassert the role of investors in corporate decision making and to make
and scholars of various stripes. As with many other contemporary issues, one wonders whether these participants adequately reflect the views of those whose affairs are really at stake and whether the law can or should take account of such views through less visible channels.

The second important feature of the debate is that although certain propositions made about takeovers in these discussions are uncontestable, the participants have reached no real consensus on the overarching question of whether high levels of takeover activity are, overall, good or bad for the nation. This key issue remains highly divisive, and its two sides serve to cabin a wide array of subarguments for and against corporate management more accountable to shareholders, especially in takeovers. See Vise, "Bill of Rights" Seeks to Boost Power of Shareholders, Wash. Post, Apr. 13, 1986, at F1, col. 1. Professor Conard lists other examples of institutional investor activism on takeover-related issues. See Conard, Beyond Managerialism: Investor Capitalism?, 22 U. Mich. J.L. Ref. 117, 131-52 (1989).

16. The most outspoken practicing lawyers have been those who customarily represent target companies. See, e.g., Lipton, Corporate Governance in the Age of Finance Corporatism, 136 U. Pa. L. Rev. 1, 11-35, 59-69 (1987) (examining the current trend of "abusive" takeover techniques and proposing reforms in corporate governance); Trevor, Hostile Takeovers: A U.S. Falkland Islands Where the Argentines Always Win, in HOSTILE TAKEOVERS, supra note 11, at 16, 27 (criticizing the arguments for hostile takeovers and concluding that the legislature should pass an "Abolition of Tender Offers Act").

17. Academicians in the fields of law, finance, economics, sociology, public policy, and ethics have studied and debated the subject of hostile takeovers. See supra note 11. Recently, the Church of England has begun exploring the issue from a theological perspective. See INDUSTRIAL AND ECONOMIC AFFAIRS COMM., GEN. SYNOD BD. FOR SOCIAL RESPONSIBILITY, CHURCH OF ENGLAND, THE ETHICS OF ACQUISITION: A DISCUSSION OF THE DILEMMAS AND HUMAN CONSEQUENCES OF Mergers and TAKEOVERS 1-2 (1989) [hereinafter THE ETHICS OF ACQUISITION].

18. As expressed by Professor Tribe: "For it is the most vulnerable, the most forgotten, whose perspective is least akin to that of the lawmaker or judge or bureaucrat and whose fate is most forcefully determined by the law's overall design—by its least visible, most deeply imbedded gaps and deflections." Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics, 103 Harv. L. Rev. 1, 13-14 (1989). For examples of how, in the related area of plant closings, those persons most dramatically affected by a transaction may have no voice in the matter, see Singer, The Reliance Interest in Property, 40 Stan. L. Rev. 611, 614-51 (1988) and Roger & Me (Dog Eat Dog Films 1989).


20. One obvious reason for the lack of consensus on this larger question is an absence of agreement on the relevant criterion for measuring the national interest. The discipline of economics provides the notion of "allocative efficiency," and much of the takeover debate has focused on the efficiency effects of takeover activity. Even assuming that the thin notion of efficiency adequately captures the national interest, however, economists cannot agree on whether high levels of takeover activity in fact advance that goal. Compare Jensen, Takeovers: Folklore and Science, Harv. Bus. Rev., Nov.-Dec. 1984, at 109, 120 (arguing that "scientific evidence indicates that activities in the market for corporate control almost uniformly increase efficiency") with Fortier, Hostile Takeovers and the Market for Corporate Control, Econ. Persp., Jan.-Feb. 1989, at 2, 12 ("Research does not provide clear support for the hypothesis that there are real efficiency gains from takeovers. . . . Only with additional research can the social and economic welfare implications and policy directives regarding hostile takeovers be more precisely drawn.")
takeovers. The persisting discord on this critical point prevents the one governmental body designed to take a broad-gauged view of social problems—Congress—from addressing this subject with real conviction. Paralyzed by uncertainty, Congress continues, as it has for years, to study and wring its hands over the takeover issue, while reliably failing to take any significant action.

In the face of congressional muteness, the duty to structure the legal environment in which takeover battles unfold has fallen to the states. State legislators have not hesitated to express their opinions about takeovers and have routinely enacted laws aimed at equipping corporate management to fulfill what lawmakers vaguely see as the fundamental purpose of corporate activity. These efforts continue to be controversial on grounds of both policy and theory, and they have only recently

21. The Interim Report of the Commission to Review Massachusetts Anti-Takeover Laws commented on congressional inaction on the takeover issue:

During the eight years of the current national administration there appears to have been a trend in the Executive branch toward treating the idea of regulating takeovers itself as a threat to market integrity. It is less clear that Congress shares this view. However, given the complexity of the issues and the limited availability of reliable data, the federal government has been reluctant to act.

...While it is easy to criticize their failure to act decisively, their lack of action appears to be a function of the failure of any set of proposals to emerge as clearly “right.”


22. One notable exception not addressed specifically to takeovers was the 1988 Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, §§ 2(a), 3, 102 Stat. 890, 890-92 (1988) (to be codified at 29 U.S.C. § 2102) (requiring employers with 100 or more employees to give 60 days notice prior to certain layoffs). In addition, the Omnibus Budget Reconciliation Act of 1989 limited the ability of bidders to deduct interest immediately on debt instruments that accrue interest but do not pay it to investors until maturity and the ability of lenders to exclude a portion of the interest earned on loans made to companies to establish employee share ownership plans (ESOPs), a favorite defensive measure. See H.R. 3200, 101st Cong., 1st Sess., 135 CONG. REC. 5334 (1989). The effect of these tax measures on takeover activity is not clear, but the latter measure is not expected to dramatically alter the appeal of ESOPs in leveraged buyouts. See Belford & Greenberg, New Bill Cuts Back Tax Benefits of ESOPs in LBO Transactions, Nat'l L.J., Dec. 16, 1989, at 16, col. 2. For a collection of the myriad takeover bills introduced into Congress over the past several years, see Conard, supra note 15, at 126 n.30.

Believers in public choice theory would explain congressional inaction on the takeover front as understandable because even though legislative initiative might please certain groups, it would alienate many others. Thus, members of Congress act rationally in doing nothing, and thereby they succeed in their quest to “maximize the total support they receive by alienating as few groups as possible.” Macey, Public Choice: The Theory of the Firm and the Theory of Market Exchange, 74 CORNELL L. REV. 43, 46 (1988). The efforts of persons involved in the leveraged buyout industry to use campaign contributions to continue congressional failure to regulate leveraged acquisitions is chronicled by Holland & Novak, supra note 10.

23. The chief aim of state antitakeover legislation is to advance the welfare of local enterprise-dependent nonshareholder interests, not the well-being of shareholders. See Johnson & Millon, Misreading the Williams Act, 87 MICH. L. REV. 1862, 1862-65, 1878-82 (1989) [hereinafter Misreading the Williams Act]; Johnson & Millon, Missing the Point About State Takeover Statutes, 87 MICH. L. REV. 846, 848 (1989) [hereinafter Missing the Point].

24. Recently, Professor Macey sought to develop a framework for assessing the claim (which he rejects) that nonshareholder constituencies should receive protection under the auspices of corporate
cleared formidable constitutional hurdles. Although state takeover statutes embody no detailed, fully developed theoretical conception of corporate personality or purpose, legislators staunchly deny that a corporation is nothing more than an atomistic meeting ground for episodic commercial exchange that, when facing a takeover threat, should cater to the short-term wealth desires of shareholders. Thus, at least regarding what is not the ultimate meaning of corporate life, the thinking of state legislators is clear, if crude, and they have designed their corporate takeover statutes with the aim of deliberately renouncing the notion of shareholder primacy.

These antitakeover statutes are quite disturbing to those whose economic and legal beliefs are more orthodox, who think that corporate activity, both in and out of the takeover context, ought to focus exclusively on the well-being of shareholders. The overall impact of these statutes on the level and tempo of takeover activity is limited, however, because the takeover statute of the most important corporate-law state—Delaware—is not as invincible as others. Consequently, the Delaware stat-

law. See Macey, Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes, 1989 DUKE L.J. 173, 173-75. Macey's article is a response to the proliferation of both state antitakeover statutes and commentary advocating management consideration of nonshareholder interests in making corporate decisions. See id. at 174. In this respect, the article stands as a thoughtful attempt to seriously rebut the reasoning behind those statutes and commentary rather than simply dismissing those positions as so uninformed and unfortunate as not to warrant extended comment. See Ribstein, Takeover Defenses and the Corporate Contract, 78 GEO. L.J. 71, 140-50 (1989) (asserting that the board of directors' discretion in resisting takeover attempts should not be interpreted to allow protection of nonshareholder interest). In spite of academic criticism, state legislators, buoyed by legal success, see infra note 25, continue to consider increasingly stringent measures. See Geyelin & Goel, Pennsylvania Legislators Gird To Battle Over Bill That Could Become Stiffest Anti-Takeover Law, Wall St. J., Dec. 20, 1989, at A16, col. 1 (discussing a proposed law that would compel transfer of raider profits to the target company if a takeover bid fails, allow directors to weigh interests other than shareholders', limit shareholder voting rights, and guarantee severance pay).


26. See Missing the Point, supra note 23, at 848-50.

27. Professor Romano characterized state antitakeover statutes as "troublesome, for they can produce results that are inconsistent with the core goal of corporation law—the maximization of equity share prices." Romano, The Political Economy of Takeover Statutes, 73 VA. L. REV. 111, 113 (1987).

28. See Johnson, State Takeover Statutes: Constitutionality, Community, and Heresy, 45 WASH. & LEE L. REV. 1051, 1056 (1988) (describing as "heretical" those states that "'corrupt' their corporate statutes by consciously deploying them to deter market forces such as hostile takeovers for the good of local communities and resident noninvestors"); Romano, supra note 27.

ute has not halted the takeover of Delaware corporations. In fact, from the passage of the law in 1988 until the collapse of the junk bond market in 1989, the pace of takeover activity appears to have quickened, and the number of takeover-related decisions rendered by Delaware judges has risen sharply.\textsuperscript{30} Therefore, not only has the task of speaking to the take-


30. The Delaware judiciary addressed a number of takeover-related subjects in 1988 and 1989. First, the judges continued to struggle with the reach of Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) (holding that when the sale of a company becomes inevitable, the directors have a duty to ensure that shareholders receive maximum value for their equity). Concern about the unexpected reach of \textit{Revlon} arose out of a decision in the Delaware federal district court finding that a defensive restructuring reducing public shareholder ownership from 92.6\% to 45.5\% and increasing management's share from 4.8\% to 23.9\% constituted a "sale" under \textit{Revlon}. See Black & Decker Corp. v. American Standard, Inc., 682 F. Supp. 772, 782 (D. Del. 1988). Chancellor Allen sought to contain the \textit{Revlon} decision in two important decisions. See \textit{In re Time Inc. Shareholders Litig.} (Paramount Communications, Inc. v. Time, Inc.), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) \S\ 94514, at 93278-80 (Del. Ch. July 14, 1989) (holding that a merger agreement did not put the target company in a \textit{Revlon} mode since it did not contemplate a change in corporate control), \textit{aff'd}, 565 A.2d 280 (Del. 1989); City Capital Assocs. Ltd. Partnership v. Intero Inc., 551 A.2d 787, 790-91 (Del. Ch.) (holding that the directors' implementation of a restructuring plan did not breach any duties derivable from \textit{Revlon}), \textit{appeal dismissed as moot}, 556 A.2d 1070 (Del. 1988). Second, the judges described how a target-company board is to conduct a \textit{Revlon} auction once in that mode. See Mills Acquisition Co. v. MacMillan, Inc., 559 A.2d 1261, 1286-87 (Del. 1989) (concluding that directors are not required to follow any standard formula in conducting an auction so long as their primary purpose is "the enhancement of the bidding process for the benefit of the stockholders"); \textit{In re RJR Nabisco, Inc. Shareholders Litig.}, [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) \S\ 94194, at 91715 (Del. Ch. Jan. 31, 1989) (holding that so long as the selection of one of two substantially equivalent bids was done in a good-faith exercise of business judgment, \textit{Revlon} required no further steps).

over phenomenon centered on state rather than federal forums, the true locus of power has shifted from the legislative branch to the Delaware judiciary.

When asked to resolve complex but seemingly narrow legal questions arising in high-profile takeover battles, the Delaware courts are doing much more than deciding who wins and loses control over Pillsbury, Polaroid, and Time. More importantly, a handful of judges are, in effect, empowered to shape (or reshape) the entire corporate landscape and to answer the most fundamental question of all—what is the meaning of corporate endeavor? Beyond the startling fact that such a crucial chore rests, for the most part uncontroversially, in the hands of a select, not especially diverse, set of unelected persons, this development is intriguing for at least two reasons.

First, one would think such a fundamental question would need no resolution. Surely we all know, do we not, the chief purposes of corporate activity? In truth, the question, like similar questions about the meaning of individual life, is rarely contemplated in the frenzy of everyday living; usually, only an unexpected calamity provokes such an in-


31. See Grand Meta., 558 A.2d at 1050, 1061.
32. See Shamrock Holdings, 559 A.2d at 269-70.
34. Martin Lipton, a well-known takeover lawyer, recently commented on the significance for judges of congressional inaction on the takeover front in a way that recognized the root issue of corporate purpose:

The failure to develop an effective national policy has left the problem in the hands of the legal and financial advisors to corporate management. . . . [T]he field of battle [has moved] from the market place to the courthouse. . . . [W]e must recognize the enterprise nature of our major business corporations. They do not exist solely for the purpose of providing transitory investment media for institutional investors. They exist to foster our continued economic growth and progress. They are an integral part of the community. . . . Pending the implementation of a national policy, the courts should recognize management’s obligations to, and concerns for, all of its constituents—employees, customers, suppliers, and communities, as well as stockholders. . . . Delaware, the home of half of our major corporations, must accept its responsibility to protect the nation against the ravages of the takeover frenzy.

Lipton, Corporate Governance: Major Issues for the 1990s, 20 DIVIDEND 2, 6-7 (1989).

35. But see Fiflis, Of Lollipops and Law—A Proposal for a National Policy Concerning Tender Offer Defenses, 19 U.C. DAVIS L. REV. 303, 306 (1986) (asserting that “[o]ne may properly ask whether it is appropriate for Delaware . . . to fix national policy in an international securities market, while Congress and the federal courts, Nero-like, abdicate a policymaking role”).

36. For a brief profile of the members of the Delaware Court of Chancery and the Delaware Supreme Court, see Meyers, Showdown in Delaware: The Battle to Shape Takeover Law, INSTITUTIONAL INVESTOR, Feb. 1989, at 64, 68-69.
quiry. Surprisingly, not a single corporate statute explicitly addresses the purpose of corporate activity. Thus, those who believe that a project of this scale is best taken up by "public law"—that is, legislatively—are met with silence. Moreover, judges have rarely, and then quite cryptically or obliquely, spoken to the issue of corporate purpose. Whence comes our thinking on this important subject? Perhaps for the most part the purpose of corporate activity has been a self-evident proposition, requiring no elaboration because it is such an integral and deep-seated part of our social fabric. Takeovers, however, have introduced a

37. Martin Heidegger's monumental analytic on the meaning of being describes the way in which humans, although capable of what he calls authentic existence, often live inauthentically by falling into the beguiling and seeming completeness of "everydayness" and its accompanying characteristics of idle talk, curiosity, and ambiguity. See M. HEIDEGGER, BEING AND TIME 210-24 (J. MacQuarrie & E. Robinson trans. 1962). For Heidegger, the uncanniness of anxiety (angst) sporadically and usefully retrieves one from absorption in the world and brings one face to face with the possibility of authenticity. See id. at 230-35.

38. An American Bar Association task force realized this point when it was asked to "consider the extent to which antitakeover initiatives may be availed of under the Revised Model Business Corporation Act ('MBCA')." Takeover Defense Task Force of the Comm. on Corporate Laws, Model Business Corporation Act: Implications for Takeover Contests, 42 BUS. LAW. 575, 575 (1987). In briefly considering whether directors could consider the interests of nonshareholders in responding to takeovers, the task force wistfully observed that "nothing in the MBCA appears to specify 'profit' as an objective of business corporations. Perhaps this goal was assumed." Id. at 581; cf. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, at 25-28 (Tent. Draft No. 2, 1984) (indicating that a business corporation's objective should be to enhance corporate profit and shareholder gain).


40. See Johnson, supra note 25, at 42-44, 50-52.

41. A wonderful example is found in an oft-cited Michigan Supreme Court case addressing the question of corporate purpose:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to obtain that end and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes. . . . It is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others . . . .

Dodge v. Ford Motor Co., 204 Mich. 459, 507, 170 N.W. 668, 684 (1919). Interestingly, the court failed to cite any authority for its statements, and one can rightly ask what the court looks to and relies on in making such important (normative) observations about the corporate institution. Although many people agree with the court's statements, the important jurisprudential point is not the substance of such judicial assertions, but their origins and their provisional rather than essential nature. The question of corporate purpose, then, can and must be visited anew by the law, just as it was visited by the Michigan court in a very limited context in 1919. To reject such an inquiry as off limits because of a belief that the matter has somehow been settled once and for all is historical error. See infra notes 59-61 and accompanying text. In addition, rejecting an inquiry on those grounds embraces the profoundly flawed . . . notion that there exists a natural, pre-political and pre-legal state of things . . . and that the process of making and interpreting law has no effect on that "natural" background. . . . If . . . things seem "natural," is it not only by virtue of an entire background of legal arrangements[. . .] not by an inexorable order of nature, but by a set of prior legal observations that have changed the very universe being observed.
sizable measure of institutional doubt and angst. Now, someone must speak to the issue of corporate purpose more methodically and conclusively, testing the suppleness of conventional wisdom, and affirm or abandon it. In our legal culture, Delaware judges possess the most authoritative voice; they decide.

Second, the question of ultimate institutional meaning is not posed directly. No litigant and no Delaware judge has ever identified the issue before the court as the meaning of corporate existence. Instead, the question that has emerged as central to Delaware's corporate jurisprudence appears to be more modest: What are the respective roles of target company shareholders and directors in resolving takeover contests? This question has come to command a critical place in takeover battles because the language in which takeover issues are framed is the somewhat anemic vernacular of contemporary corporate law. For almost sixty years, corporate law, or more narrowly corporate governance, has been preoccupied with the important problem of mending a potential rift between legal theory and reality: if shareholders are the chief beneficiaries of corporate activity—as legal orthodoxy holds—how does the law ensure that managers of publicly held corporations conscientiously operate those organizations to maximize shareholder wealth? Takeovers hold enormous promise for rectifying this predicament and, quite understandably, they are eagerly embraced. The danger is that the irksome accountability problem flowing from the separation of ownership and

42. The proper roles of management and shareholders in resolving takeovers has puzzled judges because hostile takeovers are neither purely "corporate enterprise" matters nor simply stock disposition matters. To the extent an action involves the "corporation," management participates because it is charged with operating corporate affairs. See Del. Code Ann. tit. 8, § 141 (1983). To the extent a matter involves disposition of stock, shareholders generally decide. Because hostile takeovers involve both stock disposition and corporate affairs—that is, control over the enterprise is gained by purchasing a substantial amount of stock—both shareholders and managers claim a role. See Misreading the Williams Act, supra note 23, at 1914-15. Obviously, the issue of characterization has proven to be an enormous stumbling block, especially because plausible shareholder wealth-enhancing arguments can be made on behalf of managerial involvement. Although this governance issue has generated most of the discourse on corporate takeovers, academic commentators generally have failed to address the extent to which resolution of the governance issue ultimately depends on judicial notions of institutional meaning, notions that cannot be presupposed to be identical to the simplifying assumptions of corporate theory.

43. Management accountability to shareholders—the abiding concern of modern corporate governance—was systematically treated by Berle and Means in their classic 1932 work. See A. Berle & G. Means, The Modern Corporation and Private Property passim (1932).

44. See, e.g., Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 Stan. L. Rev. 819, 841 (1981) (noting that in some circumstances "the market for corporate control may be the only potentially serious force for limiting management discretion"); Weiss, Economic Analysis, Corporate Law, and the ALI Corporate Governance Project, 70 Cornell L. Rev. 1, 27 (1984) (asserting that "the market for corporate control in general, and tender offers in particular, are the most important disciplinary factors in the corporate governance system, and should be encouraged").
management in the modern public corporation, although significant, threatens to eclipse a prior and more important question—the underlying purpose of corporate activity. In other words, by stubbornly insisting that management focus exclusively on shareholder welfare, corporate law's dogma may well succeed in checking management's broad discretion. That success, however, may come at the expense of preordaining the answer to the more fundamental question of whether the single-minded apotheosis of capital providers is in fact the proper aim of corporate endeavor.

Thus, the takeover inquiry at first seems a narrow one to be conducted within the limited intellectual province of corporate law. Examining the subject from a vantage point, however, illuminates a deeper issue: Is the manner in which takeovers serve to secure management allegiance to shareholder interests consistent with the rightful expectations and demands that other groups in society place upon corporate activity? If not, then takeovers represent the fulfillment of a Faustian wager in which they deliver a measure of good (for shareholders and corporate law) in return for the loss of something greater. Currently there is no national consensus on that larger question. Yet, impelled by the frenetic dynamics of hostile-takeover contests, and more hindered than helped by the hidebound manner in which corporate law has cast takeover questions, the Delaware judiciary is inexorably supplying its own halting answer to this elemental matter.

This Article argues that in the guise of evaluating the propriety of various defensive measures in specific takeover battles, the Delaware judiciary is deciding the foundational question of corporate purpose. More cogently, it is deciding whether one particular vision of corporate purpose—a radically proshareholder vision—will emerge as the predominant view. The Delaware judiciary is engaged in this important task even though it appears to be answering only the much narrower question of the proper balance of power between shareholders and managers, and even though it uses the traditional vocabulary of corporate-law doctrine, a language designed to deal with issues of corporate governance, not corporate purpose. The handling of this whole matter will, of course, be important for calming the current unrest in the field of corporate law, but it has other dimensions as well. It carries enormous repercussions

45. See supra note 20. Not only is there no national consensus, there is no international consensus. As takeover activity increases in the United Kingdom and as it is expected to rise dramatically in Europe after 1992, fundamental questions about takeovers and their effects are being asked abroad as well as in the United States. See, e.g., THE ETHICS OF ACQUISITION, supra note 17, at 12-13 (noting the tension between the United Kingdom's need to remain competitive in the world market and the desire to protect local communities and employees).
for our collective sense of what we take to be the point of participation in large corporations by forcing us to confront the issue of whether we accept shareholder enrichment as the supreme end of such effort. Given the interconnectedness of our work and personal lives, the institutional answer inevitably spills into and colors our sense of individual meaning as well.46

From the standpoint of legal theory, the judiciary's treatment of the takeover issue can enhance our understanding of the relationship between legal doctrine and the underlying social norms and aspirations that ultimately animate that doctrine.47 It offers an accessible means of exploring the role of judges in mediating the interplay between the rigid preconceptions of conventional legal doctrine and dimmer but broadly based social values.48 For example, most persons in this country probably would be astounded to hear that maximization of shareholder wealth

46. The late cultural anthropologist Ernest Becker, in his Pulitzer Prize-winning book The Denial of Death, asserted that each human being has a deep-seated longing to "justify himself as an object of primary value in the universe [and to] make the biggest possible contribution to world life." E. BECKER, THE DENIAL OF DEATH 4 (1973). To believe that one's work is not meaningful, or that it is easily dispensed with, can only impair one's sense of personal well-being. Chancellor William Allen touched on this issue in the recent Paramount decision: "Many people commit a huge portion of their lives to a single large-scale business organization. They derive their identity in part from that organization and feel that they contribute to the identity of the firm." In re Time Inc. Shareholders Litig. (Paramount Communications, Inc. v. Time, Inc.), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94514, at 93269 (Del. Ch. July 14, 1989), aff'd, 565 A.2d 280 (Del. 1989).

47. See M. EISENBERG, THE NATURE OF THE COMMON LAW 1, 14-161 (1988). Professor Eisenberg distinguishes between what he calls "doctrinal proposition" and "social propositions." Doctrinal propositions include those "propositions that purport to state legal rules and are found in or easily derived from textual sources that are generally taken to express legal doctrine." Id. at 1. Social propositions are much broader and include moral propositions, policy propositions, and experiential propositions. See id. at 14-42. Eisenberg addresses the way in which these divergent sets of propositions interact. See id. at 43-145. His work, then, attempts the daunting task, which other prominent scholars such as Llewellyn, Hart, Dworkin, and Unger have addressed from a variety of vantage points, of articulating the nature of law and law making. See id. at 146-61. Professor Schauer's book review summarizes the way in which Eisenberg's work fits into this larger enterprise. See Schauer, Is the Common Law Law? (Book Review), 77 CALIF. L. REV. 455, 460-71 (1989) [hereinafter Schauer, Book Review]; see also Schauer, Formalism, 97 YALE L.J. 509, 537-38, 548 (1988) [hereinafter Schauer, Formalism] (demonstrating that common notions of formalism are best understood as processes by which legal rules take on meaning and arguing that criticizing legal reasoning as formalistic tends to obscure the normative political, social, moral, and economic choices that are truly at issue).

In discussing what Eisenberg calls "social propositions," this Article uses the term "norms" rather than "propositions" because the word "propositions" carries an overly rational connotation. Admittedly, whatever their nonrational origins, we cannot discuss norms unless at some point we express them in language. Nonetheless, it is important to remember that these norms are not always rational in origins or character, and they are keenly influential even when not formed into propositions. Cf. White, What Can a Lawyer Learn From Literature? (Book Review), 102 HARV. L. REV. 2014, 2016-20 (1989) (noting the structural coerciveness in analytic discourse and asserting that we have come to view the center of any text as propositional in nature).

48. One advantage of a full public discussion of a controversial subject from a variety of vantage points, see supra note 17, is that it conveys to judges a sense of what various groups think about a novel subject in light of traditional norms.
is the raison d'être of corporate existence, yet corporate doctrine takes that focus for granted. Whether it is proper to invoke social traditions and consensus and whether it is possible to measure them are of immense importance to the common-law process and the stinging deconstructionist critique to which it has been subjected. Moreover, the dialectical way in which legal decisions not only draw on, but in turn alter, the larger social terrain deserves greater attention.

This Article's approach to making sense of Delaware's takeover decisions is to partially "disassemble" corporate law's core premise of shareholder primacy. It begins this task in a general, ruminative way in Part II and then, drawing on the doctrinal exposition of Part III, finishes the task with specific reference to takeover law in Part IV. This Article, however, adamantly rejects a full-blown deconstructive slant on corporate law. Such an account fails to appreciate that at times of institutional and doctrinal strain, Delaware's judges necessarily and properly draw on norms from outside the limited domain of corporate-law precepts and creatively "reassemble" those precepts to reach outcomes that reflect larger values. Thus, although to a committed deconstructionist the resolution of key legal contests appears to involve only a few powerful participants quarreling over the application of seemingly indeterminate rules, the common-law method provides a channel by which the beliefs of a wide segment of society can be brought to bear on this and other significant social issues. Without this access, it is not just the legitimacy of corporate managers that ought to concern us, but also that of judges.

II. The Province of Corporate Law

A. The Shareholder-Manager Axis

As a specialized field of study, contemporary corporate law has a tightly bounded and overtly normative realm of concern. To quote from the American Law Institute's Principles of Corporate Governance:

The challenge for corporate law is to facilitate the development of a corporate structure that allows management the discretion to utilize its expertise on behalf of shareholders, but at the same time

49. Justice Scalia recently injected the notion of social consensus into constitutional adjudication. See infra note 258 and accompanying text.

50. For a description of the deconstructive method, see A. Hutchinson, Dwelling on the Threshold: Critical Essays on Modern Legal Thought 35-41 (1988); Balkin, Deconstructive Practice and Legal Theory, 96 Yale L.J. 743, 746-72 (1987). The deconstructive strategy is often associated with the larger postmodern outlook described in Schlag, supra note 3, but its critical and interpretive insights can be drawn on in particular settings without also abandoning (as does postmodernism) the quest for shared understandings.

51. See Tribe, supra note 18, at 20.
guards against situations in which management might utilize that discretion to favor itself at the expense of shareholders. 52

This scheme includes only two visible parties: management, that small group of business experts charged with the responsibility of operating corporate affairs; and shareholders, the designated beneficiaries of management's efforts. The relationship of these two parties forms the twin strands of corporate-law doctrine: (1) the corporation is operated by management, but (2) for the primary good of shareholders. In turn, these strands mark the outer limits of the corporate-law domain. 53 Other participants in corporate affairs are remanded to public law54 or to the institution of private contract55 for recognition of their claims.

Thus, many commentators believe that the proper end of corporate activity is clear and uncontroversial.56 They further believe that the real

52. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. 6, at 2 (Discussion Draft No. 2 1989).
53. See R. CLARK, CORPORATE LAW 30 (1986). Corporate law, like other intellectual disciplines, uses what Thomas Kuhn calls a paradigm to shape its inquiry. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10 (2d ed. 1970). For an attempt to apply Kuhn's insights to constitutional law, see Tribe, supra note 18, at 23-39. Kuhn defines a paradigm as the "universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners." T. KUHN, supra, at viii. He also believes that paradigms are necessary to guide and speed investigation, and that

research scarcely begins before a scientific community thinks it has acquired firm answers to questions like the following: ... What questions may be legitimately asked ... and what techniques employed in seeking solutions? ... [W]e shall wonder whether research could proceed without such [conceptual] boxes, whatever the element of arbitrariness in their historic origins, and occasionally, in their subsequent development. Id. at 4-5. Likewise, corporate law could not proceed to investigate various questions without first defining the range of its investigation. However useful, occasionally paradigms unduly constrict vision, and therefore, even when refined, they can fail to account for certain problems. When a paradigm is called into serious question, it is either retooled or discarded in favor of another. Kuhn believes that paradigm breakdown is evidenced by the "proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, [and] the recourse to philosophy and to debate over fundamentals." Id. at 91.

The law's struggle with the hostile-takeover phenomenon reveals the limits of the dominant shareholder-centered paradigm of corporate law. Moreover, the contractual theory of the corporation that has recently attracted so much attention, see infra section II(C)(2), is evidence of paradigm dissatisfaction. This theory, however, is a retooling, rather than a discarding, of the core premises of corporate law.

54. See R. CLARK, supra note 53, at 680.
55. See id.; Macey, supra note 24, at 176-77.
56. See, e.g., Yablon, Poison Pills and Litigation Uncertainty, 1989 DUKE L.J. 54, 83 (stating the author's decision to "assume, as all of the caselaw and most of the theoretical discussions do, that takeover regulation exists to maximize benefit to target shareholders"). Professor Yablon is mistaken about the goal of state legislative regulation of takeovers. See Missing the Point, supra note 23. As this Article argues, Professor Yablon is also mistaken about the meaning of judge-made corporate takeover law, but he correctly expresses the dominant belief. Cf. Lodge & Walton, The American Corporation and Its New Relationships, CAL. MGMT. REV., Spring 1989, at 9, 20-21 (asserting that "the old premise of corporate purpose and governance is no longer valid [and that] we are now undergoing the transition to the new premise where the corporation's purpose is to serve all of its constituents—customers, suppliers, employees, shareholders, debt holders, and communities— in a balanced way").
burden of twentieth-century corporate law is to devise the best *means* for securing the undoubted goal of shareholder well-being. Various theoretical models of the corporation have been propounded to guide this project. Differences in conceptualization, however, do not preclude agreement on certain basic points. Most scholars realistically accept the fact that the intended beneficiaries of corporate endeavor do not and cannot manage the organization themselves. Many make the somewhat more objectionable—and paradoxical—claim that shareholders might be better served by a looser rather than a tighter tether on management activities.  

Building from these premises, the function of the law appears quite modest: it should confer a sufficiently wide berth of discretion to enable management to operate creatively and flexibly but should not be so broad that management can subvert the ultimate objective of shareholder welfare. These dual strands of management discretion and shareholder welfare are in constant tension, and each is poised on any given issue to check, if not negate and overwhelm, the other.

B. The Source of the Shareholder-Primacy Norm

Merely describing the compass of corporate law does not explain why maximization of shareholder well-being is taken to be the supreme purpose of corporate activity, a purpose privileged above all others. At other times in our society it was not. In other societies it still is

57. Much of the contemporary corporate-law scholarship can be understood as a debate over whether management possesses too much or too little discretion for the optimal welfare of shareholders. For a summary of two different schools of thought on how much constraint the law should impose on managers, see Weiss & White, Of Econometrics and Indeterminacy: A Study of Investors’ Reaction to “Changes” in Corporate Law, 75 CALIF. L. REV. 551, 551-59 (1987).

58. Professor Frug makes this same point regarding both corporate law and administrative law, see Frug, supra note 4, at 1289, and corporate-law scholars should not, as many have, ignore Frug’s trenchant analysis. On the question discussed in this Article, Professor Frug errs in his uncritical acceptance of the limited and self-proclaimed domain of corporate law and his refusal to see that for the topics traditionally dealt with by corporate law, it is useful to temporarily compartmentalize the commercial world in an effort to understand it. In other words, he takes for granted that the structure of corporate law is always as bounded as most commentators contend, and then he proceeds to debunk it for being so narrow in scope. This Article concedes that the narrow focus of corporate law works well for many traditional governance issues but argues that many factors from outside the domain of corporate law work to inform corporate doctrine when that doctrine confronts new phenomena (such as takeovers). As the influence of those factors is fitfully worked into conventional doctrine, it may appear as though doctrine oscillates irrationally. Yet it is irrational only if one attempts to explain all corporate doctrine in terms of the constricted shareholder-manager framework. By appreciating the way in which considerations other than shareholder welfare are at work in shaping corporate precepts when the root issue of institutional purpose is implicated (as in takeovers), the field of corporate law can appear as more open than many traditional corporate scholars believe but not as radically indeterminate—or as secure a bastion of prerogative—as Frug and other deconstructionists assert.

59. *See supra* note 41 and accompanying text.

60. *See Millon, State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L.

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Over the years, commentators have offered many rationales to support this proposition, which I call the fundamental postulate, and this Article does not recite or discuss all of them. Instead, because this Article focuses on the origins of these rationales and why they are said to be controlling on a common-law judge, the Article will consider only two rationales.

1. Accountability.—Many observers argue that if corporate managers were free to consider factors other than shareholder-wealth maximization in formulating corporate policy outside the takeover context or in devising defensive measures once in the takeover setting, they would wield uncontrollable power and would be unaccountable. Accordingly, many believe that by requiring corporate management to focus on the attainment of a single objective, shareholders can more carefully monitor its performance and hold it accountable. For corporate law, then, shareholder welfare is the authoritative mark by which the exercise of corporate power can be both evaluated and legitimized.

There are two different kinds of responses to this assertion. First, even if accountability could be achieved only by requiring adherence to a singular benchmark—a dubious position—it does not follow that shareholder welfare is the only available benchmark. For example, the per-
formance of senior management might be measured against the requirement that they hire only persons whose last names begin with the letter N. Because this standard is much sharper than the fuzzy notion of shareholder welfare, it would be easier to implement. In short, the belief that corporate managers should be held accountable does not logically lead to the conclusion that maximizing shareholder wealth is the proper focal point of corporate activity. That claim requires additional support.

The second response is more fundamental. No one disputes that corporate law's abiding concern with accountability is perfectly understandable and proper. Vigilance in policing the exercise of power enjoys a venerable heritage in many cultures. In our own democratic polity, attentiveness to the use and abuse of power dates back to the early republicans and runs unwaveringly through the Jacksonians and the populists, and on into the modern era. The notion that those with power can and must be held accountable, then, is a social norm that is not indigenous or unique to corporate law but one that transcends and predates it. It is a concept with widespread appeal because it resonates so deeply with the democratic sensibility.

Once resort is made to a social norm originating outside corporate law as a justification for circumscribing the domain of corporate concern, however, one quickly encounters a vast array of social norms. Many of these are more or less consistent with each other, but others are somewhat at odds. The conflict becomes particularly evident when one descends from the plane of generality and confronts a specific issue. For example, in our society the concepts of patriotism and free speech seem compatible, even inseparable, in most cases. But is it patriotic to uphold holder primacy does not ineluctably lead to specific corporate actions. See Berle, For Whom Corporate Managers Are Trustees: A Note, 45 HARV. L. REV. 1365, 1369-72 (1932); see also Dallas, Two Models of Corporate Governance: Beyond Berle and Means, 22 U. Mich. J.L. Ref. 19, 104-05 (1988) (listing reasons why the profit objective is vague and not easily monitored).

67. M. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 1-20 (1967) (discussing how the United States, France, and England have responded to the need for checks on governmental power).

68. James Madison voiced the importance of controlling those entrusted with political power: "It is a misfortune incident to republican government, though in a less degree than to other governments, that those who administer it may forget their obligations to their constituents . . . ." THE FEDERALIST No. 62, at 376, 379 (J. Madison) (C. Rossiter ed. 1961).

Madison also warned:

The aim of every political constitution is, or ought to be, first to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust.


the right of free speech as expressed in the act of burning the American flag in political protest? Many believe that the two notions are perfectly congruent, but a considerable segment, including President Bush and four Justices of the Supreme Court, disagrees. Whether their reasoning is or is not sound, many see a clash of two important values in this instance; the result is federal legislation criminalizing flag desecration.

Similarly, the assertion that the interests of capital providers should trump all others in corporate affairs is at once consistent with and repugnant to our cultural traditions. Shareholders often are likened to an exasperated political citizenry striving to be heard by its elected representatives (the board of directors) or to mistreated property owners seeking to do as they wish with their individual property (shares of common stock). So viewed, their concerns hold considerable appeal in the limited context of their bilateral relationship to managers. On the other hand, many believe that existing patterns of corporate stock ownership continue to favor a certain privileged group in society. Viewed in this way, considerable resistance will meet the claim that one select group should predominate over others in a context that implicates interests more sweeping than the shareholder-manager relationship. In this situation, as with other issues, our culture simultaneously displays a curious solicitude and resentment toward the trappings of wealth.

Again, the question is not whether one position is more sound than the other. At this level of core belief, much more is involved than dispassionate analysis and the desire to avoid inconsistency in abstract outlook.

69. The Supreme Court recently held that burning the American flag as an overt act of political expression was protected by the first amendment. Texas v. Johnson, 109 S. Ct. 2533, 2536 (1989).
71. See Johnson, 109 S. Ct. at 2548 (Rehnquist, C.J., O’Connor, White, Stevens, JJ., dissenting); id. at 2556 (Stevens, J., dissenting).
72. Flag Protection Act of 1989, Pub. L. No. 101-131, 1989 U.S. CODE CONG. & ADMIN. NEWS (103 Stat.) 777. Another highly charged clash is apparent in the ongoing controversy over Salman Rushdie’s The Satanic Verses. To many in the Western world, however insensitive certain passages of that book might be, the right to express even offensive ideas is highly valued and zealously guarded. See H. Kalven, A WORTHY TRADITION 6-19 (1988) (describing how the American free speech tradition protects individuals from blasphemy and censorship laws). Many Muslims, however, reject the belief that one is free to blaspheme Allah. See Nariman, Freedom of Speech and Blasphemy, INT’L COMMISSION OF JURISTS REV., June 1989, at 53, 53-56 (discussing the relationship between the speech and religion clauses of India’s constitution). To them, the controversy in the West makes little sense because they value reverence for Allah more highly than freedom of expression. The clash is not simply over Rushdie’s behavior; it is over the normative framework by which that behavior is to be evaluated and sanctioned.
73. See J. Bur, VALUES IN THE MARKETPLACE 164 (1988) (showing in a table that in 1976 the top 1% of adult American wealth holders owned 46% of corporate stock held in the personal sector); M. Eisenberg, THE STRUCTURE OF THE CORPORATION 52-53 (1976) (citing several studies of shareholding concentration). The recent rise of ESOPs, see Farrell & Hoer, ESOPs: Are They Good for You?, BUS. WK., May 15, 1989, at 116, 116, and the prevalence of other pension plans are unlikely to alter the perception of a skewed pattern of stock ownership.
The influence of perception, emotion, the sense of fair play, and other traditional—and potentially conflicting—values in shaping the law cannot be underestimated. Nor can context be ignored. Many are quite willing to favor shareholders over managers in the garden-variety two-party issues on which traditional corporate-law doctrine was forged. Yet they might balk at an absolute and unswerving preference for shareholders over the broad spectrum of nonmanagement interests thought to be implicated in the disrupting world of hostile takeovers. When the generally accepted norm of shareholder welfare yields to accommodate other considerations, we see that the strength and reach of a particular legal norm can be driven into a state of flux. Shareholder primacy, like many other values, is "defeasible"—embraced, but not blindly or categorically. Otherwise, if such notions were brittle rather than pliant and commodious, they would snap when subjected to the ongoing stresses of social change.

2. Efficiency.—Lest the takeover debate take on the polarizing overtones of pitting the privileged against the unprivileged, which our democratic egalitarian tradition so disdains, and in an effort to extend the shareholder-primacy norm thoroughly into the takeover setting, those who champion takeovers have fashioned an ingenious rejoinder to the previous objection. They assert that any divergence of shareholder and other important interests on the takeover issue is more apparent than real, more temporary than permanent. Ironically, this assertion hinges on a tenet drawn from the esoteric field of financial economics—the hy-


75. Jarrell, Brickley, and Netter examine various theories that takeovers redistribute wealth to target-company shareholders from various other parties rather than channelling assets to more productive uses. They conclude that:

The literature, while not conclusive, offers little or no support for the notion that the redistribution theories explain a major portion of the apparent gains from takeovers. It has been impossible so far to find systematic losses which could offset the enormous gains to . . . shareholders from mergers, tender offers, and other corporate-control activities. We therefore conclude that evidence is consistent with the notion that these corporate transactions reflect economically beneficial reshuffling of productive assets.

Jarrell, supra note 19, at 58; see also Ribstein, supra note 24, at 141 (asserting that "[i]t is mounting evidence that takeovers result in substantial net gains for society as a whole, and that substantial gains by target shareholders do not come at the expense of other groups"). In spite of these optimistic statements about the efficiency consequences of takeovers, economists are far from agreement on that point. See Scherer, Corporate Takeovers: The Efficiency Arguments, 2 J. Econ. Persp. 69, 80 (1988); supra note 20. For arguments that takeovers do enable shareholders to appropriate gains from other groups, see Coffee, supra note 8, at 48-51 and Shleifer & Summers, Breach of Trust in Hostile Takeovers, in Corporate Takeovers, supra note 11, at 33, 42. For the views of a takeover proponent who acknowledges that shareholders can appropriate wealth through opportunistic behavior, see Macey, supra note 24, at 176.
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pthesis of efficient capital markets. Rather than developing that notion or elaborating the argument for unfettered takeover activity predicated on it, this subsection only describes the upshot of the resulting conclusion.

By attributing oracle-like meaning to the behavior of the stock prices of the target company near the time of a takeover bid, many takeover proponents have sought to align shareholder well-being with an important societal concern—efficiency in the use of economic resources. Thus, a rule of corporate governance requiring management to focus on shareholder well-being as measured by share prices not only enhances shareholder wealth and solves corporate law’s nettlesome accountability problem but also serves as an infallible method for advancing the interests (or at least an interest) of society at large. Consequently, according to this view, corporate takeovers do not introduce an unwelcome divisiveness into American society as many people wrongly believe; rather, they create a happy congruence.

76. For a useful collection of materials on the efficient capital market hypothesis, see R. Hamilton, Corporation Finance 252-95 (2d ed. 1989); R. Gilson & R. Kraakman, supra note 1, at 2-9. The Supreme Court appears to have embraced the notion of efficient capital markets and its corollary, the fraud-on-the-market theory, in the context of claims under SEC Rule 10b-5, and yet the Court has left the states free to reject the concept in their antitakeover legislation. Compare Basic Inc. v. Levinson, 485 U.S. 224, 247 (1988) (concluding that a rebuttable presumption of reliance created by the fraud-on-the-market theory was proper in 10b-5 cases because all available information, including wrong information, is reflected in stock prices) with CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 86 (1987) (upholding Indiana antitakeover statute against challenges based on the commerce and supremacy clauses). In In re Time Inc. Shareholders Litig. (Paramount Communications, Inc. v. Time, Inc.), [1989 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94514 (Del. Ch. July 14, 1989), aff'd, 565 A.2d 280 (Del. 1989), Chancellor Allen expressed misgivings about the efficient market hypothesis and concluded that "just as the Constitution does not enshrine Mr. Herbert Spencer's social statics, neither does the common law of directors' duties elevate the theory of a single, efficient capital market to the dignity of a sacred text." Id. ¶ 94514, at 93277. For a discussion of the Paramount decision, see infra notes 256-91 and accompanying text.

77. See, e.g., Lehn & Mitchell, Agency Evaluates Bust-Up Takeover, Nat'l L.J., Nov. 6, 1989, at S1, col. 1, S3, col. 2 (optimistically stating that "[t]he stock market seems to provide a good estimate, almost instantaneously, of the likelihood that acquisitions will 'succeed' (if retaining acquired assets is a measure of success)"). This mode of discourse—that the market is a "force of nature, governed by laws all its own" and that it is "out there"—is easy to fall into, but it can distract us from the fact that at any given time market prices are simply the result of a consensus of the people buying and selling. Rowe, Individuals Control the Market, Christian Sci. Monitor, Nov. 1, 1989, at 13, col. 2. The predictive powers of a large group of persons are not necessarily superior to those of a small group.

78. See Misreading the Williams Act, supra note 23, at 1866-67 & n.19, 1892-93 & n.125.

79. See id.

80. Sprinkel, The Real Issue in Corporate Takeovers, Wall St. J., July 17, 1987, at 16, col. 3 ("In the process of maximizing the wealth of America's shareholders, we create benefits for the economy as a whole."). Robert Reich has noted in another context that this congruence expresses "principles already codified in American law and policy: The corporation existed for its shareholders, and as they prospered, so would the nation." Reich, Corporation and Nation, ATLANTIC MONTHLY, May 1988, at 76. Reich goes on to argue that "[t]his root principle of our political economy is no longer valid." Id.
this argument vindicates corporate law's traditional preoccupation with the shareholder-management relationship from the charge of intellectual parochialism because its insights ultimately lead to outcomes that work for the general good of nonshareholder groups as well.

This mode of reasoning exhibits two notable qualities. First, it is somewhat paradoxical. In an attempt to constrain management and achieve accountability, corporate law prohibits management from consciously and overtly serving nonshareholder interests; this proshareholder focus nonetheless winds up serving a whole host of nonshareholder interests. Act narrowly; serve globally. Second, the reasoning apparently concedes that the linkage between shareholder welfare and societal well-being is critical. Without it, the concerns of corporate law are not visibly moored to more generally shared expectations of corporate behavior. In a recognized conflict, those concerns might be forced to yield to more important considerations—just as, however important free speech might usually be, many believe it must succumb to respect for the flag. Many takeover critics might concede that the quest for accountability can be achieved by carrying corporate law's narrow compass into the takeover arena, yet reject this application because accountability is purchased at a price they believe too dear. To short-circuit precisely that reaction, the claim for efficiency is a powerful and, in the eyes of many, a clinching protakeover argument.

Ultimately, the extent to which high levels of takeover activity redound to the general good is the key policy issue associated with the takeover phenomenon. It is an empirical question, and, as indicated by congressional immobility on the subject, it is still very much in doubt. Even if authoritative evidence linking high levels of takeover activity with efficiency in the use of economic resources eventually appears, state lawmakers probably would not defer to that evidence. Society at large does not vote in state elections. State legislators, therefore, will readily sacrifice efficiency gains for the nation as a whole to forestall the jarring

81. In exploring the relationship between the strategies of corporations and the goals of the nation, Reich describes the views of those who believe that corporate allegiance to shareholders remains paramount: "The world economy as a whole will be stronger if corporations are free to attract investors from anywhere and undertake production anywhere, with the sole objective of rewarding their shareholders with the highest possible returns." Id. at 80. Apparently, what is good for shareholders is not only good for the nation, but for the world.

82. As Professors Meyer and Gustafson note, the linkage between individual welfare and the public good forms part of "the oldest moral traditions of the West, which held that persons should pursue not only proper self-fulfillment but also the common good and that these two ends were mutually implicated." Meyer & Gustafson, Epilogue: For Whom Does the Corporation Toil?, in THE U.S. BUSINESS CORPORATION, supra note 11, at 211, 230.
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dislocation of voting members of their local constituencies.\textsuperscript{83} Such political decision making is an unalterable fact of life in our federalist system. If, however, the efficiency argument can carry the political day at the national level, there would at least be a sounder basis for congressional action, perhaps through express preemption of the area. But such action now is both empirically premature and politically unattainable.\textsuperscript{84} In the meantime, as we weather this state of incomplete knowledge, takeovers go on. No voluntary cease-fire has been called while public policy gets thrashed out. Given the legislative public-law vacuum,\textsuperscript{85} the takeover dilemma falls squarely into the laps of the Delaware judiciary. Unlike legislators, judges cannot evade the knotty questions associated with social transformation by pleading for more time and further information. Lacking omniscience and drawing on whatever is at hand, judges respond on an acute rather than a systemic basis, deciding specific cases for litigants while resolving bedrock issues for society at large.

Whether the takeover issue is addressed wholesale by legislators as a public-policy subject or piecemeal by judges as a corporate-law question, support for the focus on shareholders must ultimately be found outside the walls of corporate law. The support must be rooted in exogenous and broad-based social norms. As Delaware's judges decide today’s momentous takeover issues, it matters not that they couch their actions in the cramped conceptual and linguistic conventions of corporate law. Necessarily and properly, they are free to probe behind the simplistic assertion that shareholder welfare is paramount and decisive at all times and in all circumstances. Being more than private referees, judges can and must be

\textsuperscript{83} Professor Romano described this point as “interjurisdictional subsidization.” Romano, \textit{supra} note 27, at 138-41.

\textsuperscript{84} “‘There are lots of people who would like to pre-empt the state [takeover] statutes, but the majority of them are law professors and economists. . . . That's not a large enough constituency to encourage strong federal pressure to overturn what are about 40 state laws.’” Sontag, \textit{After Ruling, Stricter Laws on Mergers?}, Nat’l L.J., July 10, 1989, at 24, col. 4 (quoting Professor John Coffee of Columbia University School of Law). In 1988, Congress considered preemption, but intense lobbying by labor unions, the Business Roundtable, and other groups quashed the subject. \textit{See id.}

\textsuperscript{85} In using “legislative vacuum,” I do not mean to deny that many state legislatures have passed antitakeover statutes. \textit{See, e.g.}, IND. CODE § 23-1-42 (1989) (permitting disinterested shareholders to decide whether voting power will be given to the acquirer’s “control shares”); N.Y. BUS. CORP. LAW § 912 (McKinney 1986 & Supp. 1990) (“no . . . corporation shall engage in any business combination with any interested shareholder . . . for a period of five years following such interested shareholder’s stock acquisition date unless . . . approved by the board of directors”); OHIO REV. CODE ANN. § 1701.01 (Anderson 1985) (“any control share acquisition of an issuing public corporation shall be made only with the prior authorization of the shareholders of such corporation”). Instead, I use the phrase because Congress has failed to act and because Delaware’s statute, the most important, is not particularly burdensome. \textit{See DEL. CODE ANN. tit. 8, § 203 (Supp. 1988) (“a corporation shall not engage in any business combination with any interested stockholder for a period of three years” unless one of seven exceptions apply).
willing to reexamine the social footings of that position. Yet, if such reexamination is legitimate at all, as the takeover enthusiasts themselves suggest by resorting to accountability and efficiency as justifications for shareholder primacy, then judges are manumitted to consider other social norms as well and to determine how they bear on the takeover issue.

86. Professor Macey has noted that although courts increasingly approve of board conduct that takes account of nonshareholder interests, they "have failed to articulate a theoretical basis" for doing so. Macey, supra note 24, at 178. He rejects efforts to ground protection of nonshareholders in property and tort law, and, consistent with his view that corporations are networks of contractual relationships, he concludes that private contracting can protect nonshareholders even better than regulatory intervention. See id. at 200-01. Macey fails to consider that the law "protects" nonshareholders not by conferring affirmative legal entitlements on them (whether under the auspices of property law, contract law, or statute), but by limiting the ability of another party (shareholders) to alienate stock without limitation. Antitakeover statutes and judge-made doctrine, both of which accord management significant say in the conduct of hostile-takeover bids, serve to protect various nonshareholders by effectively impairing shareholder autonomy over the decision to sell stock and thereby transfer control of corporate assets. Thus, corporate law serves nonshareholder interests in much the same "indirect" way as restraints on alienation of property and the nonenforceability of contracts on public-policy grounds serve interests other than the property owner or promisee. See Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Columbia L. Rev. 931, 937-51 (1985) (discussing theoretical rationales for restrictions on alienability); Restatement (Second) of Contracts § 178(1) (1981) ("A premise or other term of an agreement is unenforceable on grounds of public policy if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

87. Herbert Hart explicitly recognized this point in his later writing on legal reasoning. In describing cases that could not clearly be brought under an existing rule, he explained that judicial decisions:

[D]o not arise in a vacuum but in the course of the operation of a working body of rules, an operation in which a multiplicity of diverse considerations are continuously recognized as good reasons for a decision. These include a wide variety of individual and social interests, social and political aims, and standards of morality and justice . . . . Frequently these considerations conflict, and courts are forced to balance or weigh them and to determine priorities among them.


88. Professors Gilson and Kraakman contend that if judges were to empower management to consider nonshareholder interests, the result would be to "render most of corporate law incoherent." Gilson & Kraakman, Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?, 44 Bus. Law. 247, 267 n.65 (1989). That statement is wrong for at least two reasons. First, it mistakenly lumps takeover doctrine with more traditional corporate-law precepts. In garden-variety corporate cases addressing managerial competence or self-dealing, only the second-order issue of corporate governance is implicated while the root question of corporate purpose is submerged. Because they are less directly at stake, nonshareholder interests add little to the doctrinal analysis. Takeovers more visibly raise the foundational question of corporate purpose because they both imbue shareholders with awesome power and abruptly unsettle a whole cluster of corporate relationships. Secondly, and more fundamentally, the statement suffers from a misunderstanding of the term "coherence." As Professor Eisenberg has observed, the term has a dual aspect. See M. Eisenberg, supra note 47, at 44-46. It includes "systemic consistency," which, apparently, is what Professors Gilson and Kraakman mean by the term as applied to corporate law as an intellectual system. See Gilson & Kraakman, supra, at 260. Yet it also denotes "social congruence," a resonance with deep-seated social norms. By ignoring this dimension, Gilson and Kraakman pro-
C. **Constraints on Decision-Maker Discretion**

At this point, two related objections might be made to my line of argument. One is general and the other is specific.

1. **Avoiding the Legal Abyss: The Refuge of Formalism.**—At a general level, some corporate scholars will draw on formalist legal theory to contend that it is wholly illicit for judges to consider social norms and that the judicial function is and must be considerably more circumscribed. They may argue that the introduction of such hazy matters as social norms simply shifts the risk of uncontrollable discretion from corporate management to judges. Judges would have free rein to canvass the social landscape, and their accountability and the entire legitimacy of the adjudicative function in a free society would be at stake. This important point, by highlighting the danger of according judges the discretion to remake the very rules by which they are said to be bound,ceed as though corporate law were somehow quarantined from those considerations. Eisenberg’s richer rendition of coherence is more consistent with the Latin word cohaereo, meaning to “stick together” and to “be joined (by ties of relationship, friendship, etc.).” *Oxford Latin Dictionary* 347 (1969). Furthermore, to insist on “coherence” is, as with the references to accountability and efficiency, to invoke a norm from outside corporate law to justify the focus of corporate law. It is perfectly appropriate to do so provided it is recognized that coherence and efficiency and accountability must compete with other norms.

89. I am not suggesting that scholars overtly borrow from formalist legal theory; rather, the arguments made are often formalistic in nature. A prime example is Professor Ribstein’s continued reference to “the corporate contract” as if the contours of that notion were quite evident and its power to resolve legal disputes talismanic. See Ribstein, *supra* note 24, at 141-42, 150. One of the larger aims of this Article is to highlight the formalistic tone of discourse so that discussion within corporate law may become more self-conscious and more explicitly informed by larger (and important) debates in legal theory. The chief way in which corporate law has looked outside itself in the past decade is to use economic analysis and the language of contract law. Insights abound in those fields, but to speak as if invoking certain precepts from these areas will bring closure to the problems of corporate law (or law in general) is to become more, not less, rigid.

90. This is the primary concern of Robert Bork in the field of constitutional law where he argues that judges must resist the temptation to substitute their vision of the public good for that of the legislative branch or the framers of the Constitution. See R. BORK, THE TEMPTING OF AMERICA 143-60 (1989). For the very different views of a commentator whose conservative credentials are also impeccable, see R. Epstein, The Independence of Judges: The Uses and Limitations of Public Choice Theory 39 (Sept. 18, 1989) (paper delivered at Washington & Lee University School of Law) (copy on file with Texas Law Review) (arguing that independence of judges necessarily makes them somewhat unaccountable). However important the debate over judicial interpretation, it is one thing to argue about how judges should interpret texts written by others and another to argue about what judges should do in the absence of texts. In common law, of course, although there is precedent, there is no text (i.e., constitution, statute, or rule) to interpret; thus the problem of judicial discretion may be even worse. Indeed, Professor Schauer remarks that Professor Eisenberg, in attempting to describe what judges do in this area, follows a path that is “especially treacherous.” Schauer, Book Review, *supra* note 47, at 467. One appeal of the contractual theory of corporate law is that it purports to describe a bargain and, hence, it again reduces the judicial function to interpreting a bargain—a kind of text—struck by other parties. See *infra* note 104 and accompanying text. Thus, the contractual theory of the corporation has profound implications for how judicial power seemingly is constrained in the corporate sphere.
expresses the puzzling nature of the common-law method generally.\textsuperscript{91} Corporate law, however, cannot pretend to elude the full import of this larger theoretical quandary by clutching the security blanket of a shrunken two-party world. Instead, we must directly examine the way in which the preconceptions, methodology, and the very structure of corporate law— for which judge-made law plays an integral role—fit into overarching concerns about judicial law making. The task for scholarship is to transcend the doctrinal cubbyholes of corporate law and explore (or at least be as sensitive to) similarities in judicial law making across legal fields.\textsuperscript{92} Once we have made that move into the realm of legal theory, the challenge will be to steer between the formalist claim and the realist claim. On the one hand, the formalist argues that judge-made doctrine occupies a discrete normative universe both smaller than and largely immune from incessant encroachment by the totality of social propositions. The realist, on the other hand, insists that “social propositions are the masters in every case.”\textsuperscript{93}

It is beyond the scope of this Article to explain or defend in general the common-law method and the interaction of what Professor Melvin Eisenberg has called “social propositions” and “doctrinal propositions.”\textsuperscript{94} Rather, the Article addresses one conspicuous instance of the interplay between legal doctrine and social norms in an effort to demonstrate how the claims of formalism and realism might be reconciled. It contends that corporate law is not the stronghold of unalloyed formalism it is sometimes thought to be and that support for its traditionally narrow focus on shareholder primacy is inescapably grounded in larger social norms. Furthermore, those possibly conflicting and ever-evolving social norms vitally influence the adjudication of takeover contests even though Delaware’s judges look to, and speak in terms of, the twin doctrinal

\textsuperscript{91} See M. EISENBERG, supra note 47, at 43-49.

\textsuperscript{92} Dean Robert Clark's recent article on the advantages and disadvantages of various sources of rules—contractual, elitist, and traditional—while not focusing exclusively on judicial lawmaking, is a valuable effort to place corporate law, indeed legal and normative systems generally, into a broad perspective. See Clark, Contracts, Elites, and Traditions in the Making of Corporate Law, 89 COLUM. L. REV. 1703, 1703-47 (1989). Professor Kronman criticizes Dean Clark for failing to explain why he chooses to assess the pros and cons of the various sources from the standpoint of welfare maximization. See Clark, supra, at 1713 n.30; Kronman, A Comment on Dean Clark, 89 COLUM. L. REV. 1748, 1755-56 (1989). It would be interesting for Clark to analyze situations in which sources of law supply disparate normative frameworks. For example, given that the main concern of people making contracts might be understood to be welfare maximization, their behavior might rightly be evaluated in those terms. But tradition in any but the most stagnant society might bequeath a more complex set of values on which to base an evaluation of this behavior. From what vantage point or by what decisional rule does one, even in theory, determine which source of law should govern? Although Clark ends up favoring tradition, he seems to reach this conclusion on some basis other than his original basis of welfare maximization. See Clark, supra, at 1744-47.

\textsuperscript{93} Schauer, Book Review, supra note 47, at 466.

\textsuperscript{94} See M. EISENBERG, supra note 47, at 1.
strands of corporate law—management discretion and shareholder primacy. This Article contends that doctrinal propositions are socially loaded vessels that are occasionally reloaded to better fulfill their function as the clumsy but vital vernacular in which widely subscribed notions about the proper meaning of corporate activity are expressed. Moreover, because courts are not the fount of their own authority to make law, and inasmuch as they owe a duty that radiates beyond the immediate litigants to society at large, the adjudicative function would face a legitimacy crisis if judges did not mediate social norms and legal doctrine, not because they do.

2. Misunderstanding Corporateness.—At a more local but related level, and in a further attempt to delimit both managerial and judicial discretion, some assert that the nature of corporate relationships has been badly misconceived. Rather than liken shareholders to citizens in an economic polity or to owners of property or even to beneficiaries under trust law, many corporate scholars draw on the work of financial economists to describe corporate relationships in the language of contract law.95 The corporate firm as a reified entity is dismantled into a network of two-party contractual relationships. A business firm is simply the nexus where economic actors pursue the beneficial, bargained-for

95. For the economics literature, see Alchian & Demsetz, Production, Information Costs, and Economic Organization, 62 AM. ECON. REV. 777, 794 (1972) (asserting that the contractual structure of the firm arises as a means of enhancing efficient organization of team production); Cheung, The Contractual Nature of the Firm, 26 J.L. & ECON. 1, 1-21 (1983) (interpreting Coase's arguments about the scope of economic behavior in the light of the findings about contracts in general and about the piece-rate contract in particular and arguing that the word "firm" is a shorthand description of a way to organize activities under contractual arrangements); Jensen & Meckling, Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure, 3 J. FIN. ECON. 305, 307-08 (1976) (discussing the behavioral implications of the property rights specified in contracts between the owners and managers of a firm); Klein, The Modern Business Organization: Bargaining Under Constraints, 91 YALE L.J. 1521, 1521 (1982) (suggesting that the most useful way to analyze the modern enterprise is to interpret the terms of the economic arrangements of a firm as a series of bargains subject to constraints and made in contemplation of a long-term relationship); Williamson, Corporate Governance, 93 YALE L.J. 1197, 1200 (1984) (using a microanalytic approach in transaction-cost economics to examine contracts of corporate constituencies). The origins of the contractual approach go back to Coase, The Nature of the Firm, 4 ECONOMICA 386, 390-92 (1937), but only began to influence corporate-law theory in any significant way in the 1980s. For legal scholarship drawing on this economics literature, see Bebchuk, Limiting Contractual Freedom in Corporate Law: The Desirable Constraints on Charter Amendments, 102 HARV. L. REV. 1820, 1840-46 (1989) (concluding that labor, control, capital, and product markets will discourage managers from bringing value-decreasing amendments with respect to "insignificantly redistributive issues"); Butler, The Contractual Theory of the Corporation, GEO. MASON L. REV., Summer 1989, at 99, 99 (providing an extensive explanation of contractual theory of the corporation); Ribstein, supra, note 24, at 75-94 (developing the theory that takeover defenses are terms of the shareholders' contract); Bebchuk, Contractual Freedom in Corporate Law—Foreword: The Debate on Contractual Freedom in Corporate Law, 89 COLUM. L. REV. 1395 (1989); see also Butler & Ribstein, State Anti-Takeover Statutes and the Contract Clause, 57 U. CIN. L. REV. 611, 615-17 (1988) (summarizing the contractual theory of the corporation).
exchange of productive inputs.\textsuperscript{96} The chief axis still runs from shareholders to management, however, and shareholders alone are entitled to the unwavering devotion of managers because shareholders are residual claimants who get "paid" after everyone else's fixed claims are satisfied.\textsuperscript{97} To make the contractual model work, these scholars analogize shareholders to principals and corporate managers to agents—not agents of the corporation but the direct agents of shareholders. To support this metaphor, its proponents attempt to recast corporate law. Corporate statutes are regarded as "standard form contracts"\textsuperscript{98} made available to contracting parties to minimize the bargaining costs of assembling such a complex transaction. The parties remain free, however, to opt out of or contract around these normal provisions.\textsuperscript{99} Similarly, judicial doctrine dealing with the shareholder-management relationship is lifted out of the historically rich, context-bound domain of fiduciary obligation and is spuriously reduced to an effort to fathom "a standby or off-the-rack guess about what parties would agree to if they [had] dickered about the subject explicitly."\textsuperscript{100}

Recent commentators have criticized this metaphor and have seriously questioned its analytical utility.\textsuperscript{101} Two aspects of the contractual model warrant mention here. First, shareholder welfare remains central in the model because shareholder contractual rights are chiefly and most riskily at stake.\textsuperscript{102} Furthermore, the singular focus on shareholder welfare severely curtails both managerial and judicial discretion. Management's charge is simply to fulfill "the implicit terms of their employment agreements with shareholders."\textsuperscript{103} Judges are not free to roam the social landscape, but are to confine themselves to figuring out what the bargain is and then enforcing it or penalizing its breach.\textsuperscript{104} Corporate law is re-

\textsuperscript{96} For both a further description and a critique of this conception, see Bratton, \textit{The "Nexus of Contracts" Corporation: A Critical Appraisal}, 74 CORNELL L. REV. 407, 410-12 (1989).

\textsuperscript{97} See Macey, \textit{supra} note 24, at 186.

\textsuperscript{98} Butler & Ribstein, \textit{supra} note 95, at 617. Corporate statutes are sometimes described as establishing default rules to indicate that they apply in the absence of explicit choice. See Clark, \textit{supra} note 92, at 1706 & n.11.

\textsuperscript{99} See Bebchuk, \textit{supra} note 95, at 1820-25, 1859-60 (describing and criticizing position of unlimited right to opt out of corporate-law rules).

\textsuperscript{100} Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 436 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988); see also Easterbrook & Fischel, \textit{Corporate Control Transactions}, 91 YALE L.J. 698, 702 (1982) (discussing the advantages of the fiduciary principle and arguing that it approximates the terms to which two parties would agree in a true contractual negotiation).

\textsuperscript{101} See Bratton, \textit{supra} note 96, at 410; Dallas, \textit{supra} note 66; DeMott, \textit{Beyond Metaphor: An Analysis of Fiduciary Obligation}, 1988 DUKE L.J. 879, 889 & n.45.

\textsuperscript{102} See Macey, \textit{supra} note 24, at 180.

\textsuperscript{103} \textit{Id.} at 186.

\textsuperscript{104} Professor Ribstein states that the "law's role should be to interpret and enforce the contracts the parties have made and to provide generally waivable standard terms to reduce the costs of entering into customized agreements." Ribstein, \textit{supra} note 24, at 78.
garded as private ordering *par excellence,* and any sense of corporate law as public law is completely absent. In this way the model allegedly achieves its own esteemed virtue—commercial and juridical accountability. In reality, the power to supply a guess about what other people would agree to is an awesome power indeed, as is the even more basic power to decide whether particular formulations of the scope of the judicial task will be embraced or rejected. 105 Thus, the presence of a public law giver is inescapable, and judicial discretion is not so much limited as it is disguised.

The contractual model also supposedly fulfills the norms of judicial modesty, 106 determinacy, 107 and economic self-reliance. Persons are economic actors who, as contracting parties, are exhort to protect themselves by shrewd bargaining, not by expecting managers or judges to look after them. The contractual model thus presents a self-regulating system in which informed private ordering minimizes the need for public oversight. 108 Firms are a convenient meeting place for wary actors to negoti-

105. Professor Ribstein chides critics of this conception of “hypothetical bargain” for not understanding that this approach “is simply a way of arriving at a result when the parties have not bargained. The substituted-market result is justified not because it is the product of bargaining, but rather because it minimizes transaction costs.” Ribstein, *supra* note 24, at 108 n.193. Ribstein’s remarks confess the metaphorical (and nonconsensual) nature of the corporate contract, and they reveal an overtly normative objective for corporate law—to reduce transaction costs. The footings of that normative position cannot, however, be the bargain of the parties themselves because, concededly, the parties have not bargained over everything (including whether transaction costs should always and above all else be lowered and whether the corporate statute will enable them to waive the statutory provisions). Unavoidably, because the parties have not decided all the issues that might arise—indeed, have not been given the right to decide all issues—the contractual model does little to relieve the burden of the judicial “guess.” Thus, this position is not grounded on consent at all, but on its proponents’ desire to have judges make law in a particular way.

106. Professor Schauer has generally described the appeal of this virtue. See Schauer, *Formalism,* supra note 47, at 543; see also *supra* note 90 and accompanying text (examining the question of when straying from judicial modesty destroys legitimacy).


108. Professor Tribe describes the tendency to view the realm of private action as natural and prior to public intervention as a psychological and ideological predilection to perceive the existence of a private sphere—albeit circumscribed by law and by the state—in which actions are autonomous: “Many of us . . . cling to such institutions as freedom of contract and private property, viewing them as a natural ‘given’ part of the legal landscape which provides a background for our private, consensual transactions.” Tribe, *supra* note 18, at 10 n.40 (quoting L. TRIBE, CONSTITUTIONAL CHOICES 264 (1985)); see also *id.* at 23-24 n.90 (describing the way in which neoclassical economics makes assumptions about the background against which law operates).
ate to their own advantage. Enduring relationships are not valued in their own right, but will be attended to out of enlightened self-interest and dropped just as fast when better opportunities arise. The web of advantage must not become a snare of privation. Furthermore, this restless dynamic allows rapid redeployment of assets, and thereby the social good of ever greater efficiency in the use of resources can be achieved.

This vision of commercial activity, stark and mechanistic as it is, may well be a largely accurate description of human affairs. It might even be proffered with a twinge of regret.\(^ {109} \) Certainly, the belief that the world really works this way will shape one's understanding of law. The vision relies on certain base unchanging principles of human behavior drawn from economics,\(^ {110} \) which, as a social science, is naively believed to be immune from deeper critiques of law. The law's function, then, is fatalistically to accept and conform to perceived reality.\(^ {111} \)

Obvious problems with the contractual model are that, as an ontological matter, the world of social action might not work quite the way it is thought, and that, as an epistemological matter, relying on the insights of economics alone may preclude us from completely knowing whether it does. Moreover, the model ignores the way in which the very practice of contracting in markets is grounded on noncontractual social and legal values.\(^ {112} \) Finally, the stoic way in which this viewpoint chooses to re-

109. In commenting on Francis Fukuyama's provocative essay, Michael Novak describes what he regards as the single most persistent criticism of democratic capitalism, even among its friends: that it is spiritually deficient. It may work, they say. It may produce abundance. It may put an end to famine, curb disease, enable the average age of mortality to jump from eighteen in the year 1800 to seventy-five in 1986. It may even generate unprecedented liberties. But, they say, all this is for naught, since under democratic capitalism human beings live vacuous and empty lives. Novak, Boredom, Virtue, and Democratic Capitalism, 88 COMMENTARY 34, 34 (1989) (commenting on Fukuyama, The End of History?, THE NAT'L INTEREST, Summer 1989, at 3). Novak goes on to criticize this harsh judgment as grounded on the mistaken notion that democratic capitalism is intended to "fill the soul" or "teach a philosophy," rather than simply "create space within which the soul may make its own choices." Id. Novak is correct that market economies are not designed to provide spiritual fulfillment so much as liberation from certain oppressions. Regrettably, however, such economies tend to promote an outlook on life that is egocentric and oriented toward the satisfaction of ever-increasing material appetites without reference to how individual choices bear on others. Thus, the principles by which economic activity is organized become, however unintended, the underlying premises by which the moral order of a society is organized. See A. Wolfe, Whose Keeper?: Social Science and Moral Obligation 17-18 (1989).

110. As Professor Bratton points out, the contractual notion of the corporation "succeeded in bringing the interior of the firm to neoclassical economics and in bringing neoclassical economics inside the firm." Bratton, supra note 96, at 416.

111. To view the law as simply the vehicle by which the insights of social sciences can be brought to bear on human affairs is, of course, to ignore the way in which legal actions themselves alter the very social reality of which social sciences give an account. See Tribe, supra note 18, at 7-8.

112. From the vantage point of sociology, markets are social institutions:

When we say that markets are social institutions, what we mean, in part, is that they, like all social institutions, are constituted by a moral order. The term "moral order"... refers
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spond to its own existential analytic is laden with normative preference. It espouses crafty resignation and wariness over other equally available stances toward economic acquaintances, such as "foolish" sacrifice, commitment, and the preservation of trust. It also fails to acknowledge the richness of human motivation and the deeper affection felt for those who are closer rather than more distant in the economic sphere. The result is to ignore the important tasks of explaining why people should (or should not) consider the effects of their actions on others and of analyzing the respective roles of markets and state intervention (whether legislative or judicial) for inducing that behavior.

Thus, while the notions of accountability and efficiency serve as this model's apparent lifelines to more widely shared social norms, the dreary egoistic underpinnings make it clear that those notions are only enticing window dressing; they are not essential. The contractual model subscribes to the root norm that, in a pinch, people do—therefore they to the conditions of action which specify how people ought to behave. The moral order of a market, then, establishes rules about how one ought to trade, who is allowed to trade, and what are acceptable terms of trade, and it includes some kind of structural apparatus charged with the duty of enforcing market rules. That all markets are constituted by a moral order of this kind is no news to sociologists. It has been an important contention within the discipline since Emile Durkheim formulated his theory of the noncontractual bases of contract.

J. Burk, supra note 73, at 7-8 (1988) (footnote omitted); see id. at 144-45.

113. The conservative scholar Richard Epstein has recognized that theory must deal with the most powerful counterexamples of persons who do appear to behave with disinterested benevolence to their fellow man. Ideally (I think) we should seek a theory that allows us to recognize some exceptions to the dictates of self-interest. Such is in accord with our considered intuitions about self-interest, as with David Hume's wonderful phrase, "self-interest with confin'd generosity."

R. Epstein, supra note 90, at 5-6.

It is fitting for Professor Epstein to cite Hume, for as Professor Wolfe points out, Hume and other eighteenth-century thinkers recognized that to the degree that capitalism encouraged pure selfishness, it ran the risk of destroying its moral potential. The new economic order being created during the late eighteenth and early nineteenth centuries strengthened individual freedom, but it also made obvious the degree to which people in civil society were interdependent. Civil society, by forcing people to recognize the reality of their interdependence, made freedom possible. Freedom was a social, not a natural, phenomenon, something that existed only through the recognition, rather than the denial, of obligations to others.

A. Wolfe, supra note 109, at 15-16.

114. Many who refer to Adam Smith's classic 1776 political economy treatise, A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (1976), ignore the fact that in 1759 he also wrote a book on moral philosophy in which he depicted man as essentially a benevolent and altruistic being, not purely an egoist. See A. Smith, The Theory of Moral Sentiments 9 (D. Raphael & A. Macfie rev. ed. 1976) (6th ed. 1790). For a recent attempt to reconcile these seemingly incompatible positions based on the extent to which people are bound to each other by intimate ties, see Niel, Spheres of Intimacy and the Adam Smith Problem, 47 J. Hist. Ideas 611, 624 (1986).

115. See A. Wolfe, supra note 109, at 8-11. These tasks are of the utmost importance as the countries of Eastern Europe seek to build economies that in all likelihood will follow a "middle way" between pure market and command economic systems.
should—act to save their own skin.116 If that is one’s sense of life, why should the ethos in work and business or corporate law be different? Inevitably, the model shifts from description to prescription—we should be what we are—and the normative cards are played. In this case, the hand reminds one of B.F. Skinner’s work with pigeons.117 No doubt, people, like pigeons, often respond with distressing predictability to given stimuli. The difference is that people can choose to respond otherwise.118

Second, theorizing about the nature of corporations and corporate relationships is useful, even in the abstract. By isolating certain relationships for closer examination, corporate law can temporarily compartmentalize the social world to highlight and record portions of commercial phenomena in more digestible form.119 Moreover, theorizing often influences the way in which immediate participants in a specific legal dispute frame issues to comport with evolving social norms as well as existing legal doctrine. Of course, conceptualizing within too narrow a framework has serious drawbacks. Even the best intellectual paradigm may be plagued by proponents for whom its analytical constructs become fetishes—who deny that its vision is partial, bound in time and place, and always somewhat disengaged from the very reality it seeks to describe. Just as discrete social norms jockey for ascendancy and must periodically be reharmonized,120 so too must the seams of disparate fragments of intellectual cloth occasionally be opened and rewoven, if only provisionally and with humility, into a larger garment.

Moreover, as so often happens in our legal system, a prior question to what (is the nature of corporateness or the purpose of corporate endeavor) is who decides (what is the nature of corporateness or the pur-

116. In positing that humans regularly behave selfishly, the contractual theory, like the classical economic theory underlying capitalism, appears to be "anticommunal." As one observer has noted, however, "capitalism is probably more anticommunal in theory than practice, for human beings cannot be as consistently selfish and calculating as capitalist doctrine calls on them to be." Tinder, Can We Be Good Without God?, ATLANTIC MONTHLY, Dec. 1989, at 68, 84.


118. Some might prefer to say that we act as though people can choose to respond differently, but, for both individual behavior and legal doctrine, both phrases amount to the same thing.

119. In this way, corporate law's traditional focus on the shareholder-management relationship is useful. The mistake is to insist that this generally useful framework is always useful and disposi-
tive, especially when more fundamental matters are under investigation. See supra note 58. Although Professor Palmiter is wrong in asserting that courts have adopted shareholder wealth-
maximization as their sole reference point, his recent article on the duty of independence commendably acknowledges that the question of corporate purpose is an altogether different question, which he does not take up. See Palmiter, supra note 5, at 1368 n.57; see also Yablon, supra note 56 ("The remainder of this discussion . . . will assume . . . that takeover regulation exists to maximize benefit to target shareholders.") (emphasis added); cf. Gilson & Kraakman, supra note 88 (asserting that corporate law would be rendered "incoherent" were it to acknowledge the interests of nonshareholders).

120. See supra notes 68-74 and accompanying text.
pose of corporate endeavor). Today, the Delaware judiciary is the who, and therefore we must come to grips with the manner in which it thinks about corporate purpose, a practice that differs markedly from the approach of academic system builders. As these judges rule on complex and novel legal issues, unquestionably they seek guidance from both existing legal doctrine and more rarefied and intellectual models, structures, and metaphors. Yet the substantive insights of theory, however compelling from within the snug cocoon of an intellectual paradigm (here, the closed chamber of corporate law), will not remake corporate doctrine unless they also have "substantial support in the community." Given the interplay between social norms and legal doctrine in the common-law process, it is not enough that a legal theorist is bright and perspicacious, or even "right." One must also be appealingly and overwhelmingly right. Only then do fresh theoretical insights break through into new doctrine.

Before prevailing doctrine is reformed, there must be a substantial failure of congruence between social norms and legal doctrine. Otherwise, legal doctrine would be unstable, perhaps volatile, and not clearly deenarcted either from the realm of pure reason or from the universe of all social norms. Moreover, an enormous outlay of time and expense (with uncertain payoff) would be required if judges reexamined the rationales of doctrinal precedent in every case rather than uncritically referring to settled doctrine in all but the most novel disputes. With a precondition of breakdown in the connection between norms and doctrine, doctrine does change, albeit sometimes unjustly and often too slowly for those whose claims or theories are not yet accredited. Of course, this conception of the interplay between norms and law bespeaks a tremendous faith that, over time, consensus in a free society will congeal around only those ideals and practices that, in the stubborn residue of our arational and asocial selves, we regard as timelessly decent and just. Moreover, to admire the cautious dynamics of the common-law process regardless of its inherent flaws may simply be to reveal one's own root norm—a conservative preference for incremental change from time-tested traditions. This preference, however, seems predominant, if only by virtue of the continued and thriving functioning of our legal regime and widespread assent to its method and force.

121. See supra note 7 and accompanying text.
122. M. Eisenberg, supra note 47, at 15, 29.
124. See Clark, supra note 92, at 1727.
Today it is far from clear that there is substantial support for ex-
tending an unmitigated shareholder-primacy vision of corporate activity 
into the takeover arena,\footnote{If state antitakeover legislation is any 
gauge of public sentiment, shareholder primacy in the 
takeover arena is not a widely shared objective. See infra subpart IV(A). 
Moreover, according to one public opinion poll conducted in the wake of the 
RJR Nabisco buyout, a large majority of 
Americans believe that takeovers themselves are "somewhat" or "very" corrupt 
Furthermore, as argued infra Part III, in spite of the prevalence in legal theory of the 
shareholder-primacy norm, legal doctrine, in practice, has subdued it.} whether that vision is grounded on the recent 
contract model of corporateness or on more traditional portrayals. Thus, 
although proponents of this vision value stability and predictability of 
law and seek to curb decision maker discretion, to implement their vision 
of corporate life is to invent social consensus where none exists. If legal 
theory can either ordain such consensus or ignore its absence, what pre-
vents the managerial and judicial decision makers charged with oversee-
ing takeover transactions, once cut free of the anchor of social strictures, 
from similarly disregarding other social conventions, such as the respon-
sibility to fulfill and enforce contracts? Unless grounded on a foundation 
of nonmarket properties such as public trust and widespread assent to a 
preexisting normative order,\footnote{Professor Wolfe believes that "economic self-interest is made possible only because obligations 
are part of a preexisting moral order." A. \textsc{Wolfe}, supra note 109, at 17; see also supra note 112. 
For an argument that takeover activity might reduce trust, see Shleifer & Summers, \textit{supra} note 75, at 41-42. 
Whether takeovers actually have that effect is not the point. The point is that trust is 
vital to market economies and is not itself created or sustained solely by contract. 
Furthermore, we must be attentive to the ways in which economic activity both 
presupposes trust (and other virtues such as commitment and fair dealing) and occasionally 
serves to erode trust.} neither private market activity nor confi-
dence in judicial pronouncements is possible. For judge-made corporate 
law to ignore these qualities would be to unleash enormous discretion 
over corporate affairs and law in the name of constraining them. Thank-
fully, theory, metaphor, and the advancement of knowledge do not oper-
ate in a sociological or institutional vacuum. Thus, the province of 
corporate law is not as sealed off from other considerations, or as im-
mune from the exercise of judicial discretion, as is believed by many who 
have circled the ideological wagons.

III. Traditional Corporate-Law Doctrine

Having discussed the way in which many seek—but fail—to delimit 
the domain of corporate law to the shareholder-management relation-
ship, this Article next examines the manner in which traditional corpo-
rate-law doctrine reflects that narrow ambit of concern.

125. If state antitakeover legislation is any gauge of public sentiment, shareholder primacy in the 
takeover arena is not a widely shared objective. See infra subpart IV(A). Moreover, according to 
one public opinion poll conducted in the wake of the RJR Nabisco buyout, a large majority of 
Americans believe that takeovers themselves are "somewhat" or "very" corrupt processes. Kaplan, 
\textit{M & As: Should Congress Act?}, Nat'l. L.J., Feb. 27, 1989, at 1, 28. Furthermore, as argued infra 
Part III, in spite of the prevalence in legal theory of the shareholder-primacy norm, legal doctrine, in 
practice, has subdued it.

126. Professor Wolfe believes that "economic self-interest is made possible only because obligations 
are part of a preexisting moral order." A. \textsc{Wolfe}, supra note 109, at 17; see also supra note 112. 
For an argument that takeover activity might reduce trust, see Shleifer & Summers, \textit{supra} note 75, at 41-42. 
Whether takeovers actually have that effect is not the point. The point is that trust is 
vital to market economies and is not itself created or sustained solely by contract. Furthermore, we 
must be attentive to the ways in which economic activity both presupposes trust (and other virtues 
such as commitment and fair dealing) and occasionally serves to erode trust.
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A. The Abasement of Shareholders

In form, corporate-law doctrine respects the limited compass of the corporate sphere. Its rules express and strive to accommodate the twin strands of management discretion and shareholder primacy on a wide variety of issues.127 Yet judge-made corporate doctrine has never resolved the inherent tension between these precepts in a way that accords them equal prominence. Throughout the twentieth century, courts have subordinated the shareholder-primacy aspect to an ever-enlarging managerial prerogative.128 The question of to whom, exactly, management owes a fiduciary duty illustrates this development.

Early judicial pronouncements routinely declared that management's fiduciary duty ran not directly or exclusively to shareholders but to the "corporation and its shareholders."129 In spite of the concerted effort, past130 and present,131 to maintain a tight linkage between shareholders and managers and to avoid the conceptual pitfall of reification, the fact of the matter is that the "corporate enterprise" is distinct from and larger than the joint efforts of capital providers and managers. After all, Exxon's management operates Exxon's business, not the separate affairs of Exxon's shareholders. The emphasis on duty to the corporation, however, is also dangerous. It serves to mediate and blunt the direct claim of shareholders on management's efforts, making shareholders only indirect beneficiaries of an activity in which they already were bystanders. Having engendered the corporate form, imbued it with person-

127. See generally R. CLARK, supra note 53, at 21-22, 32-34 (balancing the enormous discretion of corporate centralized management against the duty of the manager to benefit the corporation and its shareholders).

128. For a concise description of the rise and drawbacks of this "managerial capitalism," see Conard, supra note 15, at 120-30. Undeniably, many theorists consider expansive managerial discretion to be perfectly consistent with shareholder primacy. See supra note 57. The discretion of managers to defeat hostile takeovers, however, continues to be a major stumbling block for this position.

129. See, e.g., Loft, Inc. v. Guth, 23 Del. Ch. 138, 167, 2 A.2d 225, 238 (1938) (asserting that corporate directors have a fiduciary relationship with the corporation and its shareholders and that the rules governing the conduct of trustees apply to directors), aff'd, 5 A.2d 503 (Del. 1939); see also 2 S. THOMPSON & J. THOMPSON, COMMENTARIES ON THE LAW OF CORPORATIONS § 1320, at 778 (3d ed. 1927) (commenting that "[t]he rule is thoroughly embedded in the general jurisprudence of both America and England that the status of directors is such that they occupy a fiduciary relation toward the corporation and its stockholders" (emphasis added)). For the effect of this formulation of managerial duty on judicial review of management's takeover duty, see infra subpart IV(B).

130. Professor Adolf Berle drew on the law of trusts as a means of constraining managerial discretion by likening shareholders to beneficiaries of a trust. See Berle, Corporate Powers as Powers in Trust, 44 HARV. L. REV. 1049, 1049-51, 1072-74 (1931). Later, he turned to public welfare considerations for restraints on managerial discretion. See A. BERLE, POWER WITHOUT PROPERTY: A NEW DEVELOPMENT IN AMERICAN POLITICAL ECONOMY 102-10 (1959) (arguing that the legitimacy of a corporate management depends on a consensus of acceptance by the public).

131. Those who advocate a contractual and market-oriented model of the corporation and who describe managers as the "agents" of shareholders are the outstanding example.
ality, and conferred the privileges of personhood upon it, however, the law could not very well ignore it as a sociolegal artifact. Thus, since the corporate form first began to emerge as a dominant business organization, the claim that shareholders are the sole recipients of managerial devotion has been, in the discourse of corporate law, less fact than fantasy.

The preeminence of shareholders in corporate affairs has faced other assaults as well. First, although shareholders possess suffrage under corporate statutes and may remove derelict directors, recourse to this mechanism often proves futile because coordinating large numbers of shareholders into effective collective action is colossally problematic and because management ordinarily dominates the proxy machinery. As a result, most disenchanted shareholders dispose of their stock on capital markets rather than pursue internal governance remedies of doubtful efficacy. Second, except in cases that implicate the duty of loyalty, the infamous business-judgment rule’s emphasis on the managerial-discretion strand of corporate law insulates most managerial behavior from meaningful judicial review. In the past decade, great judicial deference to management’s decision not to pursue, or to seek dismissal of, corporate derivative actions has exacerbated this longstanding problem. Third, throughout the twentieth century many corporations have regularly contributed significant amounts of money to social, educational, and humanitarian organizations and, due to the previous two factors, management has largely succeeded in warding off shareholder


133. Historically, legal doctrine’s assertion that managerial duty ran to the “corporation and its stockholders” might be a pragmatic doctrinal accommodation to the raging late nineteenth- and early twentieth-century debate over the nature of corporateness. Asserting that directors owe duties to stockholders acknowledges the corporation as an aggregation of individual actors, and emphasizing duties to the corporation expresses that corporations are entities separate and distinct from individual participants. Rather than seek to resolve a theoretical debate that could not be, and did not need to be, resolved at the doctrinal level, see infra text accompanying notes 180-81, pretakeover legal doctrine in the fiduciary area simply equivocated. In this example, instead of settling an issue, tradition merely bracketed it in the service of resolving several shareholder-manager issues that arose in twentieth-century corporate law. See supra note 92. As takeovers brought the question of corporate purpose to the fore, however, the dormant tension between duty to the corporation and duty to its shareholders resurfaced. For a historical account of theories of the corporation, see Bratton, The New Economic Theory of the Firm: Critical Perspectives from History, 41 STAN. L. REV. 1471, 1482-501 (1989). For an argument that theories of the corporation by themselves have no determinate thrust, see Millon, Theories of the Corporation, 1990 DUKE L.J. (forthcoming).

134. See R. CLARK, supra note 53, at 390-400.

135. See Conard, supra note 15, at 144-46.

136. See Palmiter, supra note 5, at 1363-66.

137. See R. CLARK, supra note 53, at 123-25, 136-40; Palmiter, supra note 5, at 1358-62.

138. See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS pt. 7 (Tentative Draft No. 9 1989).
challenges to those donations.\textsuperscript{139}

Some observers contend that these developments cannot be squared with the fundamental postulate that the law must make shareholder welfare paramount in corporate endeavor.\textsuperscript{140} These observers stress that large-scale corporate philanthropy is incompatible with the vision of shareholder primacy\textsuperscript{141} and that "shareholder democracy" is either a mythical remnant from a bygone era or, worse, a cruel hoax.\textsuperscript{142} Many observers, alarmed at the extent to which unbridled managerial discretion has subjugated shareholder welfare, would meliorate the shareholders' predicament within the traditional doctrinal framework. Reinvigorating judicial review of management behavior and bolstering other monitoring mechanisms such as independent boards and the derivative action are oft-heard proposals along this line,\textsuperscript{143} as is the call for institutional investors to flex their new-found muscle.\textsuperscript{144} As a first step toward reclaiming shareholder primacy, however, others would proceed more boldly and seek to completely reorient our thinking about corporate relationships. The appearance of the contractual model of corporate law is an example; it is a resourceful attempt to synthesize the normative centrality of the shareholder function with the conceded reality of management's awesome discretion.

Still others have trundled out yet another device for reconciling certain adverse developments with shareholder preeminence—the elusive notion of the "long run."\textsuperscript{145} In essence, particularly with corporate largesse, acts that do not immediately augment corporate profits or shareholder wealth, but that benefit one or more nonshareholder groups in the community, can nonetheless be justified and sustained against judicial

\begin{itemize}
\item \textsuperscript{139} See Davis, supra note 63, at 57-75.
\item \textsuperscript{140} For a summary of objections to corporate voluntarism and the role of the business-judgment rule in supporting managerial discretion in the expenditure of corporate funds, see id. at 13-28.
\item \textsuperscript{141} See id. at 13-19. The classic statement is that by economist Milton Friedman:
\begin{quote}
Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than to make as much money for their stockholders as possible. This is a fundamentally subversive doctrine. . . . [T]he direction in which policy is now moving, of permitting corporations to make contributions for charitable purposes[,] . . . is a step in the direction of . . . undermining the basic nature and character of our society.
\end{quote}
\item \textsuperscript{142} See Conard, supra note 15, at 127-28.
\item \textsuperscript{143} See, e.g., Brudney, Corporate Governance, Agency Costs, and the Rhetoric of Contract, 85 Colum. L. Rev. 1403, 1431 (1985) (proposing for managerial transactions "newer forms of incentive and sanction" and "intervention by external authority . . . to set limits on . . . the terms within which the parties can 'bargain' for their private ordering"); Cary, Federalism and Corporate Law: Reflections upon Delaware, 83 Yale L.J. 663, 696-705 (1974) (calling for a uniform federal act applying to all corporations engaged in interstate commerce that would help stop the "race to the bottom" in state courts).
\item \textsuperscript{144} See Conard, supra note 15, at 131-44.
\item \textsuperscript{145} See Davis, supra note 63, at 26 n.66.
\end{itemize}
scrutiny because they enhance the corporation's long-run interests.  

This notion thus permits management to take explicit account of non-shareholder interests so that the enterprise, and hence shareholders, are better off over the longer term. This rationalization is a wonderful tribute to the fluidity of corporate doctrine; it is the complete reverse of the orthodoxy that emphasizes how, by focusing solely on shareholder welfare, the larger social good is attained.  

Whether a particular management action actually achieves a salutary effect is a question that cannot be answered; thus, it is never posed. Instead, the chief attraction of the long-run phantom is its marvelous ability to apparently harmonize management discretion with shareholder primacy while, in fact, sweeping the whole thing under the rug.

Whatever the form of response to unfavorable developments for modern shareholders, two observations remain clear. First, most attempts to explain, defend, or rectify the situation are premised on a shareholder-oriented conception of the corporation. Thus, the structural presuppositions and normative thrust of corporate law are honored. As such, the proper treatment of shareholders is still conceived of as a governance issue, not an issue going to the very purpose of corporate activity. So framed, corporate hegemony, not direction, endures as the thematic focus of corporate law, and shareholders and managers persevere as the only respectable contestants for the center of the stage. Second, notwithstanding continued lip service to the orthodox notion of shareholder primacy, pretakeover corporate-law doctrine upheld the management discretion strand in virtually every conflict not colored by unambiguous self-interest. In fact, this stranglehold was so overwhelming that it jeopardized the continued viability of the fundamental

146. See id. at 57-64.

147. See supra note 23; supra text accompanying note 81.

148. The late Professor Donald Schwartz described how the rationale of the “long run” only pays lip service to the profit concept because the analysis fails to test whether long-term profit expectations were reasonably related to the decision. In other words, if wealth enhancement justified the decision, the discounted value of anticipated profits should exceed present foregone gains. The courts did not ask this question.

Schwartz, Defining the Corporate Objective: Section 2.01 of the ALI’s Principles, 52 GEO. WASH. L. REV. 511, 516 (1984). Robert Reich believes that “some of the expenditures . . . [made by business executives to benefit shareholders over the long term] had little positive effect on the corporation’s bottom line.” Reich, supra note 80, at 76.

149. See Palmiter, supra note 5, at 1361. Many corporate theorists consider a large measure of managerial discretion to be consistent with shareholder primacy. See supra note 128. This position is common among those who regard takeovers as a potent capital-market check on managerial discretion. See Easterbrook & Fischel, supra note 100, at 705-06. Thus, this revisionist view of twentieth-century corporate-law developments blossomed after the takeover phenomenon emerged and now depends on continued takeover activity for its viability. See Palmiter, supra note 5, at 1360-62.
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postulate. From corporate law's standpoint, theory and reality were at intolerable odds.

B. Corporate Takeovers and the Restoration of Shareholders

Into this conceptual maelstrom came hostile takeovers. This new form of corporate transaction, little known before the mid-1960s, threatened to break the skewed equipoise in which the management-discretion and shareholder-primacy strands of corporate law rested. As direct invitations to purchase shareholder stock, tender offers circumvented target management's firm grip on corporate activity and empowered shareholders in a way lacking since the capital-owning and capital-managing functions had first been sundered. As a result, they introduced both untold promise and a major dilemma into corporate law. While mouthing allegiance to the canon of shareholder primacy, the law had failed to assure it. Now, with the emergence of a powerful securities-market mechanism for imposing shareholder will on corporate affairs, it seemed within reach. In retrospect, some would say it had been there all along, waiting like a star to be discovered.

Hostile takeovers, and the novel market-driven notion of corporate law of which they are an integral part, would at last do what moribund internal governance mechanisms, judicial review, and corporate derivative actions could not—police management discretion. They would not rid management of discretion but would penalize its abuse and thereby hold it in check. Takeovers promised to recapture true accountability to shareholders and achieve greater efficiency in the use of scarce resources. Takeovers would redress an imbalance of power in the two-party world of corporate law and reestablish internal systemic consis-


151. An example is Professor Hetherington, who finds it "incredible that Berle and Means assigned so little importance to the role of the market in disciplining management." Hetherington, Redefining the Task of Corporation Law, 19 U.S.F. L. Rev. 229, 236 (1985).

152. See supra note 44. For a recent and optimistic assessment of the governance function of hostile takeovers, see Jensen, The Eclipse of the Public Corporation, Harv. Bus. Rev., Sept.-Oct. 1989, at 61, 64-65 (arguing that takeovers create new value and unlock value that was destroyed by inefficient management).
tacency with the core premise of shareholder primacy. In short, takeovers promised a true restoration and, from the limited perspective of corporate law, the promise was welcome and long overdue. As with so many heralded changes, however, when they finally occur, a nagging disquietude sets in and we begin to wonder whether what we got is really what we wanted. 153

From a vantage point broader than corporate law’s perspective, it is worthwhile to ask whether we should simply forget decades of experience with the corporate institution during which management fidelity to shareholder interests was somewhat loose and strive to establish a more vigilantly proshareholder vision. In other words, should the prospect of a shareholder restoration be warmly greeted, or has the notion of shareholder primacy rightly suffered such disabling violence that it should at last be forthrightly dethroned? Given the unparalleled prosperity of the pretakeover midtwentieth century, a prosperity enjoyed by shareholders and nonshareholders, relatively few persons saw any compelling reason for worrying about investor welfare or fretting about corporate law’s accountability dilemma. Outside the orbit of corporate law, the goal of shareholder primacy seemed to coexist peacefully, if loosely, with the reality of managerial liberty. As economic growth slowed in the 1970s and 1980s, however, and the United States witnessed a diminution in its formerly unrivaled economic superiority, the abilities and discretion of corporate executives were subjected to renewed scrutiny from many quarters, not simply from those who wanted to sharpen the focus on shareholder interests. 154 Thus, the intellectual impetus for institutional reformation was born not from corporate law’s lofty concerns (although its storehouse of precepts was there in obliging support), but from the more widely felt displeasure about the performance of American corporations in a world economy.

Although rethinking and rechanneling managerial discretion is an uncontroversial goal, it does not follow that rearming shareholders is equally unobjectionable. There are other social desiderata to be consid-

153. As only Garrison Keillor could put it: “Some luck lies in not getting what you thought you wanted but getting what you have, which once you have it you may be smart enough to see is what you would have wanted had you known.” G. KEILLOR, LAKE WOBEGON DAYS 337 (1985).

154. Critiques of managers of publicly held corporations are legion. Nonetheless, the 1970s and 1980s witnessed a greatly heightened concern over managerial competence, a concern that came to be encapsulated in the emphasis on American competitiveness in the world marketplace. According to one prominent commentator, “One of the most ominous developments for the future of America is the speed with which the Japanese are taking over the markets of the rapidly industrializing countries: Brazil, for instance, or India.” Drucker, Corporate Takeovers—What Is to Be Done? 82 PUB. INT. 3, 13 (1986). Drucker believes that because management had failed to develop a wide base of social support for its power, disenchantment with its performance, as manifested through high levels of takeover activity, left managers vulnerable to attack. See id.
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Remember, though, that in the cramped domain of corporate law, as manifested in corporate-law doctrine, there are only two citizens—shareholders and managers. With any realignment of power from one party to the other, corporate law unrealistically implies that no one else is affected. Other participants in corporate activity are unwelcome, irrelevant interlopers whose interests are to be protected, if at all, by mechanisms external to corporate law. As noted before, the simplifying assumptions of corporate law can be quite beneficial because they allow a manageable piece of social reality—here, the shareholder-manager axis—to be carved off and bracketed for special study. When the desire for analytical ease overrides fidelity to an altered and unruly social reality, however, and when the part under scrutiny is stubbornly clutched and never fitted back into the larger whole, then descriptive power is held captive to conceptual purity. The risk of corporate theory's unbending insularity to more expansive considerations, which severely diminishes the usefulness of legal theory in the richer environs where judges work to adapt legal doctrine to emerging phenomena, is apparent in corporate law's neglect of two key problems associated with hostile takeovers.

First, to what extent are nonshareholder interests adversely affected by high levels of takeover activity? As stated, this question is an empirical one on which no consensus has been reached. Although this subject is immensely important and controversial, corporate law has usually shunned it. Yet, interestingly, corporate theory itself has provided a recent glimmer of recognition that takeovers enable shareholders to do more than right their relationship with management. Takeovers simultaneously equip shareholders to impose their markedly greater appetite for risk (and debt) on the larger corporate ecosystem, namely on other parties with fixed claims on corporate endeavor, to the disadvantage of those

155. Robert Reich has made this unorthodox observation as well: "[T]oo much attention to shareholders' demands may in fact detract from the nation's long-term vitality—then the presumptive link between corporate executives' responsibilities to their shareholders and to the nation is severed. What is good for the shareholders is not necessarily good for the nation." Reich, supra note 80, at 77.

156. Bevis Longstreth, a former SEC Commissioner, recently expressed the sentiment that corporate-law doctrine simply was not designed to address the issues raised by corporate takeovers: "[The business-judgment rule] was not intended to bear the weight of the conflicts that emerge from change of ownership and control situations." Ex-SEC Member Urges Action to Protect Shareholder Rights in Control Contests, 21 Sec. Reg. & L. Rep. (BNA) No. 39, at 1494, 1495 (Oct. 6, 1989).

157. See supra note 119 and accompanying text.

158. Richard Epstein neatly captures the tradeoff between descriptive richness and analytical rigor: "The richer theory may lead to ad hoc explanations while the more powerful theory may miss important features of the overall situation." R. Epstein, supra note 90, at 7.
parties. Some draw on this likelihood to suggest, with varying degrees of enthusiasm, that corporate management must now include non-shareholder interests under the protection of its fiduciary umbrella. Thus, the takeover phenomenon has engendered unmistakable signs of partial erosion in the formerly impregnable two-party sphere of corporate law. Others, however, rush to shore up its girders, adamantly insisting that nonshareholders stay out of corporate law and seek refuge elsewhere, perhaps through contract law or legislative intervention.

Second, those who continue to resist the incursion of non-shareholder interests into the domain of judge-made corporate law imply that the legislative branch is, today, equipped to deal with the repercussions of takeovers. Yet, nothing approaching consensus exists on this controversial issue. On many key points, we are operating in the world of conjecture and possibility, not certainty. When it comes to legislation, agnosticism breeds inaction. Thus, Congress does nothing. Delaware’s judges, however, do not have the luxury of inertia, and today they play the pivotal role in speaking to takeovers. Consequently, if non-shareholder, nonmanagement considerations are to be judicially acknowledged, they must find expression in preexisting judge-made precepts. In today’s binary world of corporate doctrine, these factors must somehow align themselves with one or the other of the only two mainstays in the corporate-law world—shareholders or managers. Given the traditionally low level of corporate social responsibility in our society and an understandable reluctance to expand the range of managerial discretion further, it is not especially easy or satisfying to join

159. Even Professor Macey, a takeover enthusiast, concedes this point. See Macey, supra note 24, at 182. See generally Coffee, supra note 8, at 1-15 (recognizing that increased shareholder controls threaten directors' managerial powers). Management-initiated restructurings designed to preempt unfriendly takeover attempts also have this effect, although incumbent senior managers remain intact by placating shareholders at the possible expense of nonmanagement third parties such as employees.

160. Many states have passed laws declaring that in making corporate decisions, a director may consider the interests of nonshareholder constituencies. See, e.g., CONN. GEN. STAT. § 33-313(c) (1989) (permitting directors to look to the interests of employees, customers, creditors, and suppliers, as well as at community and societal considerations, in determining the best interests of the corporation); MINN. STAT. ANN. § 302A.251, subdiv. 5 (West Supp. 1990) (same); PA. STAT. ANN. tit. 15, § 12423.1(a)(2) (Purdon 1988) (authorizing directors to consider the effect of any action on employees, suppliers, and customers, as well as on communities in which corporate facilities are located, and also to consider “all other pertinent factors”).

161. See Macey, supra note 24, at 200-01; Ribstein, supra note 24.

162. One attribute of the judicial law-making process is that, within jurisdictional and procedural limits, citizen disputants can “force” judges to address problems in a more direct and immediate way than they can compel legislators to act. The Delaware Chancery Court responds to litigant entreaties with remarkable speed. See Cary, supra note 143, at 686-92 (discussing the relative freedom to litigate corporate claims in Delaware and the role of Delaware’s legislature and judiciary in developing the state’s corporate law).

163. In describing the extent to which statutes and cases authorize corporate management to
noninvestor elements with management. At the same time, although noninvestors might generally loathe managerial discretion over corporate affairs as much as shareholders, on the takeover front the interests of shareholders and nonshareholders may seriously diverge, making them even more unlikely allies. Thus, while nonshareholder concerns are not easily fitted into the straitjacket of traditional corporate-law doctrine, their interests in takeovers are more closely linked to managers than to shareholders.

The question remains, nonetheless, whether judge-made corporate law should acknowledge the effects of hostile takeovers on nonshareholder groups through an expansive interpretation of the management-discretion strand of corporate doctrine. In tilting the internal balance of power away from management and back to shareholders, takeovers are an attractive antidote for corporate law's internal set of problems. Many in corporate law embrace takeovers for that effect alone and without regard to their effect on others outside the corporate governance scheme. These observers take our lack of information on certain nonshareholder dimensions of the takeover issue to be irrelevant to judge-made corporate law as it continues in a self-absorbed search for answers to its own inner quandary. So long as we know that shareholders profit handsomely from takeovers—as we undeniably do know—many contend that the mission for corporate law is obvious. It should permit shareholders to gather rosebuds while they may, leaving to other disciplines and institutions the task of dealing with whatever undesirable outgrowth ensues.

Still, just as sanction for the limited reach of the corporate-law domain must be found in underlying social norms, so too with the bipolar world of corporate-law doctrine. In advocating that judge-made corporate doctrine should embrace takeovers as a vital instrument for vindicating shareholder rights and achieving order in the closed world of

expend corporate funds for nonshareholder purposes, Professor Davis sums up the magnitude of such expenditures:

While the authorities to date are too sparse to permit meaningful assessment of just how far the corporation may go in improving the world at the expense of its shareholders, it could have been said with confidence, as recently as ten years ago, that little exists to suggest that the level of expenditures contemplated by these express authorizations rises to what an accountant would describe as material in relation to the corporation's overall financial condition.

Davis, supra note 63, at 8. Davis goes on to note, however, that management consideration of nonshareholder interests in the takeover context has "called that conclusion into question." Id. 164. See supra note 19.


166. See supra subparts II(B) and II(C).
corporate law, takeover enthusiasts overlook a basic point. They forget that, as a normative end, shareholder primacy in this new setting must find "substantial support in the community" and that traditional corporate-law doctrine, having submerged that norm for so long, will not radically change course without clear evidence that such support exists.

Judges will not hasten to achieve internal systemic coherence for the field of corporate law at the cost of sacrificing congruence with deep-seated notions about the appropriate meaning of corporate endeavor. The parameters of lawmaking are not as cordoned off from social forces as the simplifying assumptions and logical imperatives of model building. By no means would an alert judge conclude today that the full-throttled proshareholder position espoused by takeover proponents strikes a responsive chord in other groups in society. Furthermore, because judicial concern over the effect of takeovers on noninvestors can be housed only in the management-discretion strand of corporate doctrine, however ill-designed for that purpose, judicial reservations about the overall impact and value of takeovers—doubts that can and should inform corporate doctrine lest judges undermine their own legitimacy for the sake of preserving corporate law’s tidy symmetry—will lead to continued presumptive emphasis on managerial prerogative. Of course, many construe such an emphasis as evidence of the judiciary’s enduring thrall to corporate management. Viewed through the lens of corporate governance, that interpretation is perfectly sensible. Viewed from the wider angle of corporate purpose, however, such a reading is far too myopic. For all the theoretical discussion about the liberating effect of takeovers on corporate law and corporate activity, the dynamics of judicial law making dictate that judicial underscoring of managerial prerogative will persist unless and until devotion to the norm of shareholder primacy demonstrably speaks to widely held expectations about corporate endeavor and succeeds in drawing those considerations under its own doctrinal mantle. Today, the notion of shareholder primacy has not achieved those goals in state legislatures and, in spite of considerable growing solicitude for shareholder welfare over the past few years, it meets stern resistance in Delaware’s judge-made doctrine. The next section addresses these observations.

167. M. Eisenberg, supra note 47, at 15.
168. For Professor Eisenberg’s discussion of “systemic consistency” and “social congruence,” see id. at 44-47.
169. See supra note 125.
IV. The Response of Corporate Law to Takeovers

A. The Legislative Response

Elsewhere I have described how state legislatures have reacted to the takeover phenomenon.171 Interestingly, to pass constitutional muster, states have lodged antitakeover measures in their general corporation statutes, thereby reclaiming primary regulatory authority over takeovers as capital-market transactions.172 This section briefly summarizes the motivations behind these responses and the manner in which they reject maximization of shareholder welfare as the primary objective of a corporation confronted with the prospect of a takeover. To the extent legislation is an important instrument for divining how social norms bear on a legal issue, these statutes provide a crude but revealing insight into the takeover views of a sizable segment of society. These views may not be wholly unselfish, enlightened, or efficacious; but they exist and cannot be discarded as so much legal folderol.

Most states have enacted legislation to regulate takeover contests because they feared the disruptive effects of increasing hostile-takeover activity on their economies. Delaware’s recent statute alone governs about half of all companies listed with the New York Stock Exchange.173 The overwhelming majority of public corporations are thus protected by state legislation.

All recent state takeover statutes share a common purpose: To discourage hostile takeover attempts by creating obstacles that require approval by target managers, thereby causing delay, uncertainty, and increased costs.174 Many of these laws use the rhetoric of shareholder welfare, but their primary goal is to protect nonshareholder interests thought to be affected adversely by hostile takeovers.

States recognize that takeover battles may assist bidders, financial intermediaries, and target-company shareholders, both to enhance their wealth and to establish an effective, if blunt, governance mechanism. Such contests might—although this effect is much more controversial—fulfill society’s desire for a more efficient use of economic resources. States also perceive, however, that all those benefits are likely to be realized by the residents of other states, leaving the economic and social costs

171. See Misreading the Williams Act, supra note 23, at 1873-82; Missing the Point, supra note 23, at 848-53.
172. See Misreading the Williams Act, supra note 23, at 1883.
174. See id. at 1862-63.
of corporate disruption to fall disproportionately on the state having the closest connection to the target company.

The increasingly typical "bust-up" takeover is of particular concern to state legislators. In this type of takeover, the bidder seeks to profit from large-scale asset liquidations or corporate restructurings that necessitate plant closings, layoffs, and relocations. Such takeovers "are believed to threaten jobs, established customer and supplier relationships, tax revenues, charitable contributions, and other economic and social benefits provided by resident companies to local communities." These local concerns have occupied the legislators' attention as they have responded to heightened takeover activity. Thus, for economic and political reasons, the states' chief motivation in passing takeover laws has been to deter tender offers, not to promote shareholder welfare. Moreover, state legislators have begun to acknowledge this motivation more candidly. Shareholder primacy, at least in the takeover context, has been renounced.

B. The Judicial Response

1. Judicial Ambivalence: Restraining and Enhancing Managerial Discretion.—Most of Delaware's takeover decisions arise in the same procedural posture. The hostile bidder or target-company shareholders implore one of the chancellors to enjoin various defensive measures adopted by target management, such as lockup options or shareholder-rights plans (poison pills). In addressing the complex issues raised by hostile takeovers, the Delaware judiciary has only a limited repertoire of legal rules. Moreover, these rules were developed in another epoch and for another purpose: To evaluate shareholder charges of managerial incompetence or disloyalty.

175. See id. at 1863.
176. Id.
177. See Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496, 502 (7th Cir.) (asserting that states are not constitutionally required to treat shareholder welfare as "summum bonum"), cert. denied, 110 S. Ct. 367 (1989).
178. See Missing the Point, supra note 23, at 848-50.
179. The Delaware Chancery Court is a court of equity. The Court has jurisdiction over traditionally equitable matters and over those actions in which equitable relief is sought. See DEL. CODE ANN. tit. 10, § 341 (1975). If legal relief is available before another court, the chancery court is without jurisdiction. See id. at § 342. This Article uses the term "common law" to describe the work of these equity judges, both for ease of reference and because they use the common-law method of adjudication.
180. See supra notes 129, 156 and accompanying text.
managers shirk responsibility or engage in unfair self-dealing, they damage the corporate enterprise by lowering net profits or asset values. They also harm the shareholders, both by lessening the amount of funds available for distribution and by potentially reducing the market price of the company's stock. This identity of corporate and shareholder interests in relation to management interests accounts for a phrase that surfaced early in pretakeover corporate law and that recurs throughout decisions evaluating management's compliance with its duties—corporate management is said to owe fiduciary duties to the "corporation and its shareholders."181

Until 1985, defensive measures adopted in response to a hostile overture were analyzed in much the same way as challenges to more conventional managerial behavior.182 The standard was whether the actions fell outside the spacious mantle of the business-judgment rule, a most unlikely prospect. In Unocal v. Mesa Petroleum Co.,183 however, the Delaware Supreme Court articulated a modified business-judgment rule for reviewing defensive tactics because it recognized that management responses to unsolicited takeover bids differed from routine operating behavior.184 The key distinction, according to the court, was the presence of management self-interest—an ingrained tendency to resist a bid purely to preserve control of the corporation rather than to advance shareholder welfare.185

In that same decision, however, the Delaware Supreme Court did something less visible, but equally, if not more, important. It sanctioned, albeit in dicta, the propriety of management's consideration of noninvestor interests in formulating defensive responses. The court asserted that in analyzing the effect of a takeover bid on the corporate enterprise, the second prong of the modified business-judgment rule analysis,186 directors may consider, among other matters, the impact on "creditors, customers, employees, and perhaps even the community generally."187

In effect, the Delaware Supreme Court differentiated takeover re-

181. See supra note 129 and accompanying text.
183. 493 A.2d 946 (Del. 1985).
184. Unocal requires target directors to prove the existence of reasonable grounds for believing that a takeover attempt endangers "corporate policy and effectiveness." Id. at 955. This burden is satisfied "by showing good faith and reasonable investigation." Id. (quoting Cheff v. Mathes, 199 A.2d 548, 555 (Del. Super. Ct. 1964)). In addition, a defensive measure must be "reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise." Id.
185. See id. at 954.
186. See id. at 955.
187. Id.
sponses from the normal run of managerial decision making in two respects—the presence of managerial self-interest and the potential adverse impact on nonshareholder constituencies. The latter dimension seemed oddly out of place in the bilateral world of corporate-law doctrine. To be sure, since Merrick Dodd’s 1932 article on the subject, commentators occasionally have advocated the inclusion of such factors in management’s field of fiduciary concern. Certain courts had even mildly accredited nonshareholder interests before, in the charitable contribution context and in other settings as well. Yet the Delaware Supreme Court had never been so candid about the subject in the takeover arena.

This unexpected opening was not lost on perceptive members of the corporate bar. Yet another ingredient in the vast mix of factors to be considered by target management had fortuitously entered the picture. Target-company lawyers saw what Adolf Berle had seen in responding to Dodd’s suggestion that management should be free to take account of manifold interests: introducing nonshareholder interests into the decisional matrix would further enhance managerial discretion and serve to blunt the pointed focus on shareholder well-being. To management and its counselors this development constituted a great advantage, one that could redirect Unocal’s spotlight away from managerial self-interest. Now the law allowed target management to rebuff takeovers not simply out of the entrenchment motives recognized by the Unocal court, but valiantly on behalf of nonshareholders. The demands on management in the takeover setting would thus be qualitatively different than the demands in the operating-decision context. In the latter context, at least in

188. See Dodd, For Whom Are Corporate Managers Trustees?, 45 HARV. L. REV. 1145, 1160-61 (1932).

189. See, e.g., Blumberg, Corporate Responsibility and the Social Crisis, 50 B.U.L. REV. 157, 204-08 (1970) (arguing that aggregate corporate social welfare expenditures will result in the fulfillment of many business objectives including the attainment of a more productive work force); Conard, Reflections on Public Interest Directors, 75 MICH. L. REV. 941, 959-61 (1977) (advocating that corporations reserve board seats for some directors who would function solely as representatives of customer and employee nonshareholders).

190. See Johnson, supra note 25, at 43.

191. See id. at 50-52.

192. One wonders what moved Delaware’s judges to enumerate nonshareholder factors as a proper element in managerial deliberation. Whether genuine judicial solicitude for these factors exists or whether they serve as a screen for shoring up managerial discretion, the rhetoric clearly looks outside the management-shareholder sphere to buttress the decision to allocate corporate power in a particular direction. See id. at 43-50; see also Loft, Inc. v. Guth, 23 Del. Ch. 138, 167, 2 A.2d 225, 238 (1938) (arguing that the law of trusts should apply to corporate governance issues), aff’d, 5 A.2d 503 (Del. 1939). Thus, issues of corporate governance, ostensibly involving only managers and shareholders, are not resolved solely by reference to manager and shareholder interests but require grounding in factors outside the traditional corporate paradigm.

193. See Berle, supra note 66, at 1371-72.
theory, loyalties undeniably ran to shareholder-wealth maximization, even at the expense of other participants. In takeovers, the Delaware Supreme Court seemed to be saying, multiple interests could be entertained in a way that might further loosen the shareholders' already tenuous claim to primacy. The very next year, however, the Delaware Supreme Court confronted and quashed, at least in part, this unorthodox reading of *Unocal*.

2. The Halting Emergence of Shareholder Primacy.—In *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, the Delaware Supreme Court noted that it was addressing for the first time the "extent to which a corporation may consider the impact of a takeover threat on constituencies other than shareholders." MacAndrews and Forbes made an offer to purchase Revlon that the Revlon board of directors rejected. The board adopted a poison pill rights plan and eventually granted a lockup option to Forstmann, Little & Co. as part of accepting Forstmann's offer to purchase Revlon. MacAndrews sued to enjoin the lockup option. The Delaware Chancery Court issued an injunction and the Delaware Supreme Court affirmed.

The Delaware Supreme Court began its analysis by reciting the common, but fuzzy, adage that directors owe fiduciary duties to the "corporation and its shareholders." The court then upheld the initial implementation of the rights plan because it advanced corporate interests and because it served the best interests of shareholders as well by "spurr[ing] the bidding to new heights." Only as the court addressed and invalidated the lockup option did it recognize the need to clarify and distinguish management's duty to shareholders from its duty to the corporation. The court found a change in duty so that maximizing the takeover premium for shareholders should have formed the directors' sole motivation when a sale of the company became inevitable. Once directors are transformed into auctioneers, directorial solicitude for noninvestor (in this case, creditor) interests or for preserving the corporate enterprise expires, overborne by the charge to garner top dollar for the stock.

195. *Id.* at 176.
196. *Id.* at 175.
197. *Id.* at 185.
198. *Id.* at 179.
199. *Id.* at 181.
200. *See id.* at 182.
201. The court asserted that a target-company board of directors "may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accru-
Unmistakably, in *Revlon* the Delaware Supreme Court sought to contain the potentially mutinous *Unocal* dicta and to resurrect the primacy of the shareholder-welfare strand of corporate law that, like an old soldier, is widely revered but mostly ignored. One salient question after *Revlon* was whether the shareholder-primacy strand would be given full play and made paramount at all times or whether it would apply only in the narrow circumstances of a *Revlon*-like multibidder contest for control. In 1987, in *Ivanhoe Partners v. Newmont Mining Corp.*, the Delaware Supreme Court tempered *Revlon*’s auction mandate by upholding Newmont’s defensive actions against T. Boone Pickens. The court emphasized that no generally applicable duty to auction a company under siege existed. Only the directors’ conclusion that a sale of the target company had become “inevitable” triggered such an obligation. In refusing to unleash the full force of shareholder primacy, the court reiterated that a target board outside the *Revlon* posture had broad discretion to consider the impact of a takeover bid on nonshareholder constituencies. Once in the *Revlon* mode, however, management’s range of action narrowed considerably; top price for the shareholders was the sole aim.

Thus, the obvious way for target-company management to subvert immediate shareholder primacy and retain maximum flexibility is to stay out of the *Revlon* mode. As could be expected, many decisions have grappled with the question of whether, under the circumstances presented, management had crossed the *Revlon* threshold. The Delaware Supreme Court recently underscored that *Revlon* applies in a variety of contexts, “whether the ‘sale’ takes the form of an active auction, a management buyout, or a ‘restructuring.’” Noting that the *Revlon* mode may be entered by diverse paths and that its threshold may be crossed unwittingly, the court also emphasized that not every offer or transaction affecting the corporate structure invokes the *Revlon* duties. A refusal to entertain offers may comport with a valid exercise of business judgment. Circumstances may dictate that an offer be rebuffed, given the nature and timing of the offer; the alternatives available and their effect on the various constituencies, particularly the stockholders; and any special

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203. See id. at 1341-42.
204. See supra note 30.
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factors bearing on stockholder and public interests.\textsuperscript{206} Consequently, the Delaware Supreme Court simultaneously stressed both the unexpected reach of Revlon and its clear limitation. It paid tribute to the norm of shareholder primacy while refusing to give it a free rein. In doing so, it gallantly sought to avoid a calamitous showdown between the two strands of corporate law and, instead, strove to strike a provisional accord.

Notwithstanding the Delaware Supreme Court's enduring approval of management attentiveness to nonshareholder interests outside the Revlon mode, no target company appears to have bottomed its business or litigation strategy solely on the need to protect those interests. Instead, management often concurrently asserts that its resistance is actually beneficial for shareholders. Although in form a tender offer aims directly at shareholders and appears to involve a simple decision on their part to sell or hold stock, management intervenes on the ground that its involvement can actually enhance shareholder well-being. Management undertakes to convert a pure stock disposition matter, taking place on national capital markets that are admittedly beyond management's sphere of influence, into a corporate matter, taking place in a realm in which its sovereignty is well established. Management achieves this conversion by pursuing a variety of tactics, perhaps finding a friendly merger candidate, altering the target company's asset composition or capital structure in some way, or causing the company to adopt one or more defensive measures. By recharacterizing the key moves in a takeover battle as corporate, not shareholder, efforts, management surmounts the risk that shareholder autonomy over stock alienation will work to its disadvantage.

Moreover, because management seizes the initiative and acts through the corporation, ostensibly for the benefit of shareholders, judges reviewing these defensive measures evaluate only the propriety of such corporate action, not the substantive impact on shareholders. Judges conduct this review by simplistic reliance on well-settled precedent—developed outside the takeover context—that courts will not disturb management's business judgment. Almost as if by alchemy, the whole complexion of takeovers is brilliantly transmogrified, and managerial dominion over their resolution is reclaimed. Just as apparent solicitude for nonshareholders amplifies managerial discretion, so too does the companion strategy of remolding the whole tender offer process, purportedly to better serve shareholders,\textsuperscript{207} into a corporate matter.

\textsuperscript{206} Id. at 1285 n.35 (emphasis added) (citations omitted).
\textsuperscript{207} There are plausible reasons for permitting managerial intervention in takeover contests, even where shareholder primacy is the agreed-upon objective. First, although quite rare today, two-
agement discretion leads at once in opposite directions.

The precise manner in which target-company management paternalistically, if double-mindedly, endeavors to make tender offers corporate matters, thereby depriving shareholders of sole decision-making authority for the paradoxical purpose of "helping" them, varies from case to case. One of the most common measures is a poison pill. Although the court upheld the implementation of such a measure in Moran v. Household International, Inc., the more important question—a question left open in Moran—is whether and when target management must redeem a pill. As courts examine that question, once again the twin strands of corporate-law doctrine pull in opposite directions.

There are credible reasons for management's participation in the tender-offer process, even from a shareholder-primacy perspective. As the court recognized in Unocal, however, such rationales for involvement might simply be a pretext for preserving sufficient managerial leeway to defeat a bid by refusing to redeem a pill. Because a court's analytical tools for sorting out improper from proper behavior are quite crude, it is likely that management will engage in self-serving behavior that escapes judicial sanction. After all, once a court acknowledges that management intervention might be proper to serve shareholder primacy and that this intervention necessarily takes the form of activity channeled through the corporate machinery, the court abruptly confronts the historic practice of meekly deferring to such company actions. And this precedent—grounded in the normative belief that public officials should stay out of private business affairs—is applicable even though the maneuver is not an operating decision but is manifestly an action taken in the takeover context and even though Unocal's modified business-judgment rule valiantly strives to be sensitive to the substantial risk of managerial self-interest. Short of altogether wresting takeover responses from the hands of corporate management or retrospectively reviewing the substantive tier bids serve to coerce target shareholders in a way that they are largely powerless to resist. See Missing the Point, supra note 23, at 846-47. The presence of target-company management compels a bidder to treat shareholders more even-handedly and thus counteracts the structural disadvantage faced by shareholders receiving such a bid. Indeed, it was this rationale that convinced the Supreme Court to uphold Indiana's takeover statute against constitutional attack on the pretext that it was, at bottom, a shareholder protection measure. See CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 93-94 (1987); Johnson, supra note 25. Second, even in structurally noncoercive, all-cash all-shares bids, management's resistance might help overcome a financially inadequate bid because management can do what large numbers of dispersed shareholders cannot—negotiate for a higher price by fighting the overture. Studies have empirically validated the value of management's measured resistance in achieving premiums for target shareholders higher than those initially offered. See Jarrell, The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?, 28 J.L. & ECON. 151, 174-75 (1985).

208. 500 A.2d 1346, 1348 (Del. 1985).
209. See supra note 207.
propriety of such gambits, permitting initial managerial involvement in takeover contests for the alleged purpose of protecting shareholders inevitably concedes the impropriety of scrutinizing too closely the way in which management fulfills its task. Once the camel's nose enters the tent, the rest of its body is sure to follow. This dilemma results when the supposedly core norm of shareholder primacy confronts the even stronger historic practice of judicial restraint.

Thus, in post-Revlon cases there are two diametrically opposed justifications for management's entanglement in the tender-offer process. First, management can consider nonshareholder or "corporate" interests. Second, management can protect the interest of shareholders in achieving current share price maximization. In quite dissimilar ways, each justification threatens to subvert the objective of shareholder primacy by validating management involvement. Operating within the shareholder-manager dyad of corporate-law theory, post-Revlon decisions have gamely struggled to reconcile the twin strands of shareholder primacy and management discretion. Expressed doctrinally, a court must first determine whether the Revlon mode has been entered; if so, the sole aim of management is to maximize current shareholder welfare; if not, the court must determine whether other circumstances mandate judicial overturning of management's actions to achieve the hallowed norm of shareholder primacy. Under the latter scenario, the practice of judicial restraint usually meant the subjugation of shareholder welfare. Thus, the premise of takeovers restoring shareholder primacy to corporate law was in jeopardy. Late in 1988, however, two Delaware Chancery Court decisions seized on the process value of shareholder autonomy over stock disposition in tender offers as a means of rescuing the substantive norm of shareholder primacy. In this way, that central norm might once and for all be freed of the drag of managerial discretion and elevated to the stature promised by orthodoxy and revived by Revlon.

3. The Tentative Ascendancy of Shareholders.—In City Capital Associates Limited Partnership v. Interco, Inc., the Delaware Chancery Court countenanced the propriety of management's integral involvement in a battle for corporate control but also proscribed that involvement

210. Professors Gilson and Kraakman advocate the introduction of at least a measure of "substance" into judicial review. See Gilson & Kraakman, supra note 88, at 266. This position represents a preference for shareholder welfare over a policy of deference by public officials (judges) in corporate affairs.


212. 551 A.2d 787 (Del. Ch.), appeal dismissed as moot, 556 A.2d 1070 (Del. 1988).
when the court believed it was inconsistent with shareholder welfare. City Capital Associates made a seventy-four dollar all-cash all-shares tender offer for Interco common stock, subject to the redemption of the target's poison pill. The Interco board rejected the bid as inadequate, proposed its own restructuring plan consisting of a package of cash and securities estimated to be worth a minimum of seventy-six dollars for each share, and refused to redeem the pill. The restructuring plan included the sale of Ethan Allen, a substantial division of the company. City Capital Associates sued to enjoin the restructuring and for an order requiring the target board to redeem the poison pill.\footnote{213} Chancellor Allen ordered the target board to withdraw the pill.\footnote{214} He first emphasized that the bid was not coercive and that "in the special case of a tender offer for all shares, the threat posed, if any, is not importantly [sic] to corporate policies . . . but rather the threat, if any, is most directly to shareholder interests."\footnote{215} Management was not precluded from becoming involved just because the case implicated a shareholder rather than a corporate matter, however. A bid, even if not structurally coercive, might be financially inadequate, and management might be able to extract a higher bid or arrange a more valuable alternative. Allen stressed, however, that there were limits to management participation. In Interco, the contest had neared its end stage, and although management had neither negotiated with the bidder for a higher price nor instituted a full-blown Revlon auction, it had generated and narrowed the options for shareholders leaving two functionally equivalent offers—the hostile bid and the management-sponsored restructuring.\footnote{216} According to Chancellor Allen, at that point, to preserve the division of decision-making power basic to our corporate governance scheme, management had to step aside and let shareholders decide between the hostile bid and the restructuring alternative because the choice was a quintessential

\begin{footnotesize}
\begin{enumerate}
\item[213] Id. at 789-91.
\item[214] See id. at 800.
\item[215] Id. at 797. Chancellor Allen thus collapses the historic distinction between the corporation and the shareholders. As a matter of logic and business reality, the fact that a tender offer is for all shares does not mean that there is not a threat to corporate policies as well as to shareholders' financial interests. What Allen implies, but does not say, is that in such a bid, shareholders' financial interests are more deserving of managerial efforts than corporate policies. That conclusion, which drops the corporate enterprise from the analysis, may serve shareholder welfare, but it inexplicably discards traditional formulations of managerial duty as running to the corporation as well as to the shareholders. For that reason, the conclusion deserves more careful analysis. One obvious explanation for Allen's statement in Interco is that management itself, in proposing its own restructuring, had essentially abandoned corporate policies as they had previously existed and thus was hardly in a position to defend them. See id. at 799. That explanation, however, leaves Allen's statement unexplained in the case of a target that refuses to defend itself by altering its pretakeover policies.
\item[216] See id. at 798.
\end{enumerate}
\end{footnotesize}
shareholder matter.\textsuperscript{217} Chancellor Allen asserted that depriving shareholders of the ability to accept a noncoercive offer would “be so inconsistent with widely shared notions of appropriate corporate governance as to threaten to diminish the legitimacy and authority of our corporate law.”\textsuperscript{218} This observation was germane to the outcome of the case because, in the words of Chancellor Allen, “corporation law exists, not as an isolated body of rules and principles, but rather in a historical setting and as a part of a larger body of law premised upon shared values.”\textsuperscript{219} Thus, Allen explicitly referred to underlying social norms to support his decision and thereby grasped the critical need for corporate doctrine to be rooted in those norms. Yet, Allen looked to social norms to highlight only one particular value—shareholder autonomy over disposition of private property. His choice underscores shareholder primacy in corporate affairs but, of itself, does not prevent the infiltration of additional norms into corporate law or dictate the preeminence of one norm—shareholder primacy—over others. As explained in the discussion of accountability, once one resorts to social norms originating outside corporate law, one meets a disarming panoply of such norms.\textsuperscript{220} The really intriguing question is which norm will hold sway over the others, and for how long.

Even Chancellor Allen paid only partial homage to the norm of shareholder autonomy. Although he ordered redemption of the poison pill, Chancellor Allen refused to construe the sale of the Ethan Allen division as triggering a full-scale \textit{Revlon} auction of the target, and he declined to enjoin the proposed sale of that division.\textsuperscript{221} Interco argued that, unlike a response to a tender offer, the decision to sell the Ethan Allen division was a corporate decision supported by sound business reasons rather than a shareholder stock disposition matter.\textsuperscript{222} The defensive strategy of recharacterization obviously succeeded because Chancellor Allen accorded the decision the substantial deference of a conventional business judgment.\textsuperscript{223} He reached this conclusion even though the sale of the division would drastically change Interco and even though he acknowledged that the sale “might imperil CCA’s ability to complete its transaction”\textsuperscript{224} and thereby effectively deprive target shareholders of the

\textsuperscript{217} See \textit{id.} at 799.
\textsuperscript{218} Id. at 800.
\textsuperscript{219} Id.
\textsuperscript{220} See \textit{supra} notes 63-74 and accompanying text.
\textsuperscript{221} See \textit{Interco}, 551 A.2d at 801.
\textsuperscript{222} See \textit{id.} at 794-95.
\textsuperscript{223} See \textit{id.} at 800-01.
\textsuperscript{224} Id. at 801. In fact, the bidder withdrew its offer after Chancellor Allen’s decision.
very financial choice Allen sought to preserve in ordering the pill redeemed.

Although that portion of Interco ordering redemption of the poison pill was denounced in some quarters for its severe proshareholder tilt, rarely has a case better illuminated how the shareholder-primacy strand of corporate law—apparently bolstered by the order to redeem the poison pill—continually encounters the threat of subduction and annulment by the management-discretion strand, which was vindicated by Chancellor Allen's refusal to enjoin the sale of Ethan Allen. Even though the opinion is at war with itself, it still represents a ringing, if partial, endorsement of shareholder primacy as achieved through direct shareholder choice rather than through management's acting as the enlightened agent of shareholders. As such, Allen’s opinion represents both a decisive doctrinal triumph for shareholder welfare and a statement of judicial approbation of a more vigilantly proinvestor conception of corporate purpose.

Soon after Interco, an even clearer repudiation of management's unqualified power to pursue what it claims is maximization of shareholder welfare appeared in Grand Metropolitan Public Limited Co. v. Pillsbury Co. In that case, Grand Metropolitan made a noncoercive, sixty-three dollar all-cash all-shares offer for Pillsbury stock. The Pillsbury board of directors spurned the offer as inadequate, refused to redeem its poison pill, and announced that it was developing a restructuring plan that would result in the spin-off and sale of certain of its assets over the next several years. The Delaware Chancery Court ordered the Pillsbury board to redeem the pill. In reaching that decision, the court observed that Pillsbury's management did not argue that resisting the bid was necessary to protect the corporate entity or nonshareholder constituencies. Consequently, the court asserted: "Whatever danger there is relates solely to shareholders and that concerns price only." Thus, although not implicated (or at least not raised) in that case, nonshareholder interests clearly had penetrated the consciousness of corporate law.

Having eschewed the role of keeper of the enterprise and its

225. See Meyers, supra note 36, at 75 (describing critical reaction to the Interco decision).
226. 558 A.2d 1049 (Del. Ch. 1988).
227. Id. at 1057.
228. See id. at 1060.
229. See id. at 1054-60. Indeed, one-half of the shares in employee pension plans had been tendered to the bidder.
230. Id. at 1056. This statement mirrors that of Chancellor Allen in Interco. See supra note 215 and accompanying text.
noninvestor constituencies, Pillsbury management brazenly asserted two claims in its defense. First, it conceded that the relevant benchmark for assessing its behavior was shareholder welfare and claimed that its restructuring plan was financially superior to the hostile bid. Second, management argued that it, not shareholders, should choose between the two options. The court, however, observed that for shareholders to obtain the projected higher share price under management’s alternative, they would have to “be patient and endure for a long time, perhaps until 1992 or 1993.” The court also noted that eighty-seven percent of the stock had already been tendered to the bidder and that shareholders stood to lose up to $1.9 billion dollars if the offer was defeated. As in Interco, the court thus confirmed management’s right to be involved in the takeover process but also reiterated the court’s power to halt management’s involvement when shareholder interests—mainly preservation of shareholder choice between two options—are jeopardized.

Interco and Pillsbury appeared to make an unprecedented breakthrough in corporate law. Rebuffing management’s efforts to equate their participation in tender offers to their role in normal operating decisions, the judiciary sought to maintain for shareholders the benefits of managerial involvement while safeguarding them from the risks of an unchecked discretion that might derogate shareholder welfare. At last, takeovers appeared to be fulfilling their promise of engineering the decades-long quest for accountability and for a restoration of shareholders to the center of the corporate stage. And the breakthrough was happening within the clumsy confines of traditional corporate-law doctrine. It seemed that the Delaware judiciary was forcefully reminding management and others that corporations under siege were, as always, to maximize shareholder wealth while giving shareholders a vital say in how this goal was accomplished.

At a more theoretical level, the Interco and Pillsbury decisions brought a considerable measure of consistency to the field of corporate law. The courts seemed to have successfully raised the core norm of shareholder primacy to the stature that it had been professed in theory—but doubted in reality—to occupy. It was as if the chancellors had lifted the domain of corporate law like a billiard table to return the balls to the

231. See Pillsbury, 558 A.2d at 1057.
232. See id. at 1059.
233. Id. at 1057.
234. See id. at 1058.
235. See id. at 1060 n.10.
236. See supra note 168 and accompanying text.
shareholder end of the table. Or so it seemed from within the sanctum of corporate law.

But as Professor Eisenberg has cautioned, systemic consistency is only one facet of the larger quality of coherence that we crave. The other aspect is social congruence, ringing true with norms transcending the artificial bounds of corporate law and concerning the deeper purpose of corporate endeavor. Was the rekindling of shareholder primacy in harmony with those norms? As the Delaware judiciary nearly completed the Sisyphean task of rolling the rock of systemic consistency to the top of the hill, Chancellor Allen hesitantly turned to check on the rock of social congruence; two decisions rendered by Allen in 1989 suggest that he saw it tumbling down the slope.

4. The Onset of Misgivings.—The case of TW Services, Inc. v. SWT Acquisition Corp. involved a bidder’s request for an order requiring the target’s board of directors to redeem its poison pill. The bidder had made an all-cash all-shares bid that resulted in the tender of eighty-eight percent of the target company’s stock. The bid was subject to several conditions, including board approval of the offer and board consent to enter into a merger agreement. This unusual latter condition gave Chancellor Allen an easy way out of the case. It also provided a risk-free opportunity for Chancellor Allen to engage in an extended public rumination on some very fundamental matters.

The target board’s response to the bid was to refuse to negotiate with the bidder and to refuse to redeem the pill or to take any short-term value-maximizing action whatsoever. Instead, the board argued that it was entitled to manage the corporation in the long-run interests of shareholders and, accordingly, had no obligation to develop an alternative to the hostile overture, which it persistently characterized as “merely an invitation to negotiate.” Without even applying Unocal’s modified business-judgment rule, Chancellor Allen declined to order redemption of the pill. Delaware law provides that a merger agreement, unlike a straightforward tender offer, is to be initiated by and requires the approval of the board of directors. Because the target board had refused to take such action, the board’s decision was subject to less stringent tradi-

237. See M. Eisenberg, supra note 47, at 44-47.
239. See id. ¶ 94334, at 92174.
240. See id. ¶ 94334, at 92176.
241. See id. ¶ 94334, at 92178-82.
242. See id. ¶ 94334, at 92178.
243. Id. ¶ 94334, at 92176.
244. See id. ¶ 9434, at 92182.
Although not strictly pertinent to resolution of the case, by far the most fascinating part of *TW Services* is Chancellor Allen's discussion of precisely whose interests are entitled to protection in a takeover. He begins by observing that the ubiquitous phrase—that management owes a duty to the "corporation and its shareholders"—

masks the most fundamental issue: to what interest does the board look in resolving conflicts between interests in the corporation that may be characterized as "shareholder long term interests" or "corporate entity interests" or "multi-constituency interests" on the one hand, and interests that may be characterized as "shareholder short term interests" or "current share value interests" on the other?\(^{246}\)

Chancellor Allen noted that the expression "corporation and its shareholders" and related legal doctrine originated outside the takeover context.\(^ {247}\) In these more traditional contexts, it is unnecessary to sort out the interests of shareholders, on the one hand, and noninvestors or the "corporation" on the other because

the interests of the shareholders as a class are seen as congruent with those of the corporation in the long run; ... in managing the business and affairs of the corporation, [the directors] may find it prudent (and are authorized) to make decisions that are expected to promote corporate (and shareholder) long run interests, even if short run share value can be expected to be negatively affected, and thus directors in pursuit of long run corporate (and shareholder) value may be sensitive to the claims of other "corporate constituencies."\(^ {248}\)

Here Chancellor Allen does exactly what was done in the older charitable contribution cases to which he makes reference; he reconciles the interests of shareholders and other claimants on corporate activity by reference to the vague and unknowable long run.

Although it is generally possible to hammer corporate and shareholder interests into congruence in this fashion outside the takeover context, *Revlon* makes it clear that inside the takeover setting, short-term shareholder interests sometimes become paramount and take precedence over all other interests. The question that occupies and puzzles Chancellor Allen in *TW Services*—the question he poses and ponders but concludes he need not answer—is whether a board can be thrust into a

\(^{245}\) See *id*.

\(^{246}\) *Id.* \(\|\) 94334, at 92178 n.5.

\(^{247}\) See *id.* \(\|\) 94334, at 92178; supra notes 129-31, 180-81 and accompanying text.

Revlon mode against its wishes so that it must maximize short-term shareholder wealth. Put another way, "when, if ever, will a board's duty to 'the corporation and its shareholders' require it to abandon concerns for 'long-term' values (and other constituencies) and enter a current share value maximizing mode?" Does it arise when eighty-eight percent of the shareholders essentially have declared, by tendering their stock, "that they do seek a current share value maximizing transaction now?"

Chancellor Allen is troubled by the most fundamental questions of all. Is the point of corporate endeavor always and solely to attain current wealth for shareholders? If shareholder wealth maximization is not the point at all times, can it be made so by a tenacious bidder? In spite of the Interco and Pillsbury cases, which shortly preceded TW Services and which he assiduously seeks to distinguish, Chancellor Allen does not believe that the answers to these foundational questions lie in an unthinking reliance on the notion of shareholder primacy achieved through shareholder choice. Initially, the Chancellor gets snagged on the unhelpful concept of loyalty—thereby revealing the paucity of doctrinal concepts that speak to the elemental issue of institutional meaning. He recognizes, however, the need for "some model or another to define the details of the relationship among directors, the corporation and its shareholders." The Chancellor also astutely sees that reference to a descriptively powerful theoretical model will not alone resolve the issue, which he rightly perceives "inescapably to involve normative questions." These normative questions are profoundly important for society at large; question that today have fallen to the Delaware judiciary. Allen clearly appreciates that the questions are to be answered in the language of, but not solely by reference to, the twin strands of corporate doctrine. The judges must draw on the deeper wellsprings of social norms.

Once that is apprehended, however, Revlon's emphasis on shareholder wealth interests once a sale is inevitable and Interco's and Pillsbury's trumpeting of shareholder autonomy both become only particular normative preferences residing side by side with a legion of others. These preferences, then, are subject to rejection in the service of more impor-

249. See id. ¶ 94334, at 92179-80.
250. Id. ¶ 94334, at 92180.
251. Id.
252. Id. ¶ 94334, at 92180 n.14. Here Chancellor Allen reintroduces the notion of the corporation, which he inexplicably dropped from his analysis in Interco. See supra note 215.
254. See supra notes 86-87 and accompanying text.
tant ends. Chancellor Allen faintly anticipates this extension of his own thinking. He counters that because there is no long run for shareholders once in the \textit{Revlon} mode, it does not matter for them "that a buyer who will pay more cash plans to subject the corporation to a risky level of debt, or that a buyer who offers less cash will be a more generous employer for whom labor peace is more likely."\textsuperscript{255} Although this contention is undoubtedly true, it merely expresses the conflict between shareholder and other interests; it does not resolve it. Allen appreciates that a normative preference quite properly has been made in derogating shareholder desires for current wealth \textit{outside} the \textit{Revlon} mode. Yet he fails to explain why normative choice is illicit once \textit{inside} the \textit{Revlon} mode. Allen is patently inconsistent in suggesting either that there is no room for choice or that shareholders, rather than judges, should decide the question of corporate purpose in certain cases. What Allen should say is that in one set of cases (\textit{Revlon, Interco, and Pillsbury}), he prefers the norm of shareholder primacy over competing norms like labor peace and a debt-free entity, while in other cases he does not. Chancellor Allen should also describe the even more elemental and authoritative norm that enables him to differentiate those two instances. Surely conventional corporate-law concepts are out of their depth in this realm of normative inquiry and are of no help. Above all, Allen should not pretend that a choice has not been made or that another selection is not possible.

Notwithstanding this unsettling defect, the \textit{TW Services} opinion takes an important step toward recognizing that the norm of shareholder primacy—only recently honored in \textit{Interco} and \textit{Pillsbury}—is but one norm in a hierarchy of norms and is defeasible and subject to qualification. Shareholder primacy had no sooner begun to flower than it began to fade. Doubt had set in.

5. \textit{Retrenchment}.—The second major case decided by Chancellor Allen in 1989—\textit{In Re Time Inc. Shareholders Litigation (Paramount Communications, Inc. v. Time, Inc.)}\textsuperscript{256}—was perhaps the most visible and highly charged of all recent takeover battles. \textit{Paramount} strenuously tests Chancellor Allen’s dry-run thinking in \textit{TW Services}, and the result is a splendid example of how “in an opinion legal power is actually exercised before our eyes.”\textsuperscript{257} The relationship between the decisions in \textit{TW}


\textsuperscript{257} J.B. WHITE, JUSTICE AS TRANSLATION: AN ESSAY IN CULTURAL AND LEGAL CRITICISM (forthcoming 1990).
Services and Paramount is instructive for what it teaches about the means by which legal doctrine interacts with social norms. How social norms are hauled up into legal doctrine and, in turn, how legal doctrine colors social beliefs are valid and critical concerns about the common-law method. At Justice Scalia's forceful urging, these concerns have even broken into the constitutional arena. 258

Professor Eisenberg has emphasized that the legal culture and its practitioners are critical to the interchange between these two spheres. 259 Occupants of the legal community serve as a kind of clerisy or interpretive community, 260 one function of which is to screen and translate widely held social norms into legal doctrine. 261 In the corporate-law area, the New York City and Delaware corporate bars fulfill this role. 262 Understandably, some might be highly skeptical about whether an elite group of professionals occupying a tiny subculture on the eastern sea-

258. For example, in upholding the constitutionality of the death penalty for those as young as 16, Justice Scalia noted that only 15 states expressly prohibit executions for murders committed at age 16, a fact that "does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." Stanford v. Kentucky, 109 S. Ct. 2969, 2975-76 (1989). Justice Scalia argued that if the Court did not look to the existence or absence of a societal consensus as manifested in state legislation, the Justices would decide not as the "judges of the law," but as "a committee of philosopher-kings." Id. at 2980. Responding in dissent, Justice Brennan objected to Scalia's looking only to state legislation to fathom society's beliefs. He argued that the opinions of respected organizations such as the American Bar Association and the American Law Institute, each of which opposes execution of persons under age 18, are also important barometers of social norms. See id. at 2984-85 (Brennan, J., dissenting); MODEL PENAL CODE § 210.6 commentary (1980); AMERICAN BAR ASS'N, SUMMARY OF ACTION OF THE HOUSE OF DELEGATES 17 (1983). Brennan asserted that doing otherwise would serve to "return the task of defining the contours of Eighth Amendment protection to political majorities." Stanford, 109 S. Ct. at 2986-87 (Brennan, J., dissenting).

259. See M. EISENBERG, supra note 47, at 9-13, 96-99, 118-21, 154-61. By emphasizing a lawyer's work with legal doctrine in a litigation forum, Eisenberg's portrayal may miss another way in which lawyers influence behavior. Often a lawyer counselling a client outside the courtroom—where, after all, most law work takes place—can influence behavior by direct reference to social norms that have no tidy analogs in the realm of doctrine. Through the faculty of good judgment and the power of discernment, a lawyer may stir a client to consider a whole host of factors—from cost and public relations to considerations of decency and fair play—in deciding what course of action to take. See Kronman, Living in the Law, 54 U. Chi. L. Rev. 835, 865-67 (1987). In short, lawyers not only screen and translate for judges; they—one hopes—discuss how social norms should bear on client behavior.

260. For a description of the notion of interpretive community found in the work of Professors Stanley Fish and Owen Fiss as involving "a shared commitment to common understandings that shape the members' interpretive activities," see Millon, supra note 133.

261. For example, Time attorney Robert Joffe, of Cravath, Swaine & Moore, argued to Chancellor Allen that an incorrect ruling "would take corporate governance out of the hands of boards and create a bias for the short term that would disrupt the economy." Sontag, The Heat was On— Literally—in Delaware, Nat'l L.J., July 24, 1989, at 8, col. 3. Although advocates are prone to hyperbole, it is still clear that Mr. Joffe sought to demonstrate a connection between a ruling on corporate governance and wider social repercussions and to emphasize that Allen should be mindful of that connection in arriving at his decision.

262. See Meyers, supra note 36, at 64, 65-67 (noting the influence of Wall Street lawyers and the Delaware judiciary in formulating new theories of corporate law).
board of the country are an accurate barometer of the beliefs of the populace at large. The issue of where social norms originate, how and by whom they are transmitted, and how they are deciphered is thus especially important to corporate law, particularly because lawyers on both sides of takeover frays routinely speak the frail language of corporate law as if they had no other choice. Because the dialectic is so problematic, Chancellor Allen’s extended rumination in *TW Services* was an open invitation for the corporate bar to react, retool, and prepare to address further that rather obvious tension between the direction in which *Interco* and *Pillsbury* were headed and Allen’s palpable hesitation toward that position. The lawyers participating in the *Paramount* case were thus armed in advance with a full arsenal of readings on how existing legal rules speak to basic takeover issues consonantly with widespread beliefs. Their preparation made for a clear presentation to Allen in the *Paramount* case and allowed him to briskly sweep away much of the philosophical detritus that had stalled him before. For a court that plays such a prominent role in corporate jurisprudence and that explores untried paths so frequently, the value of such ongoing professional discourse cannot be overestimated.

The *Paramount* case did not involve a poison pill. Paramount sought to enjoin Time from buying Warner stock at seventy dollars per share pursuant to a cash tender offer. Long before Paramount appeared on the scene, Time and Warner had agreed to a stock-for-stock merger of

263. See id. at 468 (raising the possibility that such a defect may affect the common-law method generally); see also Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 770-72 (1982) (discussing the narrow political interests of the legal profession); Michelman, *Bringing the Law to Life: A Plea for Disenchantment*, 74 CORNELL L. REV. 256, 266 (1989) (asserting that the legal profession’s commitment is to craft rather than to public values).

264. I am not suggesting that lawyers seek explicitly to align their clients’ interests with the larger public good. But see supra note 261. Rather, as lawyers pursued their clients’ narrow interests in *TW Services* and other pre-Paramount decisions, the outcome was not simply victory or defeat for the particular parties, but also a shift (sometimes subtle, sometimes dramatic) in the previous legal and normative climate. Lawyers representing target companies suffered serious setbacks as *Interco* and *Pillsbury* improved the atmosphere for (and thus implicitly condoned) takeovers. Conversely, target-company lawyers received new hope from Chancellor Allen’s candid confessions of doubt about the appropriate analysis of (and thus, implicitly, the value of) takeovers in *TW Services*, especially since that opinion coincided with renewed concern about takeovers in the larger political arena. See supra notes 10, 75, 125; supra notes 246-48 and accompany text.

The job of target-company lawyers in a case like *Paramount* is to adapt their arguments to the doctrinal and social turbulence created by *TW Services* and larger cultural currents and to further amplify the reasons why the concerns raised in the case are better accommodated by an emphasis on managerial discretion than by an emphasis on shareholder primacy. The result of this exchange over time is not simply the refinement of legal doctrine, but a significant contribution to the continual construction of a different normative climate for takeovers. For a sociological perspective on the effect of legal intervention on the social organization of market activity, see J. Burk, supra note 73, at 144-45.
the two companies. Time selected Warner as a merger partner only after the Time board of directors had carefully considered how such a merger would affect the zealously guarded "Time culture." In Chancellor Allen's words, "This culture appears in part to be pride in the history of the firm—notably Time Magazine and its role in American life—and in part a managerial philosophy and distinctive structure that is intended to protect journalistic integrity from pressures from the business side of the enterprise." Allen noted that this consideration was significant because Time's directors did not see the "mission of the firm . . . as wholly economic" and because they were distinctly concerned with Time's "larger role . . . in society."

Both companies had scheduled special shareholder meetings to vote on the proposed merger transaction. Shortly before the Time meetings, however, Paramount made an all-cash all-shares tender offer for Time's stock at a price of 175 dollars a share. As a result of that offer, and because the Time board feared that Time shareholders might reject the proposed merger in light of Paramount's offer, Time and Warner scuttled the merger agreement and, instead, agreed that Time would make a cash tender offer for Warner stock.

The effect of Time's cash offer was two-fold. First, such an offer, unlike a proposed merger, does not require shareholder approval. Thus, Time shareholders were deprived of the opportunity to vote no on the merger, a vote that essentially would be a yes vote on the Paramount offer. Second, because Paramount later raised its offer to 200 dollars a share, and because Time's board conceded that Time's stock would, after the acquisition of Warner, trade below that price—probably in a range of 100 to 188 dollars—Time shareholders were deprived of a chance to choose between 200 dollars now and a significantly lower value now with the possibility of an even higher premium in later years.

Both Time shareholders and Paramount sued to enjoin Time's cash offer. Because the postacquisition share price of Time's stock was likely to be below Paramount's 200-dollar cash offer, Chancellor Allen framed the pivotal legal issue as whether shareholders or management should have the right to choose between high current value and possibly higher

266. Id. ¶ 94514, at 93267.
267. Id. ¶ 94514, at 93269.
268. Id.
269. Id. ¶ 94514, at 93271.
270. Id. ¶ 94514, at 93272.
271. See id. ¶ 94514, at 93280.
future value. Holding that, under the circumstances before him, such power rested with management, Allen had to corral and synthesize the discordant principles that had developed in takeover doctrine over the past few years.

He first summarily asserted that because target management possesses superior information about the company's present and future condition, it has the power and qualifications to reject the public market's current valuation of the company's future earnings (or cash flow) stream. So much for the clairvoyance of the capital markets. Next, Allen emphasized that although the Revlon posture could be entered involuntarily, the Revlon threshold and its corresponding duty to maximize current share value is crossed only when a corporate transaction represents a change in control. He concluded that the initial merger agreement between Time and Warner did not result in a change in control because even though sixty-two percent of Time's shares would be transferred to Warner shareholders, the stock would remain widely dispersed among public shareholders in a "large, fluid, changeable and changing market." As he did in Interco, Chancellor Allen read Revlon's flash point narrowly and continued to regard that decision as neither remarkable nor inconsistent with earlier corporate law. Allen further asserted that because the board of directors of a target company standing outside the Revlon mode is under no obligation to maximize current share value, but may instead operate the corporation for long-run profit maximization, Time's board had no freestanding duty to conduct a Revlon sale. Thus, Allen respected the reasoning of Revlon but he steadfastly refused to extend it.

Having steered clear of Revlon's auction mandate, Allen still faced Interco and Pillsbury and their newly minted emphasis on shareholder choice. He noted that in both Interco and Pillsbury there was no threat to the "corporation," only a threat to shareholders. The distinction between the corporation and the shareholders that Allen had carefully drawn and explored in TW Services thus served him well. Moreover, Allen characterized the two alternative transactions in Interco and in Pillsbury as "functionally equivalent" to one another. In contrast, he

272. See id. ¶ 94514, at 93278.
273. Id. ¶ 94514, at 93279.
274. See id. ¶ 94514, at 93277.
275. See id. ¶ 94514 at 93279.
276. Id. ¶ 94514, at 93280.
277. See id. ¶ 94514, at 93280-81.
278. See id. ¶ 94514, at 93283; supra note 215.
emphasized that because Time's board had planned the merger well in advance of Paramount's offer, there were reasons to believe the merger would serve long-run profit-maximizing goals and that it was not primarily motivated to affect or retain control of the corporation. In other words, because Time's board could advance plausible, preexisting business reasons for the Warner deal, they could preclude shareholders from choosing the Paramount offer. In reaching this conclusion, Chancellor Allen came close to begging the question he posed earlier: Why, notwithstanding those business reasons, and in spite of his careful efforts to distinguish Interco and Pillsbury, should shareholders be prevented from choosing (or requiring management to choose on their behalf) between 200 dollars now and 150 dollars now, a choice many, perhaps most, shareholders would exercise in favor of Paramount's higher offer of an immediate 200 dollars?

Having framed the identical root issue in TW Services, Chancellor Allen faced it squarely in Paramount. He addressed it at two levels. First, Allen concluded that shareholders themselves have no right to make that choice. Under established principles of Delaware corporate law, they simply have no voice on whether to pursue a merger with or a cash acquisition of Warner. Allen merely pointed out the obvious: shareholders are passive bystanders, not active participants, in corporate activity. That tender offers take place on capital markets does not alter that fact. Second, Allen concluded that the board itself is not obligated to "follow the wishes of the majority of shares." Thus, in carrying out its charge to direct the affairs of the corporation, management is not obligated to maximize short-term shareholder wealth. Although the well-being of shareholders rests wholly in its hands, the board, in accordance

280. See id.

281. Although Chancellor Allen stressed that Time's proposed acquisition of Warner was "perfectly conventional" and distinguishable from a more overt control mechanism like a decision not to redeem a poison pill, that distinction collapses when pressed. See id. ¶ 94514, at 93284 n.22. In effect, he was trying to explain why shareholders in Interco and Pillsbury were accorded choice while those in Paramount were not. Just as this Article challenges Allen's defense of Revlon's auction mandate, see supra note 235 and accompanying text, the best response to Allen's attempt to distinguish Interco and Pillsbury is simply to ask why a target board, citing concern for the corporate enterprise rather than immediate shareholder value, should not be permitted to refuse redemption of a poison pill. The boards of Interco and Pillsbury made the strategic mistake of trying to fight the fire of a hostile bid with the fire of a restructuring alternative and, in so doing, invoked the norm of shareholder primacy. Thus, it was not a great surprise that the court applied that norm with considerable zeal in assessing the boards' actions. These actions, however, are quite different from steadfastly refusing to redeem a pill or restructure because of enterprise or nonshareholder considerations. In the next post-Paramount case raising this issue, Allen will have to revisit the logic of Interco and Pillsbury. See Johnson & Millon, supra note 30.

with Burkean representative democracy, is free to follow its own lights. With directorial skill, judgment, and luck, shareholders will prosper. Without it, they will not.

Chancellor Allen plainly preferred the management-discretion strand over the shareholder-primacy strand. He concluded that neither the procedural attribute of shareholder voice nor the substantive attribute of entitlement to short-term shareholder wealth maximization were innate elements of the shareholding status. He reached this conclusion not by vague allusions to nonshareholder interests, but by highlighting the importance of the "Time culture"—the interests of the corporate enterprise and its established and evolving policy, matters larger than the thin axis running between shareholders and managers. In this respect, Allen's thinking was actually quite traditional. He emphasized, as pretakeover corporate doctrine has for decades, that management is not the agent or trustee or direct representative of shareholders, but is a fiduciary of the larger enterprise. His conclusion, however, far from preserving takeovers as a powerful antidote to the failings of the slack, pretakeover governance regime, ironically delivered takeovers into the hostile hands of the very legal doctrine that grew out of that regime. How could this result occur if the chief promise of takeovers was to retrieve shareholder primacy from the flagrant and embarrassing drawbacks of that system?

One way out, of course, was for Chancellor Allen to refer to the unknowable long run. After citing the directors' concern for the "Time culture" and its larger role in society, Allen was quick to add that "there is insufficient basis to suppose at this juncture that such concerns have caused the directors to sacrifice or ignore their duty to seek to maximize in the long run financial returns to the corporation and its stockholders." Allen thus reassured us that he had not forgotten or abandoned shareholders; he had only modulated their appetites and tempered their options by reminding them that Delaware's legal doctrine allows directors to "follow a course designed to achieve long-term value even at the cost of immediate value maximization." To support this assertion, he...
summoned the charitable contribution cases.\textsuperscript{288} Of course, those cases and the many other ways in which traditional corporate doctrine had subordinated shareholder welfare to managerial discretion were what first led so many to trumpet the virtues of hostile takeover bids with their crisp alertness to the here and now. Such observers perceived the "long run" as an artful dodge by which shareholder interests were given lip service while in fact they were jettisoned. Now, it looks as though Allen has made the same distressing move with takeovers themselves.

To respond to that critique, one must break out of the cramped bilateral mode of corporate-law analysis. The stark fact is that, with little ado, both Allen and the larger universe of legal doctrine have renounced full-fledged shareholder primacy not to favor management discretion as an end in itself, but because, on balance, management discretion has served the material expectations of society at large, if not those of certain shareholders and corporate scholars. Therefore, it would not be a restoration or a return home to uphold shareholder primacy, but an acute departure from an institutional arrangement that, while flawed, basically is accepted. Shareholders cannot "go home again." The old place is long gone. Allen's opinion honored its memory by referring to the capacious long run, but rejected its claim to primacy as clearly as if he had said:

> The chief meaning of corporate endeavor is not to make shareholders wealthy. That may well happen, of course, if the enterprise—consisting of the efforts of many people coordinated by management—is a success. But it happens as a consequence of that success. It is not the very point of the activity.

Allen did not come out and say as much because doing so would be a bit too frank and even dysfunctional.\textsuperscript{289} The myth of unfettered shareholder primacy may be doddering, but it still counter-balances managerial discretion and has yet to be abandoned. Therefore, given that the nature of the shareholder claim on modern corporate activity has yet to be reformulated to give it full (but not excessive) recognition, Allen had no choice but to revert to the vernacular of traditional corporate doctrine. That doctrine, however, is reloaded, nicely packed to express widely held norms that corporate endeavor is not \textit{just} about making shareholders a little richer a little faster.

In another respect, too, Allen paid tribute to social norms. Although he was keenly aware that he had to decide who—as between shareholders and managers—is to resolve key takeover questions, he may

\textsuperscript{288} See id. ¶ 94514, at 93277 n.15.
or may not have been entirely self-conscious that he had to decide who decides.290 One cannot help but wonder how Chancellor Allen felt when the task of speaking authoritatively to the momentous question of who decides corporate purpose fell to him. Considerable sensitivity to the enormity of this role of social mediator is evident in the modesty of his stated range of possible responses. In deciding who decides, Allen carefully affirmed that he is not one of the candidates; the roster of contestants includes shareholders and managers, not judges. Allen showed his confidence that while commercial practices are rapidly evolving, the decision-making structure in which such changes occur still enjoys widespread support. He thus refused to give "substance" to Unocal,291 and he refused to interject himself into disputes beyond confirming the proper structure of the decision-making apparatus. Chancellor Allen recognized that, however murky the divide, in our society business still is managed—or so we say it is—in the "private" sphere. Judges cannot take control of enterprises and make them serve shareholders. To do so would be to breach the deep-seated norm of private enterprise. In his restraint, then, Allen preserved the vitality of the common-law method of adjudication by again lauding social norms. He refused to make either shareholders or judges masters of the corporation, because most of us—judges too—would accept neither of those outcomes.

V. Concluding Thoughts

The prevailing description of what Delaware's judiciary is doing with hostile takeovers takes for granted the boundedness of corporate life and the dichotomy between management discretion and shareholder primacy in corporate law. The judiciary is said to be painstakingly working out the respective roles of shareholders and managers in responding to takeover bids. The tools of analysis are the conventional twin strands of corporate law, as modified in Unocal to better fit the peculiar dynamics of takeover contests. This explanation is incomplete and misses a more important subtext in these decisions. Unavoidably, the Delaware judiciary is also answering the question of corporate meaning, but it is treating this leitmotif wholly within the stylized mode of traditional corporate-law discourse. This observation is noteworthy not only because an extremely significant substantive issue is at stake but also because it reveals the way in which judicial doctrine is, in corporate law as elsewhere, the

290. See supra note 7 and accompanying text.
291. See Gilson & Kraakman, supra note 88, at 251 (noting that under Unocal, management must additionally demonstrate the reasonability of its defensive tactics in relation to the takeover threat).
meeting place for competing notions of institutional meaning. In resolv-
ing the issue, Delaware’s judges are challenged to address the same bed-
rock questions that all judges face: Why do they get to settle this matter, 
and on what bases do they decide?

So far, deconstructionists have not unleashed the full force of their 
devastating critique on corporate law. Yet corporate law’s dual 
strands, each capable of overpowering and nullifying the other, are an 
inviting target for such an analysis. To save corporate law from that 
critique, this Article argues that judges are not trapped in the fabricated 
and indeterminate world of corporate law but eventually express, albeit 
crudely, tentatively, and open-endedly, the sentiments of vast numbers of 
citizens. On the takeover front, Delaware’s judges are forging an an-
swer—at least they are rejecting one answer—to the question of institu-
tional meaning in a way that conforms to the sentiments of large groups 
of people. The current outcome—and by no means is it over—is not 
pleasing to many takeover proponents or corporate law scholars, and it 
dishevels the closed world of corporate law and its chosen set of con-
cerns. Yet, to preserve trust in the corporate institution as well as to 
sustain the legitimacy of their own adjudicating function in a democratic 
society, these judges must ground their decisions on norms with approval 
wider than the thin thread of shareholder primacy.

The actions of Delaware’s judges on the takeover front reveal how 
common-law doctrine ultimately must square with underlying social 
norms. Their opinions chronicle a clumsy but fascinating doctrinal ex-
pression of ambivalent social expectations of corporate behavior. For 
courts to embrace a radically proshareholder vision of corporate en-
deavor would be substantially out of line with prevailing social norms, 
however soothing that outcome might be for corporate law’s own peace 
of mind. Serious judicial doubt as to whether society at large is prepared 
to adopt a relentlessly proshareholder conception of corporate purpose 
can only lead to the conclusion that management discretion should not 
be dislodged. However annoying management’s smug defense of its au-
thority to consider noninvestor interests, and however intellectually at-
tractive and coherent a proshareholder vision might be, shareholder 
primacy does not ring true; therefore, it must remain subdued.

In one sense, then, the rejection of total shareholder primacy is dis-
appointing because it leaves corporate law’s longstanding and legitimate 
struggle with accountability unresolved. In another sense, however, the

292. But see Frug, supra note 4, at 1373-77 (advocating a revision of market theory to confront 
and transform the structure of large-scale bureaucratic organizations).
rejection is reassuring, not simply because it reveals the admirable expertise, care, and sensitivity Delaware's judges bring to their work, but also because it provides insight into a problem that haunts legal theorists: How can the common-law method, which is so central to our legal system, respond to the strenuous challenge of critical legal studies (and legal realism before it) without reverting to the unsatisfactory position of the formalists? The task for believers in the common-law process is to steer clear of both extremes. Nowhere is that task more evident than in corporate law, which unsuccessfully struggles to stand aloof from that larger philosophic debate.

Corporate law possesses both the strengths and the weaknesses of legal formalism. Its strength is its useful ability to compartmentalize the social world, to block temporarily the full force of raw experience in an effort to assimilate and register portions of that world in digestible form. The corresponding weakness is corporate law's propensity to treat its own analytical constructs as fetishes—to insist that its tools can quell the unnerving tendency of commercial phenomena to squirt away like social quicksilver—and hence its denial that its vision is partial, bound in time and place, and somewhat disengaged from the very reality it aims to explain.

Deconstruction suffers from the opposite problems. Its strength is its incessant call to peel back the facade of certainty—to emerge from snug cocoons of knowledge and to acknowledge and relentlessly reexamine the constructedness of social and intellectual categories. Deconstruction's weakness is its profound misunderstanding of the human need for limits, its failure to see that there is no "perfect freedom from inner constraint and from outer authority,"293 that inside total self-awareness there is nothing to lean on and shove off from, and that culture itself "is a compromise with life that makes human life possible."294 The theoretical challenge is to appreciate the strengths of each stance so that we can appropriate for law what Phillip Rieff observed about character: "Character is the restrictive shaping of possibility."295 To be realized, we must at some point make infinite possibility finite, reduced, channelled, and restricted—and give it expression in the form of doctrine.

At the doctrinal level, Delaware's judges are testing the strength of the two strands of corporate law, sometimes favoring management discretion, other times emphasizing the importance of shareholder auton-

293. E. BECKER, supra note 46, at 266.
294. Id. at 265.
omy and well-being. At a deeper level, though, these doctrinal strains mirror warring conceptions of corporate purpose. This fact should be openly confessed. The world of legal doctrine is not a world unto itself, hermetically sealed from the encroachment of other beliefs. Instead, it is the place, as in an individual's soul, where those beliefs can meet, compete, and be ordered, for a time. As the Delaware judiciary inches outward on one or the other doctrinal branch, it does so only by inquiring whether the heretofore operationally dominant strand—management discretion—is ripe to yield to the shareholder-primacy norm. Although Revlon, Interco, and Pillsbury reflect substantial movement in that direction, TW Services and Paramount reveal a firm vestige of resistance. Until a clearer, broader-based swell of support for shareholder primacy appears, there will be no clean break away from management toward shareholder centrality. Judges imaginatively express this social dissonance within the linguistic bounds of corporate-law doctrine, but their opinions sound tinny because corporate law's limited reservoir of rules was not designed for speaking to such a basic question.

The discipline of corporate law should acknowledge the richness and complexity of commercial endeavor. It should not flee like a child to the safety of anxiety-reducing formalism and the illusion of immutable, "once and for all" meaning. Yet, efforts to trash corporate law as a shameless show of personal or political force greatly underestimate judicial responsiveness to social norms. System building and system debunking are both enjoyable pastimes, and both methodologies share a common trait: Each points to the same world of human action and popular belief. More disturbing than the repressed stance of formalism or the boundless critique of deconstruction may be the shriveled social reality to which they both refer. After all, while judges sensibly reject shareholder primacy, they have only a lesser evil to which they can reluctantly turn. If those two choices accurately reflect the full menu of expression for our social norms on corporate meaning, it is not corporate managers or judges we ought to be examining; it is ourselves.