The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct

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Lyman Johnson*

I. INTRODUCTION ................................................................. 35

II. JUDICIAL EXPRESSIONS OF CORPORATE PURPOSE AND MANAGEMENT DUTY ................................................................. 39
   A. Corporate Purpose .......................................................... 39
      1. Economic Orthodoxy ................................................... 39
      2. The Berle and Dodd Exchange .................................... 42
      3. Decisional Law ......................................................... 42
   B. Management Duty .......................................................... 44
      1. Pre-Revlon Decisions .................................................. 44
         a. Fiduciary Duties to a Corporation and its Shareholders ...................................................... 44
         b. Consideration of Noninvestor Interests .............. 50
      2. Revlon and Other Recent Decisions ......................... 52

III. LEGISLATIVE EXPRESSIONS OF CORPORATE PURPOSE AND MANAGEMENT CONDUCT ................................................................. 61
   A. Corporate Statutes Before the Takeover Phenomenon ............ 61
   B. States Respond to Takeovers ......................................... 65
   C. The Myth of Investor Protection and the Supreme Court ....... 72

IV. THE CLASH OF JUDICIAL AND LEGISLATIVE CONCEPTIONS OF MANAGEMENT CONDUCT ................................................................. 76
   A. A Business Combination and Control Share Acquisition Statute in Action: The Primacy of Investor Interests .................... 76
   B. Control Share Acquisition Statute Coupled With a Statute Permitting Director Consideration of Noninvestor Interests ........ 80
   C. Statute Permitting Director Consideration of Noninvestor Interests Coupled With Statute Requiring Director Approval of Business Combinations or Control Share Acquisitions ................... 82

V. CONCLUDING THOUGHTS ..................................................... 87

I. INTRODUCTION

As recently as 1985 a corporation’s response to a hostile takeover bid virtually was unassailable under common law.1 Courts largely were unwilling to

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1. See, e.g., Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 958-59 (Del. 1985)
disturb management’s business judgment that a tender offer was not in the corporation’s (as opposed to the shareholders’) best interests. At the same time, state takeover statutes sought to bolster a target company’s common-law position by erecting various barriers to hostile acquisitions. Having been dealt a crippling


Application of the business judgment rule to defensive measures has been widely criticized. See, e.g., Easterbrook & Fischel, The Proper Role of a Target’s Management in Responding to a Tender Offer, 94 HARV. L. REV. 1161, 1164 (1981) (arguing for management passivity in response to takeover bids); Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers, 33 STAN. L. REV. 819, 831-48 (1981) (arguing for a structural approach to the corporation and tender offers that would allow shareholders rather than management to play the pivotal decision-making role); Gelfond & Sebastian, Reevaluating the Duties of Target Management in a Hostile Tender Offer, 60 B.U.L. REV. 403, 434-37 (1980) (stating that the use of the business judgment rule in such situations is inappropriate); Comment, The Misapplication of the Business Judgment Rule in Contests for Corporate Control, 76 NW. U.L. REV. 980, 1003-10 (1982) (stating that courts have wrongly relied upon the business judgment rule).

In Unocal, the Delaware Supreme Court modified the business judgment rule and incorporated the “primary purpose” test, a historically separate doctrinal construct, into the rule. 493 A.2d at 954-56; see Cheff v. Mathes, 41 Del. Ch. 494, 199 A.2d 548 (1964). Concerned about the inherent conflict of interest faced by directors in formulating defensive measures, the Delaware Supreme Court no longer presumes the propriety of such tactics, but requires target directors to prove the existence of reasonable grounds for believing that a takeover endangers “corporate policy and effectiveness . . . .” Unocal, 493 A.2d at 955. The burden is satisfied by showing “good faith and reasonable investigation. . . .” Id. (quoting Cheff, 41 Del. Ch. at 506, 199 A.2d at 555). Furthermore, 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.


Indiana modified the Ohio statute in a manner that was upheld against constitutional attack.
blow by the Supreme Court in 1982, however, those laws were of little consequence.5

Today, as courts seek to ensure management’s compliance with common-law fiduciary duties, their review of defensive measures is considerably more


Finally, New York enacted a statute that forbade any “business combination” (as defined) between a target company and a 20% or more shareholder for five years after acquisition of the 20% or more block of stock unless, prior to the acquisition, the target board had approved either the stock acquisition or the proposed business combination. After five years, such a business combination requires approval of a disinterested majority of shareholders or payment of a statutorily-defined fair price. N.Y. BUS. CORP. LAW § 912 (Consol. Supp. 1987). Several states have adopted similar statutes. A.RIZ. REV. STAT. ANN. §§ 10-1201 to -1223 (Supp. 1987); IND. CODE ANN. §§ 23-1-43-1 to -24 (Burns Cum. Supp. 1988); KY. REV. STAT. ANN. § 271A.397 (Baldwin 1986); MINN. STAT. ANN. § 302A.673 (West Cum. Supp. 1988); MO. REV. STAT. § 351.459 (Cum. Supp. 1988); N.J. STAT. ANN. § 10A-1 (West 1987); WASH. REV. CODE ANN. § 23A.50 (1987); Wis. STAT. §§ 180.725(1)(mm), .725(5)-(6) (1988).

Most notably, on February 2, 1988, Delaware enacted a modified version of the New York statute. Del. CODE ANN. tit. 8, § 203 (1988). Delaware’s law prohibits any “business combination” (as defined) between a corporation and a 15% or more shareholder (“interested stockholder”) for three years following the date on which such shareholder became an interested stockholder. The prohibition does not apply if (i) prior to the date of acquisition by the interested stockholder the board of directors approved either the proposed business combination or the acquisition of the stock; or (ii) the interested stockholder’s holdings rise in one transaction from less than 85% (excluding certain insiders and employee stock plans) or more of all outstanding shares; or (iii) a business combination is approved by the board of directors and by an affirmative vote of at least 66⅔% of the outstanding voting stock not owned by the interested stockholder. The board of directors may decide to “opt out” of the statute within 90 days of its effective date. After that, a corporation may opt out of the statute by amending its certificate of incorporation or bylaws by an affirmative vote of a majority of the shares entitled to vote. The amendment will not be effective for 12 months, however.


Moreover, state takeover legislation has been given a substantial boost by the Supreme Court. Thus, in the period of a few years, both common-law fiduciary principles and legislative pronouncements on target company conduct have been revitalized dramatically.

This development especially is intriguing because courts and legislatures appear to differ on a rather basic point: whose interests should they seek to protect? Courts, chafing at criticism that they have deferred too long to target management, are moving to protect shareholder (rather than simply corporate) interests while, at the same time, expounding an analysis of takeover behavior that they believe is both conceptually sound and genuinely useful in evaluating management's actions. The upshot is the discernible emergence of a market-oriented "auction" model of target company conduct. In essence, courts have likened target management to "auctioneers" whose chief function is to resolve takeover contests in a manner yielding the greatest economic return to shareholders. In turn, the prospect of stricter judicial review of defensive tactics, and the desire to avoid the confining role of auctioneer, have motivated management to preempt takeover attempts. They have done so by significantly restructuring and leveraging the companies they manage in the hope of appeasing shareholders with substantial distributions of cash or markedly higher stock prices. This renewed judicial and managerial attention to investor well-being has produced two important results. First, target company shareholders are greatly enriched. Second, management's takeover duty is better aligned with a basic tenet of orthodox economic and legal theory: corporations invariably should act to enhance investor welfare.

State takeover statutes do not adhere to such orthodoxy. Quite aside from the rhetoric employed to defend their enactments, state legislators are not concerned greatly about shareholders, particularly those residing in other states. They act instead from a legitimate and understandable belief that public corporations having significant connections to their states must serve a broad range of interests.

6. See infra text accompanying notes 79-81.  
8. See infra text accompanying notes 79-81.  
10. There is considerable evidence that shareholders of target companies profit from corporate takeovers. See generally Jensen & Ruback, The Market for Corporate Control: The Scientific Evidence, 11 J. Fin. Econ. 5 (1983); Jensen, Takeovers: folklore and science, 62 Harv. Bus. Rev. 109 (Nov.-Dec. 1984); Jarrell, The Wealth Effects of Litigation by Targets: Do Interests Diverge in a Merge?, 28 J.L. & Econ. 151 (1985). While shareholders of target companies experience dramatic wealth gains from takeovers, it is less clear that shareholders of acquiring corporations also benefit. A study of 78 mergers and takeovers for the period 1976 through 1981 found that, three years after consummation, the price of the acquiror's stock was much lower than if it had simply continued its preacquisition performance. Magenheim & Mueller, On Measuring the Effect of Acquisition on Acquiring Firm Shareholders 13-26 (Nov. 1985) (unpublished manuscript, available at Journal of Corporation Law office); see also Weidenbaum & Vogt, Takeovers and Stockholders: Winners and Losers, 29 Cal. Mgmt. Rev. 157 (No. 4, 1987) (concluding that, on average, acquiring firm shareholders often experience wealth loss, or are no better off, as a result of acquisitions).  
11. See infra text accompanying notes 15-25.
of noninvestor interests, not simply those of capital providers.\textsuperscript{12} In seeking to accomplish their purposes, while overcoming the Supreme Court's constitutional objections to their efforts,\textsuperscript{13} states, ironically, have turned to their corporate statutes. States are deploying these statutes, traditionally silent on all corporate relationships except that of investors and managers, in a novel way—to impede rather than foster a market-oriented resolution of takeover contests—thereby aiding local noninvestor interests at the expense of shareholders. In short, just as the judiciary is relying on unobstructed \textit{external} capital markets to protect \textit{investor} interests, state legislatures are utilizing \textit{internal} corporate governance mechanisms to protect noninvestor interests.

These judicial and legislative developments will be described in greater detail in Parts I and II, respectively, of this Article. In Part III it will be argued that judicial and legislative notions of corporate purpose and management takeover conduct are at fundamental odds, and appear to give management conflicting signals about appropriate takeover behavior. Further, it will be argued that current takeover statutes—both control share and more potent forms—will succumb in this clash and fail to accomplish their objectives, and that shareholders increasingly will enjoy the ascendancy accorded them by economic and legal orthodoxy. Control share statutes will not fail, however, simply because they conflict with the new direction of common law. Nor is more potent legislation doomed merely because it raises troubling constitutional concerns. State takeover legislation will fail, more importantly, because even though it shrewdly employs corporate law to meet constitutional objections to its unorthodox noninvestor protection efforts, it does not genuinely and completely supplant the traditional focus of that law on the narrow investor-manager relationship, a task that is much too radical for the present.

\section{II. JUDICIAL EXPRESSIONS OF CORPORATE PURPOSE AND MANAGEMENT DUTY}

While there is a great deal of commentary on the subject,\textsuperscript{14} there are remarkably few cases that explicitly address the question of what is, or should be, the proper purpose of corporate activity. There are, however, countless cases addressing the related issue of management's duty in directing corporate activity. Decisions dealing with corporate purpose and management duty will be discussed in turn.

\subsection{A. Corporate Purpose}

\subsubsection{1. Economic Orthodoxy}

While formulated in various ways, orthodox economic theory is unequivocal about what is and, equally important, what ought to be the proper objective

\begin{footnotes}
\footnotetext[12]{See \textit{infra} notes 155-56 and accompanying text.}
\footnotetext[13]{Edgar v. MITE, 457 U.S. 624 (1982).}
\footnotetext[14]{It would be impossible to cite all of the secondary literature dealing with the issue of corporate purpose. One selection of such literature appears in the Reporter's Note 6 to The American Law Institute's \textit{Principles of Corporate Governance: Analysis and Recommendations} § 2.01 (Tent. Draft No. 2, 1984) (tentatively adopted at the May, 1984 \textit{ALI} meeting); see also Wedderburn, \textit{The Legal Development of Corporate Responsibility: For Whom Will Corporate Managers Be Trustees?}, in \textit{Corporate Governance and Director's Liabilities} 3 (K. Hopt & G. Teubner eds. 1985); Axworthy, \textit{Corporation Law as if Some People Mattered}, 36 U. TORONTO L.J. 392 (1986); Solomon & Collins, \textit{Humanistic Economics: A New Model for the Corporate Social Responsibility Debate}, 12 J. CORP. L. 331 (1987).}
\end{footnotes}
of the business firm:" "It is postulated that the business firm—in its typical form, the corporation—is managed, or at least should be managed, in the sole interest of the body of shareholders: employed workers and salaried managers are recruited from markets by the corporation solely to serve as instruments in achieving this goal."' 16

Several reasons are commonly advanced in support of this objective. First, both the individual firm's and society's resources will be used most efficiently if shareholder wealth maximization is pursued. 17 This is simply a corporate

15. Although it is commonly stated that the objective of the business corporation is to maximize profits for the entity, many economists believe that maximization of shareholder wealth is a more precise statement of a corporation's objective. This position is reflected in remarks of Professor Oliver Williamson of Yale University who serves as one of two economic advisors to the American Law Institute's Principles of Corporate Governance Project:

Maximization of shareholder gain has a much sharper edge [than maximizing long-run corporate profit]. Put differently, maximization of long-run corporate profits has embedded in it more degrees of freedom. I think that the integrity of the enterprise mode of organization is better protected by adhering to the stockholder gain criterion, recognizing that such maximization is subject to certain legal, ethical, and social cost constraints.

My argument here relies on the underlying proposition that the corporation is preeminently an engine of efficiency. Restriction of the objective of the corporation to stockholder gain preserves this emphasis. . . . I think that if you are interested in an economist's orientation to this subject, that that probably is not uniformly shared but widely shared.

59 A.L.I. PROC. 426 (1982) (commenting on proposed § 2.01 of the PRINCIPLES OF CORPORATE GOVERNANCE); see also THE CORPORATE ECONOMY xxii (R. Marris & A. Woods eds. 1971) ("From a 'classical' viewpoint, 'correct' behavior by managers in general should be aimed at maximizing at all times the aggregate value of all equity shares . . . ."). Section 2.01 of the PRINCIPLES OF CORPORATE GOVERNANCE Project, entitled The Objective and Conduct of the Business Corporation, reads in part as follows: "[A] business corporation should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain. . . . ." AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, comment e (Tent. Draft No. 2, 1984). By describing the "economic objective" of the corporation in this dual manner—i.e., entity profit and shareholder gain—the section suggests that corporate profit and shareholder gain are not always identical. Yet, the section does not attempt to resolve or even address possible "tensions between corporate profit and shareholder gain," leaving those to be "dealt with in Part VI [Corporate Control Transactions] and elsewhere." Id.

16. M. AOKI, THE CO-OPERATIVE GAME THEORY OF THE FIRM 3 (1984) (proposing a "co-operative" game theory of the firm in which employees, and conceivably others, are viewed as members of the firm along with shareholders).

17. 59 A.L.I. PROC. 426 (1972) ("The corporation is preeminently an engine of efficiency."); Sprinkel, The Real Issue in Corporate Takeovers, Wall St. J., July 17, 1987, at 18, col. 3 ("In the process of maximizing the wealth of America's shareholders, we create benefits for the economy as a whole."); Eisenberg, Corporate Legitimacy, Conduct, and Governance: Two Models of the Corporation, 17 CREIGHTON L. REV. 1 (1983) (describing and contrasting political and economic models of the corporation). The notion that, over the long run, shareholder and societal well-being generally coincide is one tenet in what Professor Eisenberg calls the Economic Model of the firm: "[M]anaging the corporation in the interest of the shareholders is socially desirable, in that their interest coincides with the social interest in efficiency." Id. at 5. The belief that maximization of shareholder wealth also maximizes the collective good has been described by Professor Stone as resting on "a crude sort of utilitarianism." Stone, Corporate Social Responsibility: What it Might Mean, If it Were Really to Matter, 71 IOWA L. REV. 557, 570 (1986). Moreover, the economic model of the corporation does not address the larger question of whether an efficient allocation of resources is, by some larger measure, always good, just, or desirable. R. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977).
application of Adam Smith's belief that man's nature is essentially egoistic and acquisitive, and that the pursuit of economic utility works, as if by an "invisible hand," both for his own material advantage and for the common (allocative) good.\textsuperscript{18} Second, wealth maximization is a clear guidepost for management behavior; to abandon it would leave management with "no criteria to replace the standards which the economists have painfully developed during the last century or so."\textsuperscript{19} Third, a simple goal makes for easier monitoring and evaluation of management performance.\textsuperscript{20} Fourth, the competence of persons trained as business managers to pursue goals other than straightforward economic ones is often doubted.\textsuperscript{21} Fifth, the claim on corporate resources of nonshareholder groups—such as employees, creditors, suppliers, and customers—is fixed, and their interests may conflict with each other.\textsuperscript{22} Moreover, such groups can better safeguard their interests by contract\textsuperscript{23} or, failing that, can be protected through special legislation.\textsuperscript{24} The return to capital providers, however, is residual. Thus they are uniquely dependent on and entitled to the devoted performance of management. Finally, Friederich Hayek argued that public intervention into corporate activities—an evil in his eyes—would surely follow if management were to act for interests other than those of shareholders.\textsuperscript{25}

\begin{itemize}
  \item \textsuperscript{18} A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations (1930).
  \item Interestingly, many who refer to Smith's classic 1776 political economy treatise 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. A. Smith, The Theory of Moral Sentiments (1966).
  \item A recent attempt to reconcile these seemingly incompatible positions is found in Nieli, Spheres of Intimacy and The Adam Smith Problem, 47 J. Hist. Ideas 611 (1986).
  \item Rostow, To Whom and For What Ends Is Corporate Management Responsible?, in The Corporation In Modern Society 67 (E. Mason ed. 1959).
  \item Hetherington, supra note 20, at 279; M. Friedman, Capitalism & Freedom 133-34 (1962). For a quite different view of corporate management's ability to mediate a broad range of interests in formulating takeover behavior, see Shaffer, The Tension Between Law in America and the Religious Tradition, in Proceedings of the Conference on Law and the Ordering of Our Life Together, Rockford Institute Center for Religion and Society (Apr., 1987) (forthcoming 1988). Professor Shaffer believes that management has a moral obligation to the entire corporate community to endure and surmount the ambiguity and indeterminateness that necessarily result when fixed but impoverished guides to behavior—such as enhancing shareholder well-being—are removed. Id. at 32-37.
  \item Small, The Evolving Role of the Director in Corporate Governance, 30 Hastings L.J. 1353, 1368 (1979).
  \item Oesterle, The Negotiation Model of Tender Offer Defenses and the Delaware Supreme Court, 72 Cornell L. Rev. 117, 140 (1986).
  \item R. Clark, supra note 20, §§ 1.4, 16.2.
  \item So long as the management has the one overriding duty of administering the resources under its control as trustees for the shareholders and for their benefit, its hands are largely tied; and it will have no arbitrary power to benefit this or that particular interest. But once the management of a big enterprise is regarded as not only entitled to but even obliged to consider in its decision whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power—a power which could not long be left in the hands of private managers but would inevitably be made the subject of increasing public control.
  \item 3 F. Hayek, Law, Legislation and Liberty: The Political Order of a Free People 82 (1982);
2. The Berle and Dodd Exchange

Neither orthodoxy's economic postulate itself nor its underlying rationale might have been of much interest to corporate law were it not for Berle and Means' unsettling assertion that the diffusion of share ownership in public corporations freed corporate managers of any need to pursue rigorously shareholder welfare, and thus threatened the continuing validity of the postulate.26 This observation evoked two quite different responses. One response, by Professor Berle himself, was to draw on the law of trusts as a means of reuniting the capital-providing and capital-managing functions that the large corporation had, of necessity, sundered.27 Berle argued that: "[A]ll powers granted to a corporation or to the management of a corporation, or to any group within the corporation, whether derived from statute or charter or both, are necessarily and at all times exercisable only for the ratable benefit of all the shareholders as their interest appears."28 Berle hoped that judicial adherence to such a trust conception of the corporation would circumscribe management discretion and ensure that—consistent with economic theory—shareholder-owners remained the chief beneficiary of corporate activities.

Professor Merrick Dodd provided an altogether different response to the problem identified by Berle and Means.29 He fully sympathized with Berle's efforts to strengthen the position of shareholders vis-a-vis management, but believed it undesirable "to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders."30 Dodd essentially rejected the position of economic orthodoxy as unsuitably narrow for an institution having the economic and social influence of the modern public corporation. He advocated instead that businesses should serve consciously the interests of employees, consumers, and the general public, as well as those of shareholders.31

3. Decisional Law

In 1954 Berle stated that his exchange with Dodd had "been settled (at least for the time being) in favor of Professor Dodd's contention."32 The apparent reason for Berle's concession was the decision in A.P. Smith Manufacturing Co. v. Barlow,33 which upheld a $1500 corporate contribution to Princeton University. The New Jersey Supreme Court upheld the gift on three grounds.

see also Rostow, supra note 19, at 67, 71 (discussing the relationship of management to shareholders); M. Friedman, supra note 21, at 133-34 (stating that for corporate management to do other than maximize profit for shareholders is a "fundamentally subversive doctrine").

28. Id. at 1049 (emphasis added).
30. Id. at 1148.
31. Id. at 1161-62.
32. A. Berle, The 20th Century Capitalist Revolution 169 (1954). That is not to say, however, that Professor Berle considered Dodd's stance to be the proper one, only that that position is "how social fact and judicial decisions turned out." Berle, Foreword to E. Mason, The Corporation in Modern Society at xii (1959).
First, because the gift ostensibly advanced corporate objectives, and thus "benefited" the corporation, it complied with common-law principles. Second, statutory authorization to make corporate contributions was held to apply to corporations chartered prior to passage of the authorizing legislation. Third, quite apart from corporate benefit or statutory grant, the court sounded much like Professor Dodd in asserting that "modern conditions require that corporations acknowledge and discharge social as well as private responsibilities as members of the communities within which they operate."

While the A.P. Smith case is regarded widely as a landmark decision, it is important to keep it in perspective. First, except in the very limited areas of charitable contributions and employee benefits, and quite apart from a good deal of extra-judicial rhetoric on the subject, there is virtually no judicial acknowledgment that corporations exist for any purpose other than what economic orthodoxy and Professor Berle had initially asserted: the well-being of shareholders. Thus, neither the A.P. Smith decision itself nor any judicial holding since then provides a sound basis for conceding that courts have adopted Professor Dodd's conception of corporate purpose. Second, even with respect to the charitable contribution and employee benefit cases many, perhaps all, of them might be rationalized on the ground that such corporate solicitude is in fact profit-maximizing, and thus, beneficial to investors, over the conveniently vague and elusive "long-run." In this way, the stated objective of the firm remains a purely economic one, the well-being of shareholders, and the only issues are the relevant time horizon and the range of activities that may be engaged in for its attainment.

Where, however, the clash between the profit purpose and other objectives is too glaring, or there simply is no long-run because a company is in or near liquidation, such rationalization is unavailable. Here courts are clear that shareholder interests are paramount, and Berle's concession to Dodd is seen to be in error or, at best, premature. Two older cases in particular make this point, a point that is central (if implicit) to later judicial prescriptions of proper takeover behavior.

In Dodge v. Ford Motor Co., a group of shareholders brought an action to compel the payment of dividends. In previous years the company had paid both regular dividends and very large special dividends. Henry Ford, however, announced that henceforth such special dividends would no longer be paid. Instead, the corporation would use such funds to expand and provide more jobs and to reduce prices to consumers. The Michigan Supreme Court compelled the payment of a $19,000,000 dividend and, without recitation of authority for its position, chided Mr. Ford for his misguided solicitude:

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34. Id. at 154, 98 A.2d at 586.
35. Id. at 160, 98 A.2d at 589.
36. Id. at 154, 98 A.2d at 586.
37. See generally P. Blumberg, Corporate Responsibility in a Changing Society 1-52 (1972) (discussing the legal basis for corporate involvement in charitable community affairs).
38. Professors Solomon and Collins recently have termed this conception of corporate activity the "moderate market model" to contrast it with the "pure market model" which permits no activity not singularly motivated by the pursuit of profits. Solomon & Collins, supra note 14, at 332-36.
A business corporation is organized and carried on primarily for the profit of the shareholders. 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. . . . [I]t 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 . . . .

Similarly, in Parke v. Daily News, Ltd., the board of directors of a corporation selling two newspaper operations that generated the vast majority of its revenue sought to use the entire net sales proceeds to provide employees with severance pay and pension benefits as well as compensation in the amount of one week's pay for each year of service. The court held the payments to be ultra vires and not to have been shown to benefit the company—i.e., shareholders—because it would operate on a substantially reduced basis after the sale. The court acknowledged that the “view that directors, in having regard to the question what is in the best interests of their company, are entitled to take into account the interests of the employees, irrespective of any consequential benefit to the company, is one which may be widely held.” Nonetheless, it went on to conclude that there simply was no judicial precedent for that position, and that “such is not the law.” In short, while the court essentially conceded that Professor Dodd had espoused a theory having many sympathizers and even considerable appeal as a matter of enlightened industrial relations, when the issue of corporate purpose is presented in a manner that cannot be resolved by reference to the long-run the law is unmistakeable: corporate activity must benefit the shareholders.

Thus, in the few instances where the issue of corporate purpose has been put squarely, the rhetoric of decisional law comports with economic orthodoxy in regarding shareholders as the chief beneficiary of corporate endeavor. Whether courts effectively have ensured that management actually pursue and achieve that objective on other occasions, including the takeover setting, is an altogether different matter.

B. Management Duty

1. Pre-Revlon Decisions

a. Fiduciary Duties to a Corporation and its Shareholders

Although the purpose of corporate activity may be profit maximization and shareholder well-being, courts do not formulate the fiduciary duty of corporate
management in those terms. That is, management's legal duty is not described in terms of its compliance with the tenets of economic orthodoxy. The sheer impossibility of defining precise standards for measuring performance would make such an outcome-oriented conception of duty judicially unenforceable. Instead, management simply is exhorted to act in the "best interests" of the "corporation," and is admonished that in doing so it owes both a duty of "care" and a duty of "loyalty." Even this expression is somewhat misleading, however, because neither duty actually requires attainment of the best outcome, only that particular business decisions be informed, rational, and free of fraud, conflict of interest, or illegality. Moreover, the business judgment rule creates a presumption that, absent fraud, conflict of interest, or illegality, management's actions are in fact fully informed and in the best interests of the company, thereby making it extremely difficult to prove that management, far from failing to maximize profits or shareholder well-being generally, even was remiss on a specific transaction. As a result, even though courts may be quite sensible in firmly resisting any attempt to involve them in the regulation or oversight of normal business activities, the manner in which they express management's duty does create a potential schism between stated corporate purpose and actual corporate performance, a schism that long has plagued corporate governance.

Even where shareholders allege a conflict of interest—i.e., duty of loyalty cases—management's performance still is not reviewed wholesale, but only as to a specified matter. More importantly, while judicial review of management behavior is said to be much stricter in loyalty cases than in duty of care cases, the traditional mode of analysis in loyalty decisions obscures the nature of management duty in such a way that they are of no greater utility in assessing the propriety or efficacy of management's takeover behavior than those applying the business judgment rule. The reason for this is very simple. In classic duty

44. Hetherington, supra note 20, at 258, 274. The difficulties in trying to achieve effective management of corporations by various "legal rules" have led some to conclude that that objective is attained best through the workings of various markets—e.g., markets for capital, products, management services, and the market for corporate control. R. Posner, supra note 17, at 300-13; Werner, Management, Stock Market and Corporate Reform: Berle and Means Reconsidered, 77 COLUM. L. REV. 388 (1977); Manne, Mergers and the Market for Corporate Control, 73 J. POL. ECON. 110 (1965).
46. Id. See generally R. Clark, supra note 20, § 3.4 (discussing the case law development of the duty of care).
49. Id. § 4.01(c)(3).
52. See generally R. Clark, supra note 20, at ch. 5 (discussing self dealing by corporate management).
of loyalty cases—such as those involving self-dealing by management—the interests of the corporate entity and the body of shareholders are identical. If managers unfairly favor themselves in such transactions, they damage the corporate entity by lowering net profits or asset value. They also damage the shareholders, both by reducing the amount of funds available for distribution and, by lowering entity profitability or asset value, potentially reducing the market price of the stock. This identity of interests accounts for a phrase that surfaced early in corporate law and that recurs throughout decisions evaluating management’s compliance with its fiduciary duties—corporate management is said to owe fiduciary duties to the “corporation and its shareholders.”

However accurate and useful that expression of dual duty may be in commonplace loyalty decisions, it has proven to be a real menace when uncritically recited in cases challenging management’s takeover behavior. In a takeover, the interests of the corporation, either as an ongoing commercial entity or as a codeword for its various constituent interests, may be quite different from those of capital providers. While most investors surely savor the option of tendering their stock at substantial premiums to hostile bidders, such premiums are often possible only because a bidder intends to drastically alter, perhaps even liquidate, the entity’s affairs and its extensive cluster of noninvestor relationships. If, as was discussed in section A of this Part, the principal purpose of corporate activity is truly investor well-being, the entity simply being a vehicle to that end, then the opportunity to sell stock at a generous premium is yet another more immediate way in which shareholders can extract value from the business, and their interests always should trump those of noninvestors or the entity itself. Expressed in terms of legal duty then, management’s general duty to act in the best interests of the corporation, in a takeover, may be required to yield to a higher, more precise duty running exclusively to shareholders.

Prior to Revlon Inc. v. MacAndrews & Forbes Holdings, Inc., courts generally did not formulate management’s takeover obligations in this manner. When reviewing defensive measures, courts not only failed to differentiate between the corporate entity and the body of shareholders as the exact beneficiary of management’s takeover duties, they often applied the business judgment rule without even acknowledging that, initially at least, an investor rather than a purely corporate matter was involved. Courts apparently did not appreciate that takeover contests presented shareholders with a uniquely direct avenue for action—deciding either to hold or tender their stock—without having to rely on

53. This identity of interests was described in an early corporate law treatise:

The 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, . . . [T]hey are regarded as agents entrusted with the management of the corporation, for the benefit of the stockholders collectively

2 S. THOMPSON, CORPORATIONS § 1320, at 778 (3d ed. 1927).


55. 506 A.2d 173 (Del. 1986).

56. See cases cited supra note 2.
management's business expertise to augment their wealth. If some courts did recognize the novel role of takeovers in providing shareholder choice, having completely detached their traditional formulation of management's duty—i.e., to act in the best interests of the corporation—from the underlying corporate purpose—i.e., investor wealth maximization—they were ill-equipped to articulate any basis for judicial intervention.

Once a hostile offer is made, the target company management is placed in a real bind. As fiduciaries, managers must restrain their own urges and act for the good of others. Yet, psychologically, the overture is a personal affront, bringing to the surface a deep need to preserve the life they have by making a scene or putting on a show—indulging in the histronic to renew their sense of self, purpose, and value. Thus, it is understandable that management will resist unwanted advances because, in essence, its past performance is being criticized as deficient and its future tenure is placed in jeopardy. Almost certainly it will respond in a manner that involves the corporate entity—perhaps by finding a friendly merger candidate, or by altering its asset composition or its capital structure in some way designed to defeat the tender offer directed at shareholders. Because management has taken the initiative and acted through the corporation, though not necessarily for the benefit of shareholders, when reviewing defensive measures judges are asked only to evaluate the propriety of such corporate action, and they have done so by a simplistic reliance on well-settled precedent that courts will not disturb management's business judgment.

The result was predictable: the challenged conduct was upheld, even where demonstrably adverse to shareholders, because a priori courts believed themselves to be incapable of evaluating the outcome of any corporate action initiated by management. Thus, newly-presented with the possibility that hostile takeovers might serve to ensure that corporate performance is linked to and fulfills the corporate purpose of shareholder well-being, investors simply were lost in the analysis, having fallen victim to principles of judicial review that were developed in wholly-dissimilar settings.

Even judges who believe that target management behavior raises an issue of loyalty as well as care, and thus, are inclined to review management conduct much more strictly, fail to address the underlying issue of whether management has an affirmative and overriding duty to shareholders (not simply to the corporation) to procure a premium for their stock—i.e., to use the economist's phrase, a duty to maximize shareholder wealth. Instead, these courts, as in

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57. Id.
58. In Norlin Corp. v. Rooney, Pace Inc., 744 F.2d 255 (2d Cir. 1984), target management issued sufficient common and preferred stock to its wholly-owned Panamanian subsidiary and to a newly created Employee Stock Ownership Plan (ESOP) to enable management to retain voting control of the corporation. In a decision reviewing the grant of a preliminary injunction against the voting of the newly-issued shares, the Second Circuit found that the circumstances of the defensive measures raised a "strong inference" that the purpose of the transactions was "not to benefit the employees [as claimed by management] but rather to solidify management's control of the company." Id. at 265. The court resolved the propriety of issuing stock to a wholly-owned subsidiary by looking to applicable statutory law, but turned to common-law fiduciary principles to decide the legality of issuing stock to the ESOP. Id. at 264-66. Because the board's action appeared to be motivated largely by self-interest rather than by other "corporate" purposes, the court declined to apply the business judgment rule and stated that "the duty of loyalty requires the board to demonstrate
the traditional duty of loyalty cases from which they mistakenly seek guidance, have sought only to ascertain whether defensive actions unduly were tainted by management self interest. When management can plausibly advance some corporate rather than selfish purpose for its behavior, courts will uphold the measures. Yet, if investor interests truly are paramount and their well-being the proper end of corporate endeavor, justifying defensive measures as free of management self-interest and as being in the best interest of the corporation simply is irrelevant. Serious devotion to investor welfare requires that management’s takeover conduct be evaluated exclusively in terms of its responsiveness to shareholder preferences, and its efficacy in maximizing investor opportunities to obtain the immediate economic benefits of takeover contests. Thus, economic orthodoxy demands, at a minimum, that management not impede investor economic benefits of takeover contests. It maximizes shareholder value—while not altogether defeating the opportunity to sell.

that any actions it does take are fair and reasonable.” Id. at 266. The board having failed in that showing, the court upheld the granting of an injunction. Id. at 269.

Minstar Acquiring Corp. v. AMF Inc., 621 F. Supp. 1252 (S.D.N.Y. 1985), involved the validity, under New Jersey law, of various “scorched earth” tactics and a “poison pill” stock rights plan that were implemented immediately before a hostile tender offer. Id. at 1253-54. The court initially questioned whether the business judgment rule should be applied in reviewing target management’s takeover behavior. Id. at 1259. The court expressed the view that the decision to sell stock is a “private transaction” and an “independent right of alienation” in which the board’s effort to act as a “surrogate” for the shareholders was “troublesome.” Id. at 1260 n.6. The Minstar court’s holding did not require it to confront squarely the issue of judicial deference to management action having such significant governance overtones. Nonetheless, its concern about delineating the respective provinces of shareholders and directors clearly underlay the court’s decision to strike down the “poison pill” rights plan under state law because, in several ways, the plan improperly infringed on stockholder rights. Id. at 1258-59. Furthermore, relying on Norlin as authority for requiring the target board to prove the fairness of defensive measures motivated by management self-interest, rather than by other “corporate” purposes, the Minstar court also held that management had failed to meet that burden with respect to the “scorched earth” tactics. Id. at 1260.

While both the Norlin and Minstar decisions show a fairly critical judicial attitude toward defensive measures, they focus only on management’s subjective motivation in implementing defensive measures. The more relevant issue is not why they acted as they did, but whether what they did was in the best interests of shareholders and who ought to decide these matters.

59. See, e.g., Danaher Corp. v. Chicago Pneumatic Tool Co., 633 F. Supp. 1066, 1070-71 (S.D.N.Y. 1986) (management met the burden of proving that establishment and funding of ESOP was not motivated by its desire to maintain control).

60. In 1982 Professors Easterbrook and Fischel argued that management of a target company should remain passive toward and take no action to resist a takeover attempt. Easterbrook & Fischel, supra note 2, at 1194.

61. Many commentators argue that target company management should not remain passive but should be allowed to resist a takeover for the purpose of eliciting competing bids and, in effect, “auctioning” the corporation on behalf of the shareholders at the highest price. See, e.g., Gilson, Seeking Competitive Bids Versus Pure Passivity in Tender Offer Defense, 35 STAN. L. REV. 51 (1982); Bebchuk, The Case for Facilitating Tender Offers, 95 HARV. L. REV. 1028 (1982); Bebchuk, The Case for Facilitating Competing Tender Offers: A Reply and Extension, 35 STAN. L. REV. 23 (1982); Oesterle, Target Managers as Negotiating Agents for Target Shareholders in Tender Offers: A Reply to the Passivity Thesis, 71 CORNELL L. REV. 53 (1985). Notwithstanding such commentary, pre-Revlon courts allowed target management to select entity survival and protection of existing corporate policy as its focus rather than immediate shareholder gain.

62. See Jarrell, supra note 10, at 151 (empirical study that target management resistance to an unwanted takeover attempt produces greater returns to shareholders than passivity provided the defensive measures are not so potent that they ultimately defeat the bid).
This critique of decisional law is not intended as an argument in support of, or in opposition to, the position that shareholder interests and preferences should be determinative for a target company’s takeover behavior. Nor is it meant to resolve whether corporate management should be made to heed more closely, or instead be freed to disregard, the sometimes fickle sentiments of the financial markets about its business strategies. The aim simply is to argue that when reviewing management’s takeover conduct courts have evaded resolution of these central issues. While it is widely accepted that the chief goal of corporate activity is to maximize shareholder gain, courts also appreciate that in most instances they cannot possibly ascertain whether management’s operating policies have fulfilled that objective. Consequently, unless shareholders have effective devices for disciplining management for deficient performance, management may operate the corporation in a manner that does not serve investor interests as faithfully as orthodox theory assumes. Tender offers are one such mechanism for disciplining management. Management responses to hostile takeover bids, however, are not like mundane operating decisions, and, hence, judicial deference is unwarranted and unnecessary. In fact, by presenting a potentially striking clash between investor and other interests, takeover contests raise the same issue dealt with in the Dodge and Parke cases, the bedrock issue of corporate purpose. Pre-Revlon courts, however, were unwilling to acknowledge that eventually they must speak, as did those two older decisions, to this question of corporate objective, the most elemental, stubborn issue raised by the takeover phenomenon.

If we take seriously the fundamental postulate of economic and legal orthodoxy, then it is hard to deny that shareholders have been mistreated badly, both by management efforts to thwart takeover attempts and by courts upholding such actions. Nonetheless, given the mounting concern over the effects of widespread takeover activity on our corporate system, many have balked at extending the fundamental postulate that far. This uneasiness is especially understandable given that the tenets of economic orthodoxy were conceived long before the appearance of corporate takeovers. Moreover, a desire for conceptual purity may cause some to lose sight of the fact that the pursuit of shareholder well-being is, under orthodoxy, presumed to be congruent with the larger public good. But where that congruence is claimed to be absent, as many have asserted
with respect to takeovers, the monistic pursuit of investor welfare loses its moorings in the larger society. As a result, while many will concede that shareholder interests are indeed markedly different from other corporate interests in takeovers, they also contend that investor interests are not preeminent. Instead, shareholders are viewed as just one faction in the corporate family, a faction whose interests are in fact subordinate to (or at best, perhaps, subsumed under) more collaborative corporate interests. As such, it might be argued that the prescriptions of orthodoxy must yield, and that management’s usual alliance with capital providers should and does break-down in a takeover, shifting, oddly, toward those very constituencies it generally opposes on behalf of investors—employees, creditors, suppliers, and the community at large.

Quite aside from the merits or appeal of this position, it must be appreciated that it usurps a valuable and heretofore unquestioned attribute of stock ownership—the ability of shareholders in public corporations to receive, entertain, and act decisively on attractive bids to purchase their stock without interference by corporate management. Not only does this directly impinge on shareholder wealth, it dampens a potent market mechanism for monitoring management behavior that legal rules and judicial review cannot readily provide. The result of this interference with the market is a further erosion of shareholder influence over corporate affairs. More importantly, it substantially modifies the fundamental postulate of orthodoxy so that shareholder wealth maximization is not to be sought in the full range of benefits brought by highly developed capital markets bearing stock premiums, but only over the long-run, or at least over that period of time and in that manner chosen by incumbent management. Proponents of this position ideally might seek to preserve the illusion of shareholder primacy in the same way that the corporate charitable contribution cases were woven into economic orthodoxy—by reference to the all-encompassing but vague long-run. With takeovers, however, such a resolution strains theory too severely, and in the end investor desires to obtain immediate stock premiums are forced to give way to what adherents to this position believe are more important considerations.

b. Consideration of Noninvestor Interests

Numerous cases might be pointed to as apparently supporting the proposition that courts have not evaded, as argued above, their responsibility to either adhere to or candidly reject the fundamental postulate of investor primacy, but instead have held explicitly that management’s takeover duties are not confined to shareholder well-being and, shades of Dodd, extend to the enterprise itself and even to certain noninvestor interests. For example, certain Delaware decisions make it clear that corporate share repurchases undertaken to prevent takeovers that threaten the corporate entity or its business policy are proper, while those motivated by a desire to preserve control in management are improper. Thus, in Kors v. Carey, the corporate interest to be protected was the preservation

67. See Shaffer, supra note 21, at 36; M. Aoki, supra note 16, at 3.
68. See supra notes 29-31 and accompanying text.
70. 39 Del. Ch. 47, 158 A.2d 136 (1960).
of established relationships with customers that the directors believed would be damaged, to the detriment of the enterprise, if the insurgent gained control. In *Cheff v. Mathes*, 71 a dissident shareholder's likely change in sales policies and the resulting employee unrest constituted sufficient threat to the corporate interest to meet the directors' burden of proving that the share repurchase was in the corporate interest. More recently, in *Unocal Corp. v. Mesa Petroleum Co.*, 72 the Delaware Supreme Court refrained from equating corporate and shareholder interests when it asserted that the board had a "fundamental duty and obligation to protect the corporate enterprise, which includes stockholders . . . ." The court further stated that in analyzing the effect of a takeover bid on the corporate enterprise directors may consider, among other matters, the impact on "creditors, customers, employees, and perhaps even the community generally . . . ." 74

Other decisions have cited possible harm to various noninvestor interests in either providing injunctive relief from takeover attempts or upholding defensive measures. Among such interests were employee morale 75 and even the public interest. 76 One of the most direct statements on the place of noninvestors in corporate decision-making was made by the Tenth Circuit in holding that the directors of the corporation owning the Denver Post had acted properly in taking certain challenged actions:

We are fully cognizant of the well established corporate rule of law which places corporate officers and directors in the position of fiduciaries for the stockholders. Basic in that rule of law is the profit motive of the corporate entity. In this case we have a corporation engaged chiefly in the publication of a large metropolitan newspaper, whose obligation and duty is something more than the making of corporate profits. Its obligation is threefold: to the stockholders, to the employees, and to the public. 77

More recently, a federal district court made much the same kind of statement in an almost classic expression of Dodd's view that directors are equipped to, and should, mediate the interests of various constituencies:

The exercise of independent, honest business judgment of an enlightened and disinterested Board is the traditional and appropriate way to deal fairly and even-handedly with both the protection of investors, on the one hand, and the legitimate concerns and interests of employees and management of a corporation who service the interests of investors, on the other. 78

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72. 493 A.2d 946 (Del. 1985).
73. *Id.* at 954 (emphasis added).
74. *Id.* at 955.
77. Harold Co. v. Seawell, 472 F.2d 1081, 1091 (10th Cir. 1972).
However apparently clear the language in these opinions, there is a danger of making too much of these decisions as authority for the proposition that management properly may consider noninvestor corporate interests in takeovers, just as there is a danger of reading the charitable contribution and employee benefit cases as altering the basic purpose of corporate activity.79 Most statements about noninvestor interests are dicta and unnecessary for resolving the issues presented. Furthermore, given the posture of the cases, it is not at all clear that shareholders actually were deprived of an opportunity to accept an outstanding tender offer or that they otherwise were damaged. Moreover, the statements were made less to highlight the affirmative claim of various noninvestors on the corporation than to emphasize the variety of factors that management, in its wide discretion, may consider in formulating takeover responses.

Thus, at one level these decisions might be viewed as simply respecting management's judgment that the takeover attempt should be resisted because it was not in the long run interests of shareholders. As such, management's purported concern for corporate policy and various noninvestor interests are but intermediate concerns, important only for their contribution to the eventual welfare of shareholders.80 Yet, by implicitly seeking to reconcile interests in this manner, the courts fail to state precisely why shareholders should not be entitled to elect an immediate stock premium for themselves over longer-run profit for the entity, or why management should not be unfailingly allegiance to investor desires. Nor do these decisions deal with takeovers as perhaps the only effective means for investors to express profound displeasure with management's long-term operating decisions, and as possibly the only opportunity for investors to displace management against its will. Instead, while these decisions might with some effort be wedged into the orthodox view that corporations are to be operated for the ultimate good of shareholders, the time frame for realizing economic returns from corporate activity is not decided by shareholders exercising the customary right to alienate their stock, but once again, as with other "corporate" decisions, is determined by management's business judgment. One striking result of these decisions is the preservation of management prerogative rather than any particular protection of either investor or noninvestor interests. Another result, typical of most pre-Revlon takeover decisions, is that investor claims on corporate activities substantially were weakened, to the point that shareholder well-being is less clearly the corporation's chief purpose. Eventually this potential warping of conventional economic and legal ideology required attention.

2. Revlon and Other Recent Decisions

In Revlon the Supreme Court of Delaware stated that it was addressing for the first time the "extent to which a corporation may consider the impact

79. See supra notes 37-38 and accompanying text.
80. The court in Union Carbide stated that the Union Carbide board's duty was "solely to the welfare of Carbide's investors and to deal with the interests of Carbide's employees and management fairly, in furtherance of those interests of investors." 624 F. Supp. at 1019. This statement seems to imply that the interests of management and employees are significant only in that they further investor interests.
of a takeover threat on constituencies other than shareholders. While complex, the essential facts are as follows: MacAndrews and Forbes (M and F) made an offer to purchase Revlon that the Revlon board rejected. The board then adopted a “poison pill” rights plan somewhat similar to that upheld in Moran v. Household International, Inc. M and F then offered $47.50 per share for all of Revlon’s shares, subject to procuring financing and redemption of the rights. Revlon responded with an offer to exchange notes and preferred stock for 26% of its outstanding stock. The notes contained covenants limiting the amount of additional debt that could be incurred by the company, thereby making M and F’s proposed financing plan more difficult.

M and F responded to the exchange offer by initially reducing its offer to $42 per share, but then increasing it, first to $50 and then to $53, conditioned again on redemption of the rights. The Revlon board, however, entered a leveraged buy-out agreement with Forstmann, Little & Co. and certain members of management for $56 per share. M and F responded by raising its bid to $56.25 and announced that it would engage in “fractional bidding” to defeat any other offer for Revlon. Forstmann then offered $57.25 for Revlon, conditioned on obtaining a lock-up option on two substantial divisions of Revlon, a no-shop provision, and a $25 million “break-up” fee. In addition, Forstmann agreed to support the market value of the notes that Revlon had issued in its exchange offer and which had declined in value. Acting in part out of a concern for the noteholders—or perhaps from their threat of litigation over the decline in value of the notes—the Revlon board accepted this offer.

M and F then raised its offer to $58 and sued to enjoin the lock-up option and break-up fee. The Delaware Chancery Court issued an injunction and the Delaware Supreme Court affirmed. The Delaware Supreme Court began its analysis by stating that the business judgment rule protects those decisions by directors as are in the best interests of the “company.” The court also recited the common, but fuzzy, notion that directors owe fiduciary duties to the “corporation and its shareholders.” The court then stated that the initial implementation of the rights plan was lawful because it served corporate interests and, because the plan “spurred the bidding to new heights,” it was in the best interests of shareholders as well. Although the court did not explain the corporate interest in the plan, apparently it believed that corporate and shareholder well-being coincided on this issue.

Only as the court addressed the lock-up option did it recognize the need to clarify and distinguish management’s duty to shareholders from its duty to the corporation. In doing so, the court spoke of a “change” in duty so that obtaining the maximum price for shareholders should have been the directors’ sole concern once a sale of the company became inevitable. As such, solicitude for noninvestor interests or for preserving the corporate enterprise was, notwithstanding Unocal’s dictum on the propriety of such considerations, no

82. 500 A.2d 1346, 1357 (Del. 1985).
83. Revlon, 506 A.2d at 180.
84. Id. at 179.
85. Id. at 181.
86. Id. at 182.
longer appropriate. The remainder of the opinion went on to discuss Revlon’s defensive measures exclusively in terms of how they affected investor welfare, concluding that the lock-up option was invalid because it ended the auction of the company to the detriment of shareholders.

The important question is whether the idea of a “change” in directors’ duties will be confined to the Revlon facts, or whether the decision marks the beginning of an effort to elucidate director takeover duties more generally. Notwithstanding the Delaware Supreme Court’s recent attempt to reign in the full implications of its Revlon decision, there are several reasons for believing

87. Id.
88. Id. at 184-85.
89. In Ivanhoe Partners v. Newmont Mining Corp., 535 A.2d 1334 (Del. 1987), the Delaware Supreme Court, in upholding Newmont’s defensive actions against T. Boone Pickens (acting through Ivanhoe), had occasion to address the reach of the Revlon duty to auction. In the Newmont case, Newmont’s investment bankers determined that Ivanhoe’s initial proposal of $95 per share was inadequate. Ivanhoe, which owned 9.95% of Newmont’s stock, then made an offer for 42% of Newmont’s stock at $95 per share. Ivanhoe’s purchase of more than 9.9% of Newmont stock triggered a clause in a 1983 standstill agreement between Gold Field, a 26% shareholder in Newmont, and Newmont that freed Gold Field from the standstill agreement. Newmont, concerned about threats from both Ivanhoe and Gold Field, declared a $33 per share dividend in return for Gold Field agreeing to amend the standstill agreement to provide, among other things, that its duration extend to 1997. Gold Field then used the dividend to purchase enough Newmont stock in a “street sweep” to give it a formidable 49.7% of Newmont’s outstanding stock. Newmont’s defensive plan was upheld under Unocal’s modified business judgment rule, id. at 1345, perhaps not unexpectedly given Pickens’ reputation for seeking greenmail and causing corporate break-ups (a reputation that also damaged him in Unocal) and, significantly, given the two-tier nature of the bid.

The court also, however, had to contend with Revlon. The court distinguished Revlon by saying, first, that in the case before it no sale of the target was inevitable because Newmont in fact was not for sale and, second, no bidding contest had developed. Id. As to the absence of a bidding contest, had Newmont not revived the lapsed standstill agreement Gold Field might have acted to protect its position against the threat of Ivanhoe, possibly bidding for Newmont itself (as its investment advisor suggested), or selling to a third party who might then compete with Ivanhoe. The court did not fully address the possibility. More importantly, the Newmont court did not satisfactorily settle the question of why directors have no general duty to maximize value to shareholders once a bid has been initiated. Instead, the court observed that the defense insured the “continued interest of the public shareholders in the independent control and prosperity of Newmont.” Id. Is that the only interest of shareholders in a takeover contest? To say that the court simply ducked the wealth and governance implications of its decision for shareholders is to put it mildly.

While the Newmont decision may mean that directors are not in every instance required to “auction” a target company, the apparent relief is only temporary, and the fundamental issue raised in that and other similar cases will and must be revisited. Indeed, recent 1988 decisions reveal that courts clearly test defensive measures against the Revlon auction concept of director duty. In Black and Decker Corp. v. American Standard, Inc., 682 F. Supp. 772 (D. Del. 1988), the court issued a preliminary injunction against a proposed defensive recapitalization because the court believed that the bidder was likely to prevail on its claim that the plan, designed to ensure management control of the target, was a “sale” triggering the Revlon duty to obtain the best price for stockholders. Id. at 779-80. In CRTF Corp. v. Federated Dept Stores, 683 F. Supp. 422 (S.D.N.Y 1988), the court refused to enjoin a “poison pill” rights plan because the target directors had deployed the plan to solicit competing bids and additional, more advantageous bids from the first offeror. The court stated that the plan enabled the directors to fulfill their Revlon duty because it provided them with a “shield to fend off coercive offers and with a gavel to run an auction.” Id. at 439.

In another opinion, the Delaware Chancery Court upheld a target board’s refusal to redeem “poison pill” rights during a tender offer contest because the plan enabled the board to seek a higher competing bid at a time when market price exceeded the bid price. Tate & Lyle PLC and RP Acquisition Corp. v. Stanley Continental, Inc., [1987-88 Transfer Binder] Fed. Sec. L. Rep.
Clash Between Judicial and Legislative Notions

that by finally differentiating shareholder and corporate interests Revlon signifies a major shift in judicial review of takeover conduct, and that defensive measures of all kinds and at all stages of a takeover will be scrutinized more closely to determine their specific impact on shareholders.

First, the precise nature of management's duty to shareholders in a takeover needs clarification beyond the traditionally vague command to act in the best interests of the "corporation and its shareholders." This requires an evaluation of the shareholders' claim on the corporation, assessing the significance of their status as capital providers in relation to other important demands on corporate activity, both before and during a takeover bid. Courts must decide whether shareholders are entitled to more from management than devotion to long-term profit maximization for the entity, and resolve whether (and explain why) investors deserve opportunities for stock premiums as well. In candidly confronting this issue, which has long lingered just beneath the surface of their opinions, courts must consider not only the wealth effects of takeovers, but also their value as a very potent—perhaps overly potent—mechanism for achieving managerial accountability. Upon concluding that investors are entitled to the wealth and governance benefits of takeovers, courts must delineate the reach of their claim, either confining it to instances where directors acknowledge the break-up of the company as in Revlon, or requiring value-maximizing behavior, if not at all times, at least from the point when an unsolicited offer is made. While there may be no logical reason to assign directors the role of "auctioneer" only when they concede a company's inevitable dismantling, as courts deal with this next level of issues they may find that continued insistence on shareholder welfare as the primary purpose of corporate activity becomes, in the takeover setting at least, somewhat troubling.

This is an issue that goes to the very heart of corporate governance, indeed to the very heart of corporate capitalism. Given the undeniable impact of large corporations on multiple constituencies and the very mixed evidence on the overall economic utility of takeover transactions, courts may be reluctant to

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90. There is considerable evidence that shareholders of target companies profit from corporate takeovers. See supra note 10 and accompanying text. Many economists interpret the favorable price performance of target companies' stock to imply efficiency gains from takeovers as well. See infra note 154 and accompanying text. More direct evidence on the efficiency outcomes of many mergers, however, casts some doubt on whether such acquisitions generally are efficiency-enhancing. Professor F.M. Scherer and Mr. David Ravenscraft have assembled substantial direct evidence on mergers showing that acquired companies during the 1960s and early 1970s were, on average, highly profitable before acquisition and that, after acquisition, often experienced a decline in profitability. D. RAVENSCRAFT & F. SCHERER, MERGERS AND MANAGERIAL PERFORMANCE 2-3, 12-13 (Dec. 1985) (working paper, copy available at Journal of Corporation Law office). When tender offer acquisitions were isolated from their data, similar outcomes were found. D. RAVENSCRAFT & F. SCHERER, LIFE AFTER TAKEOVER 12-13 (Sept. 1986) (working paper, copy available at Journal of Corporation Law office). Ravenscraft and Scherer also found that pretakeover profitability of targets was only "slightly inferior" to that of industry peers, thus calling into question the hypothesis that hostile takeovers are directed at incompetent management. Scherer and Ravenscraft conclude that their findings are
describe management's responsibilities so narrowly—auctioneers, no less—while being unable to say exactly why, in a culture and body of law where the rhetoric of economic orthodoxy is so deeply ingrained, shareholder-"owners" ought not do with the company as they wish, whatever the consequences for others having intimate connections with a business. Courts may not be the body best suited to resolve these matters, but because they repeatedly are called on to assess the propriety of management's behavior, they eventually must confront these elemental questions.

Second, the court in Revlon stated a principle that it may have intended for general application: "A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." This element of balance in the modified business judgment rule, originating in Unocal, will require directors to demonstrate that defensive measures will lead to specific identifiable benefits for shareholders, rather than simply being in the best interests of the corporation. The precise meaning of "benefits," however, is unclear. It might be interpreted to mean that once a takeover attempt begins, shareholders cannot be denied the opportunity to realize immediate takeover-generated premiums as maximized by management's auctioneering efforts. Even further, it may mean that defensive measures adopted prior to a takeover bid might themselves be suspect if they serve to reduce the frequency, as well as the likelihood of success, of takeover attempts without also providing a recognizable off-setting benefit to investors. Alternatively, the term simply may be construed to mean the opportunity to remain as an investor in the company as operated presently and over the long-run. Once again, resolution of this issue will require courts to address explicitly the nature of the investors' claim on corporate activity.

Third, reviewing defensive tactics for their impact on the bidding process for a corporation's stock provides a standard of propriety, almost an outcome-oriented measure of the very kind that so distressingly is absent when judges review operating decisions. Simply put, because "[m]arket forces must be allowed..." D. RAVENSCRAFT & F. SCHERER, MERGERS AND MANAGERIAL PERFORMANCE, supra, at 37. They also suggest that the "hypothesis that tender offer acquisitions are on average efficiency-increasing warrants much more skepticism than it has received thus far in the literatures of economics, corporate finance, and securities law." D. RAVENSCRAFT & F. SCHERER, LIFE AFTER TAKEOVER, supra, at 13.

In another recent study, Professors Herman and Lowenstein, having examined 56 hostile tender offers initiated between 1975 and 1983, also found a significant decline in the acquired company's postmerger financial performance and concluded that hostile takeovers do not necessarily lead to efficiency gains. Herman & Lowenstein, The Efficiency Effects of Hostile Takeovers: An Empirical Study 19-26 (Nov. 1985) (an unpublished study in proceedings of Columbia University's Center for Law and Economic Studies' Conference on Takeovers and Contests for Corporate Control, copy available at Journal of Corporation Law office).

These studies, while employing methodologies that might be questioned, at least raise some doubt as to whether only inefficiently managed companies are acquisition targets or whether there are always useful "synergies" in a takeover. They also raise a serious question as to whether acquirors are serving larger societal interests by "breaking up" or possibly mismanaging what may have been reasonably well-run businesses.


to operate freely to bring the target’s shareholders the best price available . . . ,”93 actions that inhibit this, as the lock-up option did in Revlon, are improper, while actions that enhance this, as the redeemable poison pill did in Revlon, are appropriate. Strict adherence to this perspective would require proof that defensive measures adopted both before and during a takeover attempt did not impede the workings of the financial markets and deflect their benefits away from investors.94 After all, if market forces are to operate fully, then investors should receive all available advantages of the capital market. Thus, while it is relatively uncontroversial to assert that actual pending takeover bids must be responded to in a manner that yields the maximum return to investors, logically, if “[m]arket forces must be allowed to operate freely,”95 then an even bolder proposition might be made: defensive measures that are likely to reduce the frequency of takeover bids are improper unless the potential reduction in the number of bids is offset by the benefit to shareholders of strengthening management’s ability to deploy those measures to maximize shareholder gains once a bid is launched. Sorting out this issue and evaluating defensive measures in terms of their effect on fostering either a free market only for already-commenced corporate control contests or also for initiating such contests will not be easy.96 Nonetheless, it may be an appealing benchmark as courts struggle to articulate a conceptual framework for reconciling management duty and shareholder rights.

93. Revlon, 506 A.2d at 184.
94. See Buckhorn, Inc. v. Ropak Corp., 656 F. Supp. 209 (S.D. Ohio 1987). In Buckhorn, the court noted that in adopting a poison pill rights plan and establishing its “trigger price” the “directors were making a decision which would effectively preempt the marketplace, [and therefore] they assumed a great deal of responsibility which made it imperative that they make an informed decision concerning the value of Buckhorn stock.” Id. at 230. Because the target directors failed to meet their burden of proving that they had made an informed business judgment in setting the trigger price, the court enjoined implementation of the plan. Id. at 231; see also cases cited supra note 89.
95. Revlon, 506 A.2d at 184.
96. One difficulty in evaluating defensive measures in terms of their effect on the bidding process, especially given the difficulty of complying with Jarrell’s finding that target management should resist but not to the point of defeating a hostile bid, see Jarrell, supra note 10, at 151, is made clear by Judge Guy’s dissenting opinion in Edelman v. Fruehauf Corp., 798 F.2d 882 (6th Cir. 1986). Judge Guy pointed out that no target company shareholders objected to the degree of resistance used in that contest, and that continued resistance required “an evaluation of the upside benefit of getting perhaps a dollar more per share versus the downside benefit of possibly losing the white knight in the process.” Id. at 888. If courts continue to require premium-maximizing behavior they will have to respond to Judge Guy’s valid concern.

A recent example of a court giving directors some latitude in evaluating the economics of competing bids is Citron v. Fairchild Camera & Instrument Corp., [Current Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,915, at 90,103 (Del. Ch. May 19, 1988), where the Court upheld a board’s decision to accept an immediate $66 per share cash offer over a contingent $70, not all cash, offer. Another recent instance is In re Fort Howard Litig., C.A. 9991 (Del. Ch. Aug. 8, 1988) where the court upheld a management buy-out as consistent with its Revlon auction duty, reasoning that a board may favor one bidder over another if, in good faith, it believes shareholder interests are thereby advanced. See also Cottle v. Storer Communication, Inc., 849 F.2d 570, 577 (11th Cir. 1988) (where the court held that target directors may consider factors other than the cash offer price in determining the adequacy of a tender offer). These cases mean, in effect, that even though a target board may be required to conduct an auction, the exercise of board judgment in the auction context itself may be subject to limited review.
Finally, emphasis on director duty to shareholders rather than to the company increasingly is prominent in decisions reviewing management’s takeover conduct. The last portion of the *Revlon* opinion completely abandons the customary “corporation and its shareholders” phrase and refers only to management’s duty to shareholders.97 The effect of defensive measures on shareholder participation in corporate governance clearly was of concern to the *Norlin* and *Minstar* courts, however misguided and incomplete the courts’ analyses.98 Recently, the Sixth, Second, and Seventh Circuits, in striking down a management buy-out,99 a lock-up option,100 and a poison pill rights plan,101 respectively, expressed obvious concern for the effect of these defensive measures on shareholder well-being. The Sixth Circuit made it clear that in reviewing the propriety of a management buy-out that sought to end an unwelcome takeover attempt, the court’s function was to determine whether the target corporation’s board of directors had fulfilled its fiduciary duty to shareholders to obtain the highest premium for their stock.102 The Second Circuit considered the challenged lock-up option to affect shareholders adversely by both dampening the bidding process and impinging on investor governance rights.103 The court stated that a director’s fiduciary obligation is “to protect the financial interests of the corporation, and thereby the shareholders. . . . When engaging in defensive maneuvers, . . . a director’s obligation is to ensure the overall fairness . . . to the shareholders.”104 In the Seventh Circuit, Judge Posner, in striking down a target company’s poison pill, was clearer in expressing the fiduciary duty of directors as running exclusively to the shareholders:

It is supposed to be the shareholders’ company, for it is they who are entitled to all the income that the company generates after paying off all contractually or otherwise obligated expenses. The officers and directors are the agents and fiduciaries of the shareholders and owe a duty of complete loyalty which is inconsistent with erecting insuperable barriers to hostile takeovers.105

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97. *See supra* note 88 and accompanying text.
98. *See supra* note 58 and accompanying text.
100. Hanson Trust PLC, HSCM v. ML/SECM Acquisition, Inc., 781 F.2d 264 (2d Cir. 1986).
101. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250 (7th Cir. 1986), rev’d on other grounds, CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637 (1987).
103. *Hanson*, 781 F.2d at 281.
104. *Id.*, at 277-78.
105. *Dynamics Corp.*, 794 F.2d at 254. As a result of Judge Posner’s opinion, CTS Corporation’s board later implemented a different flip-in poison pill in connection with a professed determination to sell the company. The company was valued at $50 per share and the plan was designed to self-destruct if an offer of $50 or more per share was made. When reviewing the new plan, Judge Posner expressed concern about the chilling effect of such a plan on possible tender offers at a price below $50 per share, such an offer most likely being made by Dynamics Corp. which already held a 27.5% stake. He feared that in spite of the directors’ statement of intent to sell the company, a $50 price might be unreasonably high, and thus effectively would allow the board not to fulfill its *Revlon* duty to auction the company. Therefore, he remanded the case for yet further evidence on the reasonableness of the $50 reservation price. Dynamics Corp. of Am. v. CTS Corp., 805 F.2d 705 (7th Cir. 1986).
The lower courts also have been quick to adopt Revlon's renewed focus on shareholder welfare. In *Amalgamated Sugar Co. v. N.L. Industries*,\(^{106}\) a federal district court enjoined a "flip-in" poison pill rights plan that became nonredeemable after twenty percent of the target company's stock had been acquired. The court apparently believed that share ownership carries with it the entitlement to receive tender offers, and stated that the plan's lack of redeemability would "prevent stockholders from receiving tender offers. . . ."\(^{107}\) Furthermore, the court stated that investors "are entitled to exercise their own value judgments with respect to the worth or lack of worth of the offer. . . ."\(^{108}\) Thus, the court strongly implied that both the opportunity to receive takeover bids offering stock premiums and the unimpaired power to accept or reject that opportunity are attributes inherent in share ownership.

In *A.C. Acquisitions v. Anderson, Clayton & Co.*,\(^{109}\) a bidder who had made a cash offer of fifty-six dollars per share for all, but not less than a majority, of the target company's stock sought to enjoin the target from implementing a partial self-tender for sixty-five percent of its stock at sixty dollars per share and from issuing stock to an Employee Stock Ownership Plan. The Delaware Chancery Court, stating that it was applying *Unocal*’s two-pronged test of defensive measures,\(^{110}\) first held that by seeking to create an alternative investment for shareholders the target’s plan served a valid corporate purpose. In asking whether the defensive tactic was "reasonable in relation to the threat posed,"\(^{111}\) the court went on to observe, however, that because the target’s offer had to be accepted prior to the expiration of the hostile bid, the target’s actions were highly coercive and, in fact, did not create a viable alternative for shareholders. As a result, the court held that the target company’s action was not "fair to shareholders"\(^{112}\) and thus, the board of directors had breached its "legal duty to its shareholders to exercise its judgment to promote the stockholders' interests."\(^{113}\)

While the Chancery Court’s initial reference to the corporate purpose standard shows the usual confusion as to the proper beneficiary of management duty, later language, as well as the outcome of the case, makes it clear that if a target board purports to act on specific behalf of the shareholders it must in fact create a meaningful choice for them, the corporate entity being irrelevant. Further, the upshot of *A.C. Acquisitions* is that the shareholder’s unobstructed right to choose is the preeminent factor in a takeover; and it is possible that no threat to the corporate entity can justify foreclosing the exercise of that choice.\(^{114}\) So viewed, the second step of *Unocal*’s modified business judgment rule adds nothing to judicial review of defensive measures, and Delaware courts should state forthrightly that shareholder interests now are determinative.

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\(^{107}\) *Id.* at 1238.

\(^{108}\) *Id.* at 1239.

\(^{109}\) 519 A.2d 103 (Del. Ch. 1986).

\(^{110}\) *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946 (Del. 1985).

\(^{111}\) *A. C. Acquisitions*, 519 A.2d at 113.

\(^{112}\) *Id.* at 115.

\(^{113}\) *Id.* at 114 n.12.

\(^{114}\) At one point in the opinion, the court applies the *Unocal* "reasonableness" test expressly in terms of "threat posed to stockholders," whereas *Unocal* referred to the threat to the "corporation." Compare *id.* at 114 with *Unocal*, 493 A.2d at 955.
Even decisions upholding various defensive measures show the heightened attention to shareholder well-being sought by the court in Revlon. In Samjens Partners I v. Burlington Industries, the offeror sought to enjoin the target company from entering a merger agreement with a third party. In denying injunctive relief, the court held that the target board had carried out its Revlon obligations to auction the company because the merger agreement actually prompted further bids from both the offeror and the third party.

In Gelco Corp. v. Coniston Partners, the offeror argued that its all-cash offer for the target's stock had transformed the target board into a Revlon auctioneer with the responsibility of obtaining the highest price for shareholders to the exclusion of all other considerations. The court acknowledged that such was the case if there were multiple bidders—a concession that goes beyond the narrow holding of Revlon, because the court there reached that conclusion only when the target board had determined that a sale of the company was inevitable—but not where the board of directors believed its own restructuring and self-tender program, initiated prior to the hostile offer, would "yield superior long-term benefits for its shareholders ..." Finding the latter in the case before it, the court refused to grant the injunction.

The Gelco case may mean that auctioning can be avoided and that target management can consider the noninvestor factors referred to in Unocal if it had the foresight to implement the same value-enhancing measures as a later bidder itself might have done upon attaining control. By such "preemptive" action, significant value immediately is distributed to shareholders and the corporate entity is restructured—oftentimes drastically—just as in an auction followed by a break-up of the company. The difference is that incumbent management remains in control of the corporation. In short, to retain its position and prevent a hostile bid that may require it to auction the company, management seeks to give shareholders essentially what "market forces," the new standard of performance, would have provided—a generous payment. Thus, by influencing management to behave in such a way as to avoid its application, the Revlon decision, nonetheless, may serve the interests of shareholders.

117. Id. at 847.
118. Id. at 850.
119. It is clear that heightened judicial scrutiny of defensive measures generally, and the Revlon auction concept more particularly, has influenced the behavior of corporate management. Managers themselves, though perhaps reluctantly, often speak of auctioning the companies they manage. For example, in a letter to Campeau Corp., which had launched a hostile bid for Federated Department Stores, Inc., the board of Federated, having received competing bids from Campeau and R.H. Macy & Co., stated as follows: "The auction has continued for some time now, and the board believes it is in the interests of all constituencies that it be brought to a conclusion." Federated Board Sets Vote on 2 Suitors' Final Bids, Wall St. J., Mar. 29, 1988, at 6, col 1. In fact, the contest continued, and was resolved by Campeau making the high bid. Also, in commenting on the current takeover environment, H. Brewster Atwater, Chairman of General Mills, Inc. and head of a takeover task force at the Business Roundtable, stated: "You're seeing the creation of a new auction market." Coll, Rules Are Changing in Wall Street's Takeover Game, Wash. Post, Apr. 3, 1988, at H1, col. 1.
A similar defensive recapitalization was upheld in *British Printing & Communication Corp. v. Harcourt Brace Jovanovich, Inc.* In *British Printing*, the offeror proposed a merger with the target company that would pay the target shareholders forty-four dollars cash per share. On advice of its investment bankers and after several meetings, the target board ultimately rejected that proposal in favor of a recapitalization that would pay shareholders forty dollars in cash, distribute to them one share of preferred stock valued at ten dollars, and allow them to retain part of their common stock in anticipation of future company growth. The target board also authorized the issuance of convertible preferred stock to an ESOP. The special dividend plan required a $2,500,000,000 loan, the repayment of which would necessitate a severe cost-reduction program. Moreover, transactional costs for the loan were substantial—approximately $125,000,000 to $130,000,000. The court refused to enjoin the recapitalization, holding that the plaintiff had not demonstrated target director breach of either the duty of care or loyalty because future takeover attempts had not been frustrated completely as the plaintiffs had alleged. While the court employed the traditional rhetoric of purporting to examine compliance with duties to "corporation and shareholders," the underlying result is that the target board simply preempted the bidder by taking essentially the same value-increasing measures as the plaintiff itself might have adopted. Thus, as in *Gelco*, a Revlon auction was averted, but the corporate entity and its constituent relationships were altered dramatically because target management no longer could preserve them in their pretakeover condition. Instead, responding to market forces, management was constrained to distribute substantial value to shareholders.

In sum, many courts reviewing takeover behavior still employ a rhetoric that fails to clarify whether and how corporate management's duty to the corporation differs from its duty to adhere to the tenets of orthodoxy and maximize shareholder wealth. However, in result and increasingly in their language and discourse, courts at last are sharpening their focus on shareholder well-being, thereby moving to align management duty with corporate purpose.

III. LEGISLATIVE EXPRESSIONS OF CORPORATE PURPOSE AND MANAGEMENT CONDUCT

A. Corporate Statutes Before the Takeover Phenomenon

Perhaps surprisingly, corporate statutes do not expressly address the issue of corporate objective. Thus, nowhere in these statutes is it stated that entities...
formed thereunder must or should seek to maximize profits or shareholder wealth, or pursue any other particular end. Furthermore, until recently, corporate statutes did not prescribe the duties of corporate management, choosing instead to leave that task to decisional law. Currently, those statutes that do formulate corporate management's duty do so in very general terms, almost invariably stating that management is to act in the "best interests" of the "corporation." 2

Although modern corporate statutes do not deal with corporate objectives, and would face formidable obstacles in attempting to do so, it seems clear that states have the power explicitly to insist that corporate conduct inure either to shareholder well-being or to some broader notion of public good. This sounds very strange to the modern ear, particularly in a free enterprise system where liberty of contract is so highly valued, and where relatively unhindered corporations have played such an important—even indispensable—role in our remarkable material development. It also seems a bit quaint and out of fashion in view of the "contractual" model of corporate law subscribed to by so many contemporary corporate scholars. Still, there are two related reasons why states possess this authority. First, a corporation may come into existence only by the act—whether special or general—of a sovereign power. Without formal state action, however routine and ministerial it may have become under modern statutes, corporate status is impossible. Second, and to take a less reified view of corporate existence, incorporation laws confer rights and privileges—e.g., limited liability and perpetual duration—on corporate participants that naturally are not held by individuals or partnerships, and that are attainable by private bargaining, if at all, only at great expense. It is possible then, at least in theory, if not in fashion, for states to condition the grant of such rights and privileges on the

ANALYSIS AND RECOMMENDATIONS, while not a statute is, nonetheless, an attempt to articulate succinctly the parameters of corporate activity. See supra notes 14-15 and accompanying text. That section, tentatively approved by the ALI in 1984, generated a great deal of controversy. Schwartz, Objective and Conduct of the Corporation: Defining the Corporate Objective: Section 2.01 of the ALI's Principles, 52 GEO. WASH. L. REV. 511, 511 (1984).

123. The Model Business Corporation Act contained no such provision until 1974, when it added § 35, now superseded by § 8.30 of the Revised Act. Delaware still does not have a statute that defines corporate management's duties. Its indemnification section, however, requires that a person seeking indemnification must have acted in a manner he or she "reasonably believed to be in or not opposed to the best interests of the corporation...." DEL. CODE ANN. tit. 8, § 145(a) (1986). See generally H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS Ch. 9, § 232, at 612-20 (1986) (discussing definition of the duties of corporate management by case law and statute).


125. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 409 (1819) ("The power of creating a corporation, is one appertaining to sovereignty ...."); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 634 (1819) ("A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.").

126. Woodward, 17 U.S. (4 Wheat.) at 634 ("Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.").


128. This so-called "concession theory" of the corporation is described in Hessen, A New Concept of Corporations: A Contractual and Private Property Model, 30 HASTINGS L.J. 1327, 1327-28 (1979). Hessen takes issue with the theory by asserting that corporate participants do not receive rights and privileges from the state that are not attainable by private arrangement. That analysis,
assurance—however enforced—that they will be exercised for the public good, even if doing so proves detrimental to shareholders.\textsuperscript{129} Less ambitiously, states simply might require that these rights and privileges not be used to pursue certain proscribed activities regarded from time to time as inimical to the public interest, again even if those activities would be advantageous to investors.

The implications of this authority for state influence, even control, over corporate business affairs are profound, and could be expected to meet substantial resistance if some concrete and far-reaching expression of them seriously were proposed. Yet, early in the history of business corporations, states forthrightly availed themselves of this power and exercised tight control over the granting of corporate charters,\textsuperscript{130} initially issuing them on a case by case basis with strict conditions,\textsuperscript{131} and only when “necessary in order to procure for the community some specific benefit otherwise unattainable.”\textsuperscript{132} Even after the passage of general incorporation statutes, corporations still were “presumed to be incorporated for the benefit of the public.”\textsuperscript{133}

The passage of general incorporation statutes, however, did mark a significant transformation in legislative attitudes toward corporations. Instead of being viewed with the distrust and fear of earlier days, corporations were regarded more favorably. Not only did they provide the material benefits that accompany exceptional economic growth, the very process of chartering corporations was a boon to state treasuries.\textsuperscript{134} These twin benefits led to the well-known trend, continuing today, whereby many states compete with each other in providing both congenial corporate statutes\textsuperscript{135} and hospitable business climates. Because it is management and its legal counsel that fulfill the critical function of selecting the state of incorporation (or reincorporation), corporate statutes must appeal to them.\textsuperscript{136} The result is the widespread adoption of corporate statutes having

\textsuperscript{129} Professor Dodd extended this idea to business generally: “Business . . . is private property only in a qualified sense, and society may properly demand that it be carried on in such a way as to safeguard the interests of those who deal with it either as employees or consumers even if the proprietary rights of its owners are thereby curtailed.” Dodd, \textit{supra} note 29, at 1162.

\textsuperscript{130} H. HENN \& J. ALEXANDER, \textit{supra} note 123, at 23-26.

\textsuperscript{131} \textit{Id.} at 25-26 (“The [incorporation] privilege at first was circumscribed with limitations and requirements as to permissible purposes, maximum authorized capital, minimum paid-in capital, par value, trust fund theory, limited duration, residence of incorporators and directors, maximum indebtedness, powers, etc.”); see also Liggett Co. v. Lee, 288 U.S. 517, 549-56 (1933) (Brandeis, J., dissenting) (Stating that “[t]he general laws, which long embodied severe restrictions upon size and upon the scope of corporate activity, were, in part, an expression of the desire for equality of opportunity.”).

\textsuperscript{132} Lee, 288 U.S. at 549 (Brandeis, J., dissenting); see also A.P. Smith Mfg. v. Barlow, 13 N.J. 145, 149, 98 A.2d 581, 583 (1953).

\textsuperscript{133} Hale v. Henkel, 201 U.S. 43, 74 (1906); see also Dodd, \textit{supra} note 29, at 1149. The development of new ways of thinking about corporate law matters, especially the emergence of the contractual and “market” model, has led to a kind of collective forgetting or denial of, even embarrassment over, this early stage in corporate law. The same has occurred with antitrust law. See Millon, \textit{The Sherman Act and the Balance of Power}, S. CAL. L. REV. 1219 (1988).

\textsuperscript{134} Lee, 288 U.S. at 557, 559-60 (Brandeis, J., dissenting).

\textsuperscript{135} \textit{Id.} at 558-59 (Brandeis, J., dissenting); see also Cary, \textit{Federalism and Corporate Law: Reflections Upon Delaware}, 83 YALE L.J. 663, 663-66 (1974).

\textsuperscript{136} Although corporate statutes must appeal to corporate management, that is not to say
as their philosophy the facilitating and enabling of corporate activity, rather than the goal of impeding or regulating such activity.\(^{137}\)

Moreover, modern corporate statutes do not deal with the totality of corporate behavior. They simply order—in a fairly general way—the relationship between those who provide capital (shareholders and, to a limited extent, creditors) and those who manage the enterprise. The relationship of employees, consumers, and the public at large to the corporation is determined largely by contract, or has become the subject of special legislation.\(^{138}\) In short, throughout the twentieth century noninvestor groups universally have been regarded as standing outside the governance structure erected by corporate statutes.

Contemporary corporate statutes then have no explicit requirement that serving the public good is either a quid pro quo for the initial grant of corporate status and its privileges or, once granted, a mandatory objective of corporate endeavor. Instead, it is presumed that the public good is served well by chartering large numbers of corporations which, in pursuing profits and shareholder well-being, will provide satisfying jobs, useful products and services, and sustainable economic growth. By aligning the egoistic pursuit of profits with the general good in this manner, the utilitarian underpinnings of economic orthodoxy find expression in the complex, collective activities made possible by the corporate form, as well as in the relatively simple enterprises conducted by individuals. Such a neat resolution of the investor's claim on the corporation—a claim not strictly analogous to that of a capital-providing sole proprietor on his or her enterprise—and the larger community's claim on a once feared institution also serves to justify corporate statutes that ignore all relationships except that of capital providers to capital managers, and even explains why such statutes have been skewed to the apparent advantage of management. If the public good is identified with material well-being and the efficient use of economic resources, then management's free reign in pursuing profits on behalf of shareholders becomes the "visible hand" which will guide society to that end.\(^{139}\)

In spite of the unparalleled economic prosperity of the early and mid-twentieth century, or perhaps because of the awesome power it afforded corporate management, there was and is a gnawing concern about whether corporate


\(^{138}\) See supra note 24 and accompanying text.

behavior adequately satisfies the expectations of either shareholders\textsuperscript{140} or various noninvestor groups. While the corporate governance movement aims to rectify this potentially embarrassing situation by improving the position of diffuse capital providers in relation to managers, and by reestablishing the primacy of their claim on corporate endeavor, the still-burgeoning corporate responsibility movement seeks to make corporate conduct more responsive to a host of noninvestor concerns.\textsuperscript{141} Interestingly, although they share a deep concern about corporate management's broad and potentially unaccountable power, these two movements have never been linked together. Undoubtedly each group perceives that management unfairly modulates its claims on the corporation in favor of the other. Thus, while both would like to rechannel management's discretion, they would do so in diametrically opposite directions. Investors would favor stricter allegiance to their desires, while noninvestors would seek to broaden the corporate outlook. The result is that little serious attention has been given to achieving socially more responsible action by tampering with the internal governance structure of the corporation.\textsuperscript{142} The inside of the corporation remains the inviolate province of shareholders and management.\textsuperscript{143}

\textbf{B. States Respond to Takeovers}

The hostile takeover phenomenon, little known before the 1960s, has a significant connection to both corporate governance and responsibility. As to governance, many believe, with an almost detectable sense of relief, that the "market for corporate control," first fully described by Dean Manne in 1965,\textsuperscript{144} may be the long-awaited mechanism for finally securing meaningful management accountability and for returning shareholders to their rightful place of importance

\begin{footnotesize}
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\item \textsuperscript{140} For an excellent discussion of the manner in which the modern shareholder remains vulnerable to the exercise of management discretion, see Buxbaum, \textit{The Internal Division of Powers in Corporate Governance}, 73 Calif. L. Rev. 1671 (1985).
\item \textsuperscript{141} See Stone, \textit{supra} note 17, at 570; see also sources cited \textit{supra} note 14.
\item \textsuperscript{142} Professor Stone believes that the failure to propose concrete methods of institutional reform is the major weakness of much of the literature on corporate responsibility. Stone, \textit{supra} note 17, at 558-59.
\item \textsuperscript{143} Several years ago, Professor Chayes sought to articulate a more expansive notion of corporate membership:

A more spacious conception of [corporate] "membership," and one closer to the facts of corporate life, would include all those having a relation of sufficient intimacy with the corporation or subject to its power in a sufficiently specialized way. Their rightful share in decisions on the exercise of corporate power would be exercised through an institutional arrangement appropriately designed to represent the interests of a constituency of members having a significant common relation to the corporation and its power. It is not always easy to identify such constituencies nor is it always clear what institutional forms are appropriate for recognizing their interests. The effort to answer those questions is among the most meaningful tasks of the American legal system.

Chayes, \textit{The Modern Corporation and the Rule of Law}, in \textit{The Corporation in Modern Society} 41 (E. Mason ed. 1959). It is fair to say that Chayes' idea has not been implemented, and that little if anything has been done to formalize the relationship of various noninvestor constituencies to the internal governance of the American corporation. Nonetheless, it is an idea that continues to be advanced in various forms. See commentators cited \textit{supra} note 14.
\item \textsuperscript{144} Manne, \textit{supra} note 44, at 112.
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in the corporation. In a sense, just as noninvestor interests had become foreign to corporate law, investors themselves, frustrated at traditional corporate law's seeming inability to safeguard their interests, looked beyond that law to market-based protection. That in turn has led some scholars to take a more market-oriented and less rules centered view of corporate law.

Except for common-law fiduciary principles, cash tender offers were unregulated until 1968, when Congress passed the Williams Act as an amendment to the Securities Exchange Act of 1934. Because the major purpose of the federal securities laws is maintaining fair and honest capital markets, their intended beneficiary is, naturally enough, the investor. In keeping with this philosophy of investor protection, Congress sought to ensure that target company shareholders could decide the outcome of takeover contests after full disclosure from, but without excessive influence by, the bidder and target management. It strove to be neutral between bidder and target. It has never been altogether clear whether Congress intended unimpaired financial markets to be the exclusive means for protecting investors so that state regulation could not upset that approach, or whether it sought only to establish a minimum degree of protection that states were free to exceed, perhaps even by taking a nonmarket approach to that objective. What always has been clear, however, is that shareholders were the chosen beneficiaries of the legislation, and that they were to decide a target company's fate by acting out of a self-interest that, ideally, also would work for the general good.

145. See, e.g., Gilson, supra note 2, at 841 ("Indeed, . . . the market for corporate control may be the only potentially serious force for limiting management discretion."); Weiss, Economic Analysis, Corporate Law, and the A.L.I Corporate Governance Project, 70 CORNELL L. REV. 1, 27 (1984) ("[T]he 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.").


147. 15 U.S.C. §§ 78m(d)-(e), 78n(d)-(f) (1982).

148. Id. §§ 78a-78kk.

149. Senator Williams made this point when he introduced the bill: "Every effort has been made to avoid tipping the balance of regulatory burden in favor of management or in favor of the offeror. The purpose of this bill is to require full and fair disclosure for the benefit of stockholders while at the same time providing the offeror and management equal opportunity to fairly present their case." 113 CONG. REC. 854-55 (1967); Piper v. Chris-Craft Indus., 430 U.S. 1, 28 (1977) ("The legislative history . . . shows that Congress was intent upon regulating takeover bidders, theretofore operating covertly, in order to protect the shareholders of target companies."). For a brief summary of the disclosure and other provisions of the Williams Act, see CTS Corp. v. Dynamics Corp. of Am., 107 S. Ct. 1637, 1644 (1987).

150. For a collection of the decisions and commentary subscribing to one or the other of these views, see Note, The Constitutionality of Second Generation Takeover Statutes, 73 VA. L. REV. 203, 217-19 (1987). In Edgar v. MITE Corp., 457 U.S. 624 (1982), a plurality of Justices sought to resolve this matter by stating that because "Congress intended for investors to be free to make their own decisions . . . [t]he state thus offers investor protection at the expense of investor autonomy—an approach quite in conflict with that adopted by Congress." 457 U.S. at 635-40 (emphasis added). The exact status of the MITE plurality statement is somewhat in doubt after CTS Corp., however, because the Court in CTS emphasized that while its opinion "passes muster" under MITE, the court was not "bound by its reasoning." CTS, 107 S. Ct. at 1645. For a detailed treatment of the Williams Act's aims and the current preemption of state takeover statutes controversy, see Johnson & Millon, Misreading The Williams Act (Unpublished Manuscript 1988).
While state corporate statutes in 1968 may have been fairly accommodating to corporate management, nothing in the design or rhetoric of those statutes contradicted the Williams Act's key assumption that, ultimately, shareholders, as owners of the corporation, should decide the corporation's basic direction. Nonetheless, although accepting in theory the centrality of the investors' position in corporate affairs and appreciating the need to redress the imbalance in their relationship to management, states also saw a different side of the rampant takeover activity—the social responsibility side—and began to question whether attaining takeover benefits for shareholders was as consistent with other important interests as economic and legal orthodoxy presumed.

States recognized that takeover battles may benefit bidders and financial intermediaries, and undoubtedly are good for target company shareholders, both to enhance their wealth and as an effective, if blunt, governance mechanism. Such contests might even fulfill the desire of society at large for a more efficient use of economic resources. States also perceived, however, that those benefits all are likely to be realized by the residents of other states, leaving the economic and social costs of corporate disruption to fall disproportionately on the state having a substantial connection to the target company. Feared costs include the closing or moving of corporate headquarters and plants, with a resulting loss of employment by workers, loss of income, property and sales tax revenues by the state, reduction of charitable contributions to dependent nonprofit organizations, and loss to the target company's web of suppliers, dealers, and customers. Undaunted by the absence of solid evidence that takeovers actually

152. For evidence that takeover contests do not always benefit bidders, see supra note 10 and accompanying text.

153. Id.

154. Professor Demsetz has testified that "takeovers and tender offers serve the interests of both shareholders and the nation." Securities and Exchange Commission Proceedings: Economic Forum on Tender Offers 16 (Feb. 20, 1985) (copy on file at Journal of Corporation Law office). The Annual Report of the Council of Economic Advisers for 1985 also concluded that takeovers both increase national wealth and enhance shareholder well-being. "The available evidence, however, is that mergers and acquisitions increase national wealth. They improve efficiency, transfer scarce resources to higher valued uses, and stimulate effective corporate management . . . . The evidence is overwhelming that successful takeovers substantially increase the wealth of stockholders in target companies." Economic Report of the President, transmitted to Congress together with the Annual Report of the Council of Economic Advisers 196-97 (Feb. 1985).

155. See, e.g., the preamble to Act of May 1, 1987, ch. 124, 1987 N.C. Sess. Laws 1, which states:

Whereas, takeovers and takeover attempts of corporations in North Carolina have been occurring with increasing frequency; and
Whereas, such activity can be highly disruptive to communities within North Carolina by causing, among other things, high unemployment and erosion of the State and local economy and tax base; and
Whereas, many of these corporations are not presently subject to the North Carolina Shareholder Protection Act since while substantially present in North Carolina they are chartered elsewhere; and
Whereas, these corporations offer employment to a large number of North Carolina citizens who pay income taxes, property and other taxes in this State; and
Whereas, these corporations pay significant amounts of income taxes to North Carolina; and
Whereas, these corporations pay substantial State and local property taxes; and
Whereas, these corporations pay substantial sales and use taxes in North Carolina;
cause undesirable effects on noninvestors, thirty-seven states, motivated by the mere prospect of such economic displacement, and responding to the considerable political influence wielded by corporate management, enacted takeover legislation by 1978.

These "first generation" takeover statutes often required disclosures beyond those imposed by the Williams Act, sometimes well before the commencement of a tender offer. Furthermore, state administrators frequently were authorized to hold hearings on proposed offers and to prevent an offer from proceeding if it was believed to be unfair or deficient in its disclosures. Although a principal motivation for such statutes was to protect noninvestors by precluding free-market solutions to takeover contests, ironically, though not surprisingly given the continuing hold of economic orthodoxy on discourse about corporate and securities matters, their provisions often were couched in the conventional language of shareholder protection. In 1982, however, the Supreme Court, in Edgar v. MITE Corp., frustrated state objectives by striking down the Illinois Business Takeover Act, a typical statute. The Court, after uncritically reciting the supposed salubrious effects of takeover activity on shareholder wealth, corporate governance, and efficiency in the use of society's economic resources, held the Illinois Act to be unconstitutional under the Commerce Clause because it imposed burdens on interstate commerce that were excessive in light of the local interests the Illinois Act purported to further.

Given state goals of retaining businesses within their borders as independent entities and of protecting those resident constituent interests that depend on the continuation of management-formulated operating policies—aims that are quite different from the pure investor protection policy of federal law—the critical question facing state legislatures was whether MITE left any meaningful room

and

Whereas, these corporations provide their North Carolina employees with health, retirement and other benefits; and

Whereas, these corporations and their employees contribute greatly to community projects in North Carolina; and

Whereas, many unrelated businesses rely on these corporations to purchase goods and services; and

Whereas, North Carolina has a vital interest in providing to these corporations the benefits of the provisions of the North Carolina Shareholder Protection Act; Now, therefore . . .

156. SEC Commissioner Joseph A. Grundfest recently asserted that hostile takeovers necessarily do not cause job losses and other economic dislocation. He argued that even though there is considerable "emotional appeal" to tying hostile takeovers to employee layoffs, "the logic of the relationship between job loss and takeover activity simply does not support the political rhetoric." Grundfest Challenges Argument That Takeovers Cause Job Losses, 20 Sec. Reg. & L. Rep. (BNA) 423 (1988).


164. MITE, 457 U.S. at 643.
for them to accomplish their objectives. Particularly encouraging for continued, if narrowed, state involvement in regulating corporate takeovers were statements in the concurring opinions of Justices Powell and Stevens. Joining in Justice White’s indirect burden on commerce analysis of the Illinois Act, Justice Powell stated that he favored this position because its “reasoning leaves some room for state regulation of tender offers.” He acknowledged the importance of corporations to the “general public interest” and recognized that significant disruption of state and local economies can occur upon the relocation of corporate headquarters. Moreover, he appeared to endorse state laws aimed at protecting noninvestors when he agreed with Justice Stevens that “the Williams Act’s neutrality policy does not necessarily imply a congressional intent to prohibit state legislation designed to assure—at least in some circumstances—greater protection to interests that include, but often are broader than, those of incumbent management.” Although he did not elaborate, Justice Powell obviously believed that because federal takeover policy simply did not address the concerns of those persons who, while not investors or otherwise directly associated with the capital markets, clearly have a significant stake in corporate activities, there might be room for limited state action to protect those interests.

Certain states seized this perceived window of permissible action and turned to their state corporate statutes as a constitutionally safe means of controlling certain facets of a takeover. The chief rationale for utilizing corporate laws as an avenue for regulating takeover activity stems from the notion that while federal law regulates the interstate capital markets in which shareholders buy and sell stock—an activity that in a sense is external to the corporate entity—historically only state law governed the substance of a corporation’s intracorporate relationships—its “internal affairs.” It was hoped that if a state’s corporate statutes somehow could be brought to bear on certain aspects of the takeover process, a process that previously had taken place exclusively in the capital markets and hence “outside” the corporation, perhaps states could bring, at least partially, those transactions “inside” the entity where they could regulate them, thereby circumventing the market-oriented, pro-investor philosophy of federal law.

The decision to deploy corporate law as the vehicle for state influence on takeover contests is ironic. Except for the very early years of business corporations, states long had refrained from utilizing corporate statutes as an explicit means of influencing corporations to seek the general public good. Perhaps recognizing that states, constrained by economic orthodoxy’s deep hold on corporate law, largely had ceded the province of corporate law to the narrow investor-manager relationship, defenders of these second generation statutes continue to speak in the language of that law, and often argue that the statutes are “shareholder protection” acts. Such a defense is somewhat plausible for the “fair price”

165. Id. at 646.
166. Id.
167. Id. at 646-47.
168. In Cort v. Ash, 422 U.S. 66, 84 (1975), the Supreme Court stated that “[c]orporations are creatures of state law and . . . except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation.”
The statutes pioneered by Maryland because they had the limited aim of preventing the shareholder coercion that often resulted from two-tier tender offers.\(^\text{170}\) Even here, however, the ability of the target board to opt out of the restrictions of those statutes to accomplish a friendly business combination, or to engage in its own discriminatory two-tier self-tender offer, makes that position and mode of discourse highly questionable.\(^\text{171}\)

The “control share acquisition” statute pioneered by Ohio\(^\text{172}\) also initially might be defended as a proshareholder statute because it affords shareholders the same right to act with fellow shareholders in collectively approving or disapproving a tender offer as they traditionally have had with respect to asset sales and mergers.\(^\text{173}\) Here, however, this purported \textit{ex post} benefit to shareholders once a takeover bid actually has been launched is offset by three factors. First, historically, the decision to alienate one's stock has been an individual shareholder's to make and, at least in public corporations, has been a right that largely has gone unrestricted. Thus, a valuable incident of stock ownership is curtailed substantially by control share statutes. Second, while collective rather than individual shareholder action might minimize the coercion of a partial or two-tier offer, the frequency of those kind of tender offers has declined dramatically in the past few years. Third, while shareholders technically were enfranchised to act collectively on the takeover issue, it seems clear that this was done, oddly, so that shareholders would not gain the benefits of a takeover. Under Ohio's version of the control share statute a purchase of stock that brings the buyer's ownership of stock to or above certain thresholds first must be approved by a vote of then existing shareholders.\(^\text{174}\) Because a shareholder plebiscite does not take place for up to fifty days the resulting delay, for a number of reasons, might serve to defeat a hostile bid to the detriment of investors. With the passage of time and resulting change in circumstances, such a bid might prove to be mispriced or otherwise imprudent and, therefore, be withdrawn.\(^\text{175}\) Also, the carrying costs of retaining a financing commitment obviously increase with the passage of time. Furthermore, there is a risk that additional bidders, friendly or otherwise, who did not incur the “search costs” of the first bidder might enter the contest during the interim. Such a risk may dissuade potential bidders from even making initial offers.\(^\text{176}\) Finally, and most importantly, delay provides target management with the time needed to formulate and mount a takeover defense, the assumption being that time increases the likelihood that such measures will succeed.\(^\text{177}\) All of these factors may serve, \textit{ex ante}, to reduce the aggregate

\(^{170}\) See, \textit{e.g.}, Md. Corps. & Ass'ns Code Ann. §§ 3-601 to -603 (1985); Romano, \textit{supra} note 157, at 118-19.


\(^{172}\) See \textit{supra} note 3 and accompanying text.

\(^{173}\) For a detailed description of how a control share acquisition statute is designed and operates, see Johnson, \textit{supra} note 5, at 195-97.

\(^{174}\) \textit{Id.}

\(^{175}\) Romano, \textit{supra} note 157, at 114-15 n.10.

\(^{176}\) \textit{Id.}

\(^{177}\) Interestingly, these second-generation statutes were designed during a period—the early to mid-1980s—when judicial review of defensive measures was fairly lax. Yet, as argued, see \textit{supra} notes 81-121 and accompanying text, courts have reversed field and are becoming much more critical of management's takeover behavior. Consequently, the legislative strategy of providing management with sufficient time to defeat a takeover attempt substantially may have been undermined by this unexpected shift in judicial review.
level of takeover activity, to the detriment of shareholders as a class.

These statutes then, while couched in the conventional rhetoric of investor protection, in reality were designed to equip management to safeguard interests more economically and politically significant to the chartering state. Toward that end, state corporation statutes were amended to curtail the historic right of shareholders freely to alienate their stock, thereby seeking to reduce investor influence on the outcome of takeovers. In a sense, although legal orthodoxy hardly permitted them to say so, states perceived that it was the shareholders themselves, newly empowered by takeovers in their relationship to management and having little concern for the social repercussions of their investment decisions, who were the culprits. Such a view is neither a moral condemnation of investors, nor does it reflect a belief that the goal of better management accountability to investors, were it capable of achievement without undesirable consequences for noninvestors, is undesirable. It is simply an appreciation of the fact that while interstate capital markets highly are developed, thereby allowing capital to gain almost instantaneously the highest available return by abandoning one locale and enterprise for the good of another, other materials and talents used by businesses are rooted more to place and move less readily.

However laudable it may be to protect those less mobile interests, in doing so states not only deprive investors of a powerful mechanism for disciplining management, they also inevitably open themselves to the charge that they are being unduly parochial and protectionist. Even conceding that motive, however, states might respond that they have a legitimate concern. Undoubtedly states appreciate the ever-changing nature of modern economic activity, and that the owners of today's valued resources and talents have no permanent claim on the corporation. They also might believe, however, that these resources can, as circumstances demand, be reallocated less abruptly than often occurs with takeovers, thereby allowing resource owners to plan for and make a more thoughtful, humane adaptation to inevitable change. Possessing no calculus or other mechanism by which good, nondisruptive takeovers can be identified and allowed to proceed, states simply hold that takeovers almost are uniformly unnecessary and damaging. Happily, because the content of stock ownership rights always has been defined by state corporate law, investors, unlike the out-of-state offerors in MITE who clearly were beyond a state's constitutional reach, become an expedient lever for dampening such activity. Thus, states are deploying their corporate laws to sacrifice investor interests while, at the same time, claiming to protect them.\textsuperscript{178}

Such improbity is unnecessary. While it is undeniable that corporate law in the twentieth century has been narrowed to deal only with the relationship between those who provide and those who manage capital, there is, as indicated earlier,\textsuperscript{179} no inherent reason why a state corporate statute must be so limited. A state, exercising its historic sovereign powers to insist that corporate activity

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\textsuperscript{178} A recent study by the SEC's Office of the Chief Economist found that the passage of Ohio's 1986 takeover law was accompanied by a drop in the share prices of Ohio corporations in an amount equal to roughly two percent in value, and that the law appears to "redistribute wealth from shareholders of Ohio firms to the incumbent managements and workers of these firms, residents of Ohio." \textit{The Office of the Chief Economist Securities and Exchange Commission, Shareholder Wealth Effects of Ohio Legislation Affecting Takeovers} 3, 23 (May 18, 1987).

\textsuperscript{179} See supra notes 125-29 and accompanying text.
serve what it conceives, rightly or wrongly, as the general public good, might assert simply that the ability of shareholders to alienate stock without limitation is inimical to that goal and, as a result, must be abridged legislatively. This is not to say, as some have,180 that in a pristine, precorporate condition those persons engaged in the private conduct of business are required by law or morals to give one whit about the effect of their activities on others in society, except as relevant markets require. The claim is more limited. It is simply that when business participants seek the many advantages of the corporate form of organization—advantages not inhering in citizenship—a state, the grantor of corporate status, may impose limitations of a kind not applicable to extracorporate business activity, thereby effectively requiring the participants to acknowledge the interests of others in a way that may exceed less pervasive market constraints. Yet, because states long ago had eschewed the deliberate attainment of the public good through their corporate statutes, and actually had subscribed to the orthodox view that the unbridled pursuit of shareholder wealth was more or less consonant with the public welfare, they were forced to distort reality, asserting that their takeover laws, being corporate laws, actually helped rather than hurt shareholders. Moreover, because Congress had taken a decidedly proshareholder, market-oriented approach to takeover legislation in the Williams Act, a state approach candidly aimed at harming investors and averting market outcomes for the purpose of protecting other interests would present a much starker preemption issue. The traditional power of states to regulate corporate affairs would be tested severely had they not adopted a takeover strategy phrased, however inaccurately, in terms of investor protection.

C. The Myth of Investor Protection and the Supreme Court

The United States Supreme Court recently upheld Indiana’s Control Share Acquisition Statute against Commerce and Supremacy Clause attacks by analyzing it as the shareholder protection act it purported to be.181 Indiana’s statute was modeled after Ohio’s, but differed in one significant respect. Whereas Ohio’s statute prohibited the actual purchase of “control shares” without first obtaining the consent of existing shareholders,182 Indiana’s statute did not forbid the purchase as such, but provided that such shares carried voting rights only if and to the extent granted by existing shareholders at a special meeting.183 Thus, because shareholders collectively could decide whether to confer voting rights, they effectively could decide whether acquisition of the shares, and thus control of the corporation, would be achieved.

Justice Powell’s opinion, first analyzing whether the Williams Act preempted Indiana’s law, was replete with references to the manner in which the statute’s requirement of a shareholder plebiscite purportedly benefited investors and thus served the same goal as the Williams Act:

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

180. See, e.g., Dodd, supra note 29, at 1148 n.7.
shareholders to vote as a group, the Act protects them from the coercive aspects of some tender offers . . . . The principal result of the Act is to grant shareholders the power to deliberate collectively about the merits of tender offers. This result is fully in accord with the purposes of the Williams Act.184

Justice Powell also noted that a finding of preemption would mean a wide variety of state corporate laws might also be preempted, particularly because Indiana's law, unlike Ohio's, merely limited the voting attributes of stock ownership, not the acquisition of stock itself.185 He also rejected as unpersuasive for preemption analysis the argument that by introducing up to a fifty-day delay in a takeover transaction the statute afforded management the opportunity to mount a takeover defense.186 He stated that even if management took actions "to diminish the value of the corporation's shares, . . ." the preemption analysis would be unchanged because neither the "[Indiana] Act nor any other federal statute can assure that shareholders do not suffer from the mismanagement of corporate officers and directors." This assertion, however, was conspicuously inconsistent with the larger thrust of his analysis that Indiana's statute was not preempted by the Williams Act precisely because, supposedly, it did protect shareholder interests. Moreover, it slid much too quickly over the troubling fact that it is shareholder inability to discipline management for its perceived failings in "diminish[ing] the value of the corporation's shares" by traditional legal means—e.g., proxy contests or corporate derivative actions—that makes a market-based mechanism like takeovers such an attractive governance instrument. Finally, by emphasizing elsewhere in his opinion that Indiana's statute would not "alter the balance between management and offeror in any significant way,"190 Powell implied that only incidental interference with shareholder choice was permissible, even if the admitted state objective was to empower management to "mismanage" the company by defeating a takeover bid for the benefit of noninvestors. Overall then, Powell's preemption analysis simply did not explore fully the constitutional relationship between federal law, with its clear but limited philosophy of protecting investors through the capital markets, and state corporate

184. CTS, 107 S. Ct. at 1645-46 & n.7.
185. Id. at 1647-48.
186. Id. at 1647 n.9.
187. Id. This remark by Justice Powell seems to equate effective defensive measures with "mismanagement." If such measures are considered "mismanagement," it is certainly not the kind of mismanagement that common-law fiduciary principles altogether have prohibited. Moreover, the remark seems to ignore a possible preemption attack, not against state takeover statutes, but against state common-law principles that accord directors the discretion to thwart takeover attempts. It appears that such a constitutional attack on common-law corporate principles has never been made. For development of such an argument, see Johnson & Millon, Does the Williams Act Preempt State Common Law In Hostile Takeovers?, 16 SEC. REG. L.J. 9 (forthcoming Winter 1988).
188. CTS, 107 S. Ct. at 1647 n.9.
190. CTS, 107 S. Ct. at 1646 n.7.
law, with both its admitted historic shortcomings in protecting shareholders through internal mechanisms and its renewed efforts on behalf of noninvestors to reduce further the role of capital markets (i.e., takeovers) in redressing those shortcomings.

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

The primary purpose of the Act is to protect the shareholders of Indiana corporations . . . . In our view, the possibility of coercion in some takeover bids offers additional justification for Indiana's decision to promote the autonomy of independent shareholders . . . . It only provides regulatory procedures designed for the better protection of the corporation's shareholders.191

In addition to, and somewhat at odds with, this focus on shareholder well-being, Justice Powell also emphasized the undoubted power of states to:

create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A state has an interest in promoting stable relationships among parties involved in the corporations it charters, as well as in insuring that investors in such corporations have an effective voice in corporate affairs . . . . To the limited extent that the Act affects interstate commerce, this is justified by the State's interest in defining the attributes of shares in its corporations and in protecting shareholders.192

This analysis indicates that while a state can act through its corporate statutes to protect its resident shareholders, it also can promote "stable relationships among parties involved in"193 corporations who are, presumably, not investors. Here Powell may have acknowledged, as he did more explicitly in MITE,194 the disruptive effect of takeovers on a state's economy. He was, however, less than clear in stating exactly what weight state efforts to protect noninvestor interests should be given in Commerce Clause analysis.195 Equally important, Powell emphasized in this passage that a state, and only a state, can define and delimit

191. Id. at 1651-52.
192. Id. at 1650-52 (emphasis added).
193. Id. at 1651.
194. See supra text accompanying notes 165-67.
195. Justice Powell's commerce clause analysis had two prongs: (1) Does the state statute discriminate against interstate commerce? (2) Does the state statute subject takeover activity to inconsistent regulation? Arguably, commerce clause analysis is complete after responding to those questions, thereby rendering obsolete the balancing test of Pike v. Bruce Church, Inc., 397 U.S. 137 (1970). Regan, Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation, 85 MICH. L. REV. 1865, 1866-68 (1987). However, in Hyde Park Partners, L.P. v. Connolly, 839 F.2d 837, 844 (1st Cir. 1988), the First Circuit, in reviewing the constitutionality of portions of Massachusetts' takeover law, utilized the Pike balancing test because the statute under review was not, as in CTS", a "corporate governance" statute. The First Circuit recognized the permissibility of states legislating to protect certain noninvestor interests. It held, however, that the challenged section of the Massachusetts law prohibited stock sales altogether and, consequently, was unduly burdensome under Pike because it severely hurt the interests of investors. Somewhat, the court left out of its balancing test what it had conceded to be a permissible state consideration—noninvestor interests. No doubt the Supreme Court's failure
what rights and privileges stock ownership entails. Significantly, he went on to say that a state may do so in a manner that in actuality damages investors ex ante: "Accordingly, even if the Act should decrease the number of successful tender offers for Indiana corporations, this would not offend the Commerce Clause." 196

In citing two grounds other than investor protection on which a state may utilize its corporate law to influence takeovers, Powell came close to holding what has been argued in this Part III: the power of states to define attributes of capital stock can be exercised forthrightly and without resort to the rhetoric of shareholder protection, a needless and transparently inaccurate rationale. Justice Powell stopped short of that, however. By making the myth of shareholder protection the central part of his analysis, he avoided confronting the harsh reality that many states, acting out of rational self interest, quietly have abandoned, at least with respect to takeovers, economic orthodoxy and have sought to impair the free workings of the interstate capital markets to hurt, not help, shareholders. Frankly recognizing this state objective would create a rather pointed conflict between the proshareholder concerns of the Williams Act and state takeover law designed to protect other interests. In addition, it openly would condone state efforts to safeguard local economic interests at the expense of the supposed benefits to society at large of an efficient, unrestricted interstate market for corporate control, benefits that were, however, apparently less clear to the Supreme Court in 1987 than in 1982. 197

In dissenting, Justices White, Blackmun, and Stevens discussed Indiana’s law in precisely those terms, challenging Powell to confront candidly the flawed nature of an analysis that seeks to reconcile Indiana’s law with investor protection:

to give clearer guidance as to how noninvestor factors bear on the constitutionality of state laws contributed to the First Circuit’s decision and will continue to plague lower courts as they review takeover statutes. For a persuasive argument that if a statute was “motivated by a general belief that takeovers leading to corporate removals are unacceptably disruptive of established economic relations” it would be “perfectly permissible so far as the dormant commerce clause” is concerned, see Regan, supra, at 1872 (emphasis in original). For a response to Professor Regan’s larger argument, see Gergen, Territoriality and the Perils of Formalism, 86 Mich. L. Rev. 1735, 1735 (1988) (questioning Regan’s territoriality principle: “[I]t works poorly, if it works at all, as a check on the regulatory authority of states”).

196. CTS, 107 S. Ct. at 1652.
197. In MITE, the Supreme Court described the effects of the Illinois takeover legislation on interstate commerce as follows:

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

457 U.S. at 643. The basis for this conclusion in MITE is the uncritical adoption of the reasoning of certain proponents of the “efficient capital market” hypothesis. Citing several studies showing significant stock price increases resulting from takeovers, see supra note 10 and accompanying text, these proponents conclude that such increases imply efficiency gains from takeover activity, see supra note 154 and accompanying text. For a description and critique of that theory as employed by courts to review state takeover legislation, see Johnson, supra note 5, at 203-07. In CTS, the Supreme Court did not base its commerce clause analysis on that theory, but in fact appeared to distance itself from its earlier position: “The constitution does not require the States to subscribe to any particular economic theory.” CTS, 107 S. Ct. at 1651.
The Control Share Acquisitions Chapter will effectively prevent minority shareholders in some circumstances from selling their stock to a willing tender offeror. It is the practical impact of the Chapter that leads to the conclusion that it is preempted by the Williams Act . . . . A state law which permits a majority of an Indiana corporation's stockholders to prevent individual investors, including out-of-state stockholders, from selling their stock to an out-of-state tender offeror and thereby frustrate any transfer of corporate control, is the archetype of the kind of state law that the Commerce Clause forbids. 198

There are, of course, many unanswered questions about state takeover legislation after CTS. 199 The point here is that the Supreme Court has reversed the free-market approach followed by lower courts in reviewing takeover legislation after MITE, 200 and has sanctioned state efforts to reject orthodoxy and to take away something of great value to shareholders—their long-held right to decide for themselves, individually, the outcome of a takeover contest. Whether a high level of takeover activity is as bad for state economic interests as they perceive is an empirical question on which there is no agreed-upon evidence. What matters is that state legislators, heavily influenced by incumbent management, fear that such activity, however good for investors, damages interests having a close connection to their states. Moving to protect those interests, states at last did, with the Supreme Court's blessing, what they had not done since the earliest days of corporate chartering. They utilized their corporate statutes to make a statement, bold though implicit, about corporate purpose, a statement quite different from that emerging under post-Revlon common law: when it comes to takeovers, corporations do not exist chiefly to maximize investor wealth.

IV. THE CLASH OF JUDICIAL AND LEGISLATIVE CONCEPTIONS OF MANAGEMENT CONDUCT

Having briefly traced how judicial and legislative thinking on takeovers has evolved to embrace different visions of corporate purpose, the important question is which will be more influential on management’s actual takeover behavior. Put another way, will control share acquisition statutes, or any other form of state takeover legislation, really accomplish their objectives in light of the judiciary's rewakened commitment to investor interests? The facts of a recent case, 201 and certain assumed variations of those facts, provide a way to explore that question.

A. A Business Combination and Control Share Acquisition Statute in Action: The Primacy of Investor Interests

On May 6, 1987, Samjens Partners I (Samjens)—in which Asher Edelman and Dominion Textile were principals—commenced a tender offer for all outstanding shares of Burlington Industries, Inc. (Burlington) at $67 per share.

198. CTS, 107 S. Ct. at 1655-56 (White, Blackmun, and Stevens, JJ., dissenting) (Justices Blackmun and Stevens joined Justice White only on the Commerce Clause issue) (emphasis added).
199. See infra text accompanying notes 201-40.
200. After MITE, lower courts uncritically accepted as central to their analysis of state takeover statutes the supposed economic effects described in MITE. See, e.g., Gelco Corp. v. Coniston Partners, 652 F. Supp. 829, 840 (D. Minn. 1986), aff’d in part and vacated in part, 811 F.2d 114 (8th Cir. 1987).
On May 11 the Burlington board of directors met and determined that the bid was inadequate. On May 14 Burlington announced a self-tender for twenty-five percent of its stock at $80 per share, and also stated that the board was considering other actions to enhance shareholder value, including a possible recapitalization, merger, or a leveraged buy-out agreement. On May 15 Samjens increased its bid to $72 per share. On May 20 Burlington and Morgan Stanley Group, Inc. (Morgan) reached a friendly merger agreement under which Morgan agreed to tender for all of Burlington's stock at $76 per share. On May 28 Samjens raised its offer to $77 per share and proposed a merger with Burlington on terms similar to those reached with Morgan. On June 10 Morgan raised its bid to $78 per share.

During this period the legislature of North Carolina, where Burlington was headquartered, had been very busy. On April 23 it enacted a Shareholder Protection Act (Act) which provided that a "business combination" between a corporation and any entity owning, directly or indirectly, twenty percent or more of the voting shares of such corporation required the affirmative vote of the holders of at least ninety-five percent of the voting shares of the corporation. The Act excepted certain transactions and also exempted from its coverage those business combinations engaged in by a corporation the board of which, on or before ninety days after the effective date of the law, opted out of the Act.

On May 1 the North Carolina legislature extended the Act to certain foreign corporations, thereby bringing Burlington, a Delaware corporation, within its coverage. On May 13 the legislature adopted a Control Share Acquisition Statute modeled after the Indiana statute upheld by the Supreme Court just three weeks earlier. Samjens sought to enjoin the merger agreement between Burlington and Morgan on several grounds, including both a claim that the Burlington board had failed to conduct the required Revlon auction for the company, and a claim that the Morgan merger agreement improperly required Burlington to opt out of the Act for the benefit of Morgan but not for Samjens. The court first held that the Burlington board had indeed fulfilled its duty to auction its common-law fiduciary duty of auctioning.

The court observed that, had the board not opted out of the Act, the proposed merger with Morgan—a business combination under the statute—could not take place without a shareholder vote and, therefore, might not have occurred at all. "By opting out, the board was not acting selectively to freeze Edelman out. Rather, it was enhancing the bidding by securing a $76 bid from Morgan." While the discussion was very brief, it appears as though the court said that the Burlington board had fulfilled its common-law fiduciary duty of auctioning.

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206. Id. at 626.
the company because it had opted out of a legislatively-prescribed procedure for business combinations. Reading the statute this way transforms the requirement of a shareholder vote on a business combination (or on a control share acquisition) into a statutorily-created defensive measure—similar to a board-created redeemable poison pill or lock-up option—the sole purpose of which is to strengthen management’s hand in complying with its common-law duty to secure top dollar for shareholders.

Are the common law and state takeover policies so congruent as that? Did the North Carolina legislature really enact its several takeover measures to enable the Burlington board to serve as better “negotiating agents” or “auctioneers” on behalf of shareholders? The preamble to the North Carolina law whereby the Act was extended to foreign corporations such as Burlington says a great deal about North Carolina employees and communities and nothing at all about shareholders.207 In this respect the law’s aim is precisely that of all takeover statutes—to protect resident noninvestors by reducing takeover activity. Because it is highly doubtful that the legislature especially was concerned about nonresident shareholders, and in fact clearly sought to reduce their influence on takeover contests, then why, notwithstanding the enactment of such takeover legislation, did the Burlington board—and more generally, why might any board under siege—behave as Revlon auctioneers? There are several possible answers.

First, whereas the Indiana statute upheld in CTS applied only to Indiana-chartered (domestic) corporations,208 North Carolina sought to apply its corporate laws to a Delaware (foreign) corporation.209 While this indicates that North Carolina probably has a much greater economic connection to Burlington than does Delaware, North Carolina may lack the constitutional authority of a chartering state to delimit the attributes of share ownership. By emphasizing the power of a state to define stock ownership rights in companies it creates, Justice Powell’s opinion in CTS substantially may restrict the ability of states to protect other, foreign companies important to their economies—the chartering connection may also be needed. Yet, because the Indiana law in CTS applied only to domestic corporations that also had a significant presence in the state,210 it is unclear whether, on the one hand, chartering is even a strictly necessary condition for state action if companies have a substantial presence in the state211 or, on the other, whether chartering is a necessary, but not sufficient condition, for such action if a substantial presence is lacking. Obviously, if chartering alone is sufficient, Delaware has a basis—only recently exercised212—for enacting

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207. See supra note 155 and accompanying text.
209. See supra note 203 and accompanying text.
211. In TLX Acquisition Corp. v. Telex Corp., 679 F. Supp. 1022 (W.D. Okla. 1987), the Oklahoma Control Share Acquisition Statute was held to be unconstitutional because it sought to cover not only domestic corporations, but also foreign corporations with substantial connections to Oklahoma. The court found that the statute posed the “risk of inconsistent regulation by different states,” citing CTS, because the laws of both Oklahoma and Delaware, the state of the target’s incorporation, possibly might regulate the takeover. Id. at 1029; see also Campeau Corp. v. Federated Dept’l Stores, 679 F. Supp. 735, 738-39 (S.D. Ohio 1988) (enjoining Ohio Foreign Business Corporation Act, which sought to apply the Ohio Control Share Acquisition statute to non-Ohio companies, as violative of the commerce clause).
212. See supra note 3 and accompanying text.
influential takeover legislation. If chartering is a necessary but not a sufficient basis for action, then Delaware's law may be unconstitutional as to companies lacking any other meaningful connection to Delaware. In that event, a Delaware corporation seeking takeover protection may reincorporate in that state where it has the greatest presence—if that state accommodates its locally headquartered companies by enacting favorable takeover legislation. In any case, when Burlington came under attack Delaware had no takeover statute and, because there was no time for reincorporation in North Carolina, North Carolina sought to extend the scope of its statute. Burlington’s legal counsel, however, may have had serious doubts about its constitutionality under CTS, and thus advised the board that it afforded no sure protection.

Second, being particularly vulnerable during a takeover, directors may be influenced unduly by investment bankers whose livelihood depends on doing deals, not simply on resisting unwanted advances. Third, legal counsel to a target company of course will advise the board of its emerging common-law fiduciary duty to make shareholder interests paramount to that of the company, particularly in multiple bidder situations where the Revlon duty to auction may

213. In BNS Inc. v. Koppers Co., 683 F. Supp. 458 (D. Del. 1988), the United States District Court for Delaware denied a preliminary injunction against the new Delaware takeover statute, concluding that it was probably constitutional. Because Delaware’s only connection with most corporations is the chartering connection, the statute cannot be defended on the ground that Delaware has an interest in protecting noninvestors residing in the states where Delaware companies are headquartered. Instead, Delaware’s law is perhaps the only takeover law that must be defended purely as a shareholder protection statute. Acknowledging that the statute greatly enhanced management’s power, the court noted that “entrusting management to protect shareholders is the norm in current corporate law.” Id. at 470. In essence, it appears that the court held the law not to be preempted because it regarded the Williams Act’s chief concern to be the objective of investor protection, not also assuring neutrality between offeror and management as a means to that objective. The court’s reasoning not only conflicts with MITE and its emphasis on the importance of investor autonomy in takeovers, see supra note 151 and accompanying text, it is much broader, in two respects, than CTS. First, Powell too emphasized that the Indiana statute “protects the independent shareholder against both of the contending parties . . . Unlike the MITE statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. . . . [T]he Act allows shareholders to evaluate the fairness of the offer collectively.” CTS, 107 S. Ct. at 1645-46 (emphasis added). Delaware’s statute accords target management a more central role in resolving takeover conflicts than Indiana’s. Second, Powell also pointed out that Indiana’s law would not “alter the balance between management and offeror in any significant way,” thereby apparently condoning only incidental interference with shareholder choice. Id. at 1646 n.7.

Delaware’s law, by empowering management, but not in aid of noninvestor considerations, thus radically and straightforwardly rejects shareholder autonomy as the only constitutionally accepted means of attaining the William Act’s much heralded goal of investor protection. In doing so, Delaware seeks to maintain the primacy of its promanagement body of state corporate law over the workings and advantages to investors of national financial markets. By upholding Delaware’s law, the court in BNS Inc., not only arguably misread MITE and CTS, it rather transparently favored management over the Williams Act objective of achieving investor protection through investor choice as expressed in unobstructed capital markets. Several weeks later, the court again upheld the statute against constitutional attack. RP Acquisition Corp. v. Staley Continental Inc., 686 F. Supp. 476 (D. Del. 1988). Compare RTE Corp. v. Mark IV Indus., Civil Action No. 88-C-378 (E.D. Wis. May 6, 1988) (Wisconsin business combination statute preempted by Williams Act). The RTE decision was vacated on June 22, 1988, because the case had become moot and no appellate review would be available.

be inescapable. Yet that raises the question of why the board must auction the company at all if a state has passed a constitutional and genuinely effective takeover statute. Regrettably, even though motivated by a desire to protect noninvestor interests located in their state, many takeover statutes do not explicitly inform directors of the relevance of those factors to director decisions and, if they do, fail to empower directors to protect those interests or to give any other meaningful guidance on how directors are to respond to a takeover. Finally, although friendly mergers, restructurings, and leveraged buy-outs often damage the entity and noninvestor interests as drastically as an auction or break-up takeover, such resolutions hold more appeal for management than sale to a hostile bidder. They not only place substantial value in shareholder hands, they often, at least in the near term, allow members of senior management to retain their positions.

For one or more of these several reasons, the Burlington board chose to fulfill its common-law role of auctioneer for investors in spite of a state takeover statute aimed at achieving quite different goals. To elaborate on the importance of the last two factors described above, and to explore more generally the effect of current forms of takeover statutes on target management conduct, it may be useful to suppose that the facts of the Burlington case were altered slightly.

B. Control Share Acquisition Statute Coupled With a Statute Permitting Director Consideration of Noninvestor Interests

Assume that the North Carolina legislature had done what Pennsylvania pioneered and what several states have followed: added to the director standard of care section of its corporate statute a provision to the effect that in formulating takeover strategy a board of directors may consider the interests of various noninvestors which, frankly, are a state's chief concern anyway. Assume also that the target board believes that both the existing tender offer and any preemptive measures such as a friendly merger, corporate restructuring, or leveraged buy-out will significantly, adversely affect certain of these noninvestor

215. Management of the postbuyout Burlington sold or closed 34 of its 84 plants and reduced the payroll by 18,000 employees. Moreover, while it has reduced debt substantially, debt, $1.6 billion worth, still constitutes 96% of its capital. Burlington's New Weave: Smaller and Tighter, Bus. Wk., Sept. 19, 1988, at 35. North Carolina appears not to have achieved its legislative goals in the Burlington takeover.

216. 42 PA. CONS. STAT. ANN. § 8363(b) (Purdon Supp. 1988) (previously codified at 15 PA. CONS. STAT. ANN. § 1408(b) (Purdon Supp. 1985)).


218. The Minnesota statute contains what is probably the fullest description of the various factors that a target board of directors may consider:

In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.

groups. Finally, to overcome the chartering and potential conflict of laws problem, assume that Burlington is a North Carolina corporation. How then does the target board respond to an unsolicited tender offer at a substantial premium?

While post-*Revlon* common law increasingly demands that the target board act in a manner that will extract the highest possible value for shareholders, here statutory law expressly allows the board to take a much broader view of corporate purpose and management duty. Yet, it is not at all clear, particularly in light of the reading that the Burlington court gave to North Carolina’s Shareholder Protection Act as essentially a bargaining device, that courts will construe takeover statutes as overriding the common-law duty to auction the company or otherwise to maximize shareholder well-being. Furthermore, if a target board refrains from pursuing friendly merger partners, under a control share acquisition statute a bidder that conditionally offers to buy twenty percent or more of the target company stock can trigger a shareholder plebiscite to determine whether to enfranchise those shares. It is likely that target shareholders—both those who have held their stock for a long time and arbitrageurs—will grant voting rights to a bidder making a sufficiently attractive offer if their board is not pursuing other value-enhancing options out of a belief that they too will jeopardize the entity and its constituent relationships.

What then, if anything, can such a board do actively to influence either the larger control contest or the outcome of the shareholder vote itself during the fifty-day period prior to the shareholder meeting? After all, delay was a key strategic element in the design of control share acquisition statutes, but delay so management can do what?

Implementing a poison pill rights plan to thwart the bidder is highly vulnerable at this stage because *Revlon* and its progeny sanctioned that device only because it “spurred the bidding to new heights” and thus ultimately served investor

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219. Massachusetts, like many other states, applied its control share statute to foreign corporations to help a locally-headquartered company—in this case Gillette—that is incorporated in Delaware. Doing so, however, raises the possibility of such a statute conflicting with the laws of the chartering state, thereby creating inconsistent regulation and a Commerce Clause problem. See *supra* note 211 and accompanying text. Massachusetts sought to avoid a constitutional conflict by providing that its law will be inapplicable to foreign companies when the laws of the chartering state expressly limit, restrict, or otherwise affect the voting rights of any person proposing to acquire control shares in a manner expressly inconsistent with Massachusetts law. Act of July 21, 1987, 1987 Mass. Acts ch. 272, § 2 (codified at Mass. Gen. Laws Ann. ch. 110E (West Supp. 1988)). The efficacy of such a provision in avoiding, much less resolving, a conflicts of law issue is suspect because the laws of the chartering state may well conflict with Massachusetts law even though they are not “expressly inconsistent.” Although a test of this provision was avoided when no strong bid for Gillette materialized, the issue is likely to be presented in the not too distant future.

220. See *supra* text accompanying note 203.


223. Peter Drucker has argued that because many shareholders are themselves institutional trustees, such as managers of pension funds, they may have “little choice as to whether they want to sell their shares if someone bids substantially above what the same shares fetch at the market price. They have to accept. If they were to say ‘no,’ they would lay themselves open to an enormous and uninsurable liability.” Drucker, *supra* note 66, at 11.

224. See *supra* notes 175-77 and accompanying text.
interests. Moreover, any defensive measures aimed at protecting either the corporate entity or noninvestors that also serve successfully to interfere with shareholder resolution of the hostile bid's outcome, because states have adopted the rhetoric of investor protection and ostensibly have placed the bid's outcome in their hands, may have the ironic effect of violating legislative intent. While a statute allowing directors to consider noninvestor interests may enable a board to refrain from actively auctioning the company during the preplebiscite period, it is hard to believe that a court will allow it to take defensive measures that clearly impair the stated aim of control share legislation—fair shareholder consideration of the hostile offer. In upholding Indiana’s control share statute, the Supreme Court made it very clear that it did so because it “protects the independent shareholder against both of the contending parties . . . . Unlike the MITE statute, the Indiana Act does not give either management or the offeror an advantage in communicating with the shareholders about the impending offer. . . [T]he Act allows shareholders to evaluate the fairness of the offer collectively.”

The problem is that the same statute allowing directors to consider the interests of noninvestors and the entity also provides that shareholders will make the ultimate decision on the company’s fate. In adopting a rhetoric and scheme of pure shareholder democracy to meet constitutional objections, while retaining an element of representative democracy by which a board of directors may take account of multiple interests, a modified control share statute seeks at once to go in opposite directions. Such a statute lacks any mechanism by which a board of directors, believing that both a takeover and defensive measures will harm the entity and its constituent interests, can act decisively to achieve what it truly regards as the contest’s proper outcome. Indeed, what role other than either remaining entirely passive or providing additional, noncoercive investment options for investors could a board have under such a statute? A board in this situation simply is powerless to act on behalf of the entity itself or vulnerable noninvestor groups. Thus, even this seemingly potent addition to a control share statute will fail to accomplish its objectives. It will fail because as a corporate law presumably aimed at enhancing investor welfare it will be construed to do just what it says—enfranchise shareholders—not what it really seeks—deploy corporate law to preserve management discretion to protect other, less orthodox interests.

C. Statute Permitting Director Consideration of Noninvestor Interests Coupled With Statute Requiring Director Approval of Business Combinations or Control Share Acquisitions

Suppose that North Carolina had been bolder, and truly had empowered the target board to take a broader view of its responsibilities. For example, assume a somewhat different business combination statute had been enacted, such as the one first approved in New York, and recently adopted, with some

225. See supra notes 85 & 89 and accompanying text.
227. See N.Y. Bus. Corp. Law § 912 (Consol. Supp. 1987). In Salant Acquisition Corp. v. Manhattan Indus., 682 F. Supp. 199 (S.D.N.Y. 1988), New York’s takeover statute was challenged as unconstitutional. The court denied plaintiff’s motion for a preliminary injunction on the ground that plaintiff, for several reasons, had failed to make a showing of irreparable harm. Thus, while briefly discussing the effects of the law on takeovers, the court did not pass on its constitutionality.
modifications, by several other states, including Delaware. That statute prohibits any business combination between the target company and a twenty percent shareholder for five years after acquisition of the twenty percent block unless, prior to the acquisition, the target board had approved either the stock acquisition itself or the proposed business combination. After five years, a business combination requires approval of a disinterested majority of shareholders or payment of a statutorily-defined fair price. Or, suppose a state went even farther and provided that no significant share acquisition could take place without target board approval. In either case, the proposed business combination or control share acquisition would require not only shareholder consent but also express approval of the board of directors. In short, a state comes clean and announces that it has no genuine interest in protecting shareholders or placing the outcome of a takeover contest solely in their hands. Or, perhaps less bluntly, asserts that a corporation’s board of directors should have, as with mergers and asset sales, an important voice in the proposed transaction. Assume too that the offeror intends to finance the purchase by selling off certain target company assets, a transaction falling within the definition of “business combination.”

Thus, there is a substantial offer, a board of directors genuinely concerned about the takeover’s impact on the entity or various noninvestor interests, and a statute that both enables board of director consideration of noninvestor interests and that requires board approval to accomplish a significant facet of the proposed takeover.

In this scenario, post-Revlon common law still will require, or at least strongly influence, directors to auction the company or take other shareholder wealth-maximizing measures. Statutory law, however, authorizes and apparently empowers the board to reject that course of action. Could a target board of directors utilize what seems to be a truly potent statute to avoid its common-law duty and, thus, thwart an unwanted but lucrative takeover? Realistically, would directors ever do so? There are several reasons why, in spite of a well fortified statutory arsenal, they might not.

First, for all their rhetoric about occupying a position of stewardship for various stakeholders, directors themselves may not truly believe that their function is anything other than what orthodoxy prescribes—to secure top dollar for shareholders—at least if it can be done in a manner that also accommodates their own desires. Second, upon advice of legal counsel a board simply might believe that acting contrary to investor interests is too risky. Shareholders may claim—whether persuasively is unclear—that in acting to protect noninvestor interests directors breach their common-law fiduciary duty, notwithstanding the existence of statutory authorization. Other constituencies, including the state, cannot make any claim against directors for failure to protect noninvestor interests

228. See sources cited supra note 3.
229. Id.
230. Id.
231. See, e.g., MINN. STAT. § 302A.011, subd. 46 (Supp. 1987).
232. That this could happen is seen in CTS itself. Even though Indiana provides that directors may consider noninvestor interests, IND. CODE ANN. § 23-1-35-1(d) (Burns 1988), that played no part in Judge Posner’s proshareholder analysis of a target boards’s takeover duty. Dynamics Corp. of Am. v. CTS Corp., 794 F.2d 250, 256-59 (7th Cir. 1986).
because the new standard of care statutes provide only that directors may consider their interests, not that they must.233 The permissive nature of the statutes, along with the absence of a meaningful enforcement mechanism, leaves such groups with no remedy for a breach of the statute.234 Even if consideration of such factors was mandatory, management is given no guidance as to how various interests are to be weighed and reconciled. As a result, either directors are imbued with uncontrollably broad authority or, to ensure management’s compliance with the statute,235 courts would be called on to scrutinize carefully management conduct, a task they traditionally have resisted.

Third, if directors availed themselves of their statutory power and successfully resisted a takeover on behalf of noninvestor constituencies, shareholders—especially institutional investors and arbitrageurs—later may assert their disenchantment with a board’s takeover conduct by seeking to oust (or voting with an insurgent seeking to oust) incumbent directors through the proxy machinery.236 Ultimately, however unimportant and uncontroversial to the governance of most corporations at most times, shareholders alone elect directors. With institutional investors showing renewed vigor and interest in shareholder matters,237 they might seek either to remove those directors who, having once blocked their much-valued opportunity to tender, may do so again, or, in return for not siding with a dissident faction, extract various concessions from the board that will bolster shareholder say on corporate matters. This is especially likely to happen given that stock ownership tends to concentrate in the hands of investors seeking short-term gains during periods of speculation about a takeover.238 Knowing this, directors may be inclined to avoid conduct that jeopardizes their positions,

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233. An exception to this is the Arizona statute which states that directors “shall consider the long-term as well as the short-term interests of the corporation and its shareholders including the possibility that these interests may be best served by the continued independence of the corporation.” Ariz. Rev. Stat. Ann. § 10-1202A (1987) (emphasis added).


235. Professor Axworthy makes this point about § 46 of the United Kingdom Companies Act of 1980 which states that directors “shall include [in their deliberations] the interests of the company’s employees in general as well as the interests of its members.” Id. at 408 (quoting U.K. Companies Act 1980, ch. 22, § 46).

236. Under Minnesota’s corporate statute, for example, a shareholder owning 10% or more of the voting power of all shares entitled to vote may demand a special meeting of shareholders to elect directors. Minn. Stat. § 302A.433(e) (1985). Because the holders of a majority of the voting power of the shares present and entitled to vote are a quorum, theoretically a potential acquiror could purchase very little stock, then solicit proxies in sufficient number to demand a special meeting and, finally, by garnering the voting support of as little as 25.01% of the outstanding shares, elect a new board of directors that would be more hospitable to the attempted acquisition. Id. §§ 302A.443, .437.

237. Recently, for example, the Council of Institutional Investors, a coalition of pension funds, adopted a shareholder “bill of rights” for the purpose of reasserting the role of investors in corporate decision-making and making corporate management more accountable to shareholders, especially in takeovers. Vise, “Bill of Rights” Seeks to Boost Power of Shareholders, Wash. Post, Apr. 13, 1986, at F1, col. 1. Also, T. Boone Pickens, Jr., a frequent bidder for corporations, has established a nonprofit organization—United Shareholders of America—to advocate shareholder interests. Victor, Pickens’ Plan Gets Mixed Reviews From Bar, Nat’l L.J., Aug. 11, 1986, at 9, col. 1.

238. For example, when Gillette was a takeover candidate more than 50% of its outstanding stock reportedly was held by institutions, while at least an additional 15% was concentrated in the hands of arbitragers or other short-term speculators. Wessel, Gillette’s Status as a Takeover Play Is Placed In Doubt as Stock Falls With Rest of Market, Wall St. J., Oct. 16, 1987, at 61, col 3.
especially because various preemptive measures, while adversely affecting the very noninvestor interests the state seeks to protect, can at once defeat the bid, mollify the shareholders, and preserve management jobs.

Finally, if a truly potent takeover statute is not simply employed as a bargaining device for management to extract more shareholder value from a bidder, but might actually be used to defeat a takeover attempt, it hardly lends itself to the investor protection rhetoric Justice Powell employed in upholding Indiana's law.\textsuperscript{239} While Powell's CTS opinion stated that a reduction in the number of successful tender offers as a result of Indiana's law would not offend the Commerce Clause,\textsuperscript{240} that law, as argued, probably wouldn't have that effect anyway. Are the other less prominent rationales for Powell's Commerce Clause analysis—state power to define the attributes of stock ownership and a state's interest in promoting stable corporate relationships—sufficient grounds for upholding a law that clearly and substantially does reduce takeover activity, an effect that, by the very nature of capital markets, is interstate in character?

In essence, a truly powerful takeover statute would require the Court to determine whether capital providers, who realize substantial gains from corporate activity via transactions on interstate financial markets, constitutionally are preferred to those more local noninvestor interests that states believe sometimes are damaged by sudden large-scale exchanges of stock on those very markets. When confronted with statutes putting the issue so pointedly, the Court must abandon the veneer of shareholder protection as a basis for upholding takeover statutes. Instead, if it sustains such legislation, its decisions must rest squarely on the right of states—as creators of corporate entities choosing to protect a broad array of interests dependent on those entities—to define the property rights of corporate stock in such a way that holders thereof constitutionally are not entitled to either receive, or act decisively on, tender offers for their stock.

Even if a more potent statute could escape Commerce Clause attack, it poses a much starker preemption issue than did Indiana's statute. Any attempt to veil such legislation in shareholder protection rhetoric would be completely transparent.\textsuperscript{241} Yet, straightforward state efforts to utilize corporate law to protect noninvestor interests would face a substantial risk of running afool of the Williams Act's proinvestor orthodoxy and its myopic view of takeovers as affecting but three parties—bidder, target management, and target shareholders. Here too, if presented with such a statute, the Supreme Court must determine whether the federal policy of protecting investors through the external capital markets is inconsistent constitutionally with state policy aimed at protecting other interests through the internal corporate mechanism of the board of directors.

\textsuperscript{239} See supra text accompanying notes 181-88.
\textsuperscript{240} See supra text accompanying note 193.

\textsuperscript{241} SEC Commissioner Joseph A. Grundfest recently testified in opposition to a proposed Maryland takeover statute that would combine the control share acquisition approach of Indiana with the business combination approach of New York and the already-existing fair price approach of Maryland. Grundfest testified that the proposed law was not only incredibly complex, but that it also "indiscriminately burdens all bids disapproved by management, without regard to their structure or substance, [and thereby] underscores the lack of an investor protection rationale for this legislation .... [T]here is little doubt that the bill is, at bottom, pro-manager and anti-shareholder." Grundfest Speaks Against Proposed Maryland Antitakeover Statute, Exchange Act Release No. 1278, Fed. Sec. L. Rep. (CCH) at 12-13, (Mar. 23, 1988).
All of these reasons coalesce to highlight the fatal flaw in the design of current takeover legislation. As states assiduously sought to overcome the constitutional objections of MITE they turned to that most secure area for state action—corporate law. While this strategy appeared to be vindicated in CTS, Indiana's statute, drafted in the shadow of MITE, was over-cautious and, as argued, will be ineffective. Thus, stronger statutes following the same basic strategy, but seeking to equip target management to play a more decisive role in takeovers, will present a truer test. Nonetheless, while shrewd and necessitated by MITE, a strategy of relying on corporate statutes to combat takeovers is futile ultimately because, at bottom, corporate law in our society long has concerned itself with a rather narrow province—the investor-manager relationship. Employees, communities, suppliers, and the public interest are interlopers in this scheme. Even though states genuinely may be concerned about the well-being of these interests, and are prepared to curtail the individual shareholder's right to sell his or her stock in favor of collective shareholder or even director action on tender offers, they are not about to subvert the very premises of corporate law by wholly eliminating shareholder influence on corporate matters or by providing noninvestor groups with a direct voice in takeover decisions. Instead, having stilled somewhat the new-found influence takeovers provide to investors, states naturally have turned to a corporation's board of directors as the only available body under the existing regime of corporate governance that can act for the good of multiple interests. There is, however, little more to this strategy than the vague hope that management will maintain, somehow, those business policies that serve the economic interests of the state and its residents. Yet, as seen, the continuing pressure of common-law fiduciary principles, management's own predilections, the ultimate threat of ouster by shareholders, the great uncertainty as to the reach of CTS, and, pervading all of these, the deeply imbedded and abiding influence of economic orthodoxy, are such that management cannot confidently be depended on to do what states desire.

Thus, as our private enterprise society undergoes substantial and continuing transformation, a state finds that its economic fortunes, as well as its takeover laws, remain subject to the decisions of corporate management. In turn, even in states adopting fairly forceful takeover legislation, these decisions strongly and inescapably are influenced, as orthodoxy holds they ought to be, by the desires of the ultimate authority in corporate law and capitalism—the providers of capital. In the end, states fall victim to their own rhetorical pretext that takeover laws are aimed at protecting shareholders, and to their own carefully crafted strategy of utilizing corporate statutes to accomplish their goals. As a result, they are unable to supplant a management and shareholder-centered conception of the corporation with one taking a more spacious view of the claim that various noninvestor groups have on corporate activities, either by directly empowering such groups or by providing for their well-being through

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242. The words of Justice Jackson are as true today as when first spoken: "Whether for good or ill, the stubborn fact is that in our present system the corporation carries on the bulk of production and transportation, is the chief employer of both labor and capital, pays a large part of our taxes, and is an economic institution of such magnitude and importance that there is no present substitute for it except the State itself." State Tax Comm'n v. Aldrich, 316 U.S. 174, 192 (1942) (Jackson, J., dissenting).
some means other than management discretion. Doubtless, fear of preemption by the Williams Act's unrealistic vision of the corporate world plays a role. More basically, however, such a notion is simply so foreign to current conceptions of corporate law that, when all is said and done, present takeover statutes, while hardly shareholder protection acts, will not radically alter the fundamental postulate of orthodoxy that corporations exist for the primary benefit of shareholders, and that management's foremost duty at all times—even in takeovers—is to provide for their well-being. Whether this failure means that proposed takeover solutions will once again come from outside the corporation, perhaps at the federal level, or whether it will prompt further efforts to redefine and genuinely enrich current notions of corporate governance by taking better account of noninvestor claimants, is unknown.

V. CONCLUDING THOUGHTS

Widespread agreement on the overall economic utility of frequent takeover activity would go a long way toward reducing the controversy such activity has generated. Clear evidence that takeover transactions serve not only the wealth and governance interests of investors, but also advance the desire of society at large to remain prosperous and competitive in a rapidly changing world economy, would make the economic case for takeovers. In that event, Congress could overcome state-imposed obstacles to such transactions by expressly preempting the area in the manner requested by SEC Chairman David Ruder and others.

While many people believe we are at that point today, the economic case for takeovers—largely dependent on stock price event studies—has not been made convincingly. There is simply too much evidence that raises serious doubts about the general utility of widespread takeover activity. As such, an important underpinning for takeover transactions—demonstrated overall economic benefit—falls away, leaving investor well-being as the strongest argument for continued high levels of such activity. Thus, there is a potential rift between the interests of capital providers and those of others, both local and larger societal interests. Economic and legal orthodoxy provides for no such rift, assuming instead a substantial congruence of investor and other important interests. It is little wonder

243. While alternative conceptions of corporate activity and corporate governance have never been implemented in the United States, they continue to be advanced. See, e.g., M. Aoki, supra note 16, at 3; Solomon & Collins, supra note 14, at 331; Axworthy, supra note 14, at 392.
244. The Senate Banking Committee recently approved a takeover bill that would make several changes to federal law. S. REP. No. 265, 100th Cong., 1st Sess. (1987) (Report to accompany the Tender Offer Disclosure and Fairness Act of 1987 (S.1323)). For example, the bill would increase from 20 to 35 business days the period for shareholders to respond to a tender offer; require a purchaser's Schedule 13D notice of acquisition of more than 5% of a corporation's stock to be filed within five days rather than the present ten days; prohibit a buyer who has purchased at least 25% of a company's stock from purchasing additional shares except through a tender offer; prohibit the payment by a target company of premium prices—"greenmail"—for more than 3% of a bidder's stock. The bill would not preempt state takeover law. The House Energy and Commerce Committee is also considering, but has not yet acted on, a takeover bill. H.R. 2172, 100th Cong., 1st Sess. (1987).
246. See supra notes 10 & 154 and accompanying text.
247. See supra note 90 and accompanying text.
then that the common law, bounded as it is by such orthodoxy, eventually would insist that management respond to takeovers in a manner that serves shareholders, the traditional focal point of corporate endeavor.

Federal law, the Williams Act, similarly is taken by the simple elegance of orthodoxy—serve the interests of investors and all will be well for the public good. Only states, perhaps for all the wrong reasons—managements’ irresistible political influence and an almost reflexive desire to protect local economic interests—have acted to challenge conventional thinking. Oddly, the strategy of choosing corporate law to do so led them into the very heart of orthodoxy, and, as argued, is the reason for their probable failure.

Yet the implications of the states’ thinking on takeovers for legal and economic orthodoxy merit reflection, whatever their ultimate fate. Suppose the common law and the Williams Act, in their professed devotion to the interests of capital providers, wrongly are conceived? Could it possibly be that, with respect to takeovers, unfailing allegiance to investor interests, overall, is adverse to societal interests, not simply local interests but those more national in scope as well? The implications of such an outcome potentially are disturbing. Management is perceived to have held the upper hand in its relationship with investors for so long that takeovers at last provide shareholders with an effective counterpoise. Yet, if the consequences of that are unsettling, many would simply swing the corporate pendulum back toward management prerogative, and free them of the excessive influence takeovers provide to investors. This oft-heard remedy is itself troubling, however, and reveals the unfortunate debility of present-day corporate law—one either favors management or shareholders, both of which are problematic; there are no other options, no wholly-new paradigms for recasting corporate law issues into a framework more resonant with broader concerns.

Thus, takeovers present an opportunity to revisit basic issues: does the fundamental postulate of economic orthodoxy operate for the general good when extended to its logical end in takeovers? If not, what then is the purpose of corporate activity when companies are confronted with hostile bids? As to corporate governance, are the alternatives either to favor the awesome power takeovers provide shareholders or to rearm management in its defense? The takeover phenomenon may bring us to an impasse on these issues, to a point where traditional positions, even language, on corporate purpose and corporate governance must be reexamined in an effort to reconcile conflicting goals. In an increasingly complex, diverse and competitive world, where there is growing concern about the lack of shared ideals and aspirations, persuasively restating the reasons for the orthodox beliefs of an earlier, simpler day is sure to be a daunting task. Yet, no competing vision capable of commanding widespread support is in sight. We stand at a point where the flaws of one intellectual framework are becoming clearer while no alternative ordering is emerging. As discussion about the elemental issues, raised by takeovers continues to develop, the question for corporate law is this: Will it flourish by being in the very midst of today’s larger social currents, or, by holding fast to its limited concerns, will it stand stubbornly to the side?