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Essay

THE CASE FOR FEDERAL MINIMUM CORPORATE LAW STANDARDS

JOEL SELIGMAN*

The last decade was interesting to corporate legal scholars due to the increased sophistication of theories that tended to suggest the superfluity of regulatory norms. These theories, typified by notions of “agency costs” or “nexus of contracts,” suggested that a combination of reliance on market forces—such as product, capital, and control—monitoring devices—such as the board of directors or outside auditors—and bonding techniques—implicit contracts between corporate managers and shareholders restricting, for example, forms and levels of remuneration—were likely to lead to the most efficient restrictions on corporate officers; and that, in any event, problems with this allocation were merely inevitable “agency costs.”¹ Taken to their logical conclusion, these theories attempt to justify a purely contractual approach to corporate law; in the vernacular, managers and shareholders should be permitted to “opt out” of limitations on their freedom of action.²

* Professor, The University of Michigan Law School. B.A., University of California, Los Angeles, 1971; J.D., Harvard Law School, 1974. This Essay is an expansion of remarks delivered as the 1990 Sobeloff Lecture at the University of Maryland School of Law on April 17, 1990. I wish to express my gratitude to Alfred Conard and Harvey Goldschmid for their comments on a draft of this Essay.

1. See, e.g., Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980) (economic analysis suggests wage revision process results in ex post settling up by managers which resolves managerial incentive problems); Jensen & Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976) (economic analysis of agency costs of equity and debt ownership and determination of optimal debt/equity ratio); *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989) (symposium presenting arguments for and against deregulation based upon contract theory); cf. Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985) (arguing that private bargaining in the context of contractual or agency relationships between investors and managers is not sufficient to restrain management shirking and self-dealing).

2. See Bebchuk, *Forward, The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1396-99 (1989) (introducing “The Freedom-To-Opt-Out Challenge to Corporate Law Theory”); Easterbrook & Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1418 (1989) (“The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many sets of risks and opportunities that are available in a large economy.”).

Underlying these theories is the recognition popularized by Berle and Means that there is a "divergence of interest between ownership and control" between corporate investors (the "owners") and corporate managers (those in "control").³ To Berle and Means and subsequent corporate reformers,⁴ this conflict suggested the need for legal restrictions to prevent corporate managers from engaging in indolent or self-interested conduct.⁵ It was assumed that corporate managers saw their personal interest in terms of the consumption of corporate salaries, perquisites, and opportunities; legal norms had to be imposed to redirect managerial behavior towards the goal of profit maximization, that is, the interest of the outside investors.⁶

The critical theorists see matters quite differently. They urge, in effect, that the divergence of interests between corporate owners and managers is well known to both parties.⁷ The rational corporate manager, therefore, will seek to reassure the outside investors that they will not exploit this conflict to justify a higher stock price or lower interest costs.⁸ They further urge that above and beyond the effect of whatever monitoring or bonding techniques the corporate managers might adopt, market forces represent another powerful type of limitation on managerial shirking or cupidity.⁹

There are logical problems with the nexus of contracts and agency costs analyses. To suggest that shareholders consent to giving corporate managers broad discretion through a "contract" is erroneous on several counts. First, there is no formal written contract to that effect between common shareholders and managers, no negotiating process, no volition on the part of the shareholders to such a contract, nor consent to it.¹⁰ Second, modern investment theory, particularly "portfolio" theory, posits that investors can di-

3. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-20 (1932).

4. See, e.g., R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* (1976); Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 *YALE L.J.* 663 (1974).

5. A. BERLE & G. MEANS, *supra* note 3, at 345-57; R. NADER, M. GREEN & J. SELIGMAN, *supra* note 4, at 62-71; Cary, *supra* note 4, at 696-703.

6. See A. BERLE & G. MEANS, *supra* note 3, at 345-46; R. NADER, M. GREEN & J. SELIGMAN, *supra* note 4, at 114-18.

7. See, e.g., Fischel, *The Corporate Governance Movement*, 35 *VAND. L. REV.* 1259, 1263 (1982).

8. *Id.*

9. See, e.g., Fama, *supra* note 1, at 296-97; Fischel, *supra* note 7, at 1262-65.

10. Even Easterbrook and Fischel concede that this initial argument is "simple" to make. Easterbrook & Fischel, *supra* note 2, at 1416.

versify away virtually all firm-specific risk.¹¹ The investor's primary risk is market specific because a portfolio of securities is sensitive to general market movements, the so-called "Beta" of the portfolio. To the extent that portfolio theory is adopted by major investors, it eliminates any incentive to negotiate a contract with managers. Third, it is reasonable to assume that most shareholders would view federal securities fraud and state corporate law derivative actions—rather than a hypothetical contract—as their basic protection against managerial misconduct. Although votaries of the nexus-of-contract and agency-costs theories on occasion concede that "legal rules can operate to reduce agency costs,"¹² they inevitably oppose expansion of legal protections, typically urging that market forces will address the matter more efficiently. In this sense, the agency costs theory can be criticized on a fourth ground: its indeterminance. Once it is conceded that market forces are imperfect under certain circumstances, such as takeover contests in which managerial conflicts of interest are particularly acute, the analytical utility of both the nexus-of-contract and the agency-costs theories is significantly eroded.¹³

This Essay advances a different type of claim. The most distinctive aspect of the last decade in corporate law was the celerity with which traditional constraints on corporate managers weakened. Regardless whether these constraints are characterized as market forces, monitoring techniques, or accountability mechanisms, these constraints collectively *have been reduced*. This Essay will explore the deterioration in three principle mechanisms of monitoring corporate behavior: the electoral system, the takeover contest, and shareholder litigation. The simultaneous erosion of each of these accountability mechanisms significantly strengthens the case for some form of minimalist federal corporate law. A sketch of what this law might entail is presented in the conclusion.

I. CORPORATE SUFFRAGE

The most important recent event in corporate suffrage was the 1988 adoption by the Securities and Exchange Commission (SEC) of rule 19c-4 authorizing all new corporate issuers to have disparate

11. See, e.g., W. SHARPE, *PORTFOLIO THEORY AND CAPITAL MARKETS* 130 (1970); Fama, *supra* note 1, at 291.

12. See Fischel, *supra* note 7, at 1264.

13. For an earlier, more detailed recitation of these problems, see Seligman, *A Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 GEO. WASH. L. REV. 325, 348-50 (1987).

voting rights schemes and permitting, under limited circumstances, corporations listed on the New York Stock Exchange (NYSE) also to have classes of common stock with unequal voting rights.¹⁴ The adoption of this Rule ended what had been the norm on the NYSE since 1926 that all listed corporations were required to have common stock with equal voting rights.¹⁵

The practical consequences of rule 19c-4 for those corporations eligible to adopt disparate voting schemes are three-fold. First, use of the hostile takeover as a device to "monitor" corporate managers is eliminated. Dual class capitalization has the potential to be the most successful takeover defense; this potential has not yet been fully realized.¹⁶ In a typical dual class capitalization, insiders receive common stock with multiple votes per share; public stockholders receive shares with only one vote per share.¹⁷ Dual class capitalization thus permits the insiders to control a majority of the votes of a corporation while owning a small minority of its stock. With a majority

14. 17 C.F.R. § 240.19c-4 (1989). Subsection (d) provides that:

[T]he following, standing alone, shall be presumed not to have the effect of nullifying, restricting, or disparately reducing the per share voting rights of holders of an outstanding class or classes of common stock:

(1) The issuance of securities pursuant to an initial registered public offering;

(2) The issuance of any class of securities, through a registered public offering, with voting rights not greater than the per share voting rights of any outstanding class of the common stock of the issuer;

(3) The issuance of any class of securities to effect a bona fide merger or acquisition, with voting rights not greater than the per share voting rights of any outstanding class of the common stock of the issuer;

(4) Corporate action taken pursuant to state law requiring a state's domestic corporation to condition the voting rights of a beneficial or record holder of a specified threshold percentage of the corporation's voting stock on the approval of the corporation's independent shareholders.

Id. § 240.19c-4(d).

The Business Roundtable has challenged the authority of the SEC to adopt rule 19c-4. *Business Roundtable v. SEC*, No. 88-1651 (D.C. Cir. 1988) (petition for review). As this goes to press the case has been argued but no decision has been announced. If the court did not hold that the SEC lacked authority to adopt rule 19c-4, this result initially would have little consequence. The New York Stock Exchange separately has adopted the substance of rule 19c-4 as listing standards of that Exchange. The court result would only address the Rule, not the Exchange's listing standards. *See Securities Exchange Act Release No. 27,554, 45 SEC Docket (CCH) 159 (1989).*

15. *See* 4 L. LOSS & J. SELIGMAN, *SECURITIES REGULATION* 1833-54 (1990), and citations therein; *see also* Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687 (1986).

16. *See* Baxbaum, *The Internal Division of Powers in Corporate Governance*, 73 CALIF. L. REV. 1671, 1713-15 (1985).

17. *See* Gilson, *Evaluating Dual Class Common Stock: The Relevance of Substitutes*, 73 VA. L. REV. 807, 812-13 & n.12 (1987); Gordon, *Ties That Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 40-42 (1988).

of votes in hands of the insiders, their corporation will not be a hostile takeover target.

Second, the existence of an independent board of directors to "monitor" corporate managers is eliminated. The board of directors' ability to act independently is reduced when managers are vested with statistical control of a firm. Whatever the limitations of a board when managers have a minority of the corporate stock, a board that knows the managers it monitors can cause dismissal of directors either immediately, or at the next election, will have less ability to criticize or alter management policies.

Third, the outside shareholder vote as a limitation on corporate managers is eliminated. Before rule 19c-4, managers of NYSE corporations were required to submit proposals for fundamental action (such as mergers and corporate charter amendments) normally without the statistical certainty of shareholder approval. Although corporate managers were highly successful in winning board approval of fundamental elections, even when they did not own a majority of voting stock, their lack of statistical control influenced both their behavior and the behavior of outside directors. The lack of managerial statistical control of corporate stock offered the directors a greater opportunity to behave independently than if the managers possessed statistical control of the firm. Similarly, the lack of statistical control influenced managerial submission of proposals for action. Managers felt a greater incentive to shape these proposals for action to comply with the preferences of outside shareholders.

In part, one may assume, because of the SEC's concern about the dissipation of these monitoring devices, rule 19c-4 presumptively prohibits disparate voting rights schemes for an outstanding class of common stock when this is accomplished through exchanges of new stock (normally with higher dividends) for outstanding stock or through the payment of new stock with lower voting rights in the form of a dividend on outstanding stock.¹⁸ At the same time, the Rule does not prohibit disparate voting schemes that can be accomplished by new corporations when they make initial public offerings of stock¹⁹ or by established firms when they engage in a two-step transaction, first by buying back outstanding shares, then issuing new stock with diminished voting rights.²⁰

If the SEC focused on improving monitoring or accountability

18. See 17 C.F.R. § 240.19c-4(c)(3)-(4) (1989).

19. See *id.* § 240.19c-4(d)(1).

20. See Voting Rights Listing Standards—Disenfranchisement Rule, Exchange Act Release No. 25,891, 41 SEC Docket (CCH) 432, 452 (July 7, 1988).

devices, it instead would adopt new rules that tend to increase the independence of the board of directors. Specifically, the SEC might consider rescinding rule 14a-8(c)(8) which prohibits outside shareholders from circulating at the corporation's expense proposals to nominate members of the board of directors.²¹ This Rule initially was adopted in 1942 when it was rare for hostile control contests to succeed.²² We now live in an age of takeover contests. From a corporate governance standpoint, proxy contests for control and tender offers for control are substitutes for each other. Each seeks the same result. The regulation of the two devices at the federal level, however, tends to frustrate use of the proxy contest and tends to stimulate use of the tender offer.

In the tender offer area, federal regulation through the Williams Act²³ is based, in theory, on a policy to avoid "tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid."²⁴ If the same policy goal was applied to proxy contests for control, at least three steps might be explored to achieve more "neutral" regulation.

First, state corporate law currently allows the incumbent directors of a corporation to employ corporate funds to pay for the costs of re-election to the board while requiring an outside opponent to spend its own funds to field a slate of candidates with the possibility of reimbursement only if the opponent prevails.²⁵ Corporate electoral expenses in a contested election can be substantial, involving, among other things, the costs of writing, printing, and distributing multiple sets of proxy materials; hiring proxy solicitors to telephone shareholders; sometimes newspaper or other mass media advertisements; and entertainment and transportation expenditures.²⁶ Federal law does not address this funding question. There is little question, however, that for many persons seeking control of a corporation this funding rule militates in favor of the tender offer. An unsuccessful tender offeror still owns stock which might or might

21. 17 C.F.R. § 240.14a-8(c)(8) (1989).

22. See 4 L. LOSS & J. SELIGMAN, *supra* note 15, at 1998 n.196. See generally *id.* at 1998-2052 (discussing various provisions of Rule 14a-8)).

23. 15 U.S.C. § 78m(d) (1988) (originally enacted as Act of July 29, 1968, Pub. L. No. 90-439, § 2, 82 Stat. 454; amended by Act of Dec. 22, 1970, Pub. L. No. 91-567, §§ 1-2, 84 Stat. 1497).

24. S. REP. No. 550, 90th Cong., 1st Sess. 3 (1967); H.R. REP. No. 1711, 90th Cong., 2d Sess. 4, reprinted in 1968 U.S. CODE CONG. & ADMIN. NEWS 2811, 2813; *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975).

25. See 4 L. LOSS & J. SELIGMAN, *supra* note 15, at 1922-32.

26. For data on uncontested and contested proxy expenses, see Seligman, *The Securities and Exchange Commission and Corporate Democracy*, 3 U. DAYTON L. REV. 1, 7-8 (1978).

not be resold at a profit. An unsuccessful proxy contestant for control, however, has lost his or her investment.

There have been recurrent proposals over the years to permit shareholders to nominate directors in the registrant's proxy statement.²⁷ The SEC staff's 1980 report on corporate accountability viewed the issue of shareholder nominations in the registrant's proxy materials as involving a conflict between two policy objectives: "A shareholder nomination rule is aimed at facilitating shareholder communications and strengthening shareholder control over the board of directors and management. On the other hand, there is a danger that it will encourage the harassment of management and the waste of corporate assets and render issuers' proxy statements unintelligible."²⁸ The "dangers" cited by the SEC's 1980 staff report could be addressed by placing practical limits on access to the registrant's proxy materials for the purposes of nominating opposition candidates to the board. The proposed Tender Offer Reform Act of 1987, for example, would have given owners of either 3% or more of a company's voting securities, or \$500,000 worth of such securities, the right, at the registrant's expense, to include their own proxy materials and board candidates in the registrant's proxy statement.²⁹

While there is no brief for the formula employed in the 1987 legislative proposal, it does seem reasonably clear that mechanisms could be designed to avoid the type of problems that concerned the SEC staff. The SEC demonstrated by rule 14a-8(c)(12) its ability to

27. A proposal to permit shareholder nominations to be made in management's proxy statement was circulated for comment in connection with the 1942 revision of the rules, but was abandoned as impracticable. See *Securities and Exchange Commission Proxy Rules, Hearings Before House Comm. on Interstate and Foreign Commerce on H.R. 1493, H.R. 1821, & H.R. 2019, 78th Cong., 1st Sess. 17-19, 34-43 (1943)*. For an interesting suggestion in this regard, see Caplin, *Proxies, Annual Meetings and Corporate Democracy: The Lawyer's Role*, 37 VA. L. REV. 653, 682-86 (1951) (proposing for reasons of practicality and continuity a provision by which shareholders would have the right to make nominations in management's proxy for a bare majority or perhaps only a minority of the board of directors). See also Caplin, *Shareholder Nominations of Directors: A Program for Fair Corporate Suffrage*, 39 VA. L. REV. 141 (1953); Seligman, *supra* note 26; Note, *A Proposal for the Designation of Shareholder Nominees for Director in the Corporate Proxy Statement*, 74 COLUM. L. REV. 1139 (1974).

28. See SEC, STAFF REPORT ON CORPORATE ACCOUNTABILITY: A RE-EXAMINATION OF RULES RELATING TO SHAREHOLDER COMMUNICATIONS, SHAREHOLDER PARTICIPATION IN THE CORPORATE ELECTORAL PROCESS AND CORPORATE GOVERNANCE GENERALLY, SENATE COMM. ON BANKING, HOUS. & URBAN AFFAIRS, 96th Cong., 2d Sess. 98-127 (Comm. Print 1980).

29. H.R. 2172, 100th Cong., 1st Sess. § 6 (1987). For an alternative approach, see Seligman, *supra* note 26, at 13-20.

limit shareholder access to the registrant's proxy for other kinds of shareholder proposals.³⁰ Unless the SEC is willing to design some mechanism for corporate funding of rival sides in serious proxy contests, the proxy contest will remain a second best alternative to the tender offer.

Design of a shareholder nomination formula alone, however, would not necessarily be sufficient to achieve a "neutral" regimen. The question of confidential voting also should be considered. In 1986, institutional investors held approximately 42.7 percent of total equities on the NYSE.³¹ Managers of institutional investors often refrain from voting against incumbent management because corporate managers will know of their vote and might eliminate their access to corporate information.³² A system ensuring a confidential ballot might tend to alleviate the latter concern and might encourage institutions to take a more active role in shareholder elections.

Due to the hostility concerning certain takeover defenses, some institutional investors have increasingly evidenced a willingness to take a more activist role on certain shareholder proposals for action. The Investor Responsibility Research Center (IRRC) compiles data on shareholder proposals. In the first half of 1988, 153 corporate governance resolutions were voted on by stockholders in the 1170

30. 17 C.F.R. § 240.14a-8(c)(8) (1989). The Rule provides that when a proposal deals with "substantially the same subject matter" as a prior proposal submitted by proxy during the preceding five years, management may omit the proposal from proxies for three calendar years following its latest submission provided that it received only a very small percentage of votes cast in a previous meeting or meetings. *Id.*

31. C. Brancato & P. Gaughan, *The Growth of Institutional Investors in U.S. Capital Markets ii* (Colum. U. Sch. L. Inst. Investor Project Nov. 1988) (unpublished manuscript).

32. In 1987, the Investor Responsibility Research Center proposed a confidential ballot with only the proxy tabulator and the inspector of elections knowing the identity of shareholders voting by proxy. "The purposes of confidential voting are to protect the privacy of shareholders, to deny management the considerable advantage of knowing before a vote is officially tallied how shareholders have voted, and to minimize pressures on shareholders who are vulnerable to management pressures." J. HEARD & H. SHERMAN, *CONFLICTS OF INTEREST IN THE PROXY VOTING SYSTEM* 58 (1987). With respect to the last point, the report quoted Kurt Wulff, a former stock analyst, who wrote:

The major flaw in the voting process is that management knows how each shareholder votes. As a result, employees are loath to vote against their superiors. Investment analysts may not wish to offend management because it might affect their access to information. Fiduciaries, like banks, insurance companies and pension fund managers, must consider their flow of business from corporations.

Id. at 61. The report identified 11 companies, including AT&T, Exxon, General Motors, and IBM, that currently use some type of confidential system to tabulate proxy votes. *Id.* at 58-59.

companies followed by the IRRC.³³ In a few instances, the resolutions gained majority votes. The 1988 report stated:

Proposals to redeem poison pills or submit them to a shareholder vote were approved by 61.2 percent of the shares voted at Santa Fe Southern Pacific and by 51.9 percent at USAir Group. And an antigreenmail shareholder proposal at Gillette won with the support of more than 55 percent of the shares voted.³⁴

The IRRC added, "The striking thing about antitakeover provisions this [1988] proxy season was that there were more shareholder proposals to repeal them than there were management proposals to adopt them."³⁵

Whether confidential voting would encourage institutions to take a similar role in control contests is an open question. Many institutional investor managers may consider suffrage irrelevant to the type of investment analysis that they are accustomed to doing. Others may be skeptical that even a "confidential" voting system would leave management with much doubt about who voted against them. Still others may have concerns about liability as "controlling persons" if they perform any activist role in control contests.

Professor Conard has suggested a considerably broader approach. In a recent article,³⁶ he urged that before institutional investors are likely to perform a meaningful role in corporate governance, a number of current rules and practices might have to be altered. Notably, he emphasized that institutional investors would need to be freed from the threat of control person liability when they join forces to elect directors who might supervise the management of corporations.³⁷

This is not a step that should be taken lightly, if at all. To allow institutional investors a place in the boardroom with extraordinary access to nonpublic material information raises troublesome questions. Nonetheless, Conard is correct that if the current trend towards more activist institutional investors continues, this is the type of ultimate question that the SEC will have to address.

33. INVESTOR RESPONSIBILITY RESEARCH CENTER, 5 CORP. GOVERNANCE BULL. 93 (1988) [hereinafter IRRC].

34. *Id.*; see also Proxy Rules—Amendments with Regard to Rule 14a-8, Shareholder Proposals, Exchange Act Release No. 25,217, 38 SEC Docket (CCH) 1071, 1076 n.35 (Jan. 6, 1988).

35. IRRC, *supra* note 33, at 93.

36. Conard, *Beyond Managerialism: Investor Capitalism?*, 22 U. MICH. J.L. REF. 117 (1988).

37. *Id.* at 177.

The combination of the growth of the tender offer as a significant device for shifting control of the business enterprise and the growth of the institutional investor as a potentially pivotal actor in corporate governance indeed suggests that a SEC review of restrictions on director nominations in its shareholder proposal rules is now overdue. What is most troublesome about the SEC's near simultaneous adoption of rule 19c-4 and its inaction on shareholder director nominations is that these actions frustrate two of the most significant forces to monitor corporate insiders. This is particularly significant given that the state tender offer statutes make little effort to camouflage their pro-incumbent manager bias.³⁸

II. THE TAKEOVER CONTEST

In the past two decades, the most significant new "real world" limitation on corporate managers has been the increased use of the hostile takeover. To many critical of government regulation of the corporation, the takeover has been championed as a pivotal disciplinary device replacing inefficient managers with more efficient ones.³⁹ The last few years, however, have seen a diminution of the efficacy of this disciplinarian device primarily because of decisions upholding the constitutionality of state tender offer statutes.

While the first state tender offer statute was adopted in March 1968,⁴⁰ the Supreme Court's 1982 decision in *Edgar v. MITE Corp.*⁴¹ seemed to mark a death knell for this genre of statute. *MITE* reviewed the Illinois Business Take-Over Act.⁴² Under the Act, any takeover offer had to be registered with the Illinois Secretary of State if the target company was a corporation or other issuer of securities of which shareholders located in Illinois owned at least ten percent of the class of equity securities subject to the offer, or for which any two of three conditions were met: (1) the corporation had its principal executive office in Illinois, (2) was organized under the laws of Illinois, or (3) at least ten percent of its stated capital and paid-in surplus were within Illinois.⁴³

38. For examples of these statutes, see 5 L. LOSS & J. SELIGMAN, *supra* note 15, at 2282-92.

39. See, e.g., Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169-74 (1981).

40. Take-Over-Bid Disclosure Act, ch. 119, 1968 Va. Acts 167 (codified as amended at VA. CODE ANN. §§ 13.1-528 to -541 (1985) (repealed 1989)).

41. 457 U.S. 624 (1982).

42. ILL. ANN. STAT. ch. 121-1/2, paras. 137.51-137.70 (Smith-Hurd 1979) (repealed 1983).

43. *MITE*, 457 U.S. at 626-27.

The Illinois Act provided:

An offer becomes registered 20 days after a registration statement is filed with the Secretary unless the Secretary calls a hearing. . . . The Secretary may call a hearing at any time during the 20-day waiting period to adjudicate the substantive fairness of the offer if he believes it is necessary to protect the shareholders of the target company, and a hearing must be held if requested by a majority of a target company's outside directors or by Illinois shareholders who own 10% of the class of securities subject to the offer. . . . If the Secretary does hold a hearing, he is directed by the statute to deny registration to a tender offer if he finds that . . . " . . . the take-over offer is inequitable or would work or tend to work a fraud or deceit upon the offerees"44

MITE was announced by a divided Court. Only Chief Justice Burger and Justice Blackmun joined that part of Justice White's opinion that concluded that the Illinois Act was pre-empted by Federal regulation.⁴⁵ In White's analysis, three provisions of the Illinois Act "upset the careful balance struck by Congress":⁴⁶ (1) the twenty business days' waiting period that applied to the offeror but not to the target, (2) the hearing provisions, which introduced extended delay, and (3) the state's passing on the substantive fairness of the offer.⁴⁷ It did not follow, however, that the six Justices who did not join in the pre-emption holding disagreed with it. Only Justice Stevens—with whom Justice Powell agreed generally—went out of his way to limit his concurring opinion by stating that he was not persuaded "that Congress' decision to follow a policy of neutrality in its own legislation is tantamount to a federal prohibition against state legislation designed to provide special protection for incumbent management."⁴⁸ The other four justices simply did not address the question—Justices Brennan, Marshall, and Rehnquist because they thought the case was moot,⁴⁹ and Justice O'Connor because she thought the holding of invalidity under the commerce clause made

44. *Id.* at 627 (paraphrasing ILL. ANN. STAT. ch. 121-1/2. paras. 137.54.E, 137.57.A, 137.57.E (1979)).

45. *Id.* at 626 n.*.

46. *Id.* at 634.

47. *Id.* at 634-40.

48. *Id.* at 655.

49. *Id.* at 655 (Marshall & Brennan, JJ., dissenting); *id.* at 664 (Rehnquist, J., dissenting).

it unnecessary.⁵⁰

Justice White was able to muster a majority of only five for his opinion that the Illinois statute violated the commerce clause because the burden it imposed on interstate commerce through its incidental regulation was "excessive in light of the local interests the Act purports to further."⁵¹ There was no majority for the anterior proposition that the statute "directly regulates transactions which take place across state lines, even if wholly outside the State of Illinois,"⁵² and even if the tender offer would not affect a single Illinois stockholder.⁵³ Nonetheless, after *MITE*, a number of state statutes soon fell under *MITE*'s commerce clause or supremacy clause analysis.⁵⁴

In 1987, the Supreme Court dramatically shifted direction when it sustained the Indiana Control Share Acquisitions Act in *CTS Corp. v. Dynamics Corp. of America*.⁵⁵ The Indiana Act, unless a corporation "opts out" by amending its articles of incorporation or by-laws, applies to any corporation incorporated in Indiana that has (1) at least 100 shareholders; (2) its principal place of business, its principal office, or substantial assets in Indiana; and (3) either more than 10 percent of its shareholders resident in Indiana, or more than 10 percent of its shares owned by Indiana residents, or 10,000 resident shareholders.⁵⁶

The Act focuses on the acquisition of "control shares," an event that occurs whenever an entity acquires shares that, but for the operation of the Act, would bring it voting power equal to any of 3 thresholds: 20, 33 1/3, or 50 percent.⁵⁷ An entity that acquires control shares does not acquire voting rights unless a majority vote of all disinterested shareholders holding each class of stock approves a resolution

to confer rights on the control shares at the next regularly scheduled meeting of the shareholders, or at a specially

50. *Id.* at 655 (O'Connor, J., concurring in part).

51. *Id.* at 640.

52. *Id.* at 641.

53. *Id.* at 642.

54. See, e.g., *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 209 (6th Cir. 1985) (supremacy clause); *Mesa Petroleum Co. v. Cities Serv. Co.*, 715 F.2d 1425, 1431 (10th Cir. 1983) (commerce clause); *Telvest Inc. v. Bradshaw*, 697 F.2d 576, 577 (4th Cir. 1983) (same); *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558, 565-68 (6th Cir. 1982) (same); *National City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1128-33 (8th Cir. 1982) (supremacy clause).

55. 481 U.S. 69 (1987).

56. *Id.* at 73; see IND. CODE § 23-1-42-4(a) (1989).

57. *CTS*, 481 U.S. at 73; see IND. CODE § 23-1-42-1 (1989).

scheduled meeting. The acquiror can require management of the corporation to hold such a special meeting within 50 days if it files an "acquiring person statement," requests the meeting, and agrees to pay the expenses of the meeting. . . . If the shareholders do not vote to restore voting rights to the shares, the corporation may redeem the control shares from the acquiror at fair market value, but it is not required to do so. . . . Similarly, if the acquiror does not file an acquiring person statement with the corporation, the corporation may, if its bylaws or articles of incorporation so provide, redeem the shares at any time after 60 days after the acquiror's last acquisition.⁵⁸

Justice Powell, for a majority of six, began by analyzing the Indiana Act under the supremacy clause. After distinguishing Justice White's opinion in *MITE*, Justice Powell addressed what had been the decisive fact for the Court of Appeals in *CTS*, the delay in consummation of a tender offer until fifty days after its commencement:

As did the Court of Appeals, Dynamics reasons that no rational offeror will purchase shares until it gains assurance that those shares will carry voting rights. Because it is possible that voting rights will not be conferred until a shareholder meeting 50 days after commencement of the offer, Dynamics concludes that the Act imposes a 50-day delay. This, it argues, conflicts with the shorter 20-business-day period established by the SEC as the minimum period for which a tender offer may be held open. . . . We find the alleged conflict illusory.

. . . .

Even assuming that the Indiana Act imposes some additional delay, nothing in *MITE* suggested that *any* delay imposed by state regulation, however short, would create a conflict with the Williams Act. The plurality argued only that the offeror should "be free to go forward without *unreasonable* delay." . . . In that case, the Court was confronted with the potential for indefinite delay and presented with no persuasive reason why some deadline could not be established. By contrast, the Indiana Act provides that full voting rights will be vested—if this eventually is to occur—within 50 days after commencement of the offer. This period is within the 60-day period Congress established for [tender offers in the Williams Act]. We cannot say that a delay within that congressionally deter-

58. *CTS*, 481 U.S. at 74-75 (footnote omitted).

mined period is unreasonable.⁵⁹

Powell further noted that the Williams Act “would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer” such as staggered terms for boards of directors or cumulative voting.⁶⁰

The Powell majority similarly found that the Indiana Act did not offend the commerce clause:

The principal objects of dormant Commerce Clause scrutiny are statutes that discriminate against interstate commerce. . . . The Indiana Act is not such a statute. It has the same effects on tender offers whether or not the offeror is a domiciliary or resident of Indiana. Thus, it “visits its effects equally upon both interstate and local business. . . .”

. . . .
The Court of Appeals['] . . . decision rested on its view of the Act’s potential to hinder tender offers. We think the Court of Appeals failed to appreciate the significance for Commerce Clause analysis of the fact that state regulation of corporate governance is regulation of entities whose very existence and attributes are a product of state law. . . . Every State in this country has enacted laws regulating corporate governance. By prohibiting certain transactions, and regulating others, such laws necessarily affect certain aspects of interstate commerce. This necessarily is true with respect to corporations with shareholders in States other than the State of incorporation. . . .

. . . .
. . . The Constitution does not require the States to subscribe to any particular economic theory. We are not inclined “to second-guess the empirical judgments of lawmakers concerning the utility of legislation”

. . . .
Dynamics’ argument that the Act is unconstitutional ultimately rests on its contention that the Act will limit the number of successful tender offers. There is little evidence that this will occur. But even if true, this result would not substantially affect our Commerce Clause analysis.⁶¹

The most significant state law response to *CTS* has been the adoption by Delaware and several other states of the moratorium-

59. *Id.* at 84-85.

60. *Id.* at 84-87.

61. *Id.* at 87-92.

type state tender offer statute earlier enacted by New York. In 1985, New York adopted legislation to regulate tender offers for New York corporations by prohibiting any person that buys twenty percent or more of a corporation's stock from "engaging in any business combination" with the corporation for five years without the board's approval *before* the acquisition of the twenty percent, and permitting twenty percent purchases after that only with the consent of a majority of disinterested stockholders *or* payment of the same amount to all stockholders in accordance with a statutory formula.⁶²

Few state tender offer statutes more clearly intended to frustrate hostile takeovers than did the New York Act. The Ad Hoc Committee on Corporate Legislation of the Association of the Bar of the City of New York commented in a November 1985 Interim Report:

The Committee believes that the provisions of the bill represents a major transfer of rights and power from stockholders to the board of directors in place at the time of an "unfriendly" takeover bid. Proposed section 912 would in effect give the incumbent board significant power to discourage "unfriendly" tender offers. This could curtail the opportunity for stockholders to realize a premium over current market, as generally happens in a hostile takeover bid.⁶³

Delaware General Corporation Law section 203,⁶⁴ along the

62. Act approved Dec. 16, 1985, ch. 915, 1985 N.Y. Laws 3454, 3458 (codified as amended at N.Y. BUS. CORP. LAW §§ 513(e) and 912 (McKinney 1986 & Supp. 1990) and amending the Security Takeover Disclosure Act). See generally L. SCHUMANN, STATE REGULATIONS OF TAKEOVERS AND SHAREHOLDER WEALTH: THE EFFECTS OF NEW YORK'S 1985 TAKEOVER STATUTES (report of the Bureau of Economics to the Federal Trade Comm'n, March 1987) (a sample of 94 firms studied experienced approximately a one percent decline in equity value in response to the announcement of the Governor's bill); Note, *A Policy Analysis of New York State's Security Takeover Disclosure Act*, 53 BROOKLYN L. REV. 1117 (1988); Note, *The Constitutionality of State Business Combination Legislation: New York's Section 912*, 8 CARDOZO L. REV. 1025 (1987).

63. INTERIM REPORT OF AD HOC COMM. ON CORP. TAKEOVER LEGIS. OF ASS'N OF THE BAR OF THE CITY OF N.Y. 5 (Nov. 12, 1985).

64. DEL. CODE ANN. tit. 8, § 203 (Supp. 1988). Regarding the Delaware Act, see Finkelstein, *The New Delaware Takeover Statute*, 21 REV. SEC. & COMMODITIES REG. 47 (1988); Veasey, Finkelstein & Shaughnessy, *The Delaware Takeover Law: Some Issues, Strategies and Comparisons*, 43 BUS. LAW. 865, 885 (1988) (concluding Delaware statute is moderate and balanced compared with other state statutes); Veasey & Finkelstein, *The Delaware Business Combination Statute: An Opportunity for Reassessment*, 16 SEC. REG. L.J. 157 (1988) (general description of the operation of the statute and interplay with other takeover defenses); Comment, *The Delaware Debate on Takeover Legislation: No Small Wonder*, 93 DICK. L. REV. 339, 354-63 (1989) (describing Delaware's struggle to write an acceptable law); Note, *The Delaware Takeover Statute: Constitutionally Infirm Even Under the Market Par-*

general lines of the New York law, similarly prohibits for three years "business combinations" between a publicly traded Delaware corporation and an "interested stockholder"⁶⁵ (in essence, a bidder with at least 15 percent of the target's shares),⁶⁶ unless: (1) the target's board earlier approved either the business combination or the transaction that resulted in the stockholder's becoming an "interested" holder;⁶⁷ (2) upon consummation of the transaction that resulted in the stockholder's becoming an "interested" holder, the interested stockholder owned at least 85 percent of the voting stock (apart from shares owned by (i) persons who are both directors and officers, and (ii) employee stock plans in which employees do not have the right to determine confidentially whether to tender or exchange shares);⁶⁸ (3) the business combination is approved on or after the date the stockholder achieved interested status by 66 2/3 percent of the outstanding voting stock not owned by the interested stockholder;⁶⁹ (4) the corporation's *original* certificate of incorporation expressly elects not to be governed by section 203;⁷⁰ (5) the corporation's stockholders elect not to be governed by section 203;⁷¹ or (6) certain competitive offers to acquire the target are made with the approval (or not opposed by a majority) of the target's board.⁷²

The Delaware takeover statute is in certain respects less likely to impede hostile tender offers than the New York statute. First, it imposes a three year, rather than a five year, moratorium.⁷³ Second, unlike the *blunderbuss* New York statute that prohibits *any* substantial sale of assets during the five year period,⁷⁴ the Delaware Act's definition of business combination covers transactions between the target and the bidder only during the moratorium period. The Act permits the target's assets to be sold to unaffiliated parties and the

ticipant Exception, 17 HOFSTRA L. REV. 203, 230-33 (1988) (concluding that § 203 would violate the commerce clause and would not be served by market participation doctrine because Delaware is an "effective monopoly in the sale of corporate charters").

65. DEL. CODE ANN. tit. 8, § 203(a) (Supp. 1988).

66. *Id.* § 203(c)(5).

67. *Id.* § 203(a)(1).

68. *Id.* § 203(a)(2).

69. *Id.* § 203(a)(3).

70. *Id.* § 203(b)(1). A corporation's board could also "opt out" during the 90 days after the effective date of the Section. *Id.* § 203(b)(2). The Act also excepts certain inadvertent interested stockholders. *Id.* § 203(b)(5).

71. *Id.* § 203(b)(3). Other restrictions apply. *Id.*

72. *Id.* § 203(b)(6).

73. Compare *id.* § 203(a) with N.Y. BUS. CORP. LAW § 912(b) (McKinney 1986).

74. N.Y. BUS. CORP. LAW § 912(5)(A) (McKinney 1986).

proceeds distributed pro rata to its shareholders.⁷⁵ Third, the Delaware Act contains more methods to circumvent the moratorium than does the New York law. Nonetheless, the Delaware Act's capacity to deter hostile tender offers is significant, particularly when, as is permitted in Delaware, a corporation may proceed under the section 203 shield and also adopt a poison pill.⁷⁶

It is uncertain whether moratorium statutes of the Delaware and New York types would survive constitutional review in the Supreme Court.⁷⁷ *CTS* is, at best, an ambiguous guide. The Powell majority in *CTS* was unwilling to hold that the Williams Act preempted the Indiana Control Share Acquisitions Act because (1) the Act allowed shareholders to collectively evaluate the fairness of an offer, and hence was consistent with the Williams Act policy of investor protection;⁷⁸ (2) the fifty days for the shareholder vote was within the sixth day maximum period Congress established in section 14(d)(5);⁷⁹ and (3) the Williams Act "would pre-empt a variety of state corporate laws of hitherto unquestioned validity if it were construed to pre-empt any state statute that may limit or delay the free exercise of power after a successful tender offer"⁸⁰ such as staggered terms for boards of directors or cumulative voting.⁸¹

In contrast, the New York and Delaware statutes vest existing

75. DEL. CODE ANN. tit. 8, § 203(c)(3) (Supp. 1988).

76. See, e.g., *BNS Inc. v. Koppers Co.*, 683 F. Supp. 458, 474 (D. Del. 1988) (plaintiff conceding that poison pill was within authority of target corporation board); see also *CRTF Corp. v. Federated Dep't Stores, Inc.*, 683 F. Supp. 422, 439 (S.D.N.Y. 1988) (concluding that bidder corporation would be unable to establish that poison pill of target was invalid).

Alternatively, a Delaware corporation may be able to frustrate the ability of a bidder to "opt out" by acquiring 85% or more of the common stock or by issuing stock blocks to employee stock plans that have the right to determine confidentially whether to tender their shares. See, e.g., *Shamrock Holdings, Inc. v. Polaroid Corp.*, 559 A.2d 257, 273-74 (Del. Ch. 1989).

77. To date, both Acts have avoided federal district court injunctions. With regard to New York, see *Salant Acquisition Corp. v. Manhattan Indus., Inc.*, 682 F. Supp. 199, 204 (S.D.N.Y. 1988) (summary disposition of significant and substantial constitutional issues inappropriate). Concerning Delaware, see *City Capital Assocs. Ltd. Partnership v. Interco, Inc.*, 696 F. Supp. 1551, 1555-56 (D. Del.) (probable that statute would survive Supremacy Clause-Williams Act, Commerce Clause and due process attacks), *aff'd*, 860 F.2d 60 (3d Cir. 1988); *RP Acquisition Corp. v. Staley Continental, Inc.*, 686 F. Supp. 476, 486-88 (D. Del. 1988) (Supremacy Clause-Williams Act and Commerce Clause); *BNS Inc. v. Koppers Co.*, 683 F. Supp. 458, 472-73 (D. Del. 1988) (same); *Black & Decker Corp. v. American Standard Inc.*, 679 F. Supp. 1183, 1193 (D. Del. 1988) (irreparable harm not shown).

78. 481 U.S. 69, 82-83 (1987).

79. *Id.* at 83-84.

80. *Id.* at 85.

81. *Id.*

managers with the power to block tender offers, and thus appear to be inconsistent with the Williams Act purpose of ensuring investor choice with respect to accepting or rejecting a tender offer and the more general policy "to avoid tipping the scales either in favor of management or in favor of the person making the takeover bids."⁸² While the fifty days delay in the Indiana statute is within the sixty day congressional limit,⁸³ a moratorium of three or five years obviously exceeds it. Similarly, the purpose of cumulative voting or staggered board terms can be stated in terms unrelated to tender offers, the purpose (or inevitable effect) of a successful moratorium statute is to deter tender offers.

Nonetheless, there is language in *CTS* that can be cited to support the constitutionality of a moratorium statute under the Supremacy Clause. Judge Easterbrook, reviewing the constitutionality of a Wisconsin moratorium act,⁸⁴ for example, has written:

CTS observed that laws affecting the voting power of acquired shares do not differ in principle from many other rules governing the internal affairs of corporations. Laws requiring staggered or classified boards of directors delay the transfer of control to the bidder; laws requiring super majority vote for a merger may make a transaction less at-

82. See *Piper v. Chris-Craft Indus., Inc.*, 430 U.S. 1, 31 (1977) (quoting 113 CONG. REC. 24,664 (1967) (statement of Sen. Williams)).

83. 15 U.S.C. § 78n(d)(5) (1988).

84. *Amanda Acquisition Corp. v. Universal Foods Corp.*, 877 F.2d 496, 498 (7th Cir.), cert. denied, 110 S. Ct. 367 (1989) described the Wisconsin Act in these terms:

No firm incorporated in Wisconsin and having its headquarters, substantial operations, or 10% of its shares or shareholders there may "engage in a business combination with an interested stockholder . . . for 3 years after the interested stockholder's stock acquisition date unless the board of directors of the [Wisconsin] corporation has approved, before the interested stockholder's stock acquisition date, that business combination or the purchase of stock", Wis. Stat. § 180.726(2). An "interested stockholder" is one owning 10% of the voting stock, directly or through associates (anyone acting in concert with it), § 180.726(1)(j). A "business combination" is a merger with the bidder or any of its affiliates, sale of more than 5% of the assets to bidder or affiliate, liquidation of the target, or a transaction by which the target guarantees the bidder's or affiliates [sic] debts or passes tax benefits to the bidder or affiliate, § 180.726(1)(e). The law, in other words, provides for almost hermetic separation of bidder and target for three years after the bidder obtains 10% of the stock—unless the target's board consented before then. No matter how popular the offer, the ban applies: obtaining 85% (even 100%) of the stock held by non-management shareholders won't allow the bidder to engage in a business combination, as it would under Delaware law. Wisconsin firms cannot opt out of the law, as may corporations subject to almost all other state takeover statutes. In Wisconsin it is management's approval in advance, or wait three years.

Id. at 503-04 (citations omitted).

tractive or impossible. Yet these are not preempted by the Williams Act, any more than state laws concerning the *effect* of investors' votes are preempted by the portions of the Exchange Act regulating the process of soliciting proxies. Federal securities laws frequently regulate process while state corporate law regulates substance. Federal proxy rules demand that firms disclose many things, in order to promote informed voting. Yet states may permit or compel a super majority rule (even an unanimity rule) rendering it all but impossible for a particular side to prevail in the voting. Are the state laws therefore preempted? How about state laws that allow many firms to organize without traded shares? Universities, hospitals, and other charities have self-perpetuating boards and cannot be acquired by tender offer. Insurance companies may be organized as mutuals, without traded shares; retailers often organize as co-operatives, without traded stock; some decently large companies (large enough to be "reporting companies" under the '34 Act) issue stock subject to buy-sell agreements under which the investors cannot sell to strangers without offering stock to the firm at a formula price; Ford Motor Co. issued non-voting stock to outside investors while reserving voting stock for the family, thus preventing outsiders from gaining control (dual-class stock is becoming more common); firms issue and state law enforces poison pills. All of these devices make tender offers unattractive (even impossible) and greatly diminish the power of proxy fights, success in which often depends on buying votes by acquiring the equity to which the vote is attached. None of these devices could be thought preempted by the Williams Act or the proxy rules. If they are not preempted, neither is Wis. Stat. § 180.726.⁸⁵

There are responses to the questions propounded by Judge Easterbrook. In the circumstances described, universities, hospitals, insurance companies, and cooperatives are not, for example, subject to the Williams Act, and hence are not subject to pre-emption analysis. Super-majority or unanimity rules are not employed in board elections. The buy-sell agreements and the nonvoting stock Judge Easterbrook described were long prohibited by the NYSE—although Ford Motor Company was clearly given exceptional treatment by that Exchange. None of these types of responses, however, effectively eliminates the uncertainty about how the Supreme Court will rule if it reviews a moratorium statute under the Supremacy Clause.

85. *Id.* (citations omitted).

Ultimately, the question becomes whether Congress should address laws that may be both "economic folly and constitutional."⁸⁶ The moratorium statutes strongly tilt in favor of incumbent management and jeopardize what former SEC Chairman Ruder has termed "the free transferability of securities."⁸⁷ The Supreme Court majority in *CTS* took some pains to emphasize that it was not engaged in an economic or cost-benefit analysis concerning the Indiana Act.⁸⁸ It is nonetheless readily apparent that states favor takeover statutes as a means to protect local industry and local jobs. No state claims when it adopts a tender offer statute that it has empirical evidence that the legislation is best for a national economy. This is precisely the issue Congress should address. Given the magnitude of target shareholder premiums that state moratorium statutes may block, and the likelihood that this money would be recirculated back into the economy, there is a real possibility that the more significant state laws do more harm than good. At the very least, the moratorium statutes may significantly tilt the balance in favor of target management. At the worst, the belief among state legislatures that "anything goes" will inspire a "race to the bottom." States will compete to design the most pro-incumbent management statutes as a device to attract or retain incorporations. The price of federalism can be too high. With the moratorium statutes, the states appear to have crossed that line. If the acts are not unconstitutional, then Congress should consider whether they should be pre-empted by a better balanced federal regime.

III. SHAREHOLDER LITIGATION

At least until 1976, any shareholder of a corporation had the right to maintain a derivative action against a majority or more of a board of directors to prove a violation by the board of a duty of care (negligence);⁸⁹ a duty of loyalty (exploitation of a conflict of interest);⁹⁰ or waste (payment by a board so large that it amounted to a gift).⁹¹ In theory, the shareholder's right derived from the corpora-

86. *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 97 (1987) (Scalia, J., dissenting).

87. Ruder, *Federal Preemption of State Anti-takeover Legislation*, U.S. Securities and Exchange Commission News Release, Oct. 7, 1987, at 5 (remarks before the 26th Annual Corporate Counsel Institute, Chicago, Ill.).

88. 481 U.S. at 92.

89. See, e.g., H. HENN & J. ALEXANDER, *LAWS OF CORPORATIONS* §§ 234, 242 (3d ed. 1983).

90. See Seligman, *supra* note 13, at 367-72.

91. See, e.g., *Rogers v. Hill*, 289 U.S. 582, 591 (1933).

tion and any recovery went directly to the corporate treasury.⁹² While often controversial, the derivative action generally was regarded as a useful device to ensure minimal levels of law compliance by the corporate board.⁹³

Then in 1976, in the federal district court decision *Gall v. Exxon Corp.*,⁹⁴ the technique of a board appointed special litigation committee was first used in an action against a majority or more of a board. Today, the special litigation committee technique is generally employed when demand on the board of directors is "futile" (that is, a majority or more of the board is properly named in a suit).⁹⁵ A committee normally will hire outside litigation counsel to prepare a factual report providing the context for the committee's evaluation of whether an action should be maintained.⁹⁶ The law has consistently prohibited board members properly named in a plaintiff's demand from serving on the committee.⁹⁷ The committees almost invariably have recommended that the lawsuit should not be continued.⁹⁸

This poses a pivotal legal question for the courts: How should they evaluate a committee recommendation? Three cognate approaches have evolved.

At one extreme is the view of the New York Court of Appeals (that state's highest court) which in 1979 held that if the members of a board committee are disinterested and if the committee follows appropriate procedures, a court should defer to the business judgment of the committee and not examine the substantive merits of its decision.⁹⁹ This approach, in effect, is premised on the belief that a special litigation committee evaluating the wisdom of a lawsuit against fellow directors can proceed with the same intellectual disinterestedness and detachment that the entire board could in deciding whether to make a conventional business decision, such as whether to build a new plant.

92. For a discussion of the origin and development of derivative actions, see H. HENN & J. ALEXANDER, *supra* note 89, § 358.

93. See, e.g., Coffee & Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261 (1981).

94. 418 F. Supp. 508 (S.D.N.Y. 1976).

95. H. HENN & J. ALEXANDER, *supra* note 89, § 365.

96. See Cox, *Searching for the Corporation's Voice in Derivative Suit Litigation: A Critique of Zapata and the ALI Project*, 1982 DUKE L.J. 959, 970-71.

97. *Auerbach v. Bennett*, 47 N.Y.2d 619, 631, 393 N.E.2d 994, 1001, 417 N.Y.S.2d 920, 927 (1979) ("business judgment rule does not foreclose inquiry by courts into the disinterested independence of those members of the board chosen by it . . .").

98. Cox, *supra* note 96, at 962-63.

99. *Auerbach*, 47 N.Y.2d at 623-24, 393 N.E.2d at 996, 419 N.Y.S.2d at 922.

At the other extreme was the view of Duke University School of Law Professor James Cox that the "structural bias" of a board committee made it inappropriate for such a committee to recommend dismissal of a lawsuit brought against other members of the board. Cox observed:

Commentators have explained in detail why the special litigation committee's independence may be more apparent than real. Their concern is founded on the observation that the defendants and the members of the special litigation committee share a common cultural bond: directorship of a public corporation. The natural empathy and collegiality that this bond engenders makes an adverse judgment of a colleague's behavior distasteful at best. Also, when the committee is formed after the instigation of the derivative suit, the situation is rife with opportunities for the defendants to select for committee membership those directors most sympathetic to their position. The committee's independence may be further undermined by its members' desire to curry favor with their fellow directors or with the business community in general. Finally, special litigation committees operate under the constant threat of dissolution should they displease the board by pursuing the plaintiff's cause with excessive zeal.

The likelihood that these factors will corrupt the committee's independent judgment will be referred to as "structural bias." Whatever one's view about the impact of the factors that feed a committee's structural bias, the committee's record is itself disquieting: although there have been more than a score of special litigation committee cases to date, in all but one the committee concluded that the suit in question was not in the corporation's best interest.¹⁰⁰

The "structural bias" theory received judicial approval in Iowa and, briefly, in North Carolina, where courts refused to permit directors who are parties to a derivative action to appoint an "independent" committee for the purpose of recommending dismissal of a deriva-

100. Cox, *supra* note 96, at 962-63. Professor Cox amplified this argument in two subsequent articles. See Cox, *Compensation, Deterrence, and the Market as Boundaries for Derivative Suit Procedures*, 52 GEO. WASH. L. REV. 745 (1984); Cox & Munsinger, *Bias in the Boardroom: Psychological Foundations and Legal Implications of Corporate Cohesion*, 48 LAW & CONTEMP. PROBS., Summer 1985, at 83. *But cf.* Coffee, *Litigation and Corporate Governance: An Essay on Steering Between Scylla and Charybdis*, 52 GEO. WASH. L. REV. 789, 793 & n.7 (1984) (agreeing with Cox's general concerns about structural bias, but asserting that special committees help foster internal reform).

tive lawsuit.¹⁰¹

The most influential approach is an intermediate one adopted in 1981 by the Delaware Supreme Court in *Zapata Corp. v. Maldonado*.¹⁰² The court, mindful that “‘there but for the grace of God go I’ empathy”¹⁰³ might influence directors on a litigation committee, established a two-part test. First, the trial court, when reviewing a board committee recommendation to dismiss a derivative action, should “inquire into the independence and good faith of the committee and the bases supporting its conclusions.”¹⁰⁴ Second, the court must apply its own independent business judgment—and not defer to the business judgment of the board committee—to determine whether the action should be dismissed. The *Zapata* court stated:

This means, of course, that instances could arise where a committee can establish its independence and sound bases for its good faith decisions and still have the corporation’s motion denied. The second step is intended to thwart instances where corporate actions meet the criteria of step one, but the result does not appear to satisfy its spirit, or where corporate actions would simply prematurely terminate a stockholder grievance deserving of further consideration in the corporation’s interest.¹⁰⁵

The apparent liberality of the *Zapata* test was somewhat watered down by the Delaware Supreme Court’s subsequent decision in *Aranson v. Lewis*.¹⁰⁶ There a stockholder challenged as a waste of corporate assets an employment contract between Meyers Parking System and an individual who owned forty-seven percent of Meyers stock who was alleged to have personally selected each director of Meyers.¹⁰⁷ The Delaware Supreme Court directed that the action be dismissed because the plaintiff had neither made demand on the board nor alleged facts with sufficient particularity indicating why the Meyers directors were tainted by self-interest.¹⁰⁸

101. See *Miller v. Register and Tribune Syndicate, Inc.*, 336 N.W.2d 709 (Iowa 1983); see also *Alford v. Shaw*, 72 N.C. App. 537, 324 S.E.2d 878 (1985), *rev’d*, 318 N.C. 289, 349 S.E.2d 41 (1986), *withdrawn*, 320 N.C. 465, 358 S.E.2d 323, *modified and aff’d on rehearing*, 320 N.C. 465, 358 S.E.2d 323 (1987).

102. 430 A.2d 779 (Del. 1981).

103. *Id.* at 787.

104. *Id.* at 788.

105. *Id.* at 789.

106. 473 A.2d 805 (Del. 1984).

107. *Id.* at 809.

108. *Id.* at 818.

Aronson, in effect, confirmed the bifurcation of derivative litigation procedure in Delaware. On the one hand, unless a plaintiff can allege with sufficient particularity facts that demonstrate the self-interest of a majority of a board, the board may treat dismissal of a derivative litigation much as it does any other "business" decision.¹⁰⁹ In these director "demand" cases, the board need not hire outside litigation counsel, need not prepare a written report, and except in extraordinary circumstances, a court normally will follow its recommendation to dismiss a derivative suit.¹¹⁰ For one notable example, in 1987 a Delaware Chancery Court approved General Motors' (GM) \$742 million buyback of H. Ross Perot's GM stock without examining the merits of the plaintiffs' claim because the court concluded that plaintiffs had failed to show that the GM directors were interested or not independent.¹¹¹ This decision was made despite evidence reported in the decision itself that Perot, the recipient, had presented a contract he considered "unbelievable," "something that the Board will never approve."¹¹² One set of commentators, perceptively noting the "profound" implications of this type of decision, stated:

It would appear that, under the court's formulation, demand will not be excused (and hence the litigation may not be able to continue) if a self-dealing transaction has been approved by a disinterested board even if, on the merits of the case, the interested director would not get the benefit of the business judgment rule.¹¹³

On the other hand, in Delaware, if "demand futility" is demonstrated by a plaintiff alleging sufficiently particularized facts to demonstrate that a majority of the board is not adequately independent, the case can still be dismissed without a trial on the merits, if the defendants appoint a special litigation committee and otherwise comply with the *Zapata* procedures.

None of the approaches to dismissal of shareholder litigation—not even that in New York—can prevent a shareholder from litigating a fraud action based on federal securities law claims such as rule

109. See, e.g., *id.*

110. See *id.*

111. *Grobow v. Perot*, 526 A.2d 914 (Del. Ch. 1987), *aff'd*, 539 A.2d 180 (Del. 1988).

112. *Id.* at 919.

113. L. SOLOMON, D. SCHWARTZ & J. BAUMAN, *CORPORATIONS: LAW AND POLICY* 854 (2d ed. 1988). For a discussion on the business judgment rule, see *id.* at 622-78.

10b-5.¹¹⁴ When, however, a plaintiff has no federal fraud claim, both the New York and Delaware approaches pose serious obstacles to the litigation of meritorious actions. Both acts can substantially delay the right to appear in court and try the merits.¹¹⁵ Both may prevent a plaintiff with a meritorious claim from litigating at all. While one may share the concern that the absence of a special litigation committee approach might stimulate the filing of nonmeritorious claims, there have long been judicial devices to dismiss nonmeritorious claims such as the motion for summary judgment or motion to dismiss¹¹⁶ and now, at least in federal courts, there is considerable willingness to sanction attorneys who file nonmeritorious suits.¹¹⁷

The broader significance of the rise of the special litigation committee technique for dismissing shareholder litigation becomes clearer when it is recognized that this device has become a common feature of shareholder litigation simultaneous with the erosion of shareholder suffrage suggested by rule 19c-4 and the decline of the tender offer, in part, prompted by state tender offer moratorium statutes. This means that each of the three principal restraints on corporate managers has simultaneously weakened. This weakening, however, does not give corporate managers carte blanche. They are still subject to the restraints of product and capital markets and federal securities law. It does mean that the aggregate of "monitoring" devices is not as secure as it was two decades ago.

IV. FEDERAL MINIMUM CORPORATE LAW STANDARDS

More than fifteen years ago, former SEC Chairman, then Columbia Law School Professor William Cary, troubled by Delaware's role in the deterioration of state corporate law standards, proposed a Federal Corporate Uniformity Act.¹¹⁸ The essence of Cary's proposal is that Congress should pre-empt state corporate law norms only when a compelling need for a limited intervention can be shown. This limited type¹¹⁹ of approach is appropriate in a country

114. 17 C.F.R. § 240.10b-5 (1989); see, e.g., *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

115. See, e.g., *Kaplan v. Wyatt*, 484 A.2d 501, 511-12 (Del. Ch. 1984) (suggesting that the *Zapata* procedure sidetracks derivative litigation for at least two years), *aff'd*, 499 A.2d 1184 (Del. 1985).

116. See, e.g., FED. R. CIV. P. 12, 56.

117. FED. R. CIV. P. 11.

118. Cary, *supra* note 4, at 696-705.

119. Cf. R. NADER, N. GREEN & J. SELIGMAN, *supra* note 4, at 240-42 (proposal for dual federal-state chartering and regulation of large corporations).

with our long tradition of state corporate law standards. Nonetheless, sufficient evidence has accumulated to justify congressional examination of three areas for possible federal pre-emption.

First, Congress should consider adopting a one common share, one vote norm for all corporations subject to SEC jurisdiction under section 12 of the Securities Exchange Act of 1934.¹²⁰ This would prohibit the largest corporations from adopting or maintaining a disparate voting scheme as a takeover defense or for any other reason. Elsewhere, I have urged that the prohibition of disparate voting is authorized by section 14(a) of the Securities Exchange Act of 1934 which has as its purpose "the free exercise of the voting rights of stockholders."¹²¹ Congressional enactment of a one common share, one vote rule, in a narrow sense, would be a modest achievement. It would merely restore the NYSE standard that operated between 1926 and 1987 on which the federal securities laws were premised. More significantly, restoration of the one common share, one vote standard is essential to ensure the efficacy of three pivotal types of corporate accountability mechanisms: the tender offer, the independent board of directors, and outside shareholder review of fundamental corporate transactions.¹²² The difficult issue is whether Congress should go further than merely restoring the one common share, one vote standard, and also enact a federal standard giving outside shareholders some opportunity, at corporate expense, to nominate corporate directors. There is a strong case for SEC consideration of such a rule.¹²³ One advantage of new congressional enabling legislation would be to remove questions of the SEC's power to act.

If Congress were to address this area, it should take a limited approach. Congressional legislation should be confined to the single question of shareholder power in the corporate proxy to nominate directors. It should not extend afield to other questions concerning the board such as who may be a director or whether there should be a board staff. On these questions the case for federal legislation is weaker.

Second, limited federal pre-emption of state tender offer stat-

120. 15 U.S.C. § 78(l) (1988). For discussion of § 12, see 4 L. LOSS & J. SELIGMAN, *supra* note 15, at 1733-73.

121. Securities Exchange Act of 1934, ch. 404, § 14(a), Pub. L. No. 73-291, 48 Stat. 881, 895 (1934) (codified as amended at 15 U.S.C. § 78(n) (1988)); see Seligman, *supra* note 15, at 717 (quoting *J.I. Case Co. v. Borak*, 377 U.S. 426, 431 (1964)); *id.* at 717-19.

122. See *supra* text accompanying notes 15-18.

123. See *supra* text accompanying notes 22-37.

utes should be used to prohibit the moratorium and kindred state statutes that significantly tilt the odds against shareholders receiving a tender offer. There is no need to pre-empt more restricted state statutes like the Indiana Act that was upheld as constitutional in the *CTS* decision.¹²⁴ These laws do not seriously threaten the use of the tender offer as a monitoring device. Drafting a law to pre-empt the *blunderbuss* acts, like New York, should not be particularly difficult. By analogy to the Securities Act of 1933, what might be designed would be a broad prohibitory act with a long series of specific exceptions and a residual authority to make further exceptions vested in the SEC.¹²⁵ The more important point is that the increased state enthusiasm for legislation explicitly designed to prevent tender offers for local firms threatens to Balkanize the national economy. No one could seriously suggest that the nation's shareholders favor a system of laws that has as its object the deprivation of premia averaging approximately fifty percent above market value.¹²⁶ Tender offers that risk doing competitive injury to our economy obviously should not be favored; that is why we have federal antitrust laws. The most troublesome aspect of the current state rush to adopt ever more restrictive state tender offer statutes is that there is little doubt that no one at the state level is seriously considering whether these laws are good for the country as a whole. It is for expressly this reason that congressional attention is urgently needed.

Third, Congress should enact a federal cause of action based on existing state corporate law fiduciary standards such as the duty of care, the duty of loyalty, and the waste doctrine. This cause of action would be litigated in federal court and would expressly prohibit federal courts from deferring to special litigation committees in suits properly alleging the misconduct of any member of the board of directors. The fiduciary standards applied by federal courts would remain state corporate law. This arrangement would preserve for business corporations their current opportunity to choose a state of incorporation, based in part on an evaluation of these standards. The new federal rule would be procedural. It would substitute for the special litigation committee the well-established federal courts' standards for dismissal of nonmeritorious suits.¹²⁷ It

124. See *supra* text accompanying notes 55-61.

125. For discussion of this model, see 1 L. LOSS & J. SELIGMAN, *supra* note 15, at 380-91.

126. See, e.g., Black, *Bidder Overpayment in Takeovers*, 41 STAN. L. REV. 597, 598, 601 (1989); Kraakman, *Taking Discounts Seriously: The Implications of "Discounted" Share Prices as an Acquisition Motive*, 88 COLUM. L. REV. 891, 892 (1988).

127. See *supra* text accompanying notes 116-117.

also would remove a fair amount of state derivative litigation from jurisdictions which, from time to time, have been criticized for their dependence on corporate franchise taxes, to jurisdictions which, with no similar conflict of interest, could review these causes of action in an objective manner.¹²⁸

The design of a purely procedural approach to corporate litigation would be the most difficult drafting problem posed by these proposals. How should Congress deal with state law standards such as that in the Delaware General Corporation Law that permit a corporation to "opt out" of duty of care liability?¹²⁹ How should it deal with the more than purely academic possibility that states will design new forms of takeover defense with the express intent that they are not reviewable by *any* court? At some point Congress might be forced to address the need for a substantive federal corporate law, but we are not there now. Consistent with the general theme of these proposals, that Congress should only act when a clear need is shown, we would be wiser to take a "wait and see" approach.

In each of the three areas, the proposals are modest. In essence, they return the law to where it appeared to be a short time ago. This is not a federal incorporation law or a preemption of state law as broad as Professor Cary's 1974 proposal.¹³⁰

Revisions of the current law along the lines discussed would have salutary effects. Each proposal would strengthen systems of corporate monitoring or corporate accountability. There would be a greater uniformity in corporation law and a diminution of the likelihood that more parochial concerns would prevail in legislative or administrative consideration of these proposals. By limiting these proposals, the risk of legislative overkill or of regulation that might do more harm than good, is considerably reduced. At the very least, we have witnessed so significant a deterioration of corporate law standards that a policy debate whether federal minimum corporate law standards should be adopted is now appropriate.

128. See Cary, *supra* note 4, at 697-98.

129. DEL. CODE ANN. tit. 8, § 102(b)(7) (Supp. 1988).

130. Cary, *supra* note 4, at 702.