

The Professorial Bear Hug: The ESB Proposal as a Conscious Effort to Make the Delaware Courts Confront the Basic “Just Say No” Question

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As one of the ten Delaware judges to whom the central policy argument of *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*¹ is directed, I am constrained to reply to the excellent, thought-provoking article by Professors Bebchuk, Coates, and Subramanian in a more oblique fashion than the other commentators. For obvious reasons, I will not enter into the normative debate regarding the desirability of hostile takeovers or whether state corporation law should facilitate or impede the ability of acquirors to make, and stockholders to accept, structurally noncoercive, all-shares tender offers. Nor will I comment on the reliability of the empirical evidence that the authors present.

Instead, this brief Response will highlight the basic policy choice that the authors ask the Delaware courts to enshrine in the common law of corporations. The question the authors ask us to decide affirmatively is fundamental: Can control of the corporation be sold over the objections of a disinterested board that believes in good faith that the sale is inadvisable? That is, at bottom, the authors want to force the hand of the Delaware courts to decide, once and for all, that impartial and well-intentioned directors do not have the fiduciary authority to “just say no” for an indefinite—even perpetual—period to a noncoercive tender offer made to their company’s shareholders.

Although staggered boards are critical to their proposal, the authors prescribe a judicial cure for a quite different toxin: the poison pill.² Thus, the

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1. Lucian Arye Bebchuk, John C. Coates IV & Guhan Subramanian, *The Powerful Antitakeover Force of Staggered Boards: Theory, Evidence, and Policy*, 54 STAN. L. REV. 887 (2002).

2. See Bebchuk et al., *supra* note 1, at 940 (“Before the invention of the poison pill, the staggered board was fairly innocuous as a takeover defense [Before the pill,] a staggered board could not block a bidder from acquiring a control block and creating a

authors have continued a longstanding debate, but in a particularly valuable way, by forcing the contestants to grapple with empirical facts about the real-world effects of the combined defense of a poison pill and an “Effective Staggered Board” (ESB).

The authors went about their task cleverly. By framing their policy proposal precisely, they have attempted to block off the principal doctrinal route the courts have used to sidestep the fundamental Just Say No issue. Relatedly, their proposal illustrates how bluntly the traditional fiduciary duty tool operates as a substitute for a clear legislative—or judicial—answer to this question of corporate authority. Essentially, the authors seek a clear ruling about the proper allocation of power between stockholders and directors in responding to tender offers, and have made it more difficult for the courts to avoid giving an answer. Although “muddling through” has benefits that arguably exceed those that could be achieved by a bright-line rule, nonetheless, the authors have exposed some of the more obvious logical vulnerabilities that now exist in a common law of takeover defense that has, to date, not forthrightly confronted the bottom-line Just Say No question.

My discussion of these issues breaks out as follows. Part I of this Response, a hypothetical, demonstrates how the authors have purposefully (and craftily) limited the scope of their ESB proposal. In particular, the hypothetical shows how the authors’ proposal rests on the premise that a board’s decision to block a tender offer with a poison pill involves an exercise of fiduciary power that is categorically different from a board’s determination about the corporation’s proper business strategy. Typically, independent directors do not breach their fiduciary duty when they take action that is well-motivated and well-informed. The authors’ proposal, however, asks the courts to hold that a corporate board does not possess any equitable authority to impede the procession of a tender offer, once the directors have had the chance to develop another better alternative and inform the stockholders about their view that the offer is inadequate, and after they have channeled the initial stockholder referendum on the offer into the director election process.

Part II traces how the Delaware courts have dealt with the extent of directorial authority to use a poison pill to deprive stockholders of an opportunity to sell their shares in a tender offer. From the invention of the poison pill, Delaware’s common law of corporations has displayed a studied ambivalence on this issue, recognizing the need for heightened scrutiny when boards use pills, but hesitating to override the judgment of independent directors to block acquisition offers. Indeed, the courts have deployed in tandem two doctrinal concepts to escape the ultimate Just Say No question. The first concept—“substantive coercion”—is the notion that directors may legitimately use defensive measures (to some as-yet-undefined extent) to protect stockholders from making an erroneous decision to sell their shares for

situation in which a board control shift would be inevitable.”).

too low a price in a tender offer. The second concept—what I call the “proxy out”—is the idea that the poison pill is not a preclusive or unreasonable response to the threat of substantive coercion, so long as the stockholders are able to elect a new board that can dismantle the pill. When used together, the substantive coercion and proxy out concepts reduced poison pill litigation and funneled takeover fights into the director election process.

Part III shows how the authors’ ESB proposal is intentionally designed to disable the doctrinal tools Delaware courts have employed to bypass the Just Say No question. By framing their proposal as they have, the authors make it more difficult for the courts to hold that the threat of substantive coercion justifies continued use of the poison pill, or to rely upon the availability of a proxy contest as an answer to the pill’s preclusive effect. Having thrown a roadblock in front of this escape route, the authors challenge the Delaware courts to live up to the original promise of *Moran v. Household International, Inc.*,³ by setting clear equitable limits on the power of a staggered board to use a pill to block a fully funded, premium, all-shares tender offer after shareholders have expressed their desire to receive such an offer in a director election.

Finally, in Part IV, I conclude by emphasizing the pressure the authors have exerted on the Delaware judiciary to articulate more specifically the core, foundational purpose of our corporation law, and to reconcile its doctrinal techniques with that purpose. Because the Delaware General Assembly has not provided our judiciary with clear guidance in this area of corporate law, the undertaking that the authors demand from our courts is inescapably, and uncomfortably, legislative in nature. Due to the authors’ skill and diligent research, however, it might be one that cannot ultimately be avoided.

I.

To clarify the discussion that follows, I first pose the authors’ central question a bit more comprehensively: When the stockholders of a corporation with an ESB⁴ have expressed their desire to receive a fully funded, all-shares tender offer⁵ in a fair, noncoercive board election⁶ that was preceded by an adequate opportunity for the incumbent board to develop a better strategy and

3. 500 A.2d 1346 (Del. 1985).

4. I use the term as the authors have defined it.

5. In the entirety of this Response, any reference to a tender offer will assume an unconditional, fully funded, all-cash, all-shares offer. This is obviously a simplifying assumption.

6. That is, I assume that there was adequate time for a full airing of issues and that no misdisclosures tainted the process. In this regard, it must be remembered that incumbent directors have a large advantage in proxy contests because they can spend the company’s money to tell their story and retain important, if not unconstrained, discretion regarding timing.

make their case to the target stockholders, does a well-motivated and well-informed majority of independent, incumbent directors who believe that the offer is inadequate have the power to block that tender offer by continuing to deploy a poison pill?

This single question summarizes the policy choice that the authors would have the Delaware judiciary make when they call for it to adopt their “basic approach,” which they summarize thusly:

Courts should not allow managers to continue blocking a takeover bid after they lose one election conducted over an acquisition offer. Note that without an ESB, no court intervention is necessary in order to achieve this outcome. If managers of a non-ESB target are defeated in one election, the bidder will gain control of the board and will be able to redeem the pill and consummate the bid. However, with an ESB, in the absence of a court order to redeem the pill, incumbents will be able to retain independence even after losing one election over one third of the directors. Under our proposal, after the loss of one election that is effectively a referendum on the offer, incumbents should be required to redeem the pill and allow the bidder (whose offer has received shareholder support) to proceed with its bid.⁷

Simply put, the authors’ proposal raises—once again—the as-yet-unsettled issue of whether there is a limit to the authority of a board, acting in good faith, to just say no to a noncoercive acquisition offer for the sole reason that the board believes that remaining independent is a better strategy. Their proposal does this by highlighting the centrality to this debate of the basic question of power allocation. That is, who has the primary authority regarding the acceptance of tender offers? The stockholders to whom such offers are directed, or the directors of their companies?⁸

A hypothetical shows why the authors’ proposal poses this power allocation issue starkly, and why the traditional lexicon of fiduciary duty can only be deployed awkwardly to answer the fundamental Just Say No question.

Suppose that Stars and Stripes Corporation has traditionally been in two steadily profitable business lines. Recently, the CEO of the corporation announced his intention to have the company enter into a new business line, which is quite risky and would demand large capital investments in order to pay off. For the near term, the investments to enter into that new endeavor are likely to exceed the company’s net profits and would require substantial borrowing, resulting in a decision to eliminate dividends. As part of the new strategy, the board has also decided to reposition the public image of the company by renaming its operating subsidiary (until now known publicly as Stars and Stripes) as Global Integration Systems—and making that new

7. Bebchuk et al., *supra* note 1, at 944-45.

8. The reader interested in a more comprehensive and provocative perspective on this issue should consult Robert B. Thompson & D. Gordon Smith, *Toward a New Theory of the Shareholder Role: “Sacred Space” in Corporate Takeovers*, 80 TEX. L. REV. 261 (2001).

Dec. 2002]

CONFRONTING "JUST SAY NO"

867

moniker the company's face to the public. Assume that the board has the power to approve all these acts, and that stockholder assent is not required.

Assume also that the corporation has an ESB. A large stockholder, Roosevelt Taft, whose family has long been affiliated with the company, funds a proxy fight to elect a slate of three directors to the corporation's nine-member board, which consists of the CEO, Taft, and seven incontestably independent directors. Taft's seat is up for election, as are the seats of two of the independent directors.

Taft's platform is simple: The company's core businesses have been successful for generations and the company should stick to them. He and his slate vow to do whatever they can to undo the incumbents' decision to enter the new business line, as well as to restore the company's previous dividend policy—and its name. After a vigorous and highly informative proxy contest, Taft's slate is elected.

When the newly elected Taft directors arrive at the first board meeting, however, they find that the other six directors remain committed to the CEO's new strategy. The incumbent board majority believes that the company needs to find a new business line in order to increase profit margins and to survive in the technology age. The majority fears that the company's existing business lines are in danger of becoming obsolete in coming decades and, in any case, are in mature industries without substantial growth prospects. It believes that the company needs a new, more global image, which the new name projects. After several board meetings at which the contrary views of the Taft directors are considered and rejected, a wave of lawsuits is filed seeking an injunction compelling the board to adopt the Taft directors' strategy.

The lawsuits concede that none of the incumbents (i.e., the non-Taft-affiliated directors)—including the CEO—has any improper, personal financial interest in pursuing his or her preferred strategy. Indeed, the six incumbents all own material amounts of actual company shares—not just options—and have an interest in seeing the value of their shares appreciate. On the other hand, these defendants concede that the board election was essentially a referendum on the underlying question of corporate strategy, that the issues were fully vetted over a four-month period, and that the stockholders favored the Taft slate's views. That is, the board election in this situation was as much a single-issue plebiscite over the direction the company should take as an election centering on a tender offer obstructed by a poison pill.

In view of these circumstances, the Taft-affiliated directors base their argument on the simple proposition that the electorate had participated in a referendum on the question of the company's strategy, and had overwhelmingly embraced their position. In the wake of this contest of opinion, the CEO-affiliated incumbents (it is argued) breach their fiduciary duties by putting their own views ahead of the expressed desires of the electorate.

Even given my judicial role, I feel safe in predicting that this suit would have little chance of success. Under traditional fiduciary duty principles, the decision of an informed, disinterested board to pursue a business strategy authorized by the corporation's charter and not involving any matter requiring a stockholder vote is protected by the business judgment rule. The mere fact that the stockholders had elected a dissenting minority to the corporation's ESB in one election would not require the incumbent majority to give way on matters of policy. Indeed, the statute authorizing the adoption of the ESB in the first instance⁹ would likely be read by the court as a clear statement of public policy permitting corporate policies to be insulated from change through a single board election, by way of the ESB mechanism. By statute, the board—and not the stockholders—manages the corporation and makes these strategic decisions.¹⁰ Until the stockholders can elect a new board majority that actually changes corporate policy, they must live with the strategy pursued in good faith by the incumbent board majority.

I dare say that the authors would not disagree with my prediction about how this hypothetical case would be decided. I also doubt that they would advocate that their policy proposal be extended to govern a situation like the one involving Stars and Stripes, even though the issue at stake is arguably as important to stockholder wealth as the issue of whether stockholders can receive a tender offer.¹¹

Given that the recent Stars and Stripes board election was a single issue campaign, this hypothetical underscores the limited scope of the authors' proposal. It also reveals that the underlying policy debate is one that centers most fundamentally on who has primacy to decide whether a tender offer will be accepted: the directors of the company whose stockholders have received the offer or the stockholders to whom the offer is actually directed.

II.

The centrality of this policy question is, of course, neither surprising nor a novel feature of the debate over takeover policy. Since the advent of the poison pill, the common law of corporations in Delaware has displayed a studied ambivalence about this question of power. When asked to invalidate the poison pill, the Delaware courts refused, finding there was sufficient flexibility in a provision of the Delaware General Corporation Law to permit a corporate

9. *See* DEL. CODE ANN. tit. 8, § 141(d) (2002).

10. *See id.* § 141(a) (stating that “[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation”).

11. If their argument would extend to this scenario, the authors have made a more full-bodied proposal to eliminate staggered boards. I proceed on the assumption that they have not gone so far and are limiting their proposal to the context of an acquisition offer.

board to issue "rights" to its stockholders.¹² Nonetheless, the courts were keenly aware that that statutory section was not enacted with anything like the poison pill in mind, and that a board's decision to block a tender offer with a poison pill is not rooted in any explicit statutory power of directors. The statutory authority given to boards to approve merger agreements before they are submitted to the stockholders is clearly explicit.¹³ In contrast, any statutory authority of directors to interpose themselves between tender offerors and offerees by issuing "rights" whose only purpose is to stop the procession of a tender offer is, at best, deeply implicit. Likewise, to call the thwarting of a tender offer that, by statute, may be consummated without board involvement or approval "the management of the corporation,"¹⁴ can and has been done by our courts, but not without a keen appreciation of the extraordinary and singular nature of this kind of "managerial" action—and a great deal of linguistic license.

To put a finer point on the issue, it should be recalled that stockholders of Delaware corporations live in a society that places a high value on property rights. Every day owners of shares of Delaware corporations sell their shares without any involvement by the corporations' directors. Undoubtedly, many sell all the time at prices that company directors might think too low. But is there any corporate director who would be willing to take daily calls from stockholders seeking their advice about the right time and price at which to sell? Or to help her board put out regular buy, sell, or hold advice regarding the company's shares?

Moreover, our society generally allows buyers to acquire the property of others. In this particular context, federal law specifically authorizes a buyer, subject to certain constraints, to make an offer to buy all the shares—i.e., the property—held by all the stockholders of a particular corporation. And no explicit provision of federal law or of Delaware statutory law authorizes corporate directors to destroy (by making financially unworkable) the ability of a willing tender offeror to consummate a purchase of shares by willing offerees.¹⁵

12. See *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1351-53 (Del. 1985) (stating that the "rights" contained in a poison pill can be issued under authority of DEL. CODE ANN. tit. 8, § 157).

13. See DEL. CODE ANN. tit. 8, § 251(b) (2002).

14. *Id.* § 141(a).

15. It is true, as Stephen Bainbridge notes, that stockholders have no explicit contractual right to receive tender offers. Stephen M. Bainbridge, *Director Primacy in Corporate Takeovers: Preliminary Reflections*, 55 STAN. L. REV. 791, 812 (2002). Of course, it would be surprising if they did. How many of us have an explicit contractual right to sell our personal property without interference? In our society, it is assumed that we can sell our televisions, our houses, and our cars to willing buyers, except insofar as the property rights of others (e.g., lenders) are superior.

While Professor Bainbridge argues that stockholders who buy shares have opted for a contractual stew made up of statutory, charter, bylaw, and common law ingredients, he has

In *Moran* and later cases, however, the Delaware courts embraced the idea that an all-shares tender offer that could result in a change in corporate control could, in certain circumstances, threaten the interests of the target company and its stockholders sufficiently to justify directors in issuing a “rights plan” that had just this effect. It was feared, for example, that stockholders might be stampeded into accepting a low-ball offer simply because their disaggregated status rendered them incapable of generating competing bids or alternative transactions, or because the tender offer was structured in a coercive way. At this developmental stage of the law, Delaware’s judiciary also struggled with the question of whether the corporation as an entity, in which many constituencies have an interest, has distinct interests that directors can protect, irrespective of whether such protection is in the short-term financial interest of the company’s stockholders.¹⁶ For these and other reasons, the Delaware courts were not prepared to deprive directors of all authority to block tender offers.

On the other hand, because of the unusual and extraordinary nature of director action designed solely to block a tender offer, our judiciary was unwilling to give directors a free hand to interfere with stockholders’ ability to sell their shares. Contributing importantly to suspicions about director defensive tactics was the recognition that corporate managers might seek to block tender offers in order to retain their lucrative executive positions.¹⁷

These considerations, although arising in a new context, were rooted in a longstanding debate in the United States about the core purpose of the corporation in our society. On one side stood those who embraced what has been called the “property” model, which in simple terms views the corporation as having as its purpose the goal of achieving the best financial return for its current group of stockholders. On the other side are those who adopt the “entity” model, which contends that the purpose of the corporation is to maximize the value that the entity generates for society in the long term, whether or not that is in the best interests of the current stockholders.¹⁸

not articulated which of those ingredients—before *Moran*—would have put a stockholder on notice that his right to sell his shares in a tender offer could be blocked by the board of his company. See *id.* In the normal order, contractual and statutory restrictions on the alienability of shares tend to be specifically articulated; in the absence of such explicit restrictions, it can be argued that a reasonable stockholder buying shares would assume she was free to sell to whomever she wished whenever she wished without board interference. While Bainbridge’s idea of the underlying “corporate law” contract has normative appeal as a justification for a director-centered approach to the exercise of corporate power, its accuracy as a positive description of the bargain stockholders think they make when they buy shares is less obvious.

16. See, e.g., *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946, 955-56 (Del. 1985).

17. E.g., *id.* at 955.

18. The long-standing debate over these two models is discussed in far greater depth in an article I recently coauthored. See William T. Allen, Jack B. Jacobs & Leo E. Strine, Jr., *The Great Takeover Debate: A Meditation on Bridging the Conceptual Divide*, 69 U. CHI. L.

Stronger forms of the entity model also incorporated the view that stockholders were but one of several corporate constituencies whose interests could be considered by directors in forging company strategy.

By giving directors a tool they could potentially use to thwart the desires of current stockholders for a premium in order to pursue the long-term best interests of the corporate enterprise, the poison pill intensified this foundational debate. And whichever way the Delaware courts ruled on the poison pill would have ramifications for diverse corporate constituencies, the extent and nature of which could not be predicted with confidence.

To address this reality, the Delaware courts forged a compromise. In a nod largely, but not entirely, towards the entity school, *Moran* affirmed the statutory validity of the poison pill, but with an important proviso responsive to the adherents of the property model: a promise to override directors who used the poison pill unreasonably and thereby risked depriving stockholders of a valuable opportunity to sell their shares at a profit.¹⁹ Thus, the poison pill had as part of its standard equipment an equitable safety device imposed by the Delaware courts.

Of course, at that time the notion that director action technically compliant with statutory law could still be unlawful because the action was an inequitable breach of fiduciary duties was hornbook Delaware law and represented no innovation.²⁰ What was a marked departure was the abandonment of traditional, hands-off business judgment "rationality-level" review, in favor of an enhanced form of substantive "reasonableness-level" review. This new "intermediate" form of judicial review signaled a determination that directors did not have the same range of fiduciary authority to block a tender offer as they had to determine the corporation's business strategy.

Shortly after *Moran* was decided, the Delaware courts also came to embrace a shareholder-focused view of the corporation's fundamental purpose. The result was the doctrine that directors' fiduciary duties require them to pursue the best interests of their corporations' stockholders, because the fundamental objective of the corporate form was to maximize shareholder wealth. Although directors were permitted to consider the interests of other constituencies—such as company employees—they could do that only to the extent that they were congruent with stockholders' interests.²¹ Put differently,

REV. 1067 (2002). That article also considers the institutional factors that make it difficult for courts to choose between these models when the legislative branch of government has failed to do.

19. See, e.g., *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1354 (Del. 1985) ("When the Household Board of Directors is faced with a tender offer and a request to redeem the Rights, they will not be able to arbitrarily reject the offer."); *Unocal*, 493 A.2d at 955 (subjecting defensive actions to a two-part test: First, the target board must have a basis for concluding that the hostile bid poses a threat to the company; second, the defensive measure must be reasonable in relation to the threat posed).

20. *Schnell v. Chris-Craft Indus., Inc.*, 285 A.2d 437 (Del. 1971).

21. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del.

to the extent that tender offers were claimed to threaten the corporation as an entity, the threat to the entity had to involve a real risk of harm to stockholders as the owners of the corporation's shares.

By adopting this rhetorical position, the Delaware courts adopted one feature of the property model of the corporation, but left many questions still unanswered. For example, in the case of a structurally noncoercive tender offer that a board was blocking after the board had the opportunity to develop another alternative and to inform the stockholders of its views, this stockholder focus raised the following question. Are corporate directors empowered to exercise fiduciary authority more commonly associated with guardians of the property of infirm persons: protecting the wards—here, the stockholders—from injuring themselves by making an erroneous investment decision?

The pronouncement that directors owed their duties primarily to stockholders also raised the important temporal question that divides adherents of the property and entity models. Although directors were required, first and foremost, to look out for the stockholders, and only incidentally to consider other corporate constituencies, the time horizon over which directors were to seek to maximize shareholder wealth was not clear. Were the directors required to pursue the best interests of their current array of stockholders in the short term, or the best interests of hypothetical stockholders who had entrusted their capital to the firm indefinitely? Stated differently, could the directors deny their current stockholders a premium in order to pursue a long-term strategy that they believed would, in the long run, generate greater returns for company stockholders at some future time?

The doctrinal history from that time forward is well known, even if its meaning continues to be a source of debate. There ensued a period of ferment during which the Court of Chancery undertook to define the circumstances under which a board's use of a poison pill would be reasonable. The high-water mark of this intellectually innovative period occurred when Chancellor Allen decided *City Capital Associates Ltd. Partnership v. Interco Inc.*²² In *Interco*, he suggested that there were limits to a board's fiduciary power to stymie a fully funded, all-shares cash tender offer. When such an offer was made, it was (Chancellor Allen held) permissible for the board to use the pill as a delaying mechanism, giving the board time to develop an alternative option or to inform the stockholders why the board believed the tender offer should not be accepted. Once those purposes had been achieved, however, the board had exhausted the proper limits of its authority to maintain the pill, at which point the stockholders had the ultimate right to decide whether to accept the offer.²³

1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

22. 551 A.2d 787 (Del. Ch. 1988).

23. *Id.* at 798.

Interco seemed to point to a clear, bright-line limitation on the authority of directors to use a rights plan. While directors could deploy a pill to hold off a noncoercive offer for a discrete, if undefined, period of time, in the end they had to let the stockholders decide, even if the directors reasonably and in good faith believed that the offer was too low and should not be accepted. Because *Moran* had held that there was a statutory basis for the issuance of a rights plan, this was an equitable (or fiduciary) limitation on director power, albeit a highly nontraditional one, because it constrained action taken even by well-motivated and well-informed independent directors.

This period of development soon came to a halt, in no small part because of powerful dictum contained in the *Time-Warner* opinion.²⁴ That case, the reader may recall, did *not* involve the issue of whether the Time board's use of a poison pill was proper. Despite that, the Delaware Supreme Court expressed a dim view of *Interco* and other Chancery pill decisions, in terms that made clear the *Time-Warner* panel's emphatic disapproval of those decisions.²⁵

Equally important, *Time-Warner* also appeared to reflect the view that directors have the fiduciary discretion to reject a lucrative acquisition proposal and instead pursue a long-term corporate strategy, if they believe that strategy will generate even greater wealth for the persevering stockholder who retains his shares.²⁶ Nonetheless, the absence of any frontal attack on the poison pill's use in *Time-Warner* left the full extent of that view's legal force in the netherworld of dicta and, therefore, uncertain.

Contributing to the lack of certainty was the absence of informative action by Delaware's General Assembly. Other state legislatures were adopting constituency statutes and very strong antitakeover laws, but Delaware's did not. Indeed, the Delaware General Assembly chose (wisely, many believe) not to enter the poison pill debate at all. For example, it never adopted a fairly simple form of statutory reform—a statute stating in clear terms that a garden-variety poison pill could be deployed to block a tender offer so long as the board reasonably believed that the offer was too low.²⁷ Instead, questions of these sorts were left entirely to the common law of corporations, in particular, the body of law dealing with the fiduciary powers of corporate directors.

24. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

25. *Id.* at 1153.

26. *Id.* at 1150 (stating that directors "are obliged to chart a course for a corporation which is in its best interests without regard to a fixed investment horizon"; in addition, absent a limited set of circumstances as defined under *Revlon*, a board of directors "is not under any *per se* duty to maximize shareholder value in the short term, even in the context of a takeover").

27. By contrasting example, the State of Maryland adopted a statute requiring courts to apply business judgment rule review to all defensive actions, including those involving use of a poison pill. MD. CODE ANN., CORPS. & ASS'NS § 2-405.1(f) (2001). Meanwhile, Virginia statutorily authorized a so-called "dead hand" poison pill that could not be "pulled" by directors elected in a hostile proxy contest. VA. CODE ANN. § 13.1-646(B) (Michie 2002).

Since *Time-Warner*, the Delaware courts have not addressed, in the preliminary injunction context, any case seeking to overturn a corporate board's decision to block a tender offer by use of a poison pill.²⁸ The tenor of the *Time-Warner* decision undoubtedly contributed to this dearth of cases, but so did other factors. These included the increasing willingness of corporate boards to enter into acquisition transactions with initially hostile acquirors, after having taken steps to find better alternatives and to increase the price of the bids. The competitive pressures provided by the marketplace also stimulated strategic merger agreements, the announcement of which were not infrequently followed by uninvited third-party topping bids, many of which were ultimately accepted. Also spicing up this broth were Delaware court decisions suggesting that limits remained on the ability of target boards to stymie unwanted bids—especially when the target was proposing to engage in a change of control transaction invoking so-called “*Revlon* duties.”²⁹

Although the jurisprudential landscape may not have been ideal for those who favored easy stockholder access to tender offers, the proponents of such access can hardly view the 1980s and 1990s as grounds for despair. With the sorts of swings one expects in any market, M&A transactions increased enormously during these decades.³⁰ But it is also true that occasionally situations arose that troubled investors in search of a one-time premium.

Importantly for this Response, during this period the Delaware courts managed to side step the core Just Say No question obliquely posed by *Time-Warner*. There were several reasons, a few of which I mention here.

A highly important reason is that most high-stakes M&A disputes tended to work themselves out. In recent years, directors and top executives had become more attuned to stockholder concerns and more open to consummating a deal with an initially hostile bidder if, in the end, that deal proved to be the best way to maximize value. No doubt the potential threat of judicial intervention played a role in that heightened sensitivity, but so too did the greater activism of institutional investors and the rise of equity-based compensation systems. Thus, although some cases held out the promise of

28. Admittedly, a distinguished federal judge, Murray M. Schwartz, did confront this issue in *Moore Corp. v. Wallace Computer Services, Inc.*, 907 F. Supp. 1545 (D. Del. 1995), a case applying Delaware law, but that decision is not a definitive statement of Delaware law issued by our Supreme Court.

29. *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 44-45 (Del. 1994); *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986); see also *Phelps Dodge Corp. v. Cyprus Amax Minerals Co.*, No. 17383, 1999 WL 1054255 (Del. Ch. Sept. 27, 1999); *ACE Ltd. v. Capital Re Corp.*, 747 A.2d 95 (Del. Ch. 1999).

30. An interesting article considers how players in the M&A markets adapted to what many scholars saw as doctrinally disappointing case law in Delaware and overcame that case law to produce a boom in hostile acquisitions. See Marcel Kahan & Edward B. Rock, *How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law*, 69 U. CHI. L. REV. 871 (2002).

providing further guidance on the limits of board authority to use defensive measures to block a tender offer, those cases usually disappeared without the need for a ruling.³¹

For present purposes, what bears most emphasis are two concepts that the Delaware judiciary deployed in tandem—concepts that tended to eliminate the need to pass judgment on a board's decision to use a poison pill to block a tender offer. The first is the oddly named concept of "substantive coercion," a term coined by Professors Gilson and Kraakman in an important article in the late 1980s.³² That concept posits that a tender offer can pose a threat to stockholders simply because the stockholders may mistakenly reject the board's view that the offer is not adequate. In giving birth to this concept, Professors Gilson and Kraakman were mindful that the substantive coercion justification could become a blank check for boards if it were not policed carefully. They therefore advocated that the threat of substantive coercion could justify only a time-limited use of the pill that was proportionate to the threat posed. That is, the pill could be used only for a discrete period sufficient to give the board the time to tell its story or to develop a higher value opportunity for presentation to the stockholders. Once the board had that opportunity, the threat of substantive coercion—that in accepting a fully funded, all-shares offer the stockholders will make an erroneous investment decision—could no longer justify deployment of the pill to block the offer.

In *Time-Warner* and in the later case of *Unitrin, Inc. v. American General Corp.*,³³ the Delaware Supreme Court adopted substantive coercion as a valid, cognizable threat from which boards may protect stockholders. The Court did not acknowledge, however, Professors Gilson and Kraakman's qualification that a threat of that kind was mild and could not ultimately justify a Just Say No defense.³⁴ In neither case was the Supreme Court asked to, nor did it, articulate whether a threat of substantive coercion could sustain a board's determination *never* to pull the pill in response to a bid whose only threatening aspect was inadequacy of price, even after the board had the time to explain its position and to generate a higher-value alternative.

In deciding these cases, the Supreme Court did seem to embrace the notion that directors (as a general matter) are wiser than stockholders about the time

31. In this court, the easiest example is the high-profile fight over who would acquire Warner-Lambert—Pfizer or American Home Products (AHP). When the Pfizer bid became clearly superior in economic terms to the friendly transaction proposed by AHP, the Warner-Lambert board abandoned its initial strategic merger with AHP in favor of a deal with Pfizer. See, e.g., Robert Langreth, *Behind Pfizer's Takeover Battle: An Urgent Need*, WALL ST. J., Feb. 8, 2000, at B1.

32. Ronald J. Gilson & Reinier Kraakman, *Delaware's Intermediate Standard for Defensive Tactics: Is There Substance to Proportionality Review?*, 44 BUS. LAW. 247, 248 (1989).

33. 651 A.2d 1361 (Del. 1995).

34. *Id.* at 1385; *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1152-53 & n.17 (Del. 1989).

and price at which it makes sense to sell their companies' stock.³⁵ Put a bit differently, the *Time-Warner* and *Unitrin* opinions provided rhetorical support for the idea that corporate directors could block a bid simply because they believed that the stockholders (although well-informed) might accept it, rather than follow the board's more expert, negative view of the matter. It is also noteworthy that the substantive coercion doctrine gave the Delaware courts a method of reconciling the Delaware approach of giving a strong hand to directors, with the principle that the primary duty of corporate directors is to advance the best interests of stockholders. By its own terms, the substantive coercion threat was one posed only to stockholders and not to other constituencies. Substantive coercion thus provided a stockholder-focused rationale (i.e., protecting them from selling at the wrong price or time) for upholding the primacy of decisionmaking by directors (who are, this theory goes, better-positioned to make accurate value and sale judgments), even in the tender offer acceptance context.³⁶

Substantive coercion also dovetailed nicely with the second concept, which has its origins in *Moran*: the "proxy out." One of the reasons that the Delaware courts approved the use of the poison pill was that the director election process provided an ultimate escape from the pill.³⁷ If the bidder were to elect a pro-tender offer slate of directors, then that slate could simply redeem the pill and allow the offer to proceed. This proxy out provided an elegant way for courts in later cases to avoid finding that a board's deployment of a poison pill was preclusive.³⁸ This preference for elections over tender offers as a method for resolving takeover disputes has been forcefully criticized by some scholars,³⁹ but it has been defended by others who are equally suspicious of board defensive measures.⁴⁰ The defenders prefer elections not because they enable boards to defeat worthy offers, but because elections are seen as permitting stockholders to exercise an undistorted choice on the worthiness of a bid, divorced from a concern that a failure to tender will relegate a stockholder to the uncertain fate of a back-end merger.⁴¹

Whatever may be their underlying merits, the substantive coercion and proxy out doctrinal duet gave the Delaware courts a way out. The substantive coercion concept made it relatively easy for a board to identify a cognizable

35. See Bernard Black & Reinier Kraakman, *Delaware's Takeover Law: The Uncertain Search for Hidden Value*, 96 NW. U. L. REV. 521 (2002).

36. Professor Bainbridge makes this point better than I have. See Bainbridge, *supra* note 15, at 805-09.

37. *Moran v. Household Int'l, Inc.*, 490 A.2d 1059, 1080 (Del. Ch.), *aff'd*, 500 A.2d 1346 (Del. 1985).

38. See, e.g., *Unitrin*, 651 A.2d 1361.

39. See Ronald J. Gilson, *Unocal Fifteen Years Later (and What We Can Do About It)*, 26 DEL. J. CORP. L. 491 (2001).

40. See Lucian Arye Bebchuk, *The Case Against Board Veto in Corporate Takeovers*, 69 U. CHI. L. REV. 973 (2002).

41. *Id.* at 980.

Dec. 2002]

CONFRONTING "JUST SAY NO"

877

threat to stockholders against which the pill could be deployed, satisfying the first element of *Unocal's* familiar two-part reasonableness test.⁴² And the proxy out helped boards to fulfill the second element of that standard, which required the directors to show that their use of the pill was "proportionate to the threat" and not "draconian," that is, not preclusive or coercive or otherwise unreasonable.⁴³ Because the acquiror could simply elect a new board that could redeem the pill, use of the pill could not be viewed as a fatal obstacle to the bid, and thus as injurious to the interests of target company stockholders.

III.

Professors Bebchuk, Coates, and Subramanian understand this background well, and have shaped their policy proposal with this history in mind. They have expended considerable energy attempting to show that changes in director attitudes toward takeover proposals are not sufficient to address the harm to stockholders they believe that the dynamic duo of a poison pill and an ESB create. I do not intend to enter that part of the debate. Instead, in the balance of this Response, I will highlight how the authors have sought to put stress on the doctrinal tools that the Delaware courts have employed to bypass the Just Say No question.

I begin with their proposal's impact on substantive coercion. In the authors' scenario, the target board has already been given the breathing room to look for other higher-value opportunities. The target board has also had the chance to channel the stockholders' decisionmaking process concerning the merits of the tender offer away from the (arguably) choice-distorting tender process and into the (arguably) noncoercive and more self-consciously deliberative process of a corporate board election. It is only at this stage—after the incumbent board majority has had the opportunity to state its case and to broker the best deal—that the authors urge that the board's fiduciary power to block the tender offer has been exhausted. By limiting their proposal to these specific circumstances, the authors make it much harder for courts to invoke the threat of substantive coercion as a device to avoid the basic Just Say No question.

The main reason is that the threat of substantive coercion would seem to be at its nadir in this situation. The board having spent the company's money in an election contest to make their case about the inadequacy of the tender offer, the credibility of the directors' claim that the stockholders need to be protected from their erroneous preference to receive a premium bid is likely to come under heavy scrutiny. Further, by the time the election has come and gone, the board will have had a period of time in which to develop a higher-value opportunity or strategy. Thus, the authors contend, with force, that the target

42. *Unocal Corp. v. Mesa Petroleum Corp.*, 493 A.2d 946, 955 (Del. 1985).

43. *Unitrin*, 651 A.2d at 1387-90.

corporation's stockholders do not face any cognizable threat at this stage of the takeover fight. For this reason, they argue that the target board should fail the first prong of the *Unocal* test. At the very least, this scenario poses to the Delaware courts the question of whether the substantive coercion concept should be untethered from the limits on its use originally advocated by the doctrine's creators, Professors Gilson and Kraakman. Succinctly put, the issue is whether substantive coercion, without more, can support a Just Say No defense and thereby satisfy *Unocal*'s proportionality test.

The authors appear to be advocating a bright-line approach to this scenario. In the authors' view, there simply is no justification for a board to keep a pill in place to block a tender offer, once a fair election centering on that offer has been held and the pro-tender-offer slate has prevailed, regardless of the target board's good faith and (potentially) superior knowledge.⁴⁴

This is one reason why I believe that the authors' proposal surfaces the limited utility of traditional fiduciary-duty principles, at least in their hypothetical scenario. If the board has a reasonable basis to conclude that the tender offer is priced too low, it is quite odd to say that the directors are breaching their duty to the stockholders—unless it is understood that the board's fiduciary authority to use a poison pill is a kind of power fundamentally different from the board's power to shape the company's business strategy or to take action specifically entrusted to them by statute. To grasp more easily why this is so, consider that if a guardian of a minor's property were charged with breaching his fiduciary duty for refusing to sell an asset of the ward, it would be a complete defense if the guardian persuaded the court that he had made a reasonable business judgment that the offer was inadequate.

As earlier discussed, Delaware's corporation statute provides no explicit authorization for the deployment of the poison pill, nor does it contain any language explicitly empowering corporate directors to prevent stockholders from selling their shares if the directors believe the sale would be injurious to them. Therefore, the full scope of a board's power to interfere with the ability of stockholders to sell their shares has been left for judicial development through the common law of fiduciary duty.

Should directors' powers to use the pill against a noncoercive acquisition offer be limited to buying the time to develop a better alternative, to channel

44. The authors clearly intend for their proposal to apply even when the incumbent target board majority is disinterested and has a good-faith belief that the tender offer should not be accepted because the offer is inadequate when compared to the value the directors believe will result if the company remains independent. It is also fair to say that the authors intend their proposal to apply even if the board of directors could present evidence that could convince a court that their view of the economics of the tender offer was reasonable, e.g., that the board's view that the price was too low was soundly based, but not necessarily correct. If my reading of their views is right, it is even more obvious that power allocation between stockholders and directors is the crucial issue raised by the authors' proposal.

the initial stockholder plebiscite into the electoral process, and to ensure that stockholders have the information to make an informed decision to tender? Or should directors be authorized to stop a tender offer indefinitely so long as they have a reasonable belief that the tender offer price is too low? In the scenario the authors portray, these questions of fiduciary power occupy center stage.⁴⁵

Their scenario also strains the courts' ability to use the proxy out as a rationale to avoid confronting the pill's potency as a preclusive device. If the continued use of a poison pill is not preclusive after a bidder has won one election for seats on an ESB, can it ever be? To support their argument, the authors present empirical evidence designed to prove, as a general matter, that it is commercially impractical for acquirors to incur the expense, substantial

45. The authors' scenario brings the Just Say No question to the fore for another reason. By resolving the case the authors posit with a decisive answer to the Just Say No question, the courts would tend to reduce the complexity of, and need for, takeover litigation. For example, assume the court rejects the Just Say No defense in the scenario posited, by holding that the threat of substantive coercion will not sustain the use of a poison pill after a directors' election centering on whether the tender offer should be accepted. If that is the choice made, the decision whether to accept the tender offer will ultimately belong to the stockholders, and the directors cannot postpone their day of reckoning after the tender offeror prevails in a contested election. Similarly, the court could hold that a board majority acting in good faith can indefinitely block a bid using a pill, subject to only business-judgment-rule—and not *Unocal*—review. In that case, disinterested boards acting with care would easily survive review, because the court would uphold the board's action so long as there was any rational basis for its view that the tender offer price was too low.

By contrast, if no clear choice about the Just Say No defense is made, resolution of the case the authors hypothesize could require the court to make difficult factual judgments to determine whether a board's use of the pill is, in the circumstances of a particular noncoercive bid, "reasonable"—judgments that could force courts to border dangerously close to making the choice the *Time-Warner* court said they should not: picking the best investment decision for the stockholders. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1152 (Del. 1989). Arguably, the only way for the court to answer the "reasonable relation" question would be to deeply examine the available economic evidence. At the end of that review, the court—using its own oxymoronic judicial business judgment—must determine whether the board's determination that remaining independent is preferable for the stockholders is "reasonable." This inevitably asks courts to make the sort of decision better left to Warren Buffett. Just how much and what kind of evidence do directors have to produce to show that it is "reasonable" for them to deprive the stockholders of the opportunity to sell? Must the board show with particularity how execution of the company's business plan will likely turn into results sufficient to generate a stock trading price that, in a time-valued manner, exceeds the tender-offer price reinvested at a reasonable rate?

Professor Bainbridge believes that the Delaware judiciary can apply *Unocal's* reasonableness standard to answer questions of this kind with sufficient accuracy to safeguard legitimate stockholder interests. Bainbridge, *supra* note 15, at 813-16. One suspects, however, that the form of review he truly favors may be closer to the business judgment rule standard's "rationality" test. Stated differently, if all Professor Bainbridge thinks a board must do to satisfy *Unocal* is to prove (i) that a reasonable person could believe the bid was too low and (ii) that the board in fact holds that belief, I doubt that the authors would view the *Unocal* standard as having any real utility as an accountability device, especially because courts might be reluctant to conclude that independent directors are misrepresenting their true beliefs about value.

delay, and market risk necessary to acquire a target with an ESB by winning two elections. Because of that impracticability, target stockholders bear risks of their own.⁴⁶ In the scenario we are focusing upon, the primary risk is that an acquiror will abandon its offer, even if the acquiror wins one election, if the incumbent majority continues to impede the bid. This scenario could leave the target company's stockholders—having lost the chance for a premium—holding shares that are now less valuable than the price of the offer that was thwarted.⁴⁷

Here again, the authors strike at a vulnerable spot in our doctrine. Because ESBs are creatures authorized by statute, the Delaware courts could take the position that any investment risks resulting from an ESB's use of a poison pill were assumed by the target stockholders when they chose to invest in a company with an ESB.⁴⁸ But, the authors respond, the proxy out was only one

46. These include receiving fewer offers, because potential acquirors believe that it would be too expensive and time-consuming to fight two election contests.

47. The simplifying effect of a bright-line approach to this scenario is also apparent if one examines the application of *Unocal's* "preclusion" test to the authors' scenario. In the authors' view, the purpose of the *Unocal* standard's preclusion concept is to ensure that target stockholders have reasonable access to valuable takeover offers. As such, they argue that courts should find defensive action preclusive if that action would make it commercially impracticable for the typical acquiror to proceed. This less case-specific and more general standard is favored by the authors because, among other reasons, it also establishes an incentive scheme that facilitates bids for companies with ESBs. If acquirors know before the fact that there is a limit to the extent that the pill can be used to block them and, therefore, to the costs and time it will take for them to consummate an acquisition, they will (the argument goes) make offers that otherwise would not be made.

The alternative to the authors' approach to *Unocal*, of course, is for the courts to make a case-specific inquiry and to examine whether the continued use of a pill after a tender offeror has elected one slate to an ESB is preclusive in view of the particular circumstances facing that offeror. That approach would require the courts to examine all sorts of difficult economic factors, ranging from the firm-specific to the macroeconomic. Inevitably, courts would have to address precisely how much pain an acquiror should be expected to bear in pursuit of a target. In that environment, it is conceivable that the term preclusion therefore could come to be associated with impossibility, rather than commercial impracticability. Despite the authors' empirical data and the common sense intuition that it is highly risky and difficult for a typical acquiror to maintain a bid in place for a year and half or a more, it could be argued that an acquiror who really wishes to carry out a hostile acquisition ought to be prepared to show that extraordinary level of commitment. Because of the important consequences such transactions have for targets, their stockholders, and—dare I say it, other constituencies—the term preclusion (it can be argued) should not apply if an acquiror's path is simply made rockier and more arduous, but not impossible. Of course, this approach would tend to make the term "preclusion" of little utility in the actual determination of cases.

Instead, the all-important determination would be even more amorphous: Is the target board's decision to keep the pill in place "reasonable in relation" to the threat that the stockholders might erroneously accept what the board considers to be an inadequate bid? As noted previously, *see supra* note 45, the nature of this inquiry exerts even more pressure on the courts to resolve the basic Just Say No controversy decisively in one direction or the other.

48. The authors cite reasons why they believe that this inference would be strained. *See* Bebchuk et al., *supra* note 1, at 939-44.

Dec. 2002]

CONFRONTING "JUST SAY NO"

881

of the reasons *Moran* validated the pill. Another was the promise of reasonableness review of the board's decision to use the pill to block a specific offer.⁴⁹

The main reason the election process has played so central a role in takeover jurisprudence is that the courts latched on to it as a way to avoid deciding pill cases. While this election preference might normally pose little danger to stockholders and, indeed, offer real benefits to them in cases where the target corporation does not have an ESB, the authors make reasoned arguments why this preference could endanger stockholder welfare if taken too far. If the cycle of doctrinal development is culminated by a judicial holding that the opportunity to elect a different board over a two-election cycle is, in itself, sufficient to render the pill's use innocuous and unassailable under the *Unocal* standard, the authors (implicitly) argue that the reasonableness review promised by *Moran* will have been emptied of any separate meaning and utility.

IV.

I conclude this Response with what might be seen as a self-serving plea for understanding the uncomfortable role of the judicial branch of Delaware's government in deciding cases involving the extent of directorial authority to impede the procession of a tender offer. The authors' proposal puts pressure on the Delaware courts to determine a fundamental, normative issue that is legislative in character. Our judiciary should not apologize for having taken a careful and case-by-case approach to takeover litigation posing such a choice. Faced with an important public policy issue, lacking firm policy guidance from the legislative branch of our government, and being uncertain about the effects new innovations in the market for corporate control would have, the Delaware courts responded to the M&A boom of the last twenty years by evolving the common law of corporations in an incremental manner that was provisional enough to allow for adjustments and changes in initial direction.

This approach has much to commend, because it reduced the scope of harmful impact from potential judicial errors while leaving ample room for adaptive solutions by market participants. Given that judges are appointed to decide specific cases, and are not elected with a free hand to make legislative decisions, a cautious, evolutionary approach like this should have been expected. Indeed, the policy choice that the authors would have the Delaware courts make is, by any measure, at the outer limits of the judicial function, because it involves a basic decision about the purpose of a system of corporation law that has its foundation in a skeletal legislative code. The authors ask of us a question no less fundamental than this: What is the soul that animates that statutory body?

49. *Id.* at 905 (citing *Moran v. Household Int'l, Inc.*, 500 A.2d 1354 (Del. 1985)).

In other jurisdictions, the legislative branch of government has clearly answered this question by adopting one of the two predominant models of the corporation, at least insofar as those models apply to the Just Say No question. In England, for example, the London City Takeover Code largely adopts the property model of the corporation, and gives stockholders the ultimate say about whether a tender offer should be accepted.⁵⁰ In several American states, legislation adopts the entity model of the corporation, by giving directors explicit authority to deny stockholders the opportunity to accept a tender offer.⁵¹ By contrast, the Delaware General Assembly has taken a more ambivalent approach, which has permitted talented advocates and scholars to argue both sides of the issue persuasively.

The authors challenge the Delaware courts to fill the legislative vacuum, by taking bold and decisive judicial action to settle this long-standing policy debate. They call on the Delaware judiciary to reconcile the doctrines by which it resolves takeover cases with its pronouncements about the primary purpose of the corporation law.⁵² The authors have written a powerful brief in support of the proposition that their proposal will serve the best interests of stockholders as a class, when viewed as short-term holders of the shares of particular corporations. If, as cases like *Revlon* imply, the primary purpose of Delaware's corporation law is to advance the interests of stockholders⁵³ and not of other constituencies except as incidental to that primary purpose, can the Just Say No defense be sanctioned in the circumstances the authors posit?⁵⁴ In

50. TAKEOVER PANEL, CITY CODE ON TAKEOVERS AND MERGERS (7th ed. 1992).

51. See *supra* note 27.

52. In an article coauthored with Jack B. Jacobs and William T. Allen, I have commented more extensively on the ongoing debate in the law and academy about the primary purpose of the corporation in our society, and the relationship of that debate to M&A law. In that article, we also discuss in more depth the institutional factors that limit the judiciary's capacity to resolve that debate definitively. See Allen et al., *supra* note 18.

53. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182 (Del. 1986).

54. Assume that, in the circumstances the authors hypothesize, the Just Say No question is answered in a manner that the authors would dislike. In that case, Delaware law would next confront important questions about the full viability of the *Revlon* doctrine, especially its application to stock-for-stock deals that are now considered change-in-control transactions subject to *Revlon* duties. See *Paramount Communications Inc. v. QVC Network Inc.*, 637 A.2d 34, 44-45 (Del. 1994) (articulating the standards to determine when a corporate board has the so-called *Revlon* duty to obtain the highest sale price for the corporation). Because the premise of the corporation law would be that stockholder wealth is maximized if directors can shape the future of corporate entities without regard to any short-term interests of current stockholders, it would become more difficult to argue that the fact that a stock-for-stock transaction that the board believes will generate the most long-term value invokes *Revlon* duties simply because the stockholders' access to a future control premium will be subject to the will of a controlling stockholder. Although the existing change-in-control test for the invocation of *Revlon* duties can arguably be reconciled with acceptance of the pure Just Say No defense on quite complex grounds, that test's emphasis on the stockholders' ability to obtain a control premium is strikingly different from the reasoning that supports acceptance of the Just Say No defense in the circumstances the

Dec. 2002]

CONFRONTING "JUST SAY NO"

883

those circumstances, is there really a threat to stockholders that justifies their potential loss of a valuable sale opportunity at the hands of directors who may be wrong about the right price and right time at which to sell? Or is the Just Say No defense justifiable only if the purpose of the corporation law is viewed more broadly, as resting on the proposition that directorial authority to block tender offers will, in the long run, maximize the wealth-creating potential of the corporate form, not only for the benefit of stockholders, but also for the benefit of other corporate constituencies and society as a whole?⁵⁵

These are justifiably uncomfortable questions for judges to answer, particularly in the absence of clear guidance from the legislative branch of government. Because of the authors' skillful arguments and thorough research, however, we in the Delaware judiciary may find these questions harder to avoid.

authors hypothesize.

55. There is an interesting literature developing that seeks to show how giving directors the authority to just say no to acquisition offers is consistent with, and perhaps necessary for, the overall maximization of stockholder wealth through the corporate form. See, e.g., Bainbridge, *supra* note 15; Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999); Martin Lipton & Paul K. Rowe, *Pills, Polls and Professors: A Reply to Professor Gilson*, 27 DEL. J. CORP. L. (forthcoming 2002). That literature stresses that the Just Say No defense should be evaluated as part and parcel of a comprehensive, director-centered approach to corporation law that advances stockholder interests in the aggregate, and the potential for abuse of defensive authority in particular cases does not justify endangering the larger benefits generated by this approach. Among the issues this literature could usefully address would be the following. First, to the extent that the literature emphasizes the willingness of most boards confronted with hostile offers to agree to a deal once the price is right, the proponents of giving directors the fiduciary power to just say no must address whether that same willingness would exist if directors were not constrained by the uncertainty that now exists about whether a pure Just Say No defense would justify use of the pill in circumstances like the ones the authors posit. Second, if the corporate election process is to be virtually the exclusive accountability mechanism available to stockholders to discipline poorly performing management, do proponents of the Just Say No defense believe that the current proincumbent nature of the election system should be perpetuated?