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CORRESPONDENCE

Missing the Point About State Takeover Statutes

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In a recent article in this journal, Professor Richard Booth offers an extended appraisal of state legislation regulating hostile corporate takeovers.[1] Since 1982, at least twenty-nine states have enacted one or more of the several standard statutory responses to this important and troubling phenomenon.[2] Booth evaluates these laws according to their efficacy in addressing a particular problem confronted by target company shareholders in takeover contests — the coercive effects of two-tier or partial bids. Coercion to tender in these kinds of bids is said to occur when shareholders are faced with a choice between accepting a premium, which may be less than optimally attractive, or, on the other hand, holding out but facing the prospect of a later cash-out at a much lower price or, worse yet, continuing to own a minority position in a "captive company" (p. 1641). Booth concludes that only one of the several current forms of takeover statutes adequately addresses this problem, the so-called control share acquisition statute. This type of statute, an example of which was vindicated against constitutional attack in the recent *CTS* case,[3] Booth describes as "a remarkably intelligent approach to the problem of fairness in tender offers" (p. 1681).

We think Booth's article requires comment for two reasons. The first reason is perhaps more obvious, though less interesting from our point of view. To be blunt, "unfairness" to shareholders due to coercion arising out of two-tier or partial offers simply does not occur with enough frequency to warrant a sixty-seven-page article in a major law review. According to recent congressional testimony by SEC Com-

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1. Booth, *The Promise of State Takeover Statutes,* 86 MICH. L. REV. 1635 (1988). Subsequent references to Booth's article will be enclosed in parentheses in the text.

2. *See* Grippo, *In Defense of State Takeover Laws,* 8 N. ILL. L. REV. 273, 273 n.4 (1988). For a summary of the characteristics of the various forms of takeover statutes, see Booth, *supra* note 1, at 1670-81.

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

missioner Cox, from 1982 to 1986 the number of two-tier offers declined from 18% of all bids to only 3%;[4] only six occurred in 1987.[5] An earlier SEC empirical study indicates that these developments are part of a trend in favor of "any-or-all, all-cash" bids. The SEC found that the incidence of such bids relative to two-tier or partial offers increased steadily from 1981 to 1984; only seven of the eighty-two at least partially successful cash tender offers launched in 1984 were two-tier and only nine were partial.[6] In Cox's words, "the market appears to have corrected any problem that may have existed."[7] So, even if shareholder coercion were an explanation for state takeover statutes, given the practical insignificance of the problem, coercion would hardly seem a suitable justification for these laws.

This troublesome aspect of Booth's article is related to what we think is a more important flaw, a flaw that, regrettably, characterizes much of what's being written about takeover statutes. In a nutshell, the article identifies a particular threat (coercion) to shareholder financial welfare and then proceeds to analyze how well the states have addressed that concern. This analysis takes for granted that shareholder welfare provides a meaningful standard against which to assess state takeover laws. Of course, Booth is not alone in taking this approach. His is just one of many pieces that focus on whether shareholders gain or lose from takeover laws because that standard is assumed to be the relevant evaluative standard.[8] By using shareholder welfare as the benchmark for evaluation, commentators like these

4. Mendelsohn & Berg, *Anti-Takeover Bill Would Shift Balance of Power*, Natl. L.J., Feb. 8, 1988, at 38, 40 (citing statement of SEC Chairman Charles C. Cox before the Senate Committee on Banking, Housing and Urban Affairs, June 23, 1987).

5. *Id.* at n.21.

6. OFFICE OF THE CHIEF ECONOMIST, SEC, THE ECONOMICS OF ANY-OR-ALL, PARTIAL, AND TWO-TIER TENDER OFFERS 14-15 & Table 1a (Apr. 19, 1985). This study also presented evidence suggesting that those two-tier offers that do occur are not coercive in any event. During the period covered by the study, fewer shareholders responded to two-tier and partial offers than to any-or-all bids. *Id.* at 20-22 & Table 9. Booth cites this study but does not comment on its findings of infrequency and lack of coercion. Booth, *supra* note 1, at 1643.

7. Mendelsohn & Berg, *supra* note 4, at 40. The Delaware Chancery Court recently referred to partial offers as "a largely vanished breed." City Capital Assocs. Partnership v. Interco Inc., C.A. No. 10105, slip op. at 23 (Del. Ch. Nov. 1, 1988) (on appeal). The present "dormant" status of two-tier and partial offers is probably related to the recent explosion in the availability of so-called junk bond financing. *See* Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 19-20 (1987).

8. *See, e.g.*, Block, Barton & Roth, *State Takeover Statutes: The "Second Generation,"* 13 SEC. REG. L.J. 332 (1986); Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 619-26 (1983); Pozen, *The New Round of State Tender Offer Statutes*, 53 BROOKLYN L. REV. 89 (1987); Steinberg, *Tender Offer Regulation: The Need for Reform*, 23 WAKE FOREST L. REV. 1 (1988); Comment, *State Antitakeover Legislation: Unconstitutional Economic Folly*, 20 ARIZ. ST. L.J. 475 (1988); Note, *Second Generation State Takeover Statutes and Shareholder Wealth: An Empirical Study*, 97 YALE L.J. 1193 (1988).

carry on the tradition of the many articles that have criticized management defensive tactics in hostile takeovers.[9] The shareholder welfare standard made sense in that area because, at least in theory, state statutory and common law accords shareholders a position of preeminence within the corporation law universe. It is a mistake, however, to apply that standard to state takeover laws because these statutes represent a deliberate rejection of the shareholder primacy norm.

The obsession with the shareholder welfare criterion misses the point of what the states that pass these statutes are really doing. State takeover laws are *anti* takeover laws. Their principal aim is not to maximize share values for target company investors, whether by eliminating coercion or otherwise, and no apology can alter that fact. Instead, their chief purpose is to protect *non* shareholders from the disruptive impact of the corporate restructurings that are thought typically to result from hostile takeovers. Rightly or wrongly, state legislators perceive that hostile takeovers cause lost jobs, destruction of established supplier and customer relationships, and loss of tax revenues and charitable contributions. Restricting the level of takeover activity is one way of addressing these concerns — but that approach necessarily causes shareholders to lose opportunities to realize takeover premiums while also reducing whatever accountability incentives a credible takeover threat might impose on corporate management.

Consequently, to criticize (or defend) state takeover laws for failure (or success) in protecting shareholder financial interests is to apply a standard that, when one pierces their rhetoric, state legislators have themselves decided to disregard by choosing instead to pursue objectives that are largely inconsistent with shareholder welfare. It's as if one were to criticize horses because they can't fly. Of course they can't — but then they weren't designed to. Nevertheless, Booth analyzes each of the various forms of takeover law for signs of air-worthiness. His contribution, apparently, is his discovery that at least one type (the control share acquisition statute) is not entirely earthbound. The "promise" of state takeover laws is the unintended possibility that some horses, defying their nature, might actually fly after all.

Despite the preoccupation of Booth and others with the wrong standard, there isn't anything mysterious about what the states are doing. For example, a statute amending North Carolina's so-called "Shareholder Protection Act" includes this preamble:

> Whereas, takeovers and takeover attempts of corporations in North Carolina have been occurring with increasing frequency; and

9. The seminal article, of course, was Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161 (1981).

> Whereas, such activity can be highly disruptive to communities within North Carolina by causing, among other things, high unemployment and erosion of the State and local economy and tax base; and
>
> Whereas, many of these corporations are not presently subject to the North Carolina Shareholder Protection Act since while substantially present in North Carolina they are chartered elsewhere; and
>
> Whereas, these corporations offer employment to a large number of North Carolina citizens who pay income taxes, property and other taxes in this State; and
>
> Whereas, these corporations pay significant amounts of income taxes to North Carolina; and
>
> Whereas, these corporations pay substantial State and local property taxes; and
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> Whereas, these corporations pay substantial sales and use taxes in North Carolina; and
>
> Whereas, these corporations provide their North Carolina employees with health, retirement and other benefits; and
>
> Whereas, these corporations and their employees contribute greatly to community projects in North Carolina; and
>
> Whereas, many unrelated businesses rely on these corporations to purchase goods and services; and
>
> Whereas, North Carolina has a vital interest in providing to these corporations the benefits of the provisions of the North Carolina Shareholder Protection Act . . . .[10]

Note the conspicuous absence of any reference to the interests of shareholders.

North Carolina legislators are not alone in their concerns about noninvestors. Connecticut recently passed a takeover law that empowers something called the Connecticut Partnership Compact — which is to include representatives of labor and citizen groups, as well as business and the legislature — to impose conditions on certain post-takeover transactions for the benefit of various nonshareholder interests.[11] Wisconsin's statute candidly declares that Wisconsin corporations "encompass, represent and affect, through their ongoing business operations a variety of constituencies including shareholders, employes, customers, suppliers and local communities and their economies" and states further that it is intended "to promote the welfare of these constituencies" and "should allow for the stable, long-term growth of resident domestic corporations."[12] Most notably, several states have adopted provisions that expressly empower a corporation's board of directors to take into account nonshareholder interests in re-

10. 1987 N.C. Sess. Laws 124.

11. 1988 Conn. Legis. Serv. 88-350, § 6 (West). *See* Connecticut Takeover Statute Barring Raiders Signed into Law, 20 Sec. Reg. & L. Rep. (BNA) 925 (June 17, 1988).

12. 1987 Wis. Laws 45.

sponding to takeover bids. For example, a Minnesota statute states that "a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these interests might be served by the continued independence of the corporation."[13] So far, Indiana, Illinois, Maine, Ohio, and Pennsylvania have passed similar laws.[14] Arizona actually makes consideration of nonshareholder interests mandatory.[15]

The legislative history of New York's takeover statute[16]— which has served as a sort of model act for several recent enactments in other states — clearly indicates that its purpose is to protect nonshareholders. The official memorandum that accompanied the bill refers to New York's desire to avoid the disruptive effects of takeovers on target company employees and on local communities in which targets do business. Thus, the memorandum anticipates that the new law will encourage commitment to the welfare of New York corporations and their employees and refers to promotion of "long-term growth."[17] In other words, it was hoped that the statute would discourage hostile bidders from taking actions that threaten the continuity of target company operations. This rationale explained the AFL-CIO's public support for the measure; a "Support Memorandum" stated that "[n]o matter which side wins control in a takeover battle, workers, customers, and the community in which the company is located are the likely ultimate losers."[18]

Even where express statutory language or legislative history does not reveal the legislature's real objectives, the very design of the takeover statute often does. Several states, including Delaware and New York, have enacted so-called business combination statutes.[19] These

13. MINN. STAT. ANN. § 302A.251, subdiv. 5 (West Supp. 1988).

14. IND. CODE ANN. § 23-1-35-1 (West Supp. 1987); ILL. ANN. STAT. ch. 32, para. 8.85 (Smith-Hurd Supp. 1988); ME. REV. STAT. ANN. tit. 13-A, § 716 (Supp. 1987); OHIO REV. CODE ANN. § 1701.59(E) (Baldwin Supp. 1987); PA. STAT. ANN. tit. 42, § 8363(b) (Purdon Supp. 1988).

15. ARIZ. REV. STAT. ANN. § 10-1202 (West Supp. 1987).

16. *See infra* text accompanying note 19.

17. *See* Governor's Program Bill, 1985 Extraordinary Session, Memorandum (ch. 915) 1, 6, 9 (copy on file with the *Michigan Law Review*).

18. AFL-CIO Memorandum (Dec. 10, 1985) (copy on file with the *Michigan Law Review*). The Business Council of New York supported the bill for similar reasons. *See* The Business Council of New York State, Press Release, *Business Council Urges Passage of Takeover Bill* (Dec. 10, 1985) (copy on file with the *Michigan Law Review*).

19. *See* Del. Antitakeover Law of Feb 2, 1988, ch. 204, § 203 (CCH); N.Y. BUS. CORP. LAW

statutes impose a moratorium on certain post-takeover transactions — such as mergers, substantial asset sales, and liquidations — absent approval by target company management.[20] As Booth acknowledges (p.1668), they cannot be interpreted as shareholder protection enactments for several reasons. First, by vesting dispositive decisionmaking power in the target company's board rather than in its shareholders, these statutes seem to contemplate that at least some tender offers will be rejected even though they might have elicited a favorable response from the shareholders. Second, one possible rationale for board empowerment — protection of shareholders from coercive bids — does not explain the statutes' broad coverage, which is not confined to situations in which coercion seems likely. Third, even if they did provide some measure of shareholder protection by strengthening management's bargaining position *ex post,* the statutes' likely *ex ante* chilling effect on the frequency of hostile tender offers may counteract that benefit (if it is a benefit) and thereby disserve shareholder welfare. Finally, the focus on those post-acquisition transactions that motivate "bust-up" takeovers — substantial asset sales and the like — indicates that the real objective is to deter such bids, despite their value to shareholders. An acquirer that is willing to use its power of control in some less disruptive manner, as by continuing existing operations, for example, should not be deterred by the moratorium on business combinations.

The antitakeover aspect of the control share acquisition statutes, which are analyzed at length by Booth (pp. 1678-99), is perhaps less apparent but is there nevertheless. The Indiana statute at issue in *CTS,* which is typical of the breed, conditions the successful bidder's post-acquisition voting rights on majority approval by all "disinterested" shares, that is, excluding those held or controlled by the acquirer and by inside directors and officers of the target company. This approval mechanism creates a fifty-day delay before an offer might be consummated, a period during which target company management might seek — indeed might be required by its common law fiduciary obligation to seek — competing offers or take other value-enhancing measures. The statute also confers post-acquisition redemption rights

§ 912 (McKinney 1986). So far, Arizona, Connecticut, Indiana, Kentucky, Minnesota, Missouri, New Jersey, and Wisconsin have passed similar laws.

20. Delaware's statute is unique in including an additional exception for takeovers that result in acquisitions of at least 85% of target company stock. Del. Antitakeover Law of Feb 2, 1988, ch. 204, § 203(a)(2) (CCH). The SEC takes the position that this exception is of very limited practical importance because tender offers rarely generate that favorable a response. *See* BNS Inc. v. Koppers Co., 683 F. Supp. 458, 471 (D. Del. 1988); RP Acquisition Corp. v. Staley Continental, Inc., 686 F. Supp. 476, 482-83 (D. Del. 1988).

on nontendering shareholders. Accepting for the moment that target company shareholders might benefit from a control share acquisition statute once a "coercive" takeover bid has been launched,[21] there is nevertheless another dimension to the shareholder welfare question. By conditioning voting rights on approval of disinterested shareholders, imposing significant delay, and creating a redemption right for nontendering shareholders, these statutes place substantial obstacles in the path of the hostile bidder. As such, one possible effect of control share acquisition statutes is the deterrence of hostile bids, at least to a certain extent, by raising their costs. Deterrence, of course, harms shareholders as a class because they are less likely to receive the benefits of takeovers. Judge Posner considered this *ex ante* deterrent effect so potent as to refer to the Indiana statute as a "lethal dose" for hostile takeovers.[22] In the words of one commentator, "There is little doubt that the [Indiana control share acquisition] statute's purpose was to discourage tender offers . . . ."[23] The intended beneficiaries of this policy were, of course, Indiana nonshareholders deemed likely to suffer from the harmful effects of hostile bids. Thus, even if control share acquisition and other takeover statutes fail to achieve their policy objectives, and high levels of takeover activity continue to benefit shareholders, that result will occur in spite of, not because of, state legislation.

Though the real objectives of state takeover laws should be clear to everyone by now, some commentators continue to dismiss them as nothing more than "shameless" management-entrenchment devices passed by compliant legislators at the behest of politically influential firms.[24] In fact, recent Wisconsin legislation was the product of a

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21. In this regard, Booth seeks to make the rather obvious point that the statute effectively addresses the collective action problem that two-tier and partial offers present. Pp. 1688-89. His reading of the statute may be overly optimistic. If the statute effectively gave to nontendering shareholders the power to veto a bid by denying voting rights, it would be a potent defensive weapon indeed. In fact, however, it seems that the plebiscite of "disinterested" shareholders will typically include tendering as well as nontendering shareholders. Because only shares owned or controlled by the bidder or by target insiders are excepted and the bidder generally will not have purchased tendered shares by the plebiscite's record date, the stock of tendering shareholders can be voted on the voting rights question. Accordingly, whenever a majority of "disinterested" shares responds favorably to a tender offer, the nontendering shareholders' blocking power will effectively be eliminated. *See* CTS Corp. v. Dynamics Corp. of America, 481 U.S. at 73 n.2; *see also* Cox, *The Constitutional "Dynamics" of the Internal Affairs Rule — A Comment on* CTS Corporation, 13 J. CORP. L. 317, 327 n.53, 328 n.56, 334 (1988).

22. *See* Dynamics Corp. v. CTS Corp., 794 F.2d 250, 261, 262-63 (7th Cir. 1986), *revd. in part,* 481 U.S. 69 (1987). A recent empirical study argues that, while less than lethal, control share acquisition statutes have nevertheless significantly diminished the success rate of hostile bids for corporations subject to their protection. *See* Note, *supra* note 8, at 1219.

23. Cox, *supra* note 21, at 334. This article contains a brief but excellent appraisal of the control share acquisition statute as an "investor protection" device. *See id.* at 332-35.

24. *See* Macey, *State Anti-Takeover Legislation and the National Economy,* 1988 WIS. L.

broad coalition of organized labor and other nonbusiness interests,[25] while New York's business combination statute enjoyed organized labor's support,[26] an unlikely proxy for management interests. Even where the legislative record suggests that business interests have sponsored legislation and labor and other community groups have played no visible supporting role, it seems odd to assume that such interests did not approve of the legislation[27] or that the legislators simply ignored such broader policy concerns. In Connecticut, the state on which Professor Romano has focused, labor was on record as favoring plant-closing legislation,[28] which may have led legislators to assume that labor would support an antitakeover law as well. More generally, it may often be the case that state legislators are responding to a broad range of constituencies troubled by the takeover phenomenon, even though such groups may choose to remain on the sidelines or are unable to participate in the legislative process because the costs of organizing and lobbying are simply too high.[29] In letting local companies bear the laboring oar, these groups act as rational political "free riders." Finally, the simplistic equation of management sponsorship with selfish entrenchment motives may be questionable; at least some corporate managers would dispute the suggestion that their actions are motivated solely by a desire to keep their jobs, lacking any genuine regard for the welfare of those whose lives are affected by their firms' activities.

Perhaps observers have lost sight of the real reasons for the business combination and control share acquisition statutes because of the indirect way in which these laws approach their nonshareholder protection objectives. After all, some, like North Carolina's, actually style themselves shareholder protection statutes.[30] If limiting takeover activity is the states' goal, why haven't they tried to do so directly, by

REV. 467, 470. Criticisms like this seem to be especially favored by members of the law and economics school, who are congenitally hostile to any tampering with the "market for corporate control" and, therefore, apparently unable to believe that thoughtful people of good faith could possibly see things differently. *See also* Butler, *Corporation-Specific Anti-Takeover Statutes and the Market for Corporate Charters,* 1988 WIS. L. REV. 365; Romano, *The Political Economy of Takeover Statutes,* 73 VA. L. REV. 111 (1987).

25. *See* Davis, *Epilogue: The Role of the Hostile Takeover and the Role of the States,* 1988 WIS. L. REV. 491, 493-99.

26. *See supra* text accompanying note 18.

27. In Professor Coffee's words, "silence may imply consent." Coffee, *The Uncertain Case for Takeover Reform: An Essay on Stockholders, Stakeholders and Bust-ups,* 1988 WIS. L. REV. 435, 437 n.8.

28. Romano, *supra* note 24, at 134 n.58.

29. *See* Coffee, *supra* note 27, at 437 n.8; Davis, *supra* note 25, at 498.

30. *See* N.C. GEN. STAT. § 55-75(a) (Supp. 1988) ("The North Carolina Shareholder Protection Act").

placing some kind of ban on takeovers deemed harmful to state residents? The reason, of course, is the need to disguise antitakeover laws in the form of traditional corporation law. Following the Supreme Court's *MITE* decision,[31] states sought to repackage their antitakeover efforts as traditional regulation of corporate internal affairs, imposing additional regulations on fundamental corporate changes, or redefining the scope of voting rights. In other words, to preserve their power to act in this vitally important area, states have "corporatized" takeover law. Because that strategy succeeded in *CTS,* they may be expected to continue using it. The ostensible focus on shareholders and management, the traditional stuff of corporation law, should not, however, blind one to the real objective, which has nothing at all to do with advancing shareholder interests.

Given the triviality of the coercion problem,[32] no one can deny that, at least in some respects, shareholders lose from takeover legislation.[33] Once commentators stop worrying so much about this question, perhaps they can begin to direct their energies to the much more challenging questions that this type of legislation presents. First, more evidence needs to be gathered about the actual effects of hostile takeovers on nonshareholders, and the amount of those losses needs to be quantified in some meaningful way. The motivations behind present takeover activity require further study. How significant are "bust-up" objectives, bidder overpayment, share price discounts, and the tax-preferred status of debt financing? Do such goals accurately explain the majority of hostile bids? To what extent do an effective market for corporate control and its attendant benefits for shareholders necessitate nonshareholder losses?[34]

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

32. *See supra* text accompanying notes 4-7.

33. More precisely, no one doubts that target company shareholders lose from restrictions on takeover activity. There is some evidence suggesting that bidder firms (and therefore their shareholders) sustain significant losses from takeovers, but that conclusion is questionable. *See* Macey, *supra* note 24, at 483-84. Professor Macey also argues that, even if bidder shareholders do lose, gains to target shareholders outweigh such losses, yielding a net societal gain. *Id.* at 485. In calculating net societal gain, Macey does not take nonshareholder losses into account because he doesn't believe such losses occur with any significant frequency. In his view, even in those rare cases where jobs are lost, workers elsewhere will be employed instead, so "overall national employment is unaffected." *See id.* at 478-79. Presumably the same argument would apply to the various other ripple effects of plant closings. Perhaps state legislators may be forgiven their inability to see jobs and other community benefits as merely fungible commodities that can be transferred cost-free from state to state as long as there are no net losses.

34. One promising effort is a study concluding that the gains to target company shareholders in the form of takeover premiums may in large part reflect losses by nonshareholders whose expectations of continued relations with the target corporation have been violated by acceptance of the takeover bid. *See* A. SHLIEFER & L. SUMMERS, BREACH OF TRUST IN HOSTILE TAKEOVERS (National Bureau of Economic Research Working Paper No. 2342, Aug. 1987).

Second, beyond these empirical questions are problems of political and legal theory. By seeking to protect nonshareholders at the expense of shareholders, the states make a potentially radical break with the orthodox view that corporations should confine themselves to activity that maximizes the wealth of their shareholders.[35] At stake may be a rethinking of the scope and function of corporation law and, at a deeper level, a new vision of what corporations are — broad, interdependent networks of relationships rather than merely shareholder-management agency contracts — and their role in our society.[36]

Booth's piece avoids confronting these deeper questions by instead applying an analytical approach to takeover laws that is identical to that employed by many corporation law scholars who have addressed the basic anomaly characteristic of corporation statutes generally. These scholars have reinterpreted what are clearly pro-management enactments (despite their shareholder welfare pretensions) as being only apparently so — as being in reality pro-shareholder laws because of the extra-legal constraints imposed on broad managerial discretion by well-functioning markets, including the market for corporate control. The historical motivations behind corporation statutes — to free management from unduly restrictive legal regulation — are transformed by this "market model" of corporation law so that, ironically, shareholders are better served by laxity than by some other more rigorous legal regime. While many market model scholars have been deeply troubled by takeover statutes and the way in which they "gum up" the market for corporate control in particular and, more generally, the market explanation for the content of corporation law, Booth has sought to explain even these laws in pro-shareholder terms. By his analytical alchemy, he would convert legal "lead" to market "gold." In so doing, Booth preserves intact the existing shareholder-centered mode of corporation law discourse. Not only is his approach flawed as a matter of statutory analysis; it ignores the fundamental uncertainty about the nature and objectives of corporate activity that simmers below the surface of state takeover legislation. Thus, such analysis threatens to submerge the nascent — and so understandably naïve and tentative — rethinking of these first-order issues.

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35. Radical though these developments may appear to some, the use of corporation law to protect those thought to be particularly vulnerable to corporate activity, rather than solely to promote shareholder financial interests, coincides with nineteenth-century ideas about corporation law's appropriate function, ideas that were only jettisoned during the early decades of this century. *See* Millon, *State Takeover Laws: A Rebirth of Corporation Law?*, 45 WASH. & LEE L. REV. 903 (1988).

36. *See generally* Johnson, *Corporate Takeovers and Corporations: Who Are They For?*, 43 WASH. & LEE L. REV. 781 (1986).

In addressing basic political questions like these, it is necessary to decide the appropriate role for the states in their resolution. Are such matters better addressed locally, or is a uniform federal policy desirable in this area? If addressed by the states through legislation like present takeover laws, how can such laws really work absent express legislative attention to developments in common law rules that seem to push in the opposite direction?[37]

Finally, in addition to empirical and political issues, vexing questions of constitutional doctrine are implicated. No doubt more will be said on behalf of the view that the Williams Act already preempts efforts by the states to regulate takeover activity.[38] Such claims are also driven by a market approach to corporation law and economic organization, an approach that, ironically, would use federal securities regulation to deregulate the market for corporate control. As an argument about legislative intent, however, the preemption claim is almost transparently phony.[39] More troubling are arguments to the effect that the dormant commerce clause prevents the states from protecting resident nonshareholders at the expense of nonresident shareholders — that capital markets are quintessentially interstate commerce and the interests of those (shareholders) who participate in those markets are constitutionally preferred over those who deal locally with corporations in other ways. Assuming that the states resolve the empirical and theoretical questions in favor of continued efforts to restrict takeovers, we suspect that this doctrinal question will serve as the arena within which the success or failure of those efforts will ultimately be decided.

All of these difficult questions of fact, policy, and doctrine are only beginning to receive the serious attention that they deserve.[40] Preoccupation with the economic effects of state legislation on shareholders

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37. For an argument that Delaware's common law of defensive tactics is increasingly embracing the shareholder primacy vision of corporate purpose, a vision that likely will prevail over the broader objectives of state takeover legislation, see Johnson, *The Eventual Clash Between Judicial and Legislative Notions of Target Management Conduct,* 14 J. CORP. L. 35 (1988). In effect, the task of resolving the complex issues of corporate governance and purpose in American society has fallen to the Delaware judiciary rather than to the several state (or federal) legislatures.

38. The SEC has identified this preemption campaign — targeted particularly at Delaware's statute — as a "top priority." *See* 20 Sec. Reg. & L. Rep. (BNA) 1176 (July 22, 1988) (statements of Daniel Goelzer, SEC General Counsel).

39. *See* Johnson & Millon, *Misreading the Williams Act* (forthcoming). The arguments now being advanced with respect to preemption of state statutes would, if accepted, apply with equal force to state common law sanctioning defensive tactics. *See* Johnson & Millon, *Does the Williams Act Preempt State Common Law in Hostile Takeovers?,* 16 SEC. REG. L.J. 339 (1989).

40. In addition to the Shliefer & Summers paper, *supra* note 34, see Coffee, *supra* note 27, and Davis, *supra* note 25. On the commerce clause question, see Gergen, *Territoriality and the Perils of Formalism,* 86 MICH. L. REV. 1735 (1988); Regan, *Siamese Essays: (I)* CTS Corp. v.

not only misses the point of what the states are trying to do; it diverts attention from far more important — and far more challenging — concerns.

Dynamics Corp. of America *and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation,* 85 MICH. L. REV. 1865 (1987).