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I. INTRODUCTION

Legal realists emphasized the contradictory norms of law. Contradictory norms permitted judges to reach conclusions about what basic equities and broadly accepted social interests required in particular cases. Judges then used whatever norm of law suited them to reason in support of their a priori conclusions about what these equities or broad social interests required.[1]

Critical Legal Studies (CLS) has inherited and enhanced the legacy of questioning the value of legal rules. CLS thinkers maintain that law is indeterminate, drawing heavily upon linguists who have explored the indeterminacy of language.[2] CLS scholars go beyond realists, however, both in positing contradictory norms of law and law's indeterminacy, and in stating their view of what has filled the subsequent void.[3]

Nothing, however, has been thought to be as distant from legal realism or the CLS movement as corporate law. At best CLS scholarship has applied its dogma to commercial law.[4] No less a jurist than William O. Douglas[5] fancied himself a realist but in corporate law emerges as an

1. *See, e.g.*, K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS (1960); *see also* W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 205-69 (1973).

2. *See, e.g.*, J. DERRIDA, DISSEMINATION (B. Johnson trans. 1981); J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976).

3. *See generally* Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 463-84 (1987); Tushnet, *Critical Legal Studies: An Introduction to its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 SW. L.J. 819 (1986).

4. *See, e.g.*, Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Feinman, *The Meaning of Reliance: A Historical Perspective*, 1984 WIS. L. REV. 1373; Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982). *See generally* Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

5. *See, e.g.*, W. DOUGLAS, GO EAST YOUNG MAN 160-69 (1974). The eminent corporate lawyer

old fashioned populist.[6]

A value of any jurisprudence, however, lies in how wide a variety of phenomena the jurisprudence explains. Although realism and indeterminacy have yet to touch corporate law, these schools of jurisprudence explain many basic phenomena in Delaware corporate law and, indeed, do so very well. Furthermore, with the recent outpouring of case law resulting from the takeover boom, Delaware law has become our national corporate law,[7] and thus, indeterminacy describes the state of corporate law generally.

Part II of this Article explores past explanations of Delaware corporate jurisprudence, including revenue raising explanations such as Professor Harry First's "Law for Sale,"[8] and the late Professor William Cary's "Race to the Bottom" thesis.[9] Professor Daniel Fischel and other economic analysis of law scholars also have espoused an efficiency enhancing, federalist theory of Delaware corporate law.[10] Most recently, Professors Jonathan Macey and Geoffrey Miller have developed an interest group explanation for Delaware's dominance in the corporate field.[11]

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and Justice placed himself with Karl Llewellyn, Underhill Moore, and Thurman Arnold in the realist camp.

6. Douglas urged a proshareholder, shirt sleeve capitalism in corporate-securities law decisions, a majority of which he wrote during his years on the Court. His populist capitalism in turn reflected distrust of aggregations of economic power or of those who might perceive themselves as helonging to an economic elite. *See, e.g.*, Kern County Land Co. v. Occidental Petroleum Corp., 411 U.S. 582, 605, 610 (1973) (Douglas, J., dissenting) (advocating a broad reading of a provision requiring corporate insiders to disgorge short term trading profits); Superintendent of Life Ins. of New York v. Bankers Life & Casualty Co., 404 U.S. 6, 12 (1971) (proposing a broad reading of a federal securities law to reach acts of corporate mismanagement); Pepper v. Litton, 308 U.S. 295, 311 (1939) (providing lofty dictum on the duty a corporate director owes the corporation, its shareholders, and its creditors).

7. In 1965, 35% of the corporations with shares listed on the New York Stock Exchange (NYSE) were Delaware corporations. *See* G. SEWARD, BASIC CORPORATE PRACTICE 5 (1966). This number had risen to 40% by 1973. *See* Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 671 & n.57 (1974). By 1987 the percentage had risen to 45%. *See* Barrett, *Delaware Moves Closer to Adopt Law to Deter Hostile Takeovers*, Wall St. J., Dec. 9, 1987, at 41, col. 4; *see also* Geylein & Koenig, *Pension Funds Plot Against Takeover Law*, Wall St. J., April 5, 1989, at C1, col. 5 (stating that 56% of Fortune 500 firms are incorporated in Delaware). Of NYSE firms reincorporating between 1927-77, 90% had reincorporated in Delaware. Dodd & Leftwich, *The Market for Corporate Charters: "Unhealthy Competition" versus Federal Regulation*, 53 J. BUS. 259, 263 (1980). Eighty-two percent of 515 publicly held corporations that reincorporated since 1960 migrated to Delaware. *See* Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L., ECON. & ORG. 225, 244 (1985).

8. Comment, *Law for Sale: A Study of the Delaware Corporation Law of 1967*, 117 U. PA. L. REV. 861 (1969) (authored by Harry M. First).

9. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

10. *See, e.g.*, Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913 (1982).

11. Macey & Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 TEX.

Part III articulates the indeterminacy thesis with respect to Delaware corporation law by using two lines of cases to demonstrate that Delaware courts have at their disposal tools of indeterminacy. These tools enable those courts to decide many cases in whichever way they prefer. Part IV then explores what has filled the void created by indeterminacy. This examination of the Delaware Supreme Court corporate law decisions over a fourteen year period also lends circumstantial support to the indeterminacy thesis itself.

Part V concludes that Professors Macey and Miller basically are correct in their assessment but fail to identify sufficiently all of the interest groups involved. More importantly, the two scholars fail to undertake a description of the ability and the actuality of how Delaware courts are able to manipulate outcomes in order to serve the needs of the key special interest groups that make up the Delaware corporate establishment.

II. Explanations for Delaware's Corporate Law Dominance

A. *Revenue Raising: Social Irresponsibility Theses*

Drawing upon Cole Porter in a student comment entitled "Law for Sale,"[12] now Professor Harry First initially described Delaware's dominance in attracting incorporations to its doors. He credited the promanagement content of Delaware's 1967 revision of its corporate law with attracting incorporation business.[13] In turn, incorporation business brought to Delaware's treasury twenty-five percent of its revenues in 1968.[14]

Other scholars have denigrated Delaware for the state's attraction of incorporation business. In 1974 Professor William Cary illustrated in tabular form the revolving door movement between the Delaware judiciary and the Delaware corporate law firms.[15] He excoriated "the present predicament in which a pygmy among the 50 states prescribes, interprets, and indeed denigrates national corporate policy as an incentive to encourage incorporation within its borders, thereby increasing its revenue."[16] He emphasized the revenue raising aspects of adopting promanagement rules in Delaware, and argued that these aspects over-

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L. Rev. 469 (1987).

12. *Compare* Porter, "Love for Sale" (1930) *with* Comment, *supra* note 8. Professor First currently teaches law at New York University.

13. *See, e.g.*, Comment, *supra* note 8, at 874-87 (describing the evolution of rules for indemnification of corporate officers and directors).

14. *Id.* at 863. Today the proportion from franchise taxes is 16.9%. Romano, *supra* note 7, at 240.

15. Cary, *supra* note 9, at 690-92.

16. *Id.* at 701.

rode any other kind of public policy consideration.[17] Professor Cary compared Delaware's attempt to attract incorporations to "a community chest drive."[18] As a palliative for the situation, Professor Cary proposed federal minimum corporate law standards that would displace promanagement state law rules in a number of corporate law areas.[19]

Professor Cary's proposals competed with another reform proposal, federal chartering of publicly held corporations, championed by Ralph Nader and his Corporate Accountability Research Group. Federal chartering also used Delaware's promanagement rules as an example of corporate law's deplorable state.[20] Its constructive prescription was that large corporations be required to reincorporate under and be governed altogether by federal law. Together Cary's and Nader's proposals constituted the high water mark of the corporate social responsibility reform movement of the 1970s.

B. Corporate Federalist: Economic Efficiency Explanation

About this time a new jurisprudence, economic analysis of law, emerged. Several of its practitioners applied it to explain Delaware's corporate law dominance. By adopting promanagement rules, Delaware was engaged in a competition among states for incorporation business. That competition produced efficient corporate law rules. The corporate management flexibility thereby engendered could benefit shareholders by increasing the total wealth, managers' and shareholders'[21] included. This healthy competition for charters explained much about Delaware's corporate law dominance.

According to this corporate federalist view, the majority of rules that a corporate statutory scheme retains do no more than approximate the agreement the parties to a venture would have negotiated for regulating their affairs, absent transaction costs. The corporate federalists held that as corporate law evolved its principal function was to provide a low-cost, off-the-rack set of rules. As a corollary, if the parties chose

17. *See id.* at 684 (stating that "[p]erhaps there is no public policy left in Delaware corporate law except the objective of raising revenue"); *see also* Comment, *supra* note 8, at 869 (noting that "[t]he legislature did have one concern (besides tax revenues)—jobs"); *id.* at 870 (noting that "Delaware measures its concern with corporation law in terms of tax revenues . . . .").

18. *Id.* at 668 (opining that "the raison d'etre behind the whole system . . . [is] revenue for the state of Delaware").

19. *Id.* at 696-705.

20. *See* R. NADER, M. GREEN & J. SELIGMAN, CONSTITUTIONALIZING THE CORPORATION: THE CASE FOR THE FEDERAL CHARTERING OF GIANT CORPORATIONS 51-76 (1976). "Delaware-Opera Bouffe. What began as tragedy in New Jersey was institutionalized as farce in Delaware." *Id.* at 51.

21. *See generally* R. POSNER & K. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980); R. WINTER, GOVERNMENT AND THE CORPORATION 7-11 (1978); Baysinger & Butler, *Race for the Bottom v. Climb to the Top: The ALI Project and Uniformity in Corporate Law*, 10 J. CORP. L. 431 (1985); Dodd & Leftwich, *supra* note 7; Fischel, *supra* note 10.

to pay the transaction costs, they should be free to opt out of the standard form contract by negotiating for and memorializing alternative rules or arrangements. Thus, the federalist school's vision of corporate law has promanagement rules not directly, but indirectly, as the product of supremacy of contract and the superior bargaining power corporate managements would possess. The federalist school holds that market forces and contract, not hard and fast legal rules, increasingly govern corporate managers. Delaware consistently has taken the lead in making such a vision of corporate law a reality and thereby retains its dominance in the corporate field.[22]

Practitioners of this federalist school also have attacked the classical liberal, interventionist positions taken by a Ralph Nader or a William Cary. Some of these criticisms have been particularly bold. As one such practitioner confidently states, "Cary's position has been discredited; indeed, in recent years it has been discussed only as an illustration of how it is possible to reach the wrong conclusions if one lacks a basic understanding of the economic structure of the corporation and of corporate law."[23]

C. *An Interest Group Theory of Delaware Corporate Law*

The theory that best explains Delaware's corporate law environment is the interest group analysis of Professors Macey and Miller.[24] According to this theory, Delaware's legislature and judiciary do not just adopt, depending upon the points of view just seen, promanagement or efficiency enhancing sets of rules. That activity takes place but is only part of a larger equation.

Adoption of those sorts of rules serves well the Delaware state treasury and the corporation trust companies that operate in Delaware for the benefit of Delaware corporations headquartered back home in Indiana, California, or Maine. This adoption of promanagement, or efficiency enhancing, rules also serves well the managements and hometown counsel of those corporations incorporated in Delaware. At a minimum, those latter groups enjoy the predictability that Delaware's rich corporate jurisprudence creates and the flexibility that Delaware's statutes and cases give them. Moreover, many managers and their legal advisors believe that Delaware will make it difficult for shareholders

22. *See, e.g.*, Branson, *Assault on Another Citadel: Attempts To Curtail the Fiduciary Standard of Loyalty Applicable to Corporate Directors*, 57 FORDHAM L. REV. 375, 375-78, 380-82 (1988).

23. Fischel, *The Business Judgment Rule and the* Trans Union *Case*, 40 BUS. LAW. 1437, 1454 (1985) (footnote omitted).

24. Macey & Miller, *supra* note 11, at 485-91.

and their attorneys to disrupt corporate managers' designs.[25]

The other portion of the equation, and the other significant interest group in the Delaware environment, is the Delaware corporate bar. This group does not earn its livelihood from the incorporation business that has so benefited Delaware's treasury and the corporation service companies over the years. The Delaware corporate bar seldom represents corporations generally. Instead, the bar earns fees by interpreting and advising on questions of Delaware law, by acting as local counsel in corporate litigation, and most often by acting as lead counsel in the never ending flow of lawsuits to Delaware Chancery Court and appeals to the Delaware Supreme Court.[26] In a way, these latter interests of the bar are antithetical to the interests of corporate managers and of the state treasury. Corporate managers and the Delaware treasury desire predictability, tranquility, and the incorporation business that results.

In another way, however, the Delaware corporate bar and the other interest groups' interests complement each other. Litigation and the flow of chancery and supreme court opinions thereby produced actually generate the predictability hometown counsel and their corporate manager clients desire.

The Delaware corporate bar interest group analysis largely explains why Delaware has, and must have, a plaintiffs' side which eliminates many procedural hurdles so that plaintiffs will sue there.[27] Delaware makes suit in Delaware the obvious choice among possible fora. Delaware's director consent statute deems all directors to have consented to substituted service of process upon the corporation's registered agent in Delaware or the Delaware Secretary of State.[28] Unlike many other states, Delaware has no security-for-costs provision that gives potential plaintiffs pause in filing derivative litigation.[29] Delaware courts gener-

25. The overwhelming majority of decisions to reincorporate in Delaware are made by legal counsel. *See* Romano, *supra* note 7, at 274 table 12.

26. *See, e.g.*, Macey & Miller, *supra* note 11, at 494-96.

27. *See id.* at 496-97. Professor Cary also summarized many of these procedural advantages for Delaware plaintiffs, but he did not fit them neatly into his analysis. *See* Cary, *supra* note 9, at 686-88.

28. DEL. CODE ANN. tit. X, § 3114(a) (Supp. 1988). Earlier in its history Delaware deemed the situs of every share of stock in a Delaware corporation to be Delaware, thus making it possible for plaintiffs to gain quasi in rem jurisdiction over most of the actors in corporation transactions to be litigated. The Supreme Court declared this Delaware sequestration procedure unconstitutional in Shaffer v. Heitner, 433 U.S. 186 (1977). With characteristic responsiveness, the Delaware legislature enacted the consent procedure within a matter of days after the decision in *Shaffer*. Soon thereafter the Delaware Supreme Court held the new procedure constitutional. *See* Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980).

29. *See, e.g.*, ALI, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.04(c), at 88-92 comment f & reporter's note 3 (Tent. Draft No. 8, 1988) (surveying all jurisdictions).

ously approve settlements that reward plaintiffs' attorneys with handsome fees.[30] Even though the substantive rules are promanagement or efficiency enhancing, most of the procedural incidents[31] are conducive to plaintiffs suing in Delaware, as the special interest group theory of Delaware corporate law would predict.

III. The Indeterminacy Thesis

The foregoing explanations of Delaware's dominance in the corporate law area discuss Delaware's rules. They are promanagement rules, or efficiency enhancing rules, or compromise rules serving interest groups whose objectives are not always compatible. But what if there are no rules? Or what if the number of norms or rules from which to choose is so great that Delaware corporate law, or large portions of it, can be said to be indeterminate?

A. The Demise of Vested Rights Doctrines

A thorough understanding of how indeterminacy developed in corporate law requires a cursory historical survey. Not long ago fundamental shareholder rights were considered vested rights. These fundamental rights included the right to cumulate votes in the election of directors, the preemptive right to subscribe to new share issuances in proportion to shares already owned, and the preferred shareholder's right to payment of dividend arrearages before any dividends could be paid to the common shareholders. These rights were so fundamental that even a supermajority of shares could not amend articles of incorporation to remove them.[32] A definitive boundary existed beyond which majority rule could not go.

From 1940 onward, courts in various jurisdictions eliminated vested rights doctrines. The majority of shares could vote to eliminate a preemptive right or a right to cumulative voting for directors.[33] Elimi-

30. *See, e.g.*, Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980) (stating that the Delaware Supreme Court refuses to limit itself to the prevailing lodestar approach based upon hours expended and that this approach often may result in fees significantly lower than the value of the benefit conferred on the corporation formula).

31. *Compare* Beals v. Washington Intern, Inc., 386 A.2d 1156, 1158-59 (Del. Ch. 1978) (disallowing punitive damages against officials of Delaware corporations) *with* Giblin v. Murphy, 97 A.D.2d 668, 671, 469 N.Y.S.2d 211, 215 (1983) (stating that punitive damages against corporate directors are permitted in cases of gross mismanagement).

32. *See, e.g.*, Keller v. Wilson & Co., 21 Del Ch. 391, 412, 190 A. 115, 125 (1936) (invalidating a charter amendment cancelling dividend arrearages on the ground that arrearages represented a "vested right of property secured . . . by the Federal and State Constitutions").

33. *See, e.g.*, Mobile Press Register, Inc. v. McGowin, 271 Ala. 414, 426-27, 124 So. 2d 812, 823-24 (1960) (preemptive right no longer a vested right); Gottlieb v. Heyden Chem. Corp., 33 Del. Ch. 82, 95, 90 A.2d 660, 667 (1952) (preemptive right no longer a vested right); Morales v. Sevananda, Inc., 162 Ga. App. 854, 856, 293 S.E.2d 387, 389 (1982) (holding that members of not-for-

nation did not strip an objecting shareholder minority of all protection. Courts held that elimination of basic rights was subject to a fairness analysis.[34] The objecting minority, however, was deprived of the surefire objection to majority action that vested rights doctrines historically had represented.[35]

Elimination of vested rights gave rise to a commonly observed phenomenon in corporate law that forms a root of indeterminacy. In corporate law what one cannot do directly one can do indirectly. What cannot be accomplished in one step may be accomplished in three or four. Form routinely is exalted over substance.

A number of transactions have developed which exemplify this proposition that what one cannot do directly one can do indirectly. For example, a shareholder majority or their representatives on the board of directors cannot issue shares in violation of other shareholders' preemptive rights.[36] Yet indirectly they can. The majority can call a shareholders' meeting, vote to amend articles of incorporation to eliminate preemptive rights, and then issue shares to third parties that formerly would have violated the preemptive rights doctrine. Additionally, payment of certain dividends, repurchase of shares, elimination of preferred stock arrearages, or negation of cumulative voting rights cannot be accomplished directly. All these things can be accomplished indirectly, however, through muster of the requisite shareholder vote, an ensuing amendment of the articles of incorporation and a resulting recasting of financial statements, or through recapitalization or corporate

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profit corporation "had no vested right in any provision of the original articles of incorporation"); Bove v. Community Hotel Corp. of Newport, R.I., 105 R.I. 36, 43-44, 249 A.2d 89, 94 (1969) (no vested right in dividend arrearages on preferred shares); Seattle Trust & Sav. Bank v. McCarthy, 94 Wash. 2d 605, 611, 617 P.2d 1023, 1027-28 (1980) (preemptive right not a vested right) *rev'g* State *ex rel.* Swanson v. Perham, 30 Wash. 2d 368, 191 P.2d 689 (1948) (holding methods of voting to he vested rights in Washington corporations).

34. *See generally* Halloran, *Equitable Limitations on the Power to Amend Articles of Incorporation*, 4 PAC. L.J. 47 (1973); Latty, *Fairness—The Focal Point in Preferred Stock Arrearage Elimination*, 29 VA. L. REV. 1 (1942).

35. Minority shareholders may argue that provisions in the articles of incorporation are contractual protections for which they specifically bargained. Such a quasi-vested rights approach is sometimes successful. *See, e.g.*, Horowitz Bros. & Margareten v. Margareten, 101 A.D.2d 807, 475 N.Y.S.2d 134 (1984) (articles of incorporation reformed to include 1910 agreement that no material alteration could be made in the corporation's business over the objection of any owner); Jacobson v. Backman, 16 Utah 2d 355, 401 P.2d 181 (1965) (charter provision for removal of directors only by two-thirds vote was quasi-vested right unaffected by later amendment of corporate statute or subsequent majority shareholder vote). Sometimes the arguments do not succeed. *See, e.g.*, McCallum v. Gray, 273 Or. 617, 618, 542 P.2d 1025, 1026 (1975) (preincorporation agreement providing for filing of articles as attached held insufficient to protect preemptive rights from subsequent charter amendment).

36. The preemptive right is defined as a shareholder's right "to purchase a percentage of the new issue that equals his or her percentage of ownership of the already outstanding stock (of the same class) of the corporation." R. CLARK, CORPORATE LAW § 17.1.4, at 719 (1986).

reorganization. This phenomenon, that what cannot be accomplished directly may be accomplished indirectly, exists throughout corporate law. The phenomenon is not limited to Delaware, but Delaware has raised it to an art form.[37]

B. *On the One Hand: The Delaware Equal Dignity Rule*

Time and time again Delaware courts have permitted shareholder majorities to accomplish indirectly what those majorities could not accomplish directly. Moving beyond even art, Delaware has raised this phenomenon of corporate manipulation to the level of doctrine and christened it with a name: The equal dignity rule.

The Delaware equal dignity rule may find its best expression in the de facto merger cases.[38] In *Farris v. Glen Alden Corp.*[39] List Corporation desired to achieve two objectives in its acquisition of Glen Alden, a Pennsylvania corporation. First, List wanted Glen Alden to be the surviving corporation in order to preserve and utilize Glen Alden's tax loss carryforward against List's profits. The second objective was preservation of List's store of cash. If Glen Alden shareholders had a right to dissent and receive cash for their shares, a number of them might have done so. A number of dissents would have depleted List's cash hoard. Counsel, therefore, structured the transaction as stock for assets rather than stock for stock and as a reverse transaction.[40] Technically, Glen Alden would be issuing stock to List shareholders and List would be selling assets. In reality, though, the reverse was true.[41] Under Pennsylvania statutory law then in effect, shareholders of a corporation buying assets had no right to dissent and receive cash for the appraised value of their shares.[42] In a statutory merger they would have had such a right.

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37. Indeed, this elevation may be the result of legislative enactment as well as judicial decision. For example, although a statute may forbid a board of directors from acting unless a quorum is present at a meeting, the quorum requirement can be evaded easily by delegation to a committee of the board. Modern statutes place few restrictions upon such delegation. *Compare* REVISED MODEL BUSINESS CORP. ACT § 8.24 (1985) (quorum requirements) *with id.* § 8.25 (few restrictions on delegations to committees).

38. An early equal dignity rule case was Federal United Corp. v. Havender, 24 Del. Ch. 318, 11 A.2d 331 (1940) (holding that even though preferred stock dividend arrearages could not be eliminated by charter amendment they could be eliminated by merger with another corporation). The power to merge is different from the power to recapitalize, and "is plain, understandable and general" and is "not qualified or restricted by limitation or exception." *Id.* at 330-31, 11 A.2d at 337.

39. 393 Pa. 427, 143 A.2d 25 (1958).

40. *Id.* at 438, 143 A.2d at 31.

41. After the transaction, Glen Alden was renamed List Alden Corporation. *See id.* at 429, 143 A.2d at 27.

42. *Id.* at 436-37, 143 A.2d at 30-31.

The Pennsylvania Supreme Court held that the structure of the transaction between Glen Alden and List was functionally equivalent to a merger. Holding that substance must prevail over form, the court ruled the sale of assets to be a de facto merger.[43] Dissenting shareholders therefore would be entitled to cash for their shares, as in cases of statutory merger.[44]

The Delaware courts reached the opposite result four years later in *Hariton v. Arco Electronics, Inc.*[45] The Delaware statutes contained procedures for merger of two corporations.[46] Those procedures created for target company shareholders the right to dissent and seek appraisal and cash for their shares in the Delaware courts. The statutes also contained procedures for a corporation to sell all or substantially all of its assets to another corporation in return for stock or cash.[47] Those procedures did not include a right of shareholders to dissent and seek appraisal.

The Delaware Vice Chancellor held that the two statutory pathways were independent of each other so that a result may be accomplished by proceeding on a course of action under one section which is not possible, or even forbidden, under another.[48] The courts refrained from saying which of two or more inconsistent procedures was superior to another. That task was for the legislature.

The Delaware Supreme Court affirmed that the sale-of-assets statute and the merger statute were, and are, independent of one another. They are, so to speak, of equal dignity.[49] The result of decisions like *Hariton* is that no matter how circuitous a path might be, if in the Delaware statute a corporate lawyer can find a track to his objective, that path or track is of equal dignity with a more direct path, even though the circuitous track has fewer or no shareholder protections. Two or more paths to the same objective are of equal dignity.[50]

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43. *Id.* at 438, 143 A.2d at 31.

44. An interesting sequel is that List shareholders sued List directors, alleging that expenditure of corporate funds, principally for attorneys fees, for purposes of exploring the feasibility and then in attempting consummation of the transaction was a waste of corporate assets. *See* Gilbert v. Burnside, 13 A.D.2d 982, 216 N.Y.S.2d 430 (1961) (denying any recovery), *aff'd*, 11 N.Y.2d 960, 183 N.E.2d 325, 229 N.Y.S.2d 10 (1962).

45. 40 Del. Ch. 326, 182 A.2d 22 (1962), *aff'd*, 41 Del. Ch. 74, 188 A.2d 123 (1963).

46. *See* Del. Code Ann. tit. VIII, § 251 (1983).

47. *See id.* § 271.

48. *Hariton*, 40 Del. Ch. at 333, 182 A.2d at 26.

49. *Hariton*, 41 Del. Ch. at 76, 188 A.2d at 125.

50. *See, e.g.*, Rothschild Int'l Corp. v. Liggett Group, Inc., 474 A.2d 133 (Del. 1984) (allowing the use of a merger to undercut preferred share preference on liquidation when the same could not be done in liquidation—merger and liquidation pathways held to be of equal dignity); Field v. Allyn, 457 A.2d 1089 (Del. Ch.), *aff'd*, 467 A.2d 1274 (Del. 1983) (holding that statutory provisions for a cash-out merger without a shareholders' meeting and for a sale of assets only after a share-

The equal dignity rule emerged as a green light, signaling the Delaware courts' readiness to approve corporate transactions. For the corporate practitioner, the equal dignity rule signals that where there is a will there is a way. And, of course, the Delaware equal dignity rule is not a rule; it is a "non-rule" that permits a corporate lawyer to choose from, and a judge to validate a choice from, seemingly contradictory pathways or norms.

C. *On the Other Hand: The* Schnell *Case and Its Progeny*

In 1971 the incumbent managers of Chris-Craft Industries learned that an insurgent shareholder group planned to wage a proxy fight to attempt election of the insurgents' own slate of directors.[51] Chris-Craft managers and lawyers huddled, finding that nothing in Delaware law or in Chris-Craft's bylaws prevented advancement of the date for the annual shareholders' meeting. If Chris-Craft advanced the meeting date, the insurgents would not have time to prepare, let alone disseminate, proxy solicitation materials. Chris-Craft advanced the date for the meeting from January 11, 1972, to December 8, 1971, and, as an added fillip, changed the meeting's location to Cortland, New York, where Chris-Craft had a manufacturing facility. Travel to Cortland in December snows was likely to be difficult.

On the insurgent shareholders' motion for preliminary injunction, the Delaware Chancery Court held that the evidence was insufficient to establish that the corporation's board of directors advanced the date of its annual meeting.[52] Eleven days later the Delaware Supreme Court reversed, holding the incumbent Chris-Craft manager's activity to be for "inequitable purposes" and "contrary to established principles of corporate democracy."[53] To Chris-Craft's rejoinder that neither the statute nor bylaws prevented the managers' actions, the court replied that "inequitable action does not become permissible simply because it is legally possible."[54]

With *Schnell* the Delaware Supreme Court created the antipode of the equal dignity rule. The equal dignity "non-rule" rule permitted use of a circuitous statutory path to evade a shareholder protection or re-

holders' meeting are of equal dignity); *see also* Rauch v. RCA Corp., 861 F.2d 29, 30-31 (2d Cir. 1988) (pathways of cash merger and for payment of liquidation preferences upon redemption or liquidation are of equal dignity; preferred shareholders must accept $40 offered rather than $100 provided for in articles of incorporation).

51. Schnell v. Chris-Craft Indus., 285 A.2d 430, 431-32 (Del. Ch.), *rev'd*, 285 A.2d 437 (Del. 1971).

52. *Schnell*, 285 A.2d at 430.

53. *Schnell v. Chris-Craft Indus.*, 285 A.2d 437, 439 (Del. 1971).

54. *Id.*

quirement of a more direct route. Under *Schnell*, however, inequitable action cannot become permissible merely because it is legally possible. Thus, as long ago as 1971, the Delaware courts had tools of indeterminacy at their disposal.

1. Restricting the *Schnell* Doctrine to Election Cases

For many years, however, Delaware courts confined application of the *Schnell* doctrine to disputes involving the election of corporate directors. In election cases that involve no violation of a statutory directive but nonetheless offend the court's notion of fair play, a Delaware court might invoke the doctrine.

For example, in *Lerman v. Diagnostic Data, Inc.*,[55] Diagnostic's directors had the power to amend the corporation's bylaws. They used that power to change a fixed annual meeting date to one set at their discretion. The incumbent directors also added a new bylaw requiring any candidate for director, excluding management's nominees, to submit background information not less than seventy days prior to the meeting. Each action itself was permissible. Then, three months later the incumbent board set the date of the shareholders' meeting sixty-three days from the date of the board meeting, making it impossible for the plaintiff to comply with the seventy day background information bylaw.[56] Vice Chancellor Brown, however, struck down the new bylaws not merely as applied but on their face. In combination, the bylaws were held to require any challengers to be "shelf-ready" with proxy materials "whenever management decides to drop the flag" by exercising its authority to set the annual meeting date.[57] The incumbent Diagnostic board's actions constituted the type of impermissible manipulation of the corporate election machinery that the *Schnell* doctrine condemns.[58]

2. Reluctance to Expand *Schnell*'s Application

Tender offers in which shareholders are asked to displace incumbent managers by tendering shares to the "insurgents" are analogous to election contests in which shareholders are asked to tender votes. Tender offer defenses can be viewed as attempts by managers to thwart

55. 421 A.2d 906 (Del. Ch. 1980).
56. *Id.* at 909-11.
57. *Id.* at 914.
58. Other cases have described the doctrine as one that prohibits perpetuation of corporate control through "wrongful subversion of corporate democracy . . . by machinations under the cloak of Delaware law." Giuricich v. Emtrol Corp., 449 A.2d 232, 239 (Del. 1982) (perpetuation of 50-50 shareholder deadlock by previous majority so as to perpetuate 3-2 and later 5-2 control of board of directors).

the electoral process and perpetuate their control. Thus, the tender offer area seems to be a logical area for expanding application of the *Schnell* doctrine.

In *Unocal Corp. v. Mesa Petroleum Co.*[59] a target company board of directors decided to pay reverse greenmail rather than greenmail. That is, instead of purchasing the threatening shareholder's shares at a premium over the market, the corporation proposed to purchase a substantial block of shares from all shareholders other than the threatening shareholder. As a result, the corporation's treasury would be depleted and its capital structure burdened with debt, making it a less attractive takeover target. At the same time, however, the shareholders would be deprived of an opportunity to vote on the tender offer. The Delaware Supreme Court gave recognition to the *Schnell* doctrine, observing that "[o]f course, . . . the further caveat [is] that inequitable action may not be taken under the guise of law."[60] But *Schnell* did not apply because the court found that Unocal's directors had not acted out of a sole or primary desire to perpetuate themselves in office.[61]

The *Schnell* doctrine has been applied in a handful of situations other than election cases. In *Singer v. Magnavox Co.*[62] the majority shareholder proposed to use a cash merger to squeeze out the minority shareholders who remained. The Delaware Supreme Court used the *Schnell* doctrine to impose upon the majority shareholder a business purpose requirement for such mergers.[63] Although the letter of Delaware law permits such mergers, the court could enjoin them if inequitable. The *Singer* court stated that a merger conducted solely to freeze

59. 493 A.2d 946 (Del. 1985).

60. *Id.* at 955.

61. *Id.* at 958. Even in the election area the Delaware courts may balk at application of the doctrine. In Baron v. Allied Artists Pictures Corp., 337 A.2d 653 (Del. Ch. 1975), incumbent managers seized control through buying preferred shares upon which no dividends were paid for some time. The preferred shares had a feature common to such issues. The preferred could elect a majority of the directors if preferred stock dividends were more than six quarters in arrears. Then, despite a steadily improving financial picture, the incumbents kept the preferred in default and, consequently, themselves in control of the corporation. *Id.* at 655-57. The Court made passing note of the *Schnell* doctrine: "Plaintiff has cited a wealth of authorities standing for various accepted propositions of corporate law, the most prominent of which hold that incumbent directors cannot . . . manipulate corporate machinery so as to maintain or perpetuate control in a particular group of stockholders." *Id.* at 657. The court refused to apply the doctrine, however, unless plaintiff presented a case applying the doctrine on all fours with the case at bar. *See id.* at 657 (stating that plaintiff "offers no authorities which apply this prohibition to a factual situation such as the present one").

If ever there was a case to apply the *Schnell* doctrine, *Baron* would seem to be it. The case involved election of directors, manipulation of corporate machinery relating to it, and perpetuation by the directors of themselves in control. Thus, it sometimes becomes difficult to predict when Delaware courts will apply the doctrine.

62. 380 A.2d 969 (Del. 1977).

63. *Id.* at 979-80.

out minority stockholders is "an abuse of the corporate process."[64] Although the Delaware Supreme Court later repudiated its business purpose requirement,[65] the use of the *Schnell* doctrine in *Singer* increased unpredictability about when the Delaware courts would invoke the doctrine and doubt as to its confinement to the corporate elections area.[66]

3. The Latest Extension of the *Schnell* Doctrine

Through gradual extensions the *Schnell* doctrine has become an all-purpose, corporate law doctrine. Along with *Singer*, *Rabkin v. Philip A. Hunt Chemical Corp.*[67] illustrates this proposition. *Rabkin* involves neither election of directors nor any other vote by shareholders.

In March 1983 Olin Corporation acquired sixty-three percent of Hunt Chemical, paying twenty-five dollars per share. The selling Hunt shareholders, however, sought to protect the minority left behind. Their agreement of sale required Olin also to pay twenty-five dollars per share if Olin acquired the remaining Hunt stock within one year. Fifteen months later, in June 1984, Olin proposed to squeeze out the remaining Hunt shareholders but offered them only twenty dollars per share.[68]

In court Olin argued that it had not breached its contractual commitment. The Delaware Supreme Court disagreed, scoffing at Olin's contention it had no legal obligation to effect the cash-out merger within a year and supporting a claim of unfair dealing. The court reiterated the *Schnell* principle that inequitable conduct will not be protected merely because it is legal.[69]

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64. *Id.* at 980.

65. *See* Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).

66. An older, borderline elections area invocation of the *Schnell* doctrine is Petty v. Penntech Papers, Inc., 347 A.2d 140 (Del. Ch. 1975). Delaware law had long prohibited use of corporate funds to purchase shares to maintain management in control. *See, e.g.*, Bennett v. Propp, 187 A.2d 405 (Del. 1962); Yasik v. Wachtel, 17 A.2d 309 (Del. Ch. 1941). *But see* Cheff v. Mathes, 199 A.2d 548 (Del. 1964). In *Penntech Papers*, however, the articles of incorporation clearly provided that management could redeem any or all of 26,000 preferred shares that carried ten votes per share. The two managers proposed to redeem all of the preferred except the 7000 shares they owned. Together with their common stock, *ex post* they would have 53% of the voting power and control a majority of the directors. 347 A.2d at 141.

The court enjoined the preferred stock redemption, although its connection with the electoral process arguably was less direct than advancement of meetings dates and other topics with which the *Schnell* doctrine traditionally deals. Despite the clear language in the articles of incorporation permitting selective redemption of the preferred stock, the chancellor held that a "charter or bylaw provisions may technically permit the action contemplated does not automatically insulate directors against scrutiny of purpose." *Id.* at 143 (citing *Schnell*). The court proceeded to find the impermissible purpose of perpetuation in office. *Id.*

67. 498 A.2d 1099 (Del. 1985).

68. *Id.* at 1101-03.

69. *Id.* at 1106-07. Specifically the court stated:

> In our opinion the facts alleged by the plaintiffs regarding Olin's avoidance of the one year commitment support a claim of unfair dealing . . . . The defendants answer that they

Rabkin indicates that the Delaware courts need no longer confine application of the *Schnell* doctrine to cases involving election of directors, corporate elections generally, or attempts by managers to perpetuate themselves in office. *Schnell* has become a kind of universal solvent for courts and plaintiffs. Just as courts and defendants can use the "non-rule" equal dignity rule to facilitate transactions, courts and plaintiffs can use the *Schnell* doctrine to derail them. Through *Rabkin* and other cases, *Schnell* becomes a red light, signaling the Delaware courts' ability to block transactions and to accept plaintiffs' arguments, at least some of the time, in all categories of corporate law cases.

IV. In the Wake of Indeterminacy

A. *Scope of Study*

Although useful for practitioners and litigants, demonstration that the Delaware courts have the tools of indeterminacy at their disposal is not determinative. Availability of these seemingly all purpose legal doctrines and their application in a variety of settings is but circumstantial evidence of indeterminacy in Delaware corporate law.

As a search for further circumstantial evidence of indeterminacy, and also to determine what has filled the void indeterminacy leaves in its wake, I examined Delaware Supreme Court decisions from a fourteen year period. As a beginning point, I selected 1974, the year of William Cary's "Race to the Bottom" article.[70] The study then was conducted through 1987.[71]

B. *Methodology and Research Design*

The area of study was shareholder litigation in which shareholder interests opposed the interests of corporate management. In a few Delaware Supreme Court corporate law cases shareholders opposed shareholders.[72] Those cases were deleted from the sample.

In numerous other instances a corporation represented the shareholder interest.[73] Indeed, in several cases a large publicly held corpora-

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> had no legal obligation to effect the cash-out merger during the one year period. While this may be so, the principle announced in *Schnell v. Chris-Craft Industries* establishes that inequitable conduct will not be protected merely because it is legal.

Id. (citations omitted).

70. Cary, *supra* note 9; *see also supra* notes 15-19 and accompanying text.

71. The results of the study are quantified in tabular form in the Tables to the Appendix.

72. *See, e.g.*, Goldberg v. Tarpey, 419 A.2d 932 (Del. 1980) (collection action by selling shareholder against shareholder who had purchased the shares).

73. *See, e.g.*, Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (suit by corporate shareholder to enjoin payment of reverse greenmail); Monogram Indus. v. Royal Indus., 372 A.2d 171 (Del. 1976) (takeover target's suit alleging corporate shareholder's noncompliance with

tion represented the shareholder interest.[74] Hence, several cases in which large corporations squared off against large corporations were nonetheless instances of shareholder litigation. Those cases were not deleted from the sample.

In several cases, the shareholder or shareholder interest lies with the defense. In takeover litigation, for example, the target corporation frequently sues the acquiror of shares. In those cases the shareholder interest usually lies with the defendant acquiror of shares.[75] Thus, a study of shareholder litigation cannot be simply a study of when plaintiffs win or lose. The study must determine on which side the shareholder interest lies. Those cases in which the shareholder interest was determined to be on the defense side are marked with an "R," for realignment, in the column headed "Prevailing Side." The R cases number seven in the sixty-six case sample.[76]

1. Characterizations

Characterization of a particular side as representing the shareholder interest may be a subjective determination in a few cases. For example, several Delaware Supreme Court cases involve tender offerors as defendants.[77] In those cases, the defense side was characterized as representing the shareholder interest. Most corporate managers and some legal commentators would disagree. These critics would state that corporate managers rather than tender offerors typically have long term shareholder interests closer to heart.[78]

Characterizing winners and losers in these cases also may be a subjective matter. For example, Delaware cases signal judicial willingness to approve fee awards to shareholders' attorneys.[79] Generous fee awards

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Delaware takeover law).

74. *See, e.g.*, Coaxial Communications v. CNA Fin. Corp., 367 A.2d 994 (Del. 1976) (as shareholder plaintiff CNA sought an order compelling corporate management to conduct an annual shareholders' meeting); Universal City Studios, Inc. v. Francis I. du Pont & Co., 334 A.2d 216 (Del. 1975) (appeal of appraisal proceeding with large corporation as the dissenting shareholder).

75. *See, e.g.*, GM Sub Corp. v. Liggett Group Inc., 415 A.2d 473 (Del. 1980); *Monogram Indus.*, 372 A.2d at 171.

76. *See* app. Table A, col. F. That is, one way to approach the study would have been as a study of when plaintiffs win in Delaware corporate litigation, with the parties realigned in those cases in which the shareholder interest exists on the defense side.

77. *See, e.g., GM Sub Corp.*, 415 A.2d at 473; *Monogram Indus.*, 372 A.2d at 171.

78. *See, e.g.*, Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1 (1987).

79. There are at least 11 such cases in the sample. *See, e.g.*, Lipton v. News Int'l, 514 A.2d 1075 (Del. 1986) (allowance of unapproved settlement in shareholder litigation by characterizing claims as individual rather than derivative); Selfe v. Joseph, 501 A.2d 409 (Del. 1985) (refusal to modify settlement in squeeze out merger case); Wied v. Valhi, Inc., 466 A.2d 9 (Del. 1983) (refusal to interfere in class representative's settlement and post-settlement activity), *cert. denied*, 465 U.S. 1026 (1984); Geller v. Tabas, 462 A.2d 1078 (Del. 1983) (approval of derivative and class

encourage shareholder litigation and possible vindication of shareholder interests. Overly generous fee awards and excessive litigation, however, unduly burden corporate treasuries and are inimical to longer term shareholder interests.[80] Characterizing the shareholder interest as lying with those who seek approval of a fee in what may be a cosmetic settlement, or characterizing the shareholder side as the winner, may be problematic. These reservations notwithstanding, cases in which the Delaware Supreme Court approves settlements and attorney fee awards have been characterized as cases in which the shareholder interest has prevailed.[81]

Finally, the study sorts the Delaware shareholder litigation cases as either procedural or substantive corporate cases. Procedural cases principally involve approval of either attorney fee awards or derivative and class action settlements.[82] More broadly, procedural cases involve preliminary matters arising in the early stages of a lawsuit. These cases usually have a measurable impact upon whether suit will be brought in Delaware.[83]

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settlements); Thomas v. Sugarland Indus., 431 A.2d 1271 (Del. 1981) (approval of application of attorney fee award formula developed earlier); Fins v. Pearlman, 424 A.2d 305 (Del. 1980) (settlement of class action approved); Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980) (adoption of value of benefit conferred rather than strictly hourly lodestar formula for computation of shareholder attorney fee awards); Allied Artists Pictures Corp. v. Baron, 413 A.2d 876 (Del. 1980) (attorney fee award upheld); Neponsit Inv. Co. v. Abramson, 405 A.2d 97 (Del. 1979) (settlement with preferred shareholders upheld over common shareholders' objections); Wood v. Coastal States Gas Corp., 401 A.2d 932 (Del. 1979) (settlement with common shareholders upheld over preferred shareholders' objections); Iroquois Indus. v. Lewis, 318 A.2d 134 (Del. 1974) (attorney fee award upheld). In Delaware no objector has been able to derail a settlement or attorney fee award at the supreme court level, although the plaintiff in *Sugarland Indus.*, 420 A.2d at 150, enjoyed mixed success.

80. *See generally* Coffee, *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985).

81. It was difficult to pinpoint a clear winner or loser in two cases, possibly because the court gave something to each party. The cases are Judah v. Delaware Trust Co., 378 A.2d 624 (Del. 1977) (determination that while one class of Shanghai Power Co. securities did not have value another class did), and Harff v. Kerkorian, 347 A.2d 133 (1975) (preferred shareholders held to lack standing to sue for breach of fiduciary duty but allowed to proceed on claim of common law fraud).

82. Eleven of the eighteen cases classified as procedural fall into that category. *See supra* note 79.

83. *See, e.g.*, Lewis v. Anderson, 477 A.2d 1040 (Del. 1984) (forced seller of shares held to be without standing to bring derivative suit); Harman v. Masoneilan Int'l, Inc., 442 A.2d 487 (Del. 1982) (duty of majority to minority shareholder held within chancellor's subject matter jurisdiction); Doffiemeyer v. W. F. Hall Printing Co., 432 A.2d 1198 (Del. 1981) (dissenters' rights procedure strictly construed); Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980) (director presumed consent statute held constitutional); Greyhound Corp. v. Heitner, 361 A.2d 225 (Del. 1976) (Delaware share sequestration procedure upheld as constitutional), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977); Walter Reade Org., Inc. v. Crane, 332 A.2d 399 (Del. 1975) (refusal of corporate request to stay Delaware proceeding because action also pending in New York); Gimbel v. Signal Cos., 316 A.2d 619 (Del. 1974) (upholding chancellor's requirement of $25 million bond before preliminary injunction would issue to prevent sale of subsidiary's shares to another oil

Other cases that appear to be procedural in nature remain in the substantive category. Examples of such cases include those involving use of the special litigation committee device in derivative litigation, or when a plaintiff shareholder's demand on the board of directors will be excused as futile. General corporation law historically treats these incidents of the derivative action as substantive, in large part because they are matters of corporate governance.[84] Hence, the standards of what is procedural for purposes of sorting out the Delaware corporate cases may seem to be drawn somewhat narrowly.

2. End Product

Table A names in chronological order sixty-six Delaware Supreme Court opinions in shareholder litigation decided in the years 1974 to 1987, inclusive. Columns A-C contain objective items of information: case name, citation, and date of opinion release. Columns D-F contain the product of more subjective judgments. Column D is a short characterization of the principal issue in the case. Column E indicates whether the case involves procedural (P) or substantive (S) corporate law issues. Column F sets out the sometimes doubly subjective view of which side is which, shareholder or management, and, between those sides, which prevailed.

Finally, column G is headed "Roadmap." In corporate law cases, the Delaware Supreme Court seems to regard itself as an oracle, and justly so. More than any other institution, save perhaps the Securities and Exchange Commission, the Delaware courts are the propounders of national corporate law. Probably due to awareness of that role, in its opinions the Delaware Supreme Court often expatiates at length along preventive law lines. It indicates specifically what intracorporate procedure or procedures might aid others in avoiding the predicament in which the litigants at bar find themselves. When the court has rendered that kind of guidance for posterity, a "Yes" has been placed in column G.

Table B is an annual display of the total number of Delaware Supreme Court corporate law decisions. It also indicates the number and percentage of those that represent wins by shareholder interests.

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company).

84. Thus, the law of the state of incorporation rather than of the forum state will control. *See generally* Branson, *The American Law Institute Principles of Corporate Governance and the Derivative Action: A View From the Other Side*, 43 WASH. & LEE L. REV. 399 (1986) (discussing derivative litigation from the standpoint of a practitioner in Portland, Maine or Portland, Oregon).

C. *Hypotheses to Be Tested*

The propositions to be verified are of two types: Those propositions which assume that Delaware corporate law is indeterminate, and those propositions which are corollary to the major thesis that Delaware law is indeterminate. Upon reflection, only the fourth proposition is of the second type, and the first three propositions seem to be of the first type. The propositions are described below.

First, the Delaware Proshareholder Hypothesis contends that, in shareholder litigation, shareholder interests prevail much more frequently than either critics or supporters of Delaware's corporate state would imagine.

Second, the Proshareholder Hypothesis in Procedural Cases asserts that shareholder interests achieve an inordinate rate of success in procedural cases primarily because the procedural incidents so created facilitate the bringing of corporate litigation in Delaware.[85]

Third, the Roadmap Hypothesis holds that when shareholder interests do prevail on substantive issues, the Delaware Supreme Court outlines for the corporate bar a roadmap, either as appeasement to the special interest group perceived to have been affected adversely, such as corporate managements, the corporate bar, or even the Delaware legislature, or as a means to aid others in avoiding the problem litigated, or both.[86]

Fourth, the Shareholder Victory Regularity Hypothesis maintains that in Delaware, shareholder interests prevail with clocklike regularity. Shareholder victories seem evenly spaced among the corporate law decisions of the Delaware court and through time.

D. *Possible Results*

1. The Delaware Proshareholder Hypothesis. The frequency at which shareholder interests prevail stands out, especially against the background of what Professor Cary, Ralph Nader and others have written about Delaware law and Delaware courts. In sixty-six Delaware Supreme Court cases from 1974 to 1987, two involved no clear winners or losers, twenty-nine were victories for management interests, and thirty-

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85. This point is not surprising and has been made many times before. *See, e.g.*, Cary, *supra* note 9, at 686-88; Macey & Miller, *supra* note 11, at 510-13. The proposition is well illustrated by the Delaware sequestration rule's fortunes and subsequent history. *See supra* note 28.

86. This proposition might shed light upon Justice Moore's cryptic remark in a later oral argument about Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985), that "there will never be another *Van Gorkom*." *See* Macey & Miller, *supra* note 11, at 519 n.194. Although the court held directors liable for failure to comply with their duty of care in selling the company, the opinion is so much a roadmap as to how directors should sell or approve the sale of a company that an analogous case should not arise, at least until the opinion becomes shrouded in the mists of time.

five seemed to be clear wins for shareholders.[87] Shareholder interests thus prevailed nearly fifty-five percent of the time. These results may be no great surprise to those who have studied the litigation process.[88] The result would surprise those who have written that in Delaware courts the dice are loaded in favor of corporate managements, or that in Delaware the courts have a great deal of common sense and quite properly are promanagement in their decisionmaking.

2. The Proshareholder Hypothesis in Procedural Cases. In procedural cases the results are much more dramatic. Of eighteen cases denominated procedural, shareholder interests prevailed in fifteen of them, an eighty-three percent victory rate.[89] Clearly this hypothesis has a high degree of validity. Along with the Delaware legislature, Delaware courts want plaintiffs to sue in Delaware, primarily because litigation volume in Delaware fits in handsomely with the interests of a large segment of the Delaware corporate bar. Commentators, however, have been illustrating that observation for years.[90] This subset of eighteen cases merely confirms that observation in more definitive fashion.

3. The Roadmap Hypothesis. For plaintiffs to sue, or to continue to sue, in a specific forum, a favorable procedural environment alone may not suffice. Some more than de minimus prospect of victory on the merits also seems necessary.

Of the sixty-six case sample, forty-six cases remain after removing the two cases in which no clear winner was apparent and the eighteen cases termed procedural. In this subset, shareholder interests prevailed on twenty occasions; management interests prevailed in the remainder.[91] Thus, on substantive corporate law issues the shareholders' success rate drops but not drastically. Shareholders prevail 43.5 percent of the time.

In roughly half of those cases in which shareholder interests prevail on a substantive issue, as a consolation prize, or for other reasons, the Delaware Supreme Court draws a roadmap for corporate managers and those who advise them.[92] In recent years this trend certainly has held steady. Of twelve cases since 1980 denominated substantive and in which shareholder interests have prevailed, exactly half are roadmap

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87. *See* app. Table A, col. F.

88. *See, e.g.*, Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (discussing the relationship between litigated disputes and disputes settled before or during litigation).

89. *See* app. Table A, cols. E, F.

90. *See supra* note 85 and accompanying text.

91. *See* app. Table A, cols. E, F.

92. Eleven of twenty substantive decisions for shareholders have been denominated roadmap cases. *See* app. Table A, cols. E-G.

cases.[93] These roadmap cases provide rich fodder for corporate law commentators of all stripes.[94] With the bounty of material these cases and their roadmaps provide, the law review articles easily outnumber the cases themselves, by a factor of twenty or more to one.

4. The Shareholder Victory Regularity Hypothesis. In every year since 1976,[95] except 1984,[96] the Delaware justices have decided one or more cases for shareholder interests. In every one of those years, save 1980, the court rendered a major substantive law decision in favor of shareholder interests. In 1980 shareholder interests prevailed in four of six cases, but all four involved procedural issues.[97] Shareholder interests have done exceedingly well in some time periods. In 1976 and 1982, these interests prevailed in every case in which they appeared in Delaware.[98]

A more representative year for shareholder interests was probably 1985. Of eleven corporate law opinions rendered that year, the Delaware Supreme Court decided six for shareholder interests. Moreover, five of the cases were substantive corporate law cases and at least two, *Smith v. Van Gorkom*[99] and *Rabkin v. Philip A. Hunt Chemical Corp.*,[100] were major decisions. On the other hand, the 1985 cases decided in favor of management interests were all substantive and could be described as major.[101]

Shareholder interests have had some somewhat drier spells. Two occurred in the mid-1970s. Between the Delaware Supreme Court's de-

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93. *See* app. Table A, col. G. The names of most of these cases have become part of every corporate lawyer's lexicon—*Zapata v. Maldonado, Weinberger v. UOP, Inc., Smith v. Van Gorkom, Rabkin v. Philip A. Hunt Chem. Corp.*, and *Revlon v. MacAndrews & Forbes Holdings.*

94. For example, on *Smith v. Van Gorkom*, compare Burgman & Cox, *Corporate Directors, Corporate Realities and Deliberative Process: An Analysis of the* Trans Union *Case*, 11 J. CORP. L. 311 (1986) with Fischel, *supra* note 23 *and* Herzel & Katz, Smith v. Van Gorkom: *The Business of Judging Business Judgment*, 41 BUS. LAW. 1187 (1986). *See generally* Manning, *Reflections and Practical Tips on Life in the Boardroom after* Van Gorkom, 41 BUS. LAW. 1 (1985).

95. There were no corporate law opinions released in 1978. *See* app. Table A at p. 116; *see also id.* Table B (giving an annual compilation).

96. In 1984 the shareholder side in litigation lost all five decisions before the Delaware Supreme Court. *See id.* Table A at pp. 119-20.

97. Those cases were two attorney fee approvals, one class action settlement approval, and one affirmation of the constitutionality of the director consent statute. *See id.* Table A at p. 117.

98. It should be pointed out that corporate law litigation with shareholder interests and management interests in opposition to one another arose only four times in 1976 and three times in 1982. Numbers of cases per year, wins for shareholder interests, and those wins as a percentage of the yearly total of cases were extracted from Table A and are presented in a single page format as Table B.

99. 458 A.2d 858 (Del. 1985).

100. 498 A.2d 1099 (Del. 1985).

101. They were *Kaplan v. Wyatt, Moran v. Household Int'l, Inc., Unocal Corp. v. Mesa Petroleum Co.*, and *Rosenblatt v. Getty Oil Co. See* app. Table A at pp. 120-21.

cision for shareholder interests in *Lynch v. Vickers Energy Corp.*[102] and *Roland International Corp. v. Najjar*,[103] almost two years elapsed. In the interim, however, only three corporate law decisions were handed down and two of those were approvals of settlements, in other words procedural cases favorable to shareholder interests.[104]

Similarly, nearly two years elapsed between the court's decision for shareholder interests in *Roland International Corp.*[105] and its next substantive law decision for shareholder interests, *Lynch v. Vickers Energy Corp.* (*Vickers II*).[106] In the interim the court released opinions in nine corporate law cases, but all were not decided for management interests. Four of the opinions report procedural decisions that on balance favor shareholder interests, including two attorney fee award approvals,[107] an approval of settlement in a class action,[108] and a finding that the Delaware director consent statute was constitutional.[109]

In fourteen years the single truly dry spell for shareholder interests came in the mid-1980s. From the court's decision in *Weinberger v. UOP, Inc.*[110] until its proshareholder decision in *Saxon Industries v. NKFW Partners*[111] over two years passed. In this interval management interests prevailed in eight of ten cases, many involving important substantive issues.[112] Shareholder interests prevailed in only two cases, both routine settlement approvals benefiting shareholders.[113]

The 1983-1985 dry spell was followed, however, by a fertile period for shareholder interests. As shown, shareholder interests prevailed in five of eleven cases in 1985.[114]

Examination of the Delaware Supreme Court's opinions over fourteen years may not show a metronomic regularity to its decisions in favor of shareholder interests. Examination of these opinions' timing

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102. 383 A.2d 278 (Del. 1977).

103. 407 A.2d 1032 (Del. 1979).

104. These two cases were Neponsit Inv. Co. v. Abramson, 405 A.2d 97 (Del. 1979), and Wood v. Coastal States Gas Corp., 401 A.2d 932 (Del. 1979).

105. 407 A.2d 1032 (Del. 1979).

106. 429 A.2d 497 (Del. 1981).

107. Sugarland Indus. v. Thomas, 420 A.2d 142 (Del. 1980); Allied Artists Pictures Corp. v. Baron, 413 A.2d 876 (Del. 1980).

108. Fins v. Pearlman, 424 A.2d 305 (Del. 1980).

109. Armstrong v. Pomerance, 423 A.2d 174 (Del. 1980). For a listing of the four preceding cases, see app. Table A at p. 117.

110. 457 A.2d 701 (Del. 1983).

111. 488 A.2d 1298 (Del. 1984).

112. *See, e.g.*, Pogostin v. Rice, 480 A.2d 619, 627 (Del. 1984) (same); Aronson v. Lewis, 473 A.2d 805, 818 (Del. 1984) (demand excused exception for derivative actions narrowly applied); *see also* app. Table A at pp. 119-20.

113. Wied v. Valhi, Inc., 466 A.2d 9 (Del. 1983), *cert. denied*, 465 U.S. 1026 (1984); Geller v. Tabas, 462 A.2d 1078 (Del. 1983).

114. *See* app. Table A at pp. 120-21; *see also supra* notes 99-101 and accompanying text.

does indicate a regularity to the timing of decisions favoring shareholder rather than management interests. This regularity confirms a subjective impression felt by some, and with which other Delaware court watchers informally have agreed. This regularity also may be circumstantial evidence of a certain amount of indeterminacy in Delaware corporate law.

V. Possible Explanations for the Surprising Number of Proshareholder Decisions in Indeterminacy's Wake

A. A Crossed Fingers View of Delaware Judges

In a famous dictum, Judge Jerome Frank postulated that seeking to explain law's course may consist of no more than an effort to determine what judges have had for breakfast.[115] A variation of that cynical proposition is that judges decide cases with fingers crossed behind their backs. They let the public think and, in their pronouncements, pretend that law develops in a consistent manner and is firm stuff, even etched in stone. Meanwhile the fingers crossed represent their true beliefs and our judicial state of affairs. Judges know that they can decide cases any way they want and that they easily enough can evade any precedent or prior decision.[116]

Applying this crossed fingers view to the Delaware Supreme Court, its justices periodically decide cases for shareholders because they favor the underdog on certain days, or even out of flights of whim or fancy. With tools of indeterminacy such as the Delaware equal dignity rule and the *Schnell* doctrine available to them, Delaware judges certainly have some ability to decide cases in whatever way they wish.

Entire volumes have been written to explain the institutional or other forces that constrain judges and prevent them from utilizing the full breadth of their ability to decide cases in almost any way they see fit.[117] Analyzing or even replicating those volumes is beyond the scope of a single law review article, but judges, including Delaware judges, are constrained in the exercise of any theoretically unfettered discretion they may have to decide cases in any way they desire.

B. Individual Rather Than Institutional Factors at Work

Over the fourteen year period of study, only ten justices served on the Delaware Supreme Court. For twelve of those years only eight indi-

115. J. Frank, Courts on Trial 161-62 (1949) (describing gastronomical jurisprudence).

116. *See, e.g.*, R. Dworkin, Law's Empire 36-41 (1986) (contrasting the public's frequent conception of law as a plain fact with a "fingers crossed" jurisprudence).

117. *See, e.g.*, *id.*

viduals sat on the five judge court.[118] The surprisingly proshareholder content of Delaware decisions could be explained by the happenstance that during this period a high percentage of that relatively small number of individuals favored underdogs, espoused populism in their corporate philosophies, or otherwise held a more proshareholder outlook than the justices in any other period.

C. Directly Conflicting Lines of Decision and a Roughly Equal Distribution of Outcomes Are Merely the Products of Any Well-Developed System of Appellate Jurisprudence

"There are places in the law through which a pair of mutually oblivious doctrines run in infinitely parallel contrariety, like a pair of poolhall scoring racks on one or the other of which, seemingly at random, cases get hung up."[119] In Delaware the seeming diametrically opposed equal dignity rule cases and *Schnell* along with its progeny are but another example of the poolhall scoring rack phenomenon.

A slightly perverse theory goes further. The theory holds that the more opinions a high court renders in a given area the more indeterminate, rather than predictable, the law becomes. This counterintuitive notion gathers support from fourth amendment search and seizure cases decided by the United States Supreme Court. Every time the Court renders a new decision the Court introduces yet more uncertainty. To enhance predictability, appellate courts ought to cease writing opinions in areas of law that become well trafficked.[120] The

118. *See* 316 A.2d V (showing the composition of the Delaware Supreme Court). From 1974 until 1987, Daniel L. Herrman, James B. Cary, William Duffy, John J. McNeilly, William T. Quillen, Henry R. Horsey, Andrew G. T. Moore, II, and Andrew G. Christie served as justices. In 1987 Joseph T. Walsh and Randy J. Holland were added to the court, replacing the long serving Chief Justice Herrman and Associate Justice McNeilly on the five member panel. Part of the explanation for having so few justices is that the Delaware Supreme Court had only three seats until 1979. In 1979 the court expanded to five seats, although the usual panel remains three justices.

119. Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 67 (1960) (footnote omitted). Or as the legal realist Karl Llewellyn stated:

> What I wish to sink deep into your minds about the doctrine of precedent . . . is that it is two-headed. It is Janus-faced. That it is not one doctrine, nor one line of doctrine, but two, and two which, applied at the same time to the same precedent, are contradictory of each other.

K. LLEWELLYN, THE BRAMBLE BUSH 68 (1951) (emphasis omitted).

120. *See, e.g.*, Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2 & n.5 (stating that "there is an uncertainty principle at work in the judicial process: any attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles," and applying the Heisenberg Uncertainty Principle from the science of nuclear physics). Other examples used to illustrate the phenomenon are the Court's attempt to define obscenity and to define commercial speech in first amendment contexts. *See, e.g.*, *id.* at 17-27 (discussing this phenomenon in obscenity and commercial speech cases). In Delaware the example that comes to mind is the Delaware Supreme Court's ongoing attempt to define the conditions under which a

indeterminacy in Delaware corporate law is no different than other areas of appellate jurisprudence in which courts must decide a high volume of cases within a particular substantive area's relatively narrow confines.

The distribution of outcomes between shareholder and management interests is also the product of a volume of cases. Lopsided cases, those in which the merits heavily favor one side over the other, tend not to survive the pretrial discovery stage, let alone trial or appellate review by a state's highest court. Hence, when the volume of decided cases in any particular area becomes robust, as it is in Delaware in the corporate law area, the distribution of outcomes between plaintiffs and defendants, or shareholders and managers, should begin to tend toward a balanced distribution.[121] In the sample of sixty-six decisions over fourteen years, shareholder interests prevailed nearly fifty-five percent of the time.[122] In cases denominated as substantive corporate law cases, shareholder interests prevailed just under forty-four percent of the time.[123] These distributions between shareholder and management outcomes are nothing more than products of the natural winnowing process that eliminates lopsided cases long before they reach the appellate level.[124]

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majority shareholder may legitimately squeeze out the remaining minority. Each new decision seems to raise as many questions as it answers. *See, e.g.*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983); Lynch v. Vickers Energy Corp., 429 A.2d 497 (Del. 1981); Singer v. Magnavox Co., 380 A.2d 969 (Del. 1977).

121. *See* Priest & Klein, *supra* note 88, at 4-5. The authors concluded:

> Our model . . . demonstrates that, where the gains or losses from litigation are equal to the parties, the individual maximizing decisions of the parties will create a strong bias toward a rate of success for plaintiffs at trial or appellants at appeal of 50 percent regardless of the substantive standard of law. Thus, plaintiff victories will tend toward 50 percent whether the legal standard is negligence or strict liability, whether judges or juries are hostile or sympathetic.

Id. (footnote omitted). Derivative and other forms of corporate litigation seem to fit better this model than instances in which potential gains or losses to the parties are asymmetrical, though corporate litigation seemingly would not fit either extreme perfectly. Examples of asymmetry include cases of a firm accused "of manufacturing a blatantly defective product (as Ford was accused with respect to the Pinto) [in which the firm] may face a substantial loss in future sales if a jury returns an adverse civil liability verdict," and cases in which "an adverse antitrust judgment may require a defendant firm to change an existing sales practice or marketing technique and so increase its costs." *Id.* at 25.

122. *See supra* note 88 and accompanying text.

123. *See supra* note 92 and accompanying text.

124. From 1972 until 1985 the United States Supreme Court decided a large number of corporate-securities law cases. In every case save one or two, the Court decided in defendants' favor. In many of the cases, the Court used the occasion to curb the law's reach. *See, e.g.*, Branson, *Statutory Securities Fraud in the Post-*Hochfelder *Era: The Continued Viability of Modes of Flexible Analysis*, 52 TUL. L. REV. 50, 74, n.98 (1977) (reviewing 13 of 14 consecutive securities law decisions for defendants from 1972 until 1977); *see also* Dirks v. SEC, 463 U.S. 646 (1983); Aaron v. SEC, 446 U.S. 680 (1980); Chiarella v. United States, 445 U.S. 222 (1980); Touche Ross & Co. v. Redington, 442 U.S. 560 (1979). Nothing remotely resembling an equal distribution of outcomes

D. The Delaware Supreme Court's Surprisingly Proshareholder Output Accords with an Unexplored Side of Interest Group Analysis

Simply put, the interest group analysis has to have a shareholder, or plaintiffs', or more accurately, a plaintiffs' bar side to the equation. That side has been largely neglected. Indeed, not all the interest groups have been adequately identified. In addition to corporate managers and the local counsel of corporations themselves, the Delaware state treasury, the corporation service companies, and the office lawyer and defense counsel components of the Delaware corporate bar, another interest group can be identified as those attorneys who on a more or less consistent basis represent shareholder interests.

Delaware must have plaintiffs suing in its courts to deliver the volume of appellate guidance and supposed predictability that therefore will ensue. As shown, Delaware makes it easy for shareholders to bring suit in its courts.[125] The promise of relatively uncritical appraisal of plaintiff attorney fee awards and other aspects of settlements[126] also lures shareholder litigation to Delaware. Yet over time no plaintiffs' counsel could continuously bring suit in Delaware if little or no prospect of victory on the merits existed. An exceptionally venal lawyer could survive for a time bringing suit in a forum in which little or no chance of victory existed. Eventually, however, plaintiffs and the litigation would go elsewhere. Hence, Delaware substantive law must have a wild card of greater substantive law element in favor of shareholder interests. As displayed, Delaware law does.[127]

This necessity for some plaintiff or shareholders' side often is misunderstood. One leading scholar maintains that Delaware's proshareholder decisions "pose a threat to the continued primacy of Delaware."[128] On another occasion this scholar has castigated the Delaware Supreme Court and its roadmap opinions in cases it decides for shareholder interests as "bizarre" and "an antibusiness approach."[129] An apologist for dominance of management interests simply calls such decisions in favor of shareholders "atrocious."[130] Such critics fail to appreciate all the interest groups involved and the delicate and sometimes

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occurred. Appellate review in the United States Supreme Court, however, is discretionary in the corporate-securities area. In that impressive string of cases for defendants, the Burger Court seemed to select cases on the basis of their value in an overall effort to restrict the law's reach and to teach lower federal courts restraint in application of the federal securities laws.

125. *See supra* notes 27-31 and accompanying text.

126. *See supra* notes 79-81 and accompanying text.

127. *See supra* notes 87-90 and accompanying text.

128. *See* Fischel, *supra* note 10, at 942.

129. Fischel, *supra* note 23, at 1454 & n.37.

130. Manning, *supra* note 94, at 1.

perverse balancing among them that must take place for Delaware to continue the production that has resulted in its continued primacy. An explanation for Delaware's surprisingly proshareholder output of decisions is that a not uninvisible hand operates to serve the special interest groups that make up the Delaware establishment, including the shareholder and plaintiffs' counsel side that this establishment must have.[131]

V. Conclusion

Whatever the explanation for what has filled indeterminacy's wake in Delaware corporate jurisprudence, a corporate lawyer's mind inevitably turns to more practical ramifications of the theory. In fact, the indeterminacy thesis's value may be largely heuristic, incapable of proof but helpful for understanding practical phenomenon about Delaware law. One practical value of the theory's development is to expose the contrariety or indeterminacy inherent in the lines of cases on the equal dignity rule and the *Schnell* doctrine. In particular, the literature treats the latter as an isolated instance, failing to develop the substantial case law that has explored the original *Schnell* doctrine's contours. This Article is a modest, beginning effort to do so.

A more important ramification of the theory might be to turn on its head the traditional justification for incorporating or, especially, as a publicly held company, reincorporating in Delaware. That justification is that "[b]ecause of the many corporations domiciled in Delaware, the Delaware judiciary has become particularly familiar with matters of corporate law, and Delaware has an extensive body of court decisions interpreting its corporate law, which serve as a reliable guide for corporate action."[132]

Despite what has been said in this Article about pool hall scoring racks and indeterminacy in Delaware law, that justification remains undeniably sound. The wealth of Delaware precedent enables corporate counsel to construe the corporate statute, structure transactions, and

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131. This hand does not operate without limits. If the Delaware Supreme Court operates too freely in favor of shareholder or any other interests, the Delaware legislature can overrule the offending court decision. Indeed, such a trump card was played after the court's proshareholder decision in Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985). In that case, the court left open for duty of care liability an experienced and capable board of directors who had decided to sell their publicly held corporation. The potential liability ran into tens of millions of dollars for conduct that experts deemed, if anything, only slightly negligent. Approximately 15 months later, the Delaware legislature responded with a statute permitting corporations to amend articles of incorporation to opt out of liability for their directors for duty of care violations. *See* Del. Code Ann. tit. VIII, § 102(b)(7) (Supp. 1988). *See generally* Comment, *Limiting Corporate Directors' Liability: Delaware's Section 102(b)(7) and the Erosion of the Directors' Duty of Care*, 136 U. Pa. L. Rev. 239 (1987).

132. Microsoft Corp., Proxy Statement for Annual Meeting of Shareholders 11 (Sept. 17, 1986).

predict probable outcomes sbould issues become the subject of litigation. Such prediction, however, is only accurate to a point. On levels one, two, and three of interpretation, such certainty and predictability exist to a great degree.[133] On what I would call level four, however, where the stakes are quite large in litigated cases, indeterminacy operates to introduce a significant wild card element into Delaware corporate jurisprudence. That wild card element may not exist in the corporation's home state where the judiciary has no highly recognizable special interest groups, such as a corporate bar, and one markedly segmented at that, to serve. In the major cases, the home state court would be more likely to favor management, especially when other interest group factors not particularly relevant to the Delaware equation, such as jobs and tbe effect on local communities, loom large. And on levels one, two, and three, because Delaware law is becoming our national corporate law especially on technical and finer points of law, home state courts undoubtedly can be persuaded to follow Delaware's lead. Based upon the indeterminacy thesis about Delaware corporation law, the best advice to some chief executive officers and boards of directors of publicly held firms may be to stay at home.[134]

Legal realism and the indeterminacy thesis of CLS scholars explain much about Delaware's dominance in the corporate field. Application of these theses to corporate law also leads perhaps to some surprising, counterintuitive results. There seems to be far more room for sbareholder interests to prevail in cases litigated in Delaware tban is commonly thought to be the case. From the corporate viewpoint, the traditional wisdom, that at some point in a publicly held firm's maturation a serious look should be taken at reincorporation in Delaware, may not hold, in part because tbe special interest group array in Delaware has, and must have, a plaintiff-shareholder side.

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133. Across the spectrum of areas of law, CLS scholars agree. Despite their indeterminacy thesis ahout law in general, "at the level of practice, lawyers can often predict what decision a judge will make or what argument their colleagues will find most convincing." Stick, Book Review, 88 COLUM. L. REV. 407, 412 (1988) (*reviewing* M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)).

134. Martin Lipton recently has agreed. Cohen, *Lipton Tells Clients That Delaware May Not Be a Place to Incorporate*, Wall St. J., Nov. 11, 1988, at B7, col. 1 (preferring Pennsylvania, Ohio, and New Jersey); *accord* Labaton, *The "Poison Pill" Takes a Beating*, N.Y. Times, Nov. 14, 1988, at D2, col. 1 (action by Delaware courts has been inimical to adoption of takeover defenses and incorporation elsewhere may be preferred).

TABLE A

Delaware Supreme Court 1974-1987

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
1.	Gimbel v. Signal	316 A.2d 619 (1974).	Feb. 7, 1974	Court approved bond requirement for plaintiff	P	Management	No
2.	Iroquois Indus. v. Lewis	318 A.2d 134 (1974)	Mar. 25, 1974	Attorney's fee upheld	P	Shareholder	No
3.	Universal City Studios, Inc. v. Francis I. duPont & Co.	334 A.2d 216 (1975).	Jan. 20, 1975	High multiplier in appraisal proceeding	S	Shareholder	No
4.	Walter Reade Org. v. Crane	332 A.2d 399 (1975).	Jan. 30, 1975	Denial of corporate request for stay of action	P	Shareholder	No
5.	Gellis v. S. Gellis & Co.	339 A.2d 64 (1975).	May 16, 1975	Refusal to review election of directors	S	Management	No
6.	Harff v. Kerkorian	347 A.2d 133 (1975).	Oct. 17, 1975	Convertible debenture holders permitted to proceed on fraud claim, but not for breach of fiduciary duty	S	None	No
7.	Raab v. Villager Indus.	355 A.2d 888 (1976).	Apr. 12, 1976	Procedure for perfecting dissenters' appraisal rights	S	Shareholder	Yes

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
8.	Greyhound Corp. v. Heitner	361 A.2d 225 (1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).	Apr. 15, 1976	Upheld Delaware sequestration procedure	P	Shareholder	Yes
9.	Fliegler v. Lawrence	361 A.2d 218 (1976).	June 28, 1976	Conflict of interest statute construed	S	Shareholder	Yes
10.	Coaxial Communications v. CNA Fin. Corp.	367 A.2d 994 (1976).	Sept. 10, 1976	Annual meeting of shareholders ordered	S	Shareholder	No
11.	Monogram Indus. v. Royal Indus.	372 A.2d 171 (1976).	Feb. 18, 1977	Substantial compliance with state takeover statute held sufficient	S	Shareholder (R)	No
12.	Judah v. Delaware Trust	378 A.2d 624 (1977).	Aug. 11, 1977	Determination of whether Shanghai Power securities with or without value	S	None	No
13.	Providence & Worcester Co. v. Baker	378 A.2d 121 (1977).	Sept. 8, 1977	Differential voting rights upheld	S	Management	No
14.	Singer v. Magnavox Co.	380 A.2d 969 (1977).	Sept. 23, 1977	Business purpose required for squeeze out merger	S	Shareholder	Yes
15.	Lynch v. Vickers Energy Corp.	383 A.2d 278 (1977).	Oct. 18, 1977	Adequacy of disclosure in squeezeout merger	S	Shareholder	Yes

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
16.	Tanzer v. Int'l Gen. Indus.	379 A.2d 1121 (1977), *overruled*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).	Oct. 18, 1977	Business purpose of parent corporation held sufficient	S	Management	No
17.	Wood v. Coastal States Gas Corp.	401 A.2d 932 (1979).	Apr. 23, 1979	Settlement upheld over preferred shares' objection	P	Shareholder (R)	No
18.	Neponsit Inv. Co. v. Abramson	405 A.2d 97 (1979).	Jul. 10, 1979	Settlement upheld over common shareholder's objection	P	Shareholder (R)	No
19.	Roland Int'l Corp. v. Najjar	407 A.2d 1032 (1979), *overruled*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).	Aug. 6, 1979	Business purpose doctrine applied to short form merger	S	Shareholder	Yes
20.	Michelson v. Duncan	407 A.2d 211 (1979).	Oct. 2, 1979	Shareholder ratification of stock option plan upheld	S	Management	No
21.	Citron v. Merritt-Chapman & Scott Corp.	407 A.2d 1040 (1979).	Oct. 9, 1979	Refusal to forfeit officials' compensation	S	Management	No

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
22.	Bell v. Kirby Lumber Corp.	413 A.2d 137 (1980).	Feb. 20, 1980	Appraisal of shares in short form merger	S	Management	No
23.	Allied Artists Corp. v. Baron	413 A.2d 876 (1980).	Mar. 13, 1980	Attorneys' fee award upheld	P	Shareholder	No
24.	GM Sub. Corp. v. Liggett Group, Inc.	415 A.2d 473 (1980).	Apr. 30, 1980	Remand in favor of takeover target on question of Delaware takeover statute and federal law	S	Management (R)	No
25.	Sugarland Indus. v. Thomas	420 A.2d 142 (1980).	May 29, 1980	Recomputation of attorneys' fees award with refusal to adopt lower lodestar formula	P	Shareholder	Yes
26.	Armstrong v. Pomerance	423 A.2d 174 (1980).	Oct. 29, 1980	Upheld director presumed consent statute	P	Shareholder	No
27.	Fins v. Pearlman	424 A.2d 305 (1980).	Nov. 18, 1980	Settlement of class action approved with the exclusion of bondholders from the class	P	Shareholder	No
28.	Oceanic Exploration Co. v. Grynberg	428 A.2d 1 (1981).	Feb. 26, 1981.	Radical amendment of voting trust agreement upheld.	S	Management	No

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
29.	Lynch v. Vickers Energy Corp.	429 A.2d 497 (1981), *overruled*, Weinberger v. UOP, Inc., 457 A.2d 701 (Del. 1983).	Apr. 3, 1981	Recessionary measure of damages ordered	S	Shareholder	No
30.	Zapata Corp. v. Maldonado	430 A.2d 779 (1981).	May 13, 1981	Limitation on special litigation committee recommendation	S	Shareholder	Yes
31.	Sugarland Indus. v. Thomas	431 A.2d 1271 (1981).	June 17, 1981	Application of attorney fee award formula	P	Shareholder	No
32.	Dofflemeyer v. W.F. Hall Printing Co.	432 A.2d 1198 (1981).	June 19, 1981	Dissenter's rights provision strictly construed	P	Management	No
33.	Harman v. Masoneilan Int'l, Inc.	442 A.2d 487 (1982).	Feb. 9, 1982	Majority shareholders' compliance with fiduciary duty as within chancellor's subject matter jurisdiction	P	Shareholder	No
34.	Giuricich v. Emtrol Corp.	449 A.2d 232 (1982).	July 30, 1982	Boardpacking scheme stuck down under *Schnell* doctrine	S	Shareholder	No
35.	CM & M Group, Inc. v. Carroll	453 A.2d 788 (1982).	Sept. 15, 1982	Secondary purpose irrelevant if shareholder has proper purpose for access to books and records	S	Shareholder	No

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
36.	Weinberger v. UOP, Inc.	457 A.2d 701 (1983).	Feb. 1, 1983	Fair dealing and fair price test for squeeze out merger	S	Shareholder	Yes
37.	Hibbert v. Hollywood Park, Inc.	457 A.2d 339 (1983).	Feb. 15, 1983	Indemnification for former directors approved.	S	Management (R)	No
38.	Warren v. Warren	460 A.2d 526 (1983).	May 2, 1983	Lesser measure of damages for breach of duty of loyalty.	S	Management	No
39.	Geller v. Tabas	462 A.2d 1078 (1983).	May 25, 1983	Approval of derivative and class action settlement	P	Shareholder	No
40.	Wied v. Valhi, Inc.	466 A.2d 9 (1983), *cert. denied*, 465 U.S. 1026 (1984).	July 29, 1983	Refusal to interfere in class representative's settlement and post settlement activity	P	Sharerholder	No
41.	Aronson v. Lewis	473 A.2d 805 (1984).	Mar. 1, 1984	Demand futility exception narrowly applied	S	Management	No
42.	Rotbschild Int'l Corp. v. Liggett Group, Inc.	474 A.2d 133 (1984).	Mar. 20, 1984	Elimination of preferred stock liquidation preference under equal dignity rule	S	Management	Yes
43.	Lewis v. Anderson	477 A.2d 1040 (1984).	Apr. 18, 1984	Forced seller held to be without standing to bring derivative action	P	Management	No
44.	Gabelli & Co. v. Liggett Group, Inc.	479 A.2d 276 (1984).	May 29, 1984	Refusal to order declaration of dividend	S	Management	No

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
45.	Pogostin v. Rice	480 A.2d 619 (1984).	June 21, 1984	Demand requirement in derivative actions	S	Management	No
46.	Johnston v. Wolf	487 A.2d 1132 (1985).	Jan. 2, 1985	Creditors of successor cannot sue directors of predecessor corporation	S	Management	No
47.	Saxon Indus. v. NKFW Partners	488 A.2d 1298 (1984).	Feb. 15, 1985	Bankruptcy stay does not prevent suit to compel shareholders' meeting	S	Shareholder	No
48.	Smith v. Van Gorkom	488 A.2d 858 (1985).	Mar. 14, 1985*	Business judgement rule and duty of care	S	Shareholder	Yes
49.	Rosenblatt v. Getty Oil Co.	493 A.2d 929 (1985).	May 9, 1985	Application of Weinberger fairness tests	S	Management	No
50.	Unocal Corp. v. Mesa Petroleum Co.	493 A.2d 946 (1985).	June 10, 1985	Payment of reverse greenmail protected by business judgement rule	S	Management	Yes
51.	Datapoint Corp. v. Plaza Sec. Co.	496 A.2d 1031 (1985).	July 31, 1985	Attempted restriction on use of consent procedure held in conflict with statute	S	Shareholder	Yes
52.	Rabkin v. Philip A. Hunt Chem. Corp.	498 A.2d 1099 (1985).	Sept. 23, 1985	Weinberger v. UOP, Inc. applied to squeeze out merger	S	Shareholder	Yes
53.	Kaplan v. Wyatt	499 A.2d 1184 (1985).	Oct. 9, 1985	Special litigation committee investigation and report upheld	S	Management	Yes

* This date is for the opinion of denial of reargument. The case actually was decided on Jan. 29, 1985.

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
54.	Moran v. Household Int'l, Inc.	500 A.2d 1346 (1985).	Nov. 20, 1985	Adoption of poison pill takeover defense protected by business judgment rule	S	Management	Yes
55.	Selfe v. Joseph	501 A.2d 409 (1985).	Nov. 27, 1985	Refusal to modify settlement	P	Shareholder (R)	No
56.	Frantz Mfg. Co. v. EAC Indus.	501 A.2d 401 (1985).	Dec. 5, 1985	Business judgment rule does not protect actions taken solely to perpetuate control	S	Shareholder	No
57.	Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.	506 A.2d 173 (1986).	Mar. 13, 1986	Auction model applied to takeover; business judgment rule does not protect use of defensive devices to favor inside bidder	S	Shareholder	Yes
58.	Polk v. Good	507 A.2d 531 (1986).	Mar. 27, 1986	Approval of settlement including attorneys' fees, in payment of greenmail to corporate raider	S	Management	Yes
59.	Lipton v. News Int'l	514 A.2d 1075 (1986).	Sept. 16, 1986	Approval of settlement in shareholder litigation by characterization as individual rather than derivative	P	Shareholder (R)	Yes
60.	Empire of Carolina, Inc. v. Deltona Corp.	514 A.2d 1091 (1985).	Sept. 19, 1986	Setting of record date and therefore of ownership for purposes of right to execute shareholder consent	S	Management	No
61.	McDermott, Inc. v. Lewis	531 A.2d 206 (1987).	Sept. 16, 1987	Internal affairs choice of law rule affirmed as a major tenet of Delaware law	S	Management	No

	A. NAME	B. CITATION	C. DATE OPINION ISSUED	D. SUBJECT	E. SUBSTANTIVE (S) OR PROCEDURAL (P)	F. PREVAILING SIDE	G. ROADMAP
62.	Ivanhoe Partners v. Newmont Mining	535 A.2d 1334 (1987).	Nov. 18, 1987	Use of street sweep defensive takeover tactic protected by business judgement rule	S	Management	Yes
63.	Enstar Corp. v. Senouf	535 A.2d 1351 (1987).	Nov. 30, 1987	Strict application of dissenters' rights provisions of statute	S	Management	No
64.	Rainbow Navigation, Inc. v. Pan Ocean Navigation, Inc.	535 A.2d 1357 (1987).	Nov. 30, 1987	Determination of record owner for inspection of hooks and records	S	Shareholder	No
65.	Marciano v. Nakash	535 A.2d 400 (1987).	Dec. 23, 1987	Compliance with conflict of interest statute not exclusive means of validating self-dealing transaction; intrinsic fairness standard applied	S	Management	No
66.	Bershad v. Curtis H. Wright Corp.	535 A.2d 840 (1987).	Dec. 30, 1987	Refusal to apply auction model to cashout merger of suhsidiary into parent	S	Management	No

TABLE B

Delaware Supreme Court 1974-1987

Year	Corporate Law Decisions	Substantive for Shareholder Interests	Percentage of Total Interests	Procedural for Shareholder	Total Shareholder Decisions	Percentage of Total Decisions
1974	2	0	.000	1	1	.500
1975	4	1	.250	1	2	.500
1976	4	3	.750	1	4	1.000
1977	6	3	.500	0	3	.500
1978	0	0	0	0		
1979	5	1	.200	2	3	.600
1980	6	0	.000	4	4	.667
1981	5	2	.400	1	3	.600
1982	3	2	.667	1	3	1.000
1983	5	1	.200	2	3	.600
1984	5	0	.000	0	0	.000
1985	11	5	.455	1	6	.545
1986	4	1	.250	1	2	.500
1987	6	1	.167	0	1	.167