Crisis and Transition in Corporate Governance Paradigms: The Role of the Chancery Court of Delaware

Daniel P. Sullivan Donald E. Conlon

Contemporary crisis in the idea and practice of corporate governance prompts a consideration of future resolution based on historical imperatives. We review periods of analogous crisis in corporate governance in the mid-1800s, 1930s, and 1960s to evaluate the catalyst, process, and outcome of paradigmatic change. Framing our analysis are the rulings made by the Court of Chancery of Delaware during those times of change. The Chancery Court's historical role as the legitimator of governance norms grounds our consideration of its recent opinions. Recent case law, we conclude, signifies the advent of a multifiduciary model of governance. Measurement of shareholders' reaction to dilution of their fiduciary status corroborates the state of crisis and underscores the normative code of the emergent multifiduciary governance model. We close by discussing the implications of the multifiduciary model for shareholders, executives, and society.

Political economy theory argues that managers tend to maximize shareholder profits "subject to the constraint that the corporation must meet all of its legal obligations to others" (Clark 1986:17–18). Recently, the question of whom exactly are "others" and what obligations they can legally claim has been debated. For any number of reasons, ranging from the significance of property rights in a market economy, evolving social attitudes about success, money, and accountability, or relaxation of legal standards, governance questions have evolved into both intellectual polemics and practical problems.

This article tries to make sense of this situation by examining prior "inflection points" in history when the dominant corporate governance paradigm was challenged and replaced. We begin by deconstructing the concept of corporate governance in terms of the fiduciary construct, profiling seven governance models. We then discuss the importance of these topics in terms of the contemporary crisis in corporation governance. We then sketch the history and authority of the Chancery Court of Delaware. These

Address correspondence to Daniel P. Sullivan, Department of Business Administration, College of Business and Economics, University of Delaware, Newark, Delaware 19716-4196; e-mail: sullivad@be.udel.edu.

Law & Society Review, Volume 31, Number 4 (1997)
© 1997 by The Law and Society Association. All rights reserved.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

perspectives let us review the characteristics of transitions in governance paradigms in the mid-1800s, 1930s, and 1960s. The recurring dialectic of change grounds our projection of the probable resolution of the current governance crisis. Our discussion of the multifiduciary model closes with a consideration of its meanings to shareholders, managers, and society.

The Fiduciary Construct and Models of Corporate Governance

A survey of the management, finance, institutional, legal, sociology, and economics literatures identified seven distinct models of governance. We rely on the convergence of pragmatic and academic conceptualizations of governance to partition these models. Pragmatically, the American Law Institute's Principles of Corporate Governance Project (Dooley 1992) conceives of corporate governance in terms of two constructs, "responsibility" and "authority." The responsibility model posits a governance system in which all nonoperational decisions (i.e., merger or asset sale) that a board of directors makes must be ratified by shareholders. The authority model, conversely, vests directors with supreme authority and strictly limits shareholders' right to challenge their business judgment. In an academic context, Allen (1993:1401) expresses this dialectic in terms of the "philosophical realism of sociology," which champions collective responsibility, versus the "philosophical nominalism of economics," which advocates efficient authority. Congruence between these pragmatic and academic conceptualizations led us to argue for a continuum that invokes this dialectic in a way that begins to explain the relationships among the seven models.

We bound the continuum with the notions of "justice for all" and "liberty of the individual" (see Table 1). The positioning of each model follows its stipulation of the relative importance of "justice" versus "liberty" in terms of the fiduciary construct[1]—to whom do the directors of the business owe the duties of care, loyalty, and candor (Berle 1931; Dodd 1932; Justice Frankfurter in *Exchange Comm'n v. Chancery Corp.* 1943:85–86; Allen 1993). Several reasons motivate deconstructing the idea of governance in terms of the fiduciary construct. In theory, a public corporation is an expression of the relationship of the agents to whom the principal has entrusted property. Agents therefore have a

[1] In principle, a fiduciary is a person who has control over property or relationship but ownership of neither. At present, ultimate authority for managing the affairs of the corporation is vested in the board of directors of that organization. Because the law grants directors such authority, it imposes on them the obligation to act in the best interests of the corporation and to manage its affairs with the same care, diligence, and prudence that they would use to manage their own businesses. This, in essence, is what is meant by the fiduciary obligations of members of boards of directors. Control by proxy bounds a fiduciary to honor the duties of candor, loyalty, and care.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

duty of care to inform themselves reasonably before making a decision on the behalf of the principal, a duty of candor to disclose the decision to the principal, and a duty of loyalty to place the interests of the corporation and the principal above any self-serving motive. Black (1994:23) concludes that the fiduciary construct enacts "a web of legal rules" that governs plus defines in important ways what a fiduciary can and cannot do.[2] More practically, in matters alleging breach of the standards of governance, the fiduciary construct is the rationale of evaluation. For instance, the Chancery Court held in *Guth v. Loft* (1939) that directors of Delaware corporations are subject to an unwavering fiduciary obligation to the corporation and shareholders on whose behalf they act. The Chancery later ruled in *Stahl v. Apple Bancorp* (1990:1121) that "fiduciary duties constitute a network of responsibilities that overlay the exercise of even undoubted legal power." The fiduciary construct is the criterion used to judge directors accountably, the ultimate task of any governance model. Moving from "justice" to "liberty," we now profile the intellectual basis and governance norms of each model of governance.

Communitarian Model

This model holds that the corporation and its governance are grounded in the moral order of the community—put simply, governing the affairs of corporations are the ideals of the body politic (Donaldson & Preston 1995). The standard of a corporation's usefulness is not whether it creates individual wealth but whether it helps society gain a greater sense of the meaning of community by honoring individual dignity and promoting overall welfare (Dodd 1932; Bratton 1989; Allen 1993; Jackson & Carter 1995). Corporations are chartered with a quasi-public obligation to satisfy general community needs in ways that honor individual dignity and promote societal prosperity. Similarly, the corporation's identity supersedes that of the individuals who temporarily manage it; executives are simply the current guardians of the interests of all corporate stakeholders (Hall 1989). The communitarian norm of protecting the weak from exploitation by the powerful coaligns the interests of directors, shareholders and stakeholders. The resolution of "governance" disputes, as such, mirrors the social model of human action (Durkheim 1949

[2] Black (1994:20) gives a sense of the drama, noting:

> [L]egal rules keep financial institutions smaller than they would otherwise be, and discourage the institutions from acting together. Legal rules push institutions to hold debt instead of equity. Legal rules push each institution to hold small percentage stakes in a huge number of companies, instead of large stakes in a limited number of companies. Legal rules make it especially difficult for shareholders to intervene in companies in financial trouble, where the need for intervention is greatest; make it especially difficult to enter the boardroom, where oversight might be most effective; and let corporate managers largely control the shareholder voting agenda.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 1. The Dialectic of Governance, Models of Governance, and Stipulation of Fiduciary Duty

Justice for All …………						………… Liberty of the Individual
Communitarian	Multifiduciary	Property	Political Action	Relational	Natural Entity	Contractarian
The vision of an utopian distribution of authority and accountability makes the fiduciary construct an unnecessary and irrelevant legal machination. Managers' roles as trustees makes the interests of directors, shareholders, and stakeholders coextensive. Equality prevails as the presumption of justice obviates the need to create a hierarchy of fiduciary duties among classes of the community. Social relationships are seen as more important than statutory rules, thereby discouraging legislative or judicial fiat to stipulate fiduciary rights. In matters of excessive agency, the standard of the corporation's implicit fiduciary duty is not whether it irresponsibly destroyed individual wealth but whether it corrupted society's sense of community by dishonoring individual dignity and diluting overall welfare.	Proponents reason that the notion of a single fiduciary in the form of the shareholder is misleading, anachronistic, and often destructive. Rather, the multifiduciary model elaborates the historic bivariate notion of fiduciary duty of agents to principals to one that extends agents' fiduciary duty to constituencies such as lenders, suppliers, employees, managers, consumers, bondholders, *and* shareholders. As such, the multifiduciary model holds that the fiduciary rights of shareholders no longer supersede those of nonshareholders.	Stockholders are the sole risk bearers of the corporate enterprise and as such they and they alone are entitled to make claims on corporate directors' fiduciary duties of care, loyalty, and candor. More precisely, stockholders' voluntary purchase of risky equity grants them voting rights, dividends, rights to inspect books and records, rights to distributions on liquidation, and rights to sell, assign, or pledge these interests. For nonshareholders, senior management may give fair consideration to them but corporation law imposes no fiduciary obligations on management with respect to them. Later expressions of this model echo Millstein's (1993:25) observation that the quintessence of governance in this model is simply: "Managers manage the business, directors oversee management, and shareholders make sure the directors are doing their job."	This model suggests that a shareholder action committee, analogous to a political action committee, aggregates the interest of like-minded small shareholders into a united front. Directors' duties to shareholders still observe the norms of the property model. The manner of directors' direct dealings with an organized shareholder coalition, as occurs with PACs, alters the execution of those duties. The political method tries to expand the number of perspectives brought to bear on corporate decisions. However, not all suggestions necessarily invoke the doctrine of fiduciary duty. Ultimately, it is management's judgment to decide the merits of a petition without worrying about legally abrogating fiduciary duties to shareholders.	Proponents reconceive the fiduciary construct in terms of the demography of size and power. Large, organized shareholders essentially will be first among equals in the queue to call on directors. Operationally, relational governance calls for supplementing the board of directors by investor-board member(s) with direct and immediate access to agents. Formally, there is no change in primacy of shareholders and their fiduciary status as exclusive claimants. However, some note that designating large, organized shareholders as "first among equals" dilutes the rights of the others. I.e., shareholders' access and authority are ostensibly liberated but only for the elite few with the economic or positional authority to demand it. To paraphrase George Orwell's maxim from *Animal Farm*, the relational model suggests, "All shareholders are equal, but some are more equal than others."	The act of investment creates property rights and responsibilities that are intrinsic and exclusive to ownership. Therefore, the owners of the corporation are liable for all corporate debts. The reification of individual rights and collective ownership via a corporation make the notion of fiduciary duty moot. The agent is the principal and the principal is the agent, so to speak.	The fiduciary principles and obligations of traditional corporate and trust law distort and interfere with contractual duties. Therefore, this model calls for making a corporate contract the agreement that delineates the parties' negotiated rights, expectations, and responsibilities. The fact that signatories enter this agreement freely makes them bear the burden of installing protections against managers' misconduct. Directorial duties and remedies for breach of those duties are a part of the contractual safeguards that parties have freely negotiated. As a result, the only rights one can claim, in the event of a dispute, are those that have been formally contracted.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

[1893]) in which boundedly rational people, leading lives embedded in social contexts, champion laws that champion fairness among equals. So conceived, the communitarian model has a greater willingness to use legal intervention to overcome transaction costs and market failures (Millon 1993). Proponents endorse tactics such as federal chartering or the nationalization of corporations to offset the tendency of large corporations to amass power. While this model is magnanimous in intent, some scholars caution prudence in adopting communitarianism. Berle (1932:1372), for instance, cautioned: "Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe."

Multifiduciary Model

This model also conceives of the corporation in terms that invokes the "philosophical realism of sociology" (Allen 1993: 1401). It rejects the notion that the public corporation is a private, internal, and contractual nexus and, so defined, devoid of public law significance. The imposition of extensive, uncompensated costs on various nonshareholder constituencies, such as those levied by hostile takeovers, animates the thesis that property rights are ultimately embedded in human rights (Dodd 1932). Therefore, the destruction of property signifies an intolerable destruction of human rights (Bratton 1989, 1992). The multifiduciary model argues for transforming shareholder primacy into constituent equivalency and private law into public law. Doing so grants those persons whose lives fall within the realm of the corporation's affairs, such as lenders, suppliers, employees, managers, consumers, and bondholders, the right of voice in the governance process (Allen 1995). In sum, the multifiduciary model champions the quintessential American belief that power should be dispersed and regulated via a system of checks and balances that encourages contestability of ideas among shareholders and stakeholders alike.

The Property Model

Berle and Means (1932) reasoned that shareholders' relatively limited resources, liquidity goals, and diversification preferences lead them to relinquish direct control over their minor investment in the corporate entity. Shareholders' diffusion creates asymmetries in the information, skill, and incentive needed to monitor their agents (Jensen & Meckling 1976). Since such asymmetries favor executives, resolving inevitable agency problems calls for a governance structure that accords shareholders preeminent property rights. These rights are expressed in the primacy of the agent-principal relationship. Safeguarding small, faceless shareholders from managers engaging in "self-interest seeking

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

with guile" (Williamson 1979:26) requires empowering them with an inalienable, preemptive, and inviolate fiduciary right to elect a board of directors that is diligent and dutiful. The conception of governance, thus, depends on the neoclassic notions of property rights, separation of ownership and control, and organizational hierarchies that economize on transaction costs.

Political Action Model

This model posits a pluralistic governance approach in which shareholders try to influence their agents through formal and informal processes that bear "a strong resemblance to the public-sector political system" (Pound 1993:1007). Active investors contest executives' accountability by organizing a critical mass of shareholder support through principled, political mechanisms that solicit proxy rights from dispersed and disenfranchised shareholders (Monks & Minow 1996). In other words, this model calls for activating the interests, preferences, and concerns of all constituencies—provided they can directly or indirectly be communicated via the proxy mechanism—and presuming their concerns are channeled to the board of directors. The political action model aspires to supplant and, perhaps, replace the formal proxy challenge—a method it judges as inefficient, anachronistic, and extremist (Pound 1993; Monks & Minow 1991). Instead, this model proposes an analog of the "political action committee" to mobilize large and small shareholders. Governance structures and behaviors then shift from individual voting by disenfranchised shareholders to formal campaigns and lobbying from coalitions of organized shareholders.

Relational Governance Model

This model refers to the intent of activist institutions to monitor and, if needed, provoke change in the control structure of firms judged not to be honoring the primacy of maximizing the wealth of shareholders (Davis & Thompson 1994). Jensen (1993:867) pinpoints the value of vigilant institutions, noting:

> Active investors are important to a well-functioning governance system because they have the financial interest and independence to view firm management and policies in an unbiased way. They have the incentives to buck the system to correct problems early rather than late when the problems are obvious but difficult to correct.

Allowing large intermediaries to translate control of sizable blocks of debt and equity into direct say in matters of governance permits them to precede and, perhaps, preclude the opinions of smaller, disenfranchised shareholders. Absent special incentives that offset the costs of additional monitoring, institutions may not find it rational to engage in relational investing (Black 1994).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

As such, the relational governance model supplants the democratic principle of "one share, one vote" that defines the property model with a plutocratic ordering that grants bigger shareholders preferential access to the board (Jackson & Carter 1995).

Natural Entity Model

This model posits that the corporation is the creation of private initiative rather than state fiat; it calls for conceiving of the corporation as an extension of the individual or, in effect, a natural person (Hall 1989). The animating norm of governance takes its cue from the fact that through incorporation the company becomes a separate, legally recognized "person" responsible for its own acts and independent of the interests of its stakeholders (Hughes 1991). Thus, even if individual directors enter into a contract that they were unauthorized to sign, the other party to the contract can sue the corporation but not individual directors. Equating the notion of the corporation as the natural creation of private initiative dismisses any other characterization as artificial. So conceived, corporate property rights are an aggregation of individual property rights. The corporation is entitled to the same constitutional rights that society decrees are inalienable to natural persons—among them free expression, protection from illegal search and seizure, and due process (Hall 1989). Control structures take their cue from the premise that natural law protects the financial interests of shareholders from unique (i.e., unnatural) restrictions on their inalienable property rights (Horwitz 1985).

Contractarian Model

This neoclassical model sees the corporation as a convenient system of private ordering that serves as a contracting nexus for the atomistic rational maximizers in its direct realm of activity (Coase 1937; Easterbrook & Fischel 1991). Defined as a "nexus of contracts," the firm is then an artificial entity that has no authority that differs from that of ordinary market contracting between two individuals (Jensen & Meckling 1976). Rather, the firm symbolizes a system of property rights that defines a set of principal-agent relations and efficiently divides up claims to assets and residual cash flow. The notion of the firm as a "nexus of contracts" anticipates corporate constituents who contract freely with the parties that legally make up the corporate persona. Specifying the responsibilities, rewards, and rights of the principal and agent via contract better controls management misconduct than "vague" fiduciary duties. A contractarian mode benefits society by removing cumbersome legal and regulatory codes that in theory prevent market failures and transaction asymmetries but in practice aggravate agency costs and erode competi-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

tiveness (Jensen 1993). The compelling norm of wealth maximization impels the natural tendencies of a self-regulating market to define efficient governance structures and behaviors.

Contemporary Crisis in Corporation Governance

William T. Allen, Chancellor of the Chancery Court of Delaware, observed: "The tide has no doubt long run away from a world of hard and fast rules with predictable outcomes and toward some world in which it is common for courts to evaluate specific behavior in the light cast by broadly worded principles" (*Simons v. Cogan* 1987:791). After the tumultuous close of the takeover era, he noted that "there are unmistakable signs that we may be on the cusp of a new era in corporate law" (Allen 1990:2). Few envisioned the ensuing decline in governance.

Pound (1992:93), reflecting on the fallout of the takeover tumult of the 1980s, noted that "a popular and political uprising ended the hostile approach to governance . . . everyone involved now stands discredited to some degree. . . . The result is political and economic paralysis." For many reasons, directors were legally liberated from the proxy power of a like-minded majority of shareholders (Gilson & Kraakman 1991). Some evidence shows that greater authority diluted managerial accountability. Grundfest (1993), for example, warned of barbarians *inside* the gates pillaging corporate assets through both ineptness and opportunism. Monks and Minow (1991:15) wrote: "Corporations determine far more than any other institution the air we breathe, the quality of the water we drink, even where we live. Yet they are not accountable to anyone." Others asserted that the internal controls of publicly-held corporations were failing to compel managers to compensate themselves fairly (Bok 1993), optimize operational efficiency (Smith 1996), insure accountability (Roe 1994), or maximize shareholders' wealth (Jensen 1993). Corroborating anecdotes of management's abuses of power, impropriety, or dereliction of duty spotlighted the deteriorating system of governance (Monks & Minow 1996). Collectively, these flaws added another angle to Roll's (1986) "hubris hypothesis," fanned the "growing common perception that managers have become insufficiently accountable to shareholders" (Bishop 1994:3), and buttressed the assertion of "management as a self-perpetuating oligarchy" (Jackson & Carter 1995:884). In sum, Donaldson and Preston (1995:87) concluded that eroding governance structures signaled that "the conventional model of the corporation, in both legal and managerial forms, has failed to discipline self-serving managerial behavior."

Resolution remains elusive. The default option—reregulation of corporate behavior by government fiat—is a weak tonic (Jensen 1993). In the least, the intrinsic difficulties of national

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

chartering compounded by the opportunism of state legislatures biases regulation toward self-serving behavior (Easterbrook & Fischel 1991). Others outrightly dismiss political recourse; Monks and Minow (1996:15) assert that "the power of the corporation has advanced to the point of domination of the political process." The limit of government fiat has turned attention to other mechanisms, most notably, institutional investors as the agent positioned to reverse America's governance decline (Davis & Thompson 1994; Smith 1996). Some note, though, that political regulation (Romano 1993), agency distortions between control and liquidity (Coffee 1991), and philosophical concern about undue concentration of wealth and power (O'Barr, Conley, & Brancato 1992) constrain the latitude of institutional investors. Surveying this state of affairs, Millon (1993:1373) concludes: "We are in the midst of a crisis. It is a crisis of uncertainty over corporate law's normative foundations . . . . For too many people, the traditional shareholder primacy model has outlived its utility and now threatens important values. The crisis is here, and we should expect it to continue" (emphasis omitted).

Crisis also has academic overtones. In general, conceptions of governance—essentially, the structures and processes that monitor managers and govern corporations—are far-ranging. Scholars from several disciplines have developed an eclectic literature on philosophies of governance, features of control structures, and merits of monitoring mechanisms. Collectively, these works help us understand the relationship between who owns corporations, who controls them, and who plays in the arena. Moreover, each invokes a normative premise of accountability to frame interpretation of the boundaries of agency and ownership (Jensen 1993), internal control asymmetries (Williamson 1979), coexistence of ownership and control (Coffee 1991), or division of rights between the firm and society (Donaldson & Preston 1995). Within this context, we see interdisciplinary agreement that the task of governance is managing and stabilizing interdependencies—whether we define the link in terms of owners, agents, stakeholders, government, society—in ways that ensure accountability.

So far, philosophical accord has not inspired conceptual congruence. Certainly, we see in particular disciplines the signs of a unified theory of governance structures and behaviors—for example, finance and its agency cost perspective, transactional economics and notions of contractarianism, social theory and communitarian ideals. Across disciplines, though, different normative codes translate into different explanations. For example, economics advocates an efficiency-based conception of control and a doctrine of shareholder wealth maximization (Jensen 1993) while sociolegalists advocate political and social explanations that emphasize an organization's embeddedness in realistic

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

social contexts (O'Barr et al. 1992; Roe 1994; Jackson & Carter 1995). Furthermore, various scholars assert that dissimilar constructs—such as agency costs (Easterbrook & Fischel 1991), transaction costs (Williamson 1979), power relations (Donaldson & Preston 1995), or institutional legitimacy (Davis & Thompson 1994)—ought to ground our conception of governance.

Variously conceived, each perspective's ensuing framing of governance structures and behaviors in terms of its particularistic concept of control inspires competing interpretations.[3] Rather than leading to a consensus, theoretical pluralism aggravates the current crisis precisely because "excessive theoretical compartmentalization . . . [makes it] easy to lose sight of the ways in which various schools of thought are related to each other" (Astley & Van de Ven 1983:245). Evidence of this dilemma is already apparent. Fligstein and Freeland (1995) assert that pluralism in the governance literature has hampered synthesizing an integrative concept to frame inquiry, contextualize debate, and blend reports. The practical fallout of our fragmented understanding is also evident—Johnson, Daily, and Ellstrand (1996: 409), for instance, note that while we know much about directorial responsibilities, we understand little given that the "extensive body of research on corporate boards has failed to generate a specific role for directors or a specific definition of a board."

At present, crisis in governance stalls the emergence of a touchstone philosophy—debate plays across legal, economic, strategic, and institutional disciplines about the merits and deficiencies of segregated models. Still, our principal thesis here is that resolution is conceivable in the normative terms of one of the seven governance models listed in Table 1. We develop this

[3] Some may contend that incompatibility among discipline-based orthodoxies is temporal. We concede the inevitability of transitional snags given that the virtue of a paradigm is also its vice, namely, the difficulty adherents have in imagining or even acknowledging an alternative view. Integration, though, is hampered precisely because various governance orthodoxies inspire a wide-ranging medley of metaphors of inquiry. For example, some scholars propose making sense of governance structures and control behaviors by reapplying traditional semiotic filters such as "transparency" (Cannon 1992), "investor capitalism" (Useem 1996), "fiduciary capitalism" (Hawley & Williams 1996), or "governed corporation" (Pound 1995). Others call for radical reinterpretations via postmodernist metaphors such as "organizational chiaroscuro" (Jackson & Carter 1995), "governmentality" (Gordon 1991), "institutional activism" (Smith 1996), "morality play" (Hirsch 1986), "venture capital governance" (Jensen 1993), "who watches the watchers" (Millstein 1993), or "phony governance" (Monks & Minow 1996). The choice of semiotic filter matters acutely in that a metaphor is the intellectual means to the theoretical end. That is, Palmer and Dunford (1996) reasoned that the dissimilar ontological and epistemological assumptions of different metaphors, if unchallenged, inspire competing and contradictory images. Tinker (1986:364) adds that the uncritical use of multiple metaphors leads to "political voluntarism" due to each advocate's misunderstanding of the "ideological roots of metaphor." He adds that the "promiscuous use of metaphors" (a situation we see in the governance area) hampers developing useful understandings (p. 367). The breadth and variance of perspectives foreshadow proliferating interpretations of governance; in times of stability, an acceptable correlate, in times of crises, a dividing point (Palmer & Dunford 1996).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

thesis by anchoring our analyses in the institutional context and historical record of the Chancery Court of Delaware.

The Court of Chancery

Delaware is the legal home to more than 300,000 corporations, including half of the firms listed on the New York Stock Exchange and most of the Fortune 500. As a result, legal rulings from Delaware's Court of Chancery carry considerable clout because they establish precedents that most large corporations must follow. As a result of the large body of case law that the Chancery has produced over the last two centuries, and because so many organizations are incorporated in Delaware, the stature of the Chancery is unrivaled in matters of corporate governance. Consider that the *New York Times* (Henriques 1995a) declared the Chancery Court "the chief arbiter of right and wrong in corporate America." Marvin Chirelstien, professor of law at Columbia University, noted that Delaware "is the most important base of corporate law in the country, exceeding even the Supreme Court. It's the author of corporate jurisprudence for the country, and in many ways, for the world" (Gruson 1986). Distefano and Chrzanowski (1996:1) echoed this sentiment with their report that "other states—in some cases, entire countries—base their business laws on those of Delaware." Alva (1990) notes that federal and state courts plus prominent law journals often cite Chancery case law. Romano (1987:722) notes that in addition to Delaware's usually being the first state to adopt innovations in corporation law, the Chancery represents a "store of legal precedents forming a comprehensive body of law." As such, the scope of the Chancery's influence broadens (Drexler, Black, & Sparks 1995).

Historical Development of the Chancery

Berger and Luckman (1966:54–55) note: "It is impossible to understand an institution adequately without an understanding of the historical processes in which it was produced." We adopt this view and note that critical events in 1792, 1898, and 1915 partly explain the great influence the Chancery has today in matters of corporation law. In 1792 the ratification of the state's second constitution established a separate Court of Chancery modeled on the High Court of Chancery in Britain that had existed in England during medieval times. To this day, the Chancery's origin connotes elements of feudal English equity jurisprudence and the ecclesiastical courts of the English monarchy; it is in direct line of succession from its British predecessor. Principally, the Chancery is a court of equity rather than a court of law; its mandate is not to determine the legality of an action but to

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

settle fairly disputes involving property between two parties that are unexplained by existing laws or statutes. This mandate grants the Chancery jurisdiction over corporate disputes, trusts and estates, other fiduciary matters, disputes involving the sale of land, questions of title to real estate, and commercial and contractual matters in general.

DiMaggio (1988:14), addressing the issue of institutional origins, notes that "new institutions arise when organized actors with sufficient resources (*institutional entrepreneurs*) see in them an opportunity to realize interests that they value highly." In 1898, the Delaware legislature fashioned the General Corporation Law (GCL) as a lure for incorporations. At the time, Delaware's GCL was largely copied from New Jersey's law and was designed to trigger corporate migration to Delaware. Then and now, Delaware's GCL codified the form, principles, and procedures of governance in a corporation. Since 1898, the Delaware legislature has fine-tuned the GCL in ways that make it at least as beneficial for businesses to incorporate in Delaware as in any other jurisdiction. The GCL's stipulations on matters of ownership entitlements, directorial duties, administrative protocols, and points of responsibilities give it sway over most, if not all, other codes. For instance, Alva (1990:889) notes that the "General Corporation Law of Delaware is the most important corporation law in the United States . . . [it] not only governs the affairs of important corporations incorporated in Delaware, it also serves as a nearly irresistible innovator, competitor, and model for the corporate codes governing many of the remaining corporations."

In 1913, under the leadership of Governor Woodrow Wilson, New Jersey censured the rights of corporations. Tensions turned toxic in 1915 when New Jersey amended a series of restrictive amendments to its GCL. In retaliation, many corporations skipped state, crossing the Delaware River to reincorporate under the more benign Delaware GCL. Within two years, Delaware was the corporate home of most of the nation's largest businesses. Since then, its status as the "Hometown of Corporate America" has only solidified.

The connection between the economic, political, and procedural contexts and the stature of the Chancery is complex and enveloping. The catalyst for this system is the Chancery Court and its 200-plus years of case law (Massey 1992). The breadth and depth of Delaware corporate case law goes further than any other state's toward meeting corporations' need for certainty and predictability (Romano 1987; Drexler et al. 1995). That is, corporate actors need to know with reasonable precision whether particular actions are likely to create legal liabilities and, if so, the magnitude of such liabilities. The need for certainty and predictability is magnified by the fact that many corporate transactions

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

often involve planning for a long period and include many interdependent elements. Organization theorists emphasize the importance to management of reducing uncertainty by controlling or managing elements of the external environment, such as the legal environment. More profoundly, Delaware's case law serves, in terms of Scott and Meyer's (1994) institutional framework, as the "constitutive rules" of institutionalization; this body of case law defines the nature of actors and their capacity for actions. More pointedly, the cumulative structure of this case law activates the institutionalization process that represents the "reciprocal typification of habitualized actions by types of actors" (Berger & Luckman 1966:54). Delaware's repository of case law gives individuals and corporations useful benchmarks to gauge possible liability with a high degree of certainty.

In principle, North (1990:4) reasoned that institutions are fundamentally regulatory systems that set the "rules of the game." In practice, the Court of Chancery meets this mandate by clarifying the standards of precedents and creating principles for emergent governance behaviors with respect to the authority, responsibilities, and accountability of the corporation. The Chancery's activist conception and expression of how actors will and should act shapes the "normative rules" of the institution (Scott 1995). The Chancery sets rules through a unique process. The presiding chancellor fashions relief to novel disputes based on his or her interpretation of the case facts and corporation law. Today, as was chancery practice in medieval England, there are no juries.

The Authority of the Chancery

The act of incorporation makes Delaware the corporation's legal domicile because a state's GCL defines the corporation form and therefore defines the standards to evaluate the legality of its configuration, policies, and actions. As such, the legality of the internal affairs of a company incorporated in Delaware is subject to the state's standards of proper conduct as specified in the GCL and to the interpretation of breaches by the Chancery. On this theme, Chancellor Allen (1990:3) explained, "It is the corporate law that governs the inner-workings of corporations and thus it is corporation law that legitimizes and limits the exercise of power within the corporation." Consequently, the Chancery has direct legal authority over the equity affairs of the thousands of corporations domiciled in Delaware and, owing to the scale and scope of this cohort, indirect influence over nearly all others (Alva 1990).[4] Attempts to end-run Delaware's jurisdiction are fu-

[4] Alva (1992:889) has written:

> Because of Delaware's market dominance, the General Corporation Law of Delaware controls the internal affairs of thousands of corporations, including more than half of the 500 largest industrial firms in the United States. This

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

tile. The "internal affairs doctrine" stipulates that the state that had created the corporation be the only state whose law governs the relationships among the corporate entity, directors, officers, and stockholders (*Rosenmiller v. Bordes* 1991).

Current circumstances amplify the authority of the Chancery in that the task of resolving the governance crisis is falling on the judicial system. Easterbrook and Fischel (1991) assert that the recent failure of markets and other contract processes justifies setting governance protocols via legislative statutes or judicial decrees. They discount regulation by statute, asserting that the "race to the bottom" biases states' corporation law toward satisficing rather than toward optimizing the interests of society. Likewise, Jensen (1993) concluded that the demise, delay, or diffusion in takeovers, product markets, or regulation means that the only available governance structure is internal control systems, the conduct of which most courts immediately moderate. We believe, as the *New York Times* pointed out (Henriques 1995a), that the focal point of judicial scrutiny of corporate right and wrong has been, is, and will continue to be the Chancery Court of Delaware.

Research Methodology

We began this project by interviewing people who were knowledgeable about the Chancery Court. These contacts included officials of the Chancery (e.g., chancellors, the Master in Chancery, the court's Registrar and Deputy Registrar, etc.), as well as others whose work intersected with the court (members of the Delaware bar, affiliates of the Historical Society for the Court of Chancery, and local and national journalists). We then surveyed several archives to identify precedential cases. Various literatures, particularly that of corporation law, scrutinize Chancery opinions and their influence on governance norms and practices. The *Delaware Journal of Corporate Law* is notably active and insightful on identifying and analyzing precedential opinions (see, e.g., Alva 1990; Massey 1992: Fink 1995; Clark 1995; Stilson 1995; Werkheiser 1995, 1996; Taylor 1996; Van der Weide 1996 for extended discussion of Chancery case law). Another valuable source outlining important opinions through history was an essay

makes the General Corporation Law of Delaware the most important corporation law in the United States. In addition, market forces work to make Delaware's importance even greater. The other states must compete with Delaware in the charter and current market shares (and the revenues attending those shares). If Delaware adopts a provision that makes its corporate legal environment relatively more attractive to corporations, then the other states must adopt the same or similar provisions. Thus, the Delaware General Corporation Law not only governs the affairs of important corporations incorporated in Delaware, it also serves as a nearly irresistible innovator, competitor, and model for the corporate codes governing many of the remaining corporations.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

published by the Historical Society for the Court of Chancery to commemorate the court's bicentennial (Quillen & Hanrahan 1992). In addition, the *New York Times,* the *Wall Street Journal,* and the *Economist* report pivotal Chancery opinions. Together, primary and archival research identified the "landmark" Chancery Court opinions to which this essay refers.

The Role of the Chancery in Past Episodes of Crisis

The current crisis in corporate governance is not without precedent. Analogous crises unfolded in the mid-18th century, the 1930s, and the 1960s. Review of the historical record suggests that at these crisis points, the Chancery's deliberations were leading indicators of the ensuing governance paradigm. We are quick to concede that the Chancery did not create the ensuing paradigm. Rather, its institutional stature gave its rulings compelling sway over emergent governance structures and behaviors. Simply put, the procedures of review, principles of opinions, and standards of redress adopted by the Chancery at each juncture sanctioned emergent governance norms. As history played out, these norms shaped the analysis, debate, and review of the principles of governance in the corresponding era.

Episode One: The Mid-1800s and the Emergence of the Natural Entity Model

During the colonial era, the ideals of the body politic governed the affairs of public corporations. Philosophical prejudice against concentrated power led to subordinating the economic rights of individuals to the welfare of the community. The task of striking a meaningful balance fell onto the state, whose authority followed from its original sanction of a corporation's charter. Government, at the time, was seen as a social good. Hall (1989:39) noted that "the colonists did not believe that government that governs least governs best." In short, the colonial period put into play a communitarian model of governance that grounded the corporation in the moral order of the community (see first column, Table 1). Put simply, the interests of directors, shareholders, and stakeholders coincided.

By the mid-1880s, the communitarian outlook gave way to a period in which government set out to foster business growth. Officials' use of legislative fiat not just to apply but to make law led to "classicism as economic doctrine gradually merged into classicism as legal and constitutional philosophy" (Hovenkamp 1991:2). Noble intention coupled with opportunistic behaviors transformed the corporate charter. Instead of the earlier quasi-public obligation to exalt community welfare, a charter became a vehicle to create personal wealth (Hall 1989). This change led to

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

reconceiving the notion of property and its control as an inalienable right of individual liberty that fell beyond legal review (Friedman 1985). The emergent liberal-utilitarian bent of corporation law legally authorized corporate raiders to launch hostile acquisition and proxy challenges (Pound 1993). So rampant were these techniques that, contrary to popular belief, the sobriquet "corporate raider" became part of the business lexicon some 130 years before the world knew of Michael Milken, Ivan Boesky, and their fellow rogues. The novelty of corporation formats enabled early raiders to launch hostile tender offers, buy sympathetic blocks of stocks, sweep the street of unaffiliated stock, and conduct aggressive proxy contests. Incumbent managers experimented with defensive measures. Often, managers abruptly changed the incorporation charter or appealed to (and sometimes bribed) state legislatures for specialized protection through such measures as dilutive stock manipulations or retroactive revision of shareholder rights. Against this backdrop, state officials crafted diverse, often contradictory, menus of corporation law to entice incorporations (Quillen & Hanrahan 1992). Ostensibly risk neutral, such revisions often were of dubious integrity, which endangered the interests of the community. As Ballam (1993:633) explained, "in the nineteenth century individual rights were often sacrificed in order to protect, promote, and in effect to subsidize business development." Populist anger about emerging for-profit monopolies fanned cries to restore the defunct communitarian paradigm. Nevertheless, loud claims for the importance of capital formation and economic growth drowned out these pleas.

Against this backdrop, the task of the courts was to deal with the effects and aftermath of nefarious incorporation bylaws and unlawful hostile takeovers by clarifying directorial duties, ownership rights, and legal protocols. During this era the Chancery developed a body of case law that shifted the context of judicial review away from communitarian ideals and toward individual liberty (see Table 2 for illustrative cases). In so doing, the Chancery affirmed the ascension of the natural entity model of governance and its stipulation that a corporation is the creation of private initiative rather than state fiat (see Table 1, sixth column). Defining corporate property rights as aggregated individual property rights required granting the corporation the same constitutional rights and responsibilities that society decrees are inalienable to natural persons. Chancery rulings condoned this change; for instance, in the matter of *McClary v. Reznor* (1870), the Chancery sanctioned a crucial transition in the basis of judicial action in governance disputes. Prior to this ruling, the shareholder who believed that someone had taken advantage of his or her weaker position (through personal, positional, or informational asymmetries) had the right to seek relief on the basis of

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

"just price" theory. This theory, a communitarian policy adopted in the colonial era to ensure social stability, had retarded the acceptance of caveat emptor. *McClary v. Reznor* reversed this doctrine. It accorded primacy to "will theory," thereby subordinating the fairness of the terms of contracts to the issue of whether there had been a candid "meeting of the minds" by the parties. Other Chancery rulings, by legalizing private incorporations, instituting shareholder protection, delineating fairness principles, and limiting shareholders' potential liability, further sanctioned the natural entity model (see Table 2).

The natural entity model was not without detractors. An 1877 editorial in the *New York Times* relays a sense of the concern:

> The old relations between directors and stockholders, between managers and the public, exist no longer. . . . The powers incident to a directorship are used most frequently for the furtherance of interests . . . which indeed, are often antagonistic to shareholders' interests. . . . Directors may shun as a lunatic a man who arises at a meeting, or avails himself of a seat at a board, to remind them that they are simply trustees for others, that they have no right to lock-up secrets or to do anything not consistent with a fiduciary position; but unless they learn the lesson from somebody, and act on it, they will look in vain for the confidence which is essential to the renewal of corporate prosperity.

Mostly, these warnings fell on deaf ears (Nelson 1959). The nation and the Chancery linked economic growth and corporate prosperity to a governance system that encouraged liberty.

Episode Two: The Early 1930s and the Property Model

The natural entity model catalyzed corporate formation and growth. As the *New York Times* foreshadowed, it also enabled distortions. The concentration of capital in liberally governed large concerns aggravated disequilibrium in capital markets (Pound 1993), diluted the protections of the Sherman Antitrust Act (Hovenkamp 1991), and increased merger and acquisition activity (Chandler 1977). Conglomeration, often rushed by robber barons, changed the commercial landscape as firms were absorbed, crushed, or ruined (Nelson 1959). These conditions culminated in the stock market crash of 1929.

Investigation of the market collapse revealed corporate abuse of the body politic and a governance ethic lacking concern for the community. Individual liberty, perhaps best depicted in the libertine profligacy of F. Scott Fitzgerald's *Great Gatsby,* subordinated the ideal of collective justice. Interestingly, Fitzgerald's later novel *Tender Is the Night* voiced this mistrust, musing, "Either you think—or else others have to think for you and take power from you, pervert and discipline your natural tastes, civi-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 2. The Legitimation of the Natural Entity Model of Corporate Governance: Leading Rulings from the Chancery Court of Delaware

Ruling	Date	Opinion
Richards v. Seal, 3 Del. Ch. 266	1861	A lack of diligence, and not merely active default, can be construed as a breach of trust. Presaged the "duty of due care" now imposed on directors.
McClary v. Reznor, 3 Del. Ch. 445	1870	A fiduciary relationship between parties creates an inviolate duty to disclose all pertinent information, especially when the information might influence the decision of the other party. Outlined the "duty of candor" directors owe to shareholders.
Sparks v. Farmers Bank, 3 Del. Ch. 274	1869	The failure to elect officers does not dissolve or otherwise affect the corporation.
Colbert v. Sutton, 5 Del. Ch. 294	1880	"A receiver is an officer of the court" and are required to act not on the behalf the interests of the corporation but those of all interested parties; stock certificates only represent evidence of title to stock.
Allen v. Stewart, 7 Del. Ch. 287	1895	Enjoined the sale of attached stock as the judgment of the creditor transfer to a third party was effective even if not formally noted in the company's books.
Lieberman v. First Nat'l Bank, 8 Del. Ch. 229, 40 A. 382	1898	Ruled on matters of agency, reasonable reliance in fraud, and the effects of alleged negligence in supervision.
Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 A. 805	1911	Established a board of directors' scope of formal authority by extended statutory power to appoint a receiver.
Ellis v. Penn Beef Co., 80 A. 804	1911	Set the context for a board of directors position vis-à-vis pre-suit demands by shareholders.
Cahall v. Lofland, 114 A. 224	1911	The duty of a corporation's management to provide information to shareholders was largely measured by a fraud standard—namely, a duty not to deceive or affirmatively mislead.
Walter v. Peninsula Cutstone Co., 9 Del. Ch. 348, 82 A. 689	1912	Dealt with the degree of liability of a board of directors.
Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 A. 612	1913	Disregards the corporate entity in the event of a fraud or illegality.
In re Gulla, 115 A. 317	1921	The Chancery ruled that "the fitness or unfitness of individuals to become directors of the corporate [is] a matter for the stockholders . . . and it would be highly improper for the court to pay any heed whatever to charges and counter-charges concerning the fitness of either one group or the other of two factions."

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

lize and sterilize you." In 1940, then SEC Chairman William O. Douglas relayed the distrust of corporate titans, noting:

> In the eyes of high finance, business becomes pieces of paper—mere conglomerations of stocks, bonds, notes, debentures. Transportation, manufacture, distribution, investment become not vital processes in economic society but channels of money which can be diverted and appropriated by those in control. . . . For such reasons one of the chief characteristics of such finance has been its inhumanity, its disregard of social and human values. (P. 9)

The pervasiveness of managerial misconduct taxed society's faith in the citizenship ethic of companies. The depth of cynicism catalyzed populist mistrust of "financiers" and "Wall Street" and, ultimately, the natural entity model (Roe 1994). Government officials used this mandate to attenuate financial institutions' capacity to pyramid holding companies and aggregate common stock into powerful voting trusts. Soon, a battery of policies breached this nexus of contacts, thereby preempting financial intermediaries' direct involvement in the governance of corporations.

Building walls between financial intermediaries and corporations halted blatant abuse. Repairing the damaged agent-principal relationship required reconceiving the norms of governance in proactive, ennobling terms. Amid the Great Depression emerged governance norms that, simply put, echoed the norms of democratic capitalism: shareholders, like voters, had inalienable and preemptive claim to fair representation, candid disclosure, and clear accountability. In other words, safeguarding small, faceless shareholders from potential directorial self-dealings requires empowering them with ultimate authority to contest and change their agents. Against this backdrop, Berle and Means (1932) reconceived the norms of governance in terms of the principle that the corporation's property is the property of the shareholders and "it is unquestionably on their behalf that the directors are bound to act. . . . Managerial powers are held in trust for stockholders as sole beneficiaries of the corporate enterprise" (Dodd 1932:1147). Animating shareholders' authority, Berle and Means added, is their inalienable and inviolate right to elect a board of directors that is composed of diligent and dutiful agents.

Berle and Means's governance scheme, later designated the property model, resonated with prevailing sociolegal attitudes. Moreover, as had the natural entity model in the mid-1800s, the property model drew support from Chancery opinions. Eventually, the compelling consistency of this body of case law affirmed the supremacy of shareholders and sanctioned the property model (see Table 3 for illustrative cases). For example, reasserting the inalienable right of shareholders to monitor their agents,

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

the crux of the preceding collapse of governance, led the court to rule in *McKee* (1931:193) that shareholders had the right to file a derivative suit without prior demand on directors "when it is apparent that a demand would be futile, [because] the officers are under an influence that sterilizes [their] discretion and could not be proper persons to conduct the litigation." Concurrent disputes involving questions of business judgment (*Eshman v. Keenan* 1935), conflict of interest (*Guth v. Loft*, 1938), ownership (*Millstein v. Arcade Cafeteria* 1938), statutory authority (*Ringling v. Ringling Bros.* 1946), fraud (*Brophy v. Cities Services Co.* 1949), and fairness (*Bennett v. Breuil Petroleum Co.* 1953) animated the property model (see Table 3). Empowered with the force of law, shareholders contested errant agents—Drexler et al. (1995:1–8) reported: "The 1930's and 40's saw the flowering of the stockholder derivative suit as the procedural method for obtaining judicial review of allegedly improper management activity." Throughout these deliberations, the touchstone of judicial review was unequivocal: the corporation's property is the property of the shareholders. As Chancellor Allen reflected in the matter of *Blasius Industries v. Atlas Corp.* (1987:659), "the shareholder franchise is the ideological underpinning upon which the legitimacy of directorial power rests. Delaware courts have long exercised a most sensitive and protective regard for the free and effective exercise of voting rights."

A mark of a dominant intellectual paradigm is the difficulty of imagining an alternate. The court's steadfast affirmation of the property model inspired intellectual surrender. By the late 1950s, the supremacy of the property model had so thoroughly precluded discussion of other governance models that Manning (1962:245) dourly noted that "corporation law, as a field of intellectual effort, is dead in the United States."

Episode Three: The Early 1960s and the Contractarian Model

By the early 1960s, some were imagining an alternate to the property model. Framing debate was sentiment that proxy contests are "the most expensive, the most uncertain, and the least used of the various techniques" available for changing corporate control (Manne 1965:114). Some scholars proposed that takeovers, hostile if necessary, were the most efficient mechanisms to discipline intractable agency costs. Pound (1993:1016), for example, reported that "by 1963, it was becoming clear that the cash tender offer was replacing the proxy contest as the vehicle of choice for active 'raider' investors." The fading relevance of the proxy challenge, by weakening the animating norm of the property model, threw into question that model of governance.

The Chancery's rulings from the 1960s onward dealt with this crisis by recasting legal standards in themes that legitimated capi-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 3. The Legitimation of the Property Model of Corporate Governance: Leading Rulings from Chancery Court of Delaware

Ruling	Date	Ruling
Eshman v. Keenan, 181 A.2d 655	1935	Management fraud cannot be ratified by a majority of shareholders.
Millstein v. Arcade Cafeteria, 2 A.2d 158	1938	A shareholder's motive in bringing derivative litigation was irrelevant.
Guth v. Loth, Inc., 5 A.2d 503	1938	Specification of managements' fiduciary duties of care and loyalty.
Blair v. F. H. Smith Co., 156 A. 207	1941	A stockholder need not have been a stockholder at the time of the alleged wrong by the company to file an action.
Ringling v. Ringling Bros., 49 A.2d 603, 29 Del. Ch. 318	1946	Reiterated the right of shareholders to vote via proxy.
Brophy v. Cities Services Co., 70 A.2d 5	1949	Reaffirmed the sanctity of agency theory by ruling against insider trading. Moreover, the insider who acted opportunistically could be compelled to return to his or her corporation all the profits derived from such activity.
Bennett v. Breuil Petroleum Corp., 99 A.2d 236	1953	An action that grants rights to minority shareholders to offset abuse by majority shareholders.
Campbell v. Loew's Int'l, 134 A.2d 852	1957	Shareholders have the innate power to remove a director for cause.

tal markets as a mode of contestability. Absent the volatility of the Great Depression along with the residual pull of the property model, this series of rulings unfolded gradually. Nonetheless, the Chancery's opinions again affirmed the context for analysis, debate, and review of governance norms. For example, in the matter of *Trans World Airline v. State* (1962), the Chancery revised shareholders' rights to inspect the books and records of a corporation in ways that began setting the stage for takeover battles. Consider that *Fletcher's Cyclopedia of the Law of Private Corporations* (1987:379–80 n. 4) cites *Trans World Airline* for instituting the standard that "stockholders may inspect stockholders' lists for the purpose of informing fellow stockholders concerning suits which they have brought to ascertain whether any of them desire to join such action." Similarly, the landmark ruling in *Schnell v. Chris-Craft Industries* (1971) cut to the core of directors' position with regard to the shareholder franchise. The dispute in question involved the effort of the management of Chris-Craft to "entrench itself in office by impeding shareholder suffrage." In the opinion (1971:439), the Chancery held:

> Management has attempted to utilize the corporate machinery and the Delaware Law for the purpose of perpetuating itself in office; and to that end, for the purpose of obstructing the legiti-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

> mate effort of dissident stockholders in the exercise of their rights to undertake a proxy context against management. These are inequitable purposes, contrary to established principles of corporate democracy.

So ruled, the Court reaffirmed that stock ownership confers the inviolate right to make decisions about who is to control the corporation. Shareholders, empowered by this and related rulings, were able to launch waves of takeovers that management was no longer able to deter through self-serving manipulations (see Table 4 for illustrative cases).

As had the property model, the force of takeovers soon muted discussion of other governance models. Jensen (1993), for instance, noted that the swift primacy of capital markets made governance via internal control moot—by the time such controls had engaged to check managerial oversight, capital markets had already pressed the corporation to self-correct. More significantly, the success of mergers and acquisitions ushered in the contractarian model of governance (see Table 1, seventh column). Defining corporations in terms of a "nexus of contracts" let corporate constituents contract freely with the parties that legally made up the corporate persona. Clearly delineating the rights, expectations, and responsibilities of these parties via contract better controlled management misconduct than did the vague list of fiduciary duties of the property model. Conceivably, society would benefit from the removal of cumbersome legal and regulatory codes that, in theory, corrected market failures and transaction asymmetries yet, in practice, aggravated agency costs and eroded competitiveness. Released from statutory shackles, the compelling norm of wealth maximization would impel the natural tendencies of a self-regulating market.

Chancery case law supported the contractarian model by balancing the rights of agents and owners without distorting fiduciary duties or the efficient allocation of resources. Largely, the Chancery was effective. Bratton (1992:180) notes that "by the time the takeover market became white-hot in 1984 and 1985, a 'contract paradigm' had taken its place." Jensen (1993) adds that the discipline of capital markets pushed executives to maximize shareholder wealth so as not to attract the attention of unsolicited suitors. Consequently, takeovers were the most efficient remedy for intractable agency costs. The contractarian model of governance, however, had unintended outcomes.

The relaxation of fiduciary strictures inspired a variety of nefarious behaviors. Managers and raiders alike subverted shareholder democracy through such esoteric means as supervoting stock, poison pills, classified boards, lock-ups, leg-ups, creeping takeovers, bear hugs, white knights, white squires, black knights, preclusive defenses, selective stock buyouts, stock options, greenmail, crown jewel sales, auctions, and self-tenders. Whatever the

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

preferred method, the outcomes reduced shareholders' influence, abused their trust, and usurped their rights. Conveying the ire of the day was the reflection of the director of the New Jersey state retirees' fund: "You had CEOs selling companies to themselves and paying themselves $30 million in finders fees. These people don't give a damn about the shareholders" (Sweeny 1993:38).

A quick series of Chancery rulings in the mid-1980s (e.g., *Smith v. Van Gorkom* 1985; *Unocal v. Mesa Petroleum* 1985; *A C Acquisition v. Anderson Clayton* 1986; *Revlon v. MacAndrews & Forbes Holdings* 1986; *Blasius Industries v. Atlas* 1987; and *City Capital Associates v. Interco* 1988) subdued the excesses of contractarianism. This burst of case law recast shareholders' rights in ways that restricted directors' authority to act or, as some noted, to "leap before looking." The proclamation of the primacy of shareholders coupled with the reaffirmation of their inviolate right to exercise it via proxy stunned the corporate bar. Drexler et al. (1995:15–32), for example, noted that the "*Van Gorkom* opinion sent shock waves through the corporate world. Its result was viewed by some as a harbinger of a far too meticulous judicial standard for directorial responsibility applied in hindsight." More poignantly, Hirsch (1986) notes that this revision of governance norms changed corporate control battles from a straightforward clash between agents of good and evil to a cryptic "morality play." Overall, this cluster of opinions and their suggestion of a revitalized property model prompted Wachtell, Lipton, Rosen & Katz to advise their corporate clients to depart Delaware and reincorporate elsewhere (Labaton 1989).

On 14 July 1989 the Chancery ruling in *Paramount Communications v. Time Inc.* (1990) revoked the nascent restoration of the property model. The Chancery allowed Time's directors to reject Paramount's acquisition offer, even though it maximized shareholders' financial return. In strict economics, Paramount's offer clearly benefited Time's shareholders by offering a premium buyout price. However, Time was allowed unprecedented latitude to evade the primacy of shareholders on the basis of its board's justification that the proposed merger with Warner Communications better executed Time's long-term strategy than would a merger with Paramount, the hostile bidder. Essentially, Time argued that its business strategy, of which the pending merger with Warner was an instrumental component, would yield greater value for shareholders over the long term than Paramount's proposed cash-out share price. Chancellor Allen explained in the opinion:

> The financial vitality of the corporation and the value of the company's shares is in the hands of the directors and managers of the firm. The corporation law does not operate on the theory that directors, in exercising their powers to manage the

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 4. The Legitimation of the Contractarian Model of Corporate Governance: Leading Rulings from the Chancery Court

Ruling	Date	Opinion
Trans World Airline v. State, 183 A.2d 174	1962	Guaranteed the right to obtain stockholder information by inspecting the books and records of the corporation for the solicitation of other shareholders to affect litigation in which the corporation is currently involved.
Hariton v. Arco Electronics, 188 A.2d 22	1962	Rejected the assertion that a company's sale of assets for stock of the purchaser, when followed by liquidation and pro rata distribution of that stock to shareholders, was a merger with the buyer.
Orzeck v. Englehart, 195 A.2d 375	1963	Acquisition of all of the stock of another corporation constituted a merger.
Wolfensohn v. Madison Fund, 253 A.2d 72	1969	Creation of a holding company by an exchange of an operation company's shares for the shares of a new parent company was an unlawful reorganization that usurped its creditors' rights.
Schnell v. Chris-Craft Indus., 85 A.2d 437	1971	Considered petition of stockholders for injunction to prevent management from advancing date of annual shareholders' meeting in order to serve self-interested end. Affirmed directors' duty of obedience to shareholders.
Katz v. Plant Indus., Civil Action, 6,407	1981	Reversal of *Eshman v. Keenan* (1935) and *Millstein v. Arcade Cafeteria* (1938).
Weinberger v. UOP, Inc., 457 A.2d 701	1983	Discussing elimination of minority shareholders via merger between corporation and its majority owners.
Pogostin v. Rice, 480 A.2d 619	1984	Ruled that the business judgment rule is available to management even when responding to takeover attempts.
Rothschild Int'l Corp. v. Liggett Group, 474 A.2d 133	1985	A cashout merger was a liquidation.
Edelman v. Phillips Petroleum Co., Civil Action 7,899	1985	A recapitalization was an unauthorized redemption of common stock.
Lewis v. Aronson, Civil Action 6,919	1985	Constrained managements' use of corporate assets, by regulating golden parachutes, and corporate waste, respectively.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 4—Continued

Ruling	Date	Opinion
Unocal v. Mesa Petroleum Co., 493 A.2d 946	1985	A board must act in a fashion that is reasonable in relation to the threat posed when responding to a hostile tender offer. *Unocal* echoed *Smith v. Van Gorkom* (1985) by stipulating that a board must act in a way that is reasonable in relation to the threat posed when responding to a hostile tender offer.
Smith v. Van Gorkom, 488 A.2d 858	1985	This opinion rocked corporate America by holding that directors must act in a prudent and informed manner and cannot escape liability by relying on the poor judgment of co-directors.
Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173; A C Acquisition Corp. v. Anderson Clayton & Co., 519 A.2d 103; Ivanhoe Partners v. Newmont Min. Corp., 533 A.2d 585	1986	This set of cases recast standards of disclosure, fair dealing, and fair price in ways that fortified the shareholder franchise by restricting directors' authority to act unilaterally or, in the parlance of the day, to "leap before looking."
Blasius Indus. v. Atlas Corp., 564 A.2d 651	1987	Affirmed the sanctity of a shareholders' proxy challenge to contest the autonomy of executives to manage the corporation. This matter crowned this burst of case law by cutting to the elemental issue of shareholder primacy: the right of shareholders to contest via proxy contest the autonomy of executives to manage the corporation. Chancellor Allen wrote in *Blasius* p. 662), "the theory of our corporate law confers power upon directors as the agents of the shareholders; it does not create Platonic masters." Massey (1992:779) surmised, "In *Blasius,* Allen gave a ringing and bold endorsement to the role of shareholder voting in legitimating the board of directors' exercise of authority over property they do not own."
City Capital Associates v. Interco, Civil Action 10,105	1988	A board of directors was not justified in refusing to redeem rights at the end of an auction where the final bids were so close that neither was demonstrably superior.
Paramount Communications v. Time Inc., 571 A.2d 1140	1989	A majority of like-minded shareholders are not necessarily right and, moreover, directors have the authority to take actions that could conceivably limit shareholders' choice.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

> firm, are obligated to follow the wishes of a majority of shares. In fact, directors, not shareholders, are charged with the duty to manage the firm. . . . That many, presumably most, shareholders would prefer the board to do otherwise than it has done does not afford a basis to interfere with the effectuation of the board's business judgement . . . absent a limited set of circumstances as defined under Revlon, a board of directors, while always required to act in an informed manner, is not under any per se duty to maximize shareholder value in the short term, even in the context of a takeover. (Slip Opinion in *Paramount Communications v. Time* 1989).

Paramount's appeal to the Delaware Supreme Court was denied. This ruling, in effect held that the Chancery's opinion and the Delaware Supreme Court's affirmation of *Time* suggested that a majority of like-minded shareholders are not necessarily right, and moreover, directors have the authority to take actions that conceivably limit shareholders' choice. In that these two outcomes reject the underpinnings of the property model, the Chancery halted that model's fledgling reemergence. Michael Klein (Klein et al. 1990:35), lead counsel for major plaintiffs in *Paramount Communications v. Time* (1990), reasoned: "What's heinous about this case is the manipulation of the corporate machinery by the directors of Time to accomplish an avoidance of the shareholder franchise." Since the *Time* opinion did not endorse a contractarian resolution, it precluded its revitalization. Governance instead spun into its current state of crisis.

Barbarians at the Gate (Burrough & Helyar 1990), the chronicle of the RJR-Nabisco hostile takeover, documents the economic finale of the 1980s takeover mania. *Paramount Communications v. Time* (1990) provided legal closure. Indeed, *Mergers and Acquisitions* asked, "Did the *Time* Decision Torpedo the Hostile Bid?" (Lerner 1990). The evidence shows unequivocally yes—hostile takeovers came to a halt soon thereafter. Fewer U.S. mergers and acquisitions were announced in 1991 than any year since 1963. Too, in 1991, the total value of mergers and acquisitions fell to $96 billion from $340 billion in 1989 and leveraged buyouts and management buyouts declined to just over $1 billion in 1991 from $80 billion between 1989 and 1991. In bestowing last rites, *Mergers and Acquisitions* (1992:25) later noted that "tender offer activity . . . dwindled to an almost irreducible minimum in 1991." The *Economist* (1993c:60) surmised that the Chancery ruling meant that "Time's bosses were free to 'just say no' to unwanted offers. Paramount's bid failed, Time's shareholders lost a fortune and hostile bids all but disappeared."

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

The Cusp of a New Era in the 1990s

Seven years later, the precedent of *Paramount Communications v. Time* (1990) still stands. Ironically, this opinion was tested in the matter of *QVC Network v. Paramount Communications.* In 1993 QVC launched a hostile takeover of Paramount. Paramount, as had Time, instituted a poison pill to deflect the unsolicited bid. Unlike the earlier dispute, the Chancery rejected Paramount's poison pill. While seemingly contrary to precedent, this ruling refined the technical standards of the matter, ruling that two-tiered tender offers are coercive. Fink (1995:159) points out: "Although *QVC* did not overrule *Time,* the court did adopt a broader reading of directors' duty to maximize stockholder value." Nonetheless, the Chancery affirmed that directors were not subject to the single-minded standard of maximizing shareholders' immediate gain provided they had a sound long-term strategy. In so ruling, the Chancery shifted the focus to the crux of governance: to whom the directors of a corporation owe fiduciary duties.

Elaborating this agenda is an intriguing series of post-*Time* rulings. The Chancery has tested the signifying designation "fiduciary duty" in other contexts. In the case *In re USA Cafes L.P. Litigation* (1991) the Chancery considered the defendants' claim that they owed the limited partners neither loyalty nor care. The court held that there is in fact a fiduciary relationship between a corporate general partner and limited partners in a Delaware limited partnership. Similarly, the Chancery reiterated the duty of loyalty in *Cede & Co. v. Technicolor* (1993), ruling that directors must refrain from subordinating the interest of shareholders to their own. The court ruled in *In re TriStar Pictures, Inc. Litigation* (1993) that a controlling stockholder has fiduciary responsibility for proxy material on the basis of his "potential influence" over its preparation. In *Mendel v. Carroll* (1994), the court clarified the subtext of this trend. The chancellor opined that "to describe the duty that corporate directors bear in any particular situation we must first consider the circumstances that give rise to the occasion for judgement" (*Mendel* 1994:305). In other words, Werkheiser (1995:506) notes, *Mendel v. Carroll* "highlighted the importance of context in defining the fiduciary obligations of directors and controlling shareholders." In effect, the fiduciary construct, historically an ideal, had become contextualized.

In a related trend, the Chancery reconsidered the fiduciary rights of creditors. Ground zero, so to speak, was *Katz v. Oak Industry* (1984) in which the court ruled that bondholders stood in contractual relationship with the corporation; the general rule was that directors do not owe duties to creditors beyond those legally contracted. Subsequent tests in *Kass v. Eastern Air Lines* (1986) and *Shenandoah Life v. Valero Energy Corp.* (1988) affirmed

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

this opinion. Post-*Time* case law, however, reveals a different understanding. *Gans v. MDR Liquidating* (1990) and *Kidde Indus. v. Weaver Corp.* (1991) elaborate this change with their suggestion that creditors have rights beyond the trust indenture. The Court, though, did not specify the standards of these rights. Concerning *Credit Lyonnais Bank N.V. v. Pathe Communications Corp.* (1991), however, the court held that in times of corporate insolvency, directors' primary fiduciary duty is to the "corporate enterprise." The designation "the corporate enterprise" includes a broader interpretation than of simply agents and principals. As the opinion states:

> [I]f we consider the community of interests that the corporation represents it seems apparent that one should in this hypothetical accept the best settlement offer available. . . . But that result will not be reached by a director who thinks he owes duties directly to shareholders only. It will be reached by directors who are capable of conceiving the corporation as a legal and economic entity. Such directors will recognize that in managing the business affairs of a solvent corporation in the vicinity of insolvency, circumstances may arise when the right (both the efficient and the fair) course to follow for the corporation may diverge from the choice that the stockholder (or the creditors, or the employees, or any single group interested in the corporation) would make if given the opportunity to act. (*Credit Lyonnais Bank N.V. v. Pathe Communications Corp.* (1991)

The choice of predicate for this explanation—"if we consider the community of interests that the corporation represents"—signifies a pivotal shift of perspective. In effect, *Credit Lyonnais Bank* grants creditors fiduciary claim on the board of directors that go beyond the scope of the trust indenture and that historically had been denied to them. Rao, Sokolow, and White (1996) later concluded that this elaboration of the fiduciary construct signified a significant departure from the traditional shareholder wealth-maximization model. *Geyer v. Ingersoll Publishing Co.* (1992) affirms this departure: The Chancery expressly assigned the seal of "fiduciary obligation" to the duty owed by directors to a creditor of a putatively insolvent firm.

Concurrent with this theme, the court tried to equalize the asymmetric relationship between agents and owners by reconsidering agents' duty of candor. Since *Time,* the Chancellors have recast the standards of disclosure as to whether stockholders have been provided with the information needed to make an informed choice. *Stroud v. Grace* (1990) affirms the need for directors to be "completely candid" in notifying shareholders of a meeting of stockholders. In *Marhart, Inc. v. Calmat Co.* (1992) the court ruled that during a reorganization, if directors choose to disclose information to shareholders, then they accept a fiduciary duty to provide "truthfully and candidly" all material facts. The matter of *Compaq Computer Corp. v. Horton* (1993), in affirming

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

the defendant's request to investigate past acts of mismanagement by inspecting the plaintiff's stock ledgers and record, further enhanced shareholders' rights. Indeed, Clark (1995:633) commented that this ruling granted shareholders unprecedented latitude to inspect these items and, more important, "represents another step toward Delaware law favoring shareholders over corporations in this area." This decision signified a greater extension of the stipulation of shareholder inspection rights in the standard of *Trans World Airlines v. State* (1962). Compaq's appeal to the Delaware Supreme Court, citing the Chancery's undue extension of TWA, was dismissed. Recently, in *In re Wheelabrator Technologies* (1995) the Chancery extended these themes, ruling that a fully informed stockholder vote shifts the burden of proof onto management in the fairness standard of review.

Contemporary cases show the Chancery giving compelling legal force to the revised standards of disclosure. In *Zirn v. VLI Corp.* (1993) the court stipulated that the materiality of information disclosed is determined not by the viewpoint of directors but that of shareholders. The court's elaboration of this line of reasoning in *Kahn v. Roberts* (1993) and *Yaw v. Talley* (1993), Wilburn (1995:563) concluded, reflects the "greater likelihood that courts are inclined to give plaintiffs the benefit of the doubt and inquire more deeply into the facts of the challenged transaction." Concurrently, the Delaware Supreme Court underscored this message in *Rales v. Blashand* (1993). In this matter, the court reached several conclusions that countered the pre-suit "demand" standards set earlier in the pro-management *Aronson v. Lewis* (1984). By so deciding, the court lowered the barriers to shareholders intent on filing derivative litigation against errant management, and led some to fear that this line of legal reasoning would ultimately give plaintiffs the "keys to the courthouse" (Dooley & Veasey 1989:504).

Intriguingly, the individual issues of care, loyalty, and candor collectively came to bear in *Cinerama, Inc. v. Technicolor* (1988, 1993, 1994, 1995, 1996).[5] Filed in 1983, this case is one of the longest running in the history of the Chancery and its pending resolution holds pivotal implications for our understanding and specification of the fiduciary construct. The plaintiff, seeking to impose personal liability on the directors of Technicolor, filed two suits alleging that neither the price nor the process of the deal, as set and conducted by the defendant's directors, was fair to shareholders. In 1990, following an unusual 47-day trial, Chan-

[5] The matter of *Cinerama, Inc. v. Technicolor* so far has involved several opinions from both the Chancery and the Delaware Supreme Court. For the record, these deliberations have been reported in *Cinerama, Inc. v. Technicolor*, 542 A.2d 1182 (1988); 634 A.2d 345 (1993); 636 A.2d 956 (1994); 663 A.2d 1134 (1994); 663 A.2d 1156 (1994); and 684 A.2d 289 (1996). The scale of the paper trail for this dispute leads us to cite simply *Cinerama, Inc. v. Technicolor* in referring to this matter in this article.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

cellor Allen ruled that the price was fair. In 1991, Chancellor Allen ruled that the process, while perhaps not unequivocally fair, had not been proven by Cinerama to be unfair. Cinerama appealed both rulings to the Delaware Supreme Court. The latter supported their appeal and remanded the case to the Chancery for reconsideration. Chancellor Allen again ruled that both the price and process had been entirely fair, despite the board's apparent lapse in the exercise of its fiduciary duty. Again, Cinerama appealed to the state supreme court. Observed Professor John Coffee, a corporate law specialist at Columbia University: "The bar has been a little perplexed about this case for years. . . . If Judge Allen is reversed, it will make a substantial difference in the penalty that you pay when you [directors] don't cut the corners exactly squarely" (Henriques 1995a). On 23 May 1995, the state supreme court, whose philosophical bent had changed following a controversial dismissal and appointment process in the fall of 1994 (Henriques 1995b), affirmed Chancellor Allen's opinion on the duty of care. Coffee remarked that the state supreme court's affirmation of Allen's opinion appeared to put "one more set of ramparts and moats around the citadel before you hold directors liable (Felsenthal 1995). Perhaps more fundamentally, *Cinerama* further changed the construct of the board of directors by contextualizing a director's exercise of his or her fiduciary duty. Historically, Delaware courts evaluated whether a director's particular self-interest compromised or corrupted his or her judgment in terms of whether such a conflict would affect the judgment of the archetypal "reasonable director." *Cinerama* formally shifted the court's point of evaluation by instructing judges to look at each director individually in determining whether he or she had been susceptible to bias. The new heuristic, Coffee surmised, "tends to push the court into the position of being a psychiatrist" (Felsenthal 1995).

An important addendum to this chronology, as the *Cinerama* saga showed, is the role of the Delaware Supreme Court. The Chancery's charter gives it direct jurisdiction over all governance disputes involving Delaware's corporate citizens. The role of the state supreme court is that of balance—recall that appeal of a Chancery opinion is direct to this forum. Procedurally a three-person tribunal of state supreme court justices considers the appeal. In the event the Supreme Court affirms a Chancery opinion, as in the case of *Time,* it affirms the principle of the ruling but may clarify points of ambiguity or elaborate procedural issues. In the event of a reversal, time-insensitive issues are remanded to the Chancery for reconsideration. Time-sensitive matters, such as a temporary restraining order, may be reversed, dismissed, or simply expire. Historically, the symbiotic relationship between the Chancery and the state supreme court has been marked by occasional difference in opinion yet overall conver-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

gence in interpretation. Recent rulings have consolidated the changed notions of directorial duty.

In *In re Unitrin, Inc. Shareholder Litigation* (1995:136), the supreme court's review of a Chancery opinion stipulated that distinction among shareholders are neither inappropriate nor irrelevant for a board of directors to make, e.g., distinction between long-term shareholders and short-term profit-takers, such as arbitrageurs, and the stockholding objectives. So ruled, it would appear this opinion reduced directors' authority to displace shareholders en masse in the face of a hostile takeover, thereby reversing *Paramount Communications v. Time* (1990), *QVC Network v. Paramount Communications* (1993), and *Cinerama v. Technicolor.* However, the court's qualification of "en masse" suggests that distinctions among shareholders did matter in the case of *Unitrin* and therefore ought to be made by the board in the face of a hostile bid. Therefore, in the case of *Unitrin* the Supreme Court "finally acknowledged the importance of shareholder choice in the corporate realm" (Werkheiser 1996:114). The language of the court's formulation, importantly, qualified shareholder choice in terms of the extenuating criterion of short term versus long term rather than treating all shareholders as one and the same. Similarly, in April 1997, the Chancery ruled on *Equity Linked Investors v. Genta, Inc.* In dispute was the effort of Equity Linked Investors (a proxy for a set of institutional investors and holders of preferred stock) to compel the Genta board to liquidate the company and distribute most or all of its assets to the preferred shareholders before it possibly declared bankruptcy. Genta's board sought actively to find a means to continue the firm with the plan to develop commercial products from its promising technologies. In effect, Genta's shareholders asked the Chancery to order a short-term payout that they believe maximized their wealth, ostensibly their right under the property model, while Genta's directors preferred a strategy that they thought promised greater long-term benefits. In the shades of *Paramount Communications v. Time* (1990), *QVC Network v. Paramount Communications* (1993), and *Cinerama v. Technicolor,* the Chancery ruled that the "Genta board concluded in good faith" in its rejection of shareholders' claim of primacy (1997:48) and denied Equity Linked Investors' petition. Related rulings—*Arnold v. Society for Savings Bancorp* (1996)—elaborate this theme of greater directorial authority.

The Meaning of *Time*

The Chancery's post-*Time* case law has been consistent on one count: It has reaffirmed neither the property nor the contractarian model (Millon 1993; Bratton 1992). This conception, in turn, has put governance norms in flux. The question then

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

becomes, What is the philosophical intent of *Time* and its progeny? We believe a plausible explanation finds its foundation in a 65-year-old supposition. Berle (1932:1367) anticipated pleas for an arbiter of liberty to offset the occasional ruthlessness of justice. More formally, he reasoned: "Now I submit that you cannot abandon emphasis on the view that business corporations exist for the sole purpose of making profits for their stockholders until such time as you are prepared to offer a clear and reasonably enforceable scheme of responsibilities to someone else." We see in *Paramount Communications v. Time* (1990) and subsequent case law the Chancery experimenting with such a governance "scheme."

Why even devise a scheme? The basis for change, as was the basis in the 1930s, was the economic and social costs of takeover mania. Joseph Grundfest (1993:864), former SEC commissioner, concluded that takeovers were a harsh cure for a mild virus. Worse still, the restoration of health imposed a new set of ills. He explained:

> Corporate America is now governed by directors who are largely impervious to capital markets or electoral challenges. Until very recently, the principal post-takeover form of external discipline on American management was the prospect of insolvency due to product market competition, but this relief arrives only after management missteps have destroyed millions or even billions of dollars of value. An influential observer of the corporate scene thus laments that absent new monitoring strategies "the walls around the corporate castle are higher now, and the moat wider, than ever before."

Others note that the episodic and inherently unstable process of governance via takeovers aggravated the sensibilities of a nation accustomed to open, accountable, and democratic modes of governance (Roe 1994; Easterbrook & Fischel 1991; Jensen 1993; Bishop 1994). Supporting this assertion are the actions of state legislatures. By 1993 almost 40 states had added "second-generation" takeover statues to their corporation code in the belief that imposing significant and even extreme costs on hostile control contests would protect shareholders and improve community welfare.[6] Collectively, these actions suggested that the premise of the property model (the public corporation is a private undertaking that is devoid of much public law significance) was anachronistic while that of contractarianism (the public corporation is merely a set of legal contracts) was menacing.

This reasoning, of course, begs the question, What is the philosophical basis of the Chancery's post-*Time* decrees? The excesses of takeovers underscored the notion that property rights are embedded in human rights, and thus destruction of property

[6] As it turned out, these statutes unwittingly protected managers from disgruntled shareholders by suppressing hostile takeovers (Orts 1992; Pound 1993).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

signifies the destruction of human rights. Protecting "the community of interests that the corporation represents" demands a "clear and reasonably enforceable scheme" of governance that grants the public a bona fide right to voice its concerns. The court's post-*Time* opinions suggest that the force of logic or righteous indignation that historically mobilized the "community of interests" was increasingly inadequate to check managerial opportunism. Rather, empowering their voice with the force of law meant that the courts would have to alter shareholders' exclusive claim on directors' fiduciary duties. Thus, we see in post-*Time* rulings the gradual assignment of fiduciary rights to nonshareholders that are equivalent to those held by shareholders. *Time,* in effect, triggered a crisis in governance that has encouraged a line of reasoning that is "a striking departure from standard shareholder primacy assumptions and the private law theory of the corporation on which they are based" (Millon 1990:262).

The logic of this line of reasoning is increasingly evident. *Time* and its progeny hold that shareholders' rights are important but not supreme when management can enunciate a long-term strategy that offers superior benefits to shareholders and the "community of interests that the corporation represents." Fundamentally recasting the parameters of debate, Chancellor Allen (1993:1401) noted, moves us to the crux of the current governance crisis: weighing the merits of reconceiving the corporation and thus its regulation not in terms of the "philosophical nominalism of economics but the philosophical realism of sociology." Within this context, the case law of *Time* and its progeny signify the advent of the multifiduciary model of corporate governance.

Governance Revealed: The Multifiduciary "Scheme"

The multifiduciary model (Table 1, second column) is grounded in a conception of governance that exalts public law. Moving debate of governance norms to a public law framework grants voice to interests locked out of a narrowly defined agent-principal relationship. The multifiduciary model, thus, revitalizes the notions of human connectedness, societal welfare, and justice for all (Allen 1993; Millon 1993; Jackson & Carter 1995). The scope of this normative change requires resetting the criterion of managerial accountability. Within the context of a contractarian or property model, accountability is determined by, respectively, the terms of the contract or the ownership of equity. Framing exchange in terms of these standards activates established conventions that take their cue from contract law or shareholder primacy. The multifiduciary model cannot function under such conditions. Its redefinition of directors' accountability to the "community of interests" moves discussion beyond contract law

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

and shareholder economics to issues of humanity, welfare, and justice. In practical terms, then, the multifiduciary model demands a robust forum that, in the least, publicizes the private relationship between shareholders and their agents and, ultimately, facilitates public discourse among the "community of interests."

Ensuing Chancery rulings show the court removing informational asymmetries that preclude the candid exchange needed to enable a multifiduciary model. Consider, for example, the Chancery's stringent reconsideration of directors' duty of candor since *Time* (e.g., *Stroud v. Grace* 1992; *Marhart* 1992; *Compaq* 1993). The Chancery has affirmed the principle that candid disclosure of information is a director's duty. Indeed, this body of case law grants shareholders unprecedented latitude to review the decisions of directors (Clark 1995:634). Also, the Chancery has expanded the bounds of what constitutes material information, reset the point of view from which the determination will be made, and shifted the burden of proof onto management (e.g., the 1993 cases of *Zirn, Kahn v. Roberts, Yaw v. Talley, Rales v. Blashand*).

Revising the duty of candor is an evolutionary process. Legitimating a multifiduciary model depends on a single catalyst: converting the construct of a single fiduciary to that of a multifiduciary notion. The former harks back to the property model and its stipulation of the corporation exclusively in terms of shareholders and their agents. So conceived, nonshareholders lack an inalienable relationship. Therefore, shareholders alone have sole fiduciary claim on directors' duties of care, candor, and loyalty. The rights of the "community of interests" (e.g., lenders, suppliers, employees, managers, consumers, and bondholders) are governed by the precise terms of their contracts with the corporation. Consequently, they have no fiduciary claim. However, the multifiduciary conception of human connectedness and responsibility holds that the fiduciary rights of shareholders no longer supersede those of the nonshareholders. Rather, the multifiduciary model hinges on transforming the primacy of shareholders to equivalency among the "community of interests that the corporation represents." To this end, we see the Chancery testing the bounds of the multifiduciary construct by rethinking the definition of agents (e.g., *In re USA Cafes* 1991; *In re TriStar Pictures* 1993; *Mendel v. Carroll* 1994) and supplementing creditors' contractual rights with fiduciary privileges (e.g., *Gans v. MDR Liquidating Corp.* 1990; *Kidde Indus., Inc. v. Weaver Corp.* 1991; *Geyer v. Ingersoll Publishing Co.* 1992; *Credit Lyonnais Bank* 1991).

Change in the standards of disclosure and movement toward a multifiduciary construct, some may think, could suggest revival of the communitarian model at play in late 17th- through mid-18th-century America. If so, one can anticipate a radical recasting

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

of the rights of ownership and theory of property precisely because such a model imposes on managers the fiduciary duty to act in the best interest of *all* corporate constituencies. Managers, in effect, will become guardians of the interests of all corporate stakeholders, thereby enacting the universal fiduciary norm that girds the communitarian construct. Post-*Time* case law shows the Chancery careful to preclude misconstruing the multifiduciary model as signifying the restoration of a communitarian ethic. The organizing themes of review suggest that the Chancery is apprehensive that holding that all corporate constituents have fiduciary rights would insert uncertainty into the corporate law as to the circumstances in which a corporation is entitled to act. On this theme, Chancellor Allen reasoned that "if a board of directors is 'responsible to everyone' its decisions may become virtually unreviewable" (Slip opinion in *Paramount Communications v. Time* 1990). Collectively, Chancery opinions, notably in *Paramount Communications* (1990); *QVC Network* (1993); and *Credit Lyonnais Bank* (1993), affirm that the corporation is not a guardian of the fiduciary interests of the general community but a nexus of multifiduciary relationships among the "community of interests that the corporation represents."

While some may argue that the multifiduciary model dilutes directors' fiduciary duties, we suggest that it actually broadens a director's latitude to make mistakes and correspondingly reduces shareholders' license to claim a breach of fiduciary duties by their agents—recall Professor Coffee's remark that *Cinerama* effectively placed additional security around the directors that must be breached in order to hold directors liable (Felsenthal 1995). Directors' greater leeway, though, is not an indulgence. The public law premise of the multifiduciary model holds that enhancing the legal authority of the broader "community of interests" compels directors to disclose in greater detail what, why, and when they made decisions and that such disclosures serve to control incentives to abuse their enhanced authority. Therefore, *Time, QVC Network, Cinerama,* and *Unitrin* may install "one more set of ramparts and moats around the citadel" (Felsenthal 1995). On the other hand, the chancery has effectively created more parties with a fiduciary incentive to storm the citadel in their rulings in the matters of *In re USA Cafes* (1991), *In re TriStar Pictures, Inc.* (1993), *Mendel v. Carroll* (1994), *Gans v. MDR Liquidating Co.* (1990), *Kidde Indus. v. Weaver Corp.* (1991), *Geyer v. Ingersoll Publishing Co.* (1992), and *Credit Lyonnais Bank* (1991). Furthermore, the Chancery's rulings in the matters of *Stroud v. Grace* (1992), *Marhart v. Calmat Co.* (1992), *Compaq Computer Corp. v. Horton* (1993), *Zirn v. VLI Corp.* (1993), *Kahn v. Roberts* (1993), *Yaw v. Talley* (1993), and *In re Wheelabrator Technologies Inc.* (1995) grant to concerned parties the weaponry needed to ford the moats and scale the ramparts.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Scholars and Shareholders React

The emergence of a multifiduciary model in the context of the Chancery Court is a recent development. Thus far, the chancellors' attention to creditors and limited partnerships has let them deal with perhaps the most straightforward segment of the "community of interests." Still, we see the seeds of theoretical controversy and practical revolt. Recall that *Time* holds that managers may reject the preference of a majority of like-minded shareholders provided they have a long-term strategy. Gilson and Kraakman (1989) hold, though, that this is minor obstacle given that a skilled attorney can easily construe a takeover attempt to threaten corporate policy. The dubiousness of the criteria of a sound long-term strategy led Fink (1995:141) to urge the court to reject the meaning of *Time* and "allow shareholders to decide whether or not to accept a tender offer." Van der Weide (1996:84) asserts that "[a]rguing that a multilateral fiduciary duty will benefit shareholders in the long-run assumes that shareholders are naive." Stilson (1995:5–6) considers the dilemma of directorial ambiguity and contends that the Chancery's recent assignment of fiduciary rights to creditors

> fails to address whether the duty to creditors gains ascendancy over, or operates as a complement to, traditionalist directorial obligations to shareholders. . . . [T]he parameters of this duty, and its correlative standard of judicial review, are nebulous. . . . [F]ailure to fulfil their statutory or common law responsibilities may result in astounding personal liability for individual managers.

In recourse, Stilson (p. 120) encourages the court to formulate a "reasoned" choice between the property model and contractarianism.

Change of governance paradigms, by definition, changes the rules of the game. Recasting the boundaries of the shareholder franchise and the scope of directorial duty results in transitional confusion. Therefore, we surmised that shareholders' and directors' efforts to pinpoint their roles and responsibilities conceivably should result in a burst of litigation that forces clarification. This supposition is not without historical support. Recall our earlier reference to the "flowering of derivative suits" in the 1930s and 1940s that accompanied the transition from the natural entity to the property model of governance (Drexler et al. 1995:1–8). Therefore, we were curious whether recent litigation patterns at the Chancery suggested history was repeating. To find out, we examined characteristics of civil suits filed with the Chancery following *Paramount Communications v. Time* (1990). Our results can be seen in Table 5.

In petitioning the Chancery for relief, a plaintiff files a case request with the Registrar of the Chancery. The Registrar, in con-

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

sultation with the petition's sponsor, assigns one of 29 classification codes to the civil dispute. The codes range the spectrum of possible disagreement, including shareholder meetings, sale of stock, types of injunctions, recission, accounting, and appraisal. Our analysis found that between 1990 and 1995, the annual tally of breach of fiduciary duty suits grew in absolute and relative share of the total case docket of the Chancery. Of the 583 civil disputes that were filed in 1990, 141 sought relief from breach of fiduciary duty. In the first half of 1995, of the 420 civil disputes filed, 247 sought relief from breach of fiduciary duty. Table 5 captures this trend by showing the relative change among the primary types of cases filed at the Chancery during this period. (As an aside, members of the Chancery were surprised by the growing volume of breach of fiduciary duty cases. One court official told us that some staff members referred to the Chancery Court as the "Court of Breach of Fiduciary Duty.")

We believe that the recent barrage of breach of fiduciary duty suits is the by-product of transition in governance models. The transition to a multifiduciary model challenges long-running fiduciary norms. While this analysis suggests that shareholders are primarily responsible for the increase in activity, the rise in breach of fiduciary duty suits could also be due to opportunistic managements exploiting the current crisis by serving shareholders' interests less dutifully. In either case, the consequence is another flowering of shareholders motivated to exercise their right to contest their agents.

Some may argue that this burst is simply the fallout of the current crisis; it will fade upon the legitimation of the next governance model. Coffee's (1984:1220) commentary, however, suggests that fade-out is unlikely:

> So long as fiduciary duties essentially depend upon the existence of a principal-agent relationship, it is a conceptual self-contradiction to define the fiduciary's duty so that the principal cannot instruct his agent to seek a higher premium. Nor, should the agent be permitted to ignore his principal's instructions because more enlightened shareholders would decide otherwise.

We emphasize that the multifiduciary model does not redefine the fiduciary construct. Rather, it recasts it in the broader context of the "community of interests that the corporation represents." This formulation ultimately must dilute the heretofore exclusive rights of shareholders. Logically, shareholders react in kind, contesting this change by filing suits alleging a breach of fiduciary duty. Inasmuch as the types of civil action filed set the context for the ensuing test of the law, we see the time series trends in Table 5 as intriguing harbingers. In fact, one can construe the current volume of breach of fiduciary duty suits as merely the tip of the iceberg. Formerly, nonshareholders who

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Table 5. Corporation Dispute Docket of the Court of Chancery of Delaware by Type of Dispute, 1990–1995

	1990	1991	1992	1993	1994	1995
Accounting & records	60	25	29	36	53	54
Officers & directors	2	1	2	3	4	8
Shareholder meeting	10	5	3	4	10	10
Sale of stock	0	3	0	0	1	0
Appointment of trustees & receivers	9	14	4	6	10	6
Temporary restraining order	9	5	1	3	3	0
Injunction	10	7	6	4	7	40
Declaratory judgment	10	4	3	8	7	8
Equitable relief/interpleader	0	0	0	0	0	0
Arbitration	1	0	0	0	0	0
Breach of fiduciary duty	141	172	112	167	316	494
Rightful board of directors	129	76	77	79	70	54

NOTE: Distributions computed from data provided by the Rigistrar of the Court of Chancery of Delaware.

make up the "community of interests" (e.g., lenders, suppliers, employees, managers, consumers, and bondholders) had limited means to seek relief from a wrong. Namely, a breach of the trust indenture or loan covenant, as opposed to the duty of candor, care, or loyalty, meant that such parties had to invoke contract law as the basis of legal action. The Chancery's elaboration of the fiduciary construct to include contracting interests by definition grants unprecedented rights to this segment of nonshareholders. Expanding the universe of potential plaintiffs with the right to contest the fiduciary performance of management will probably expand the volume of suits alleging a breach of fiduciary duty, thereby reinforcing the trends shown in Table 5.

The Multifiduciary Model: False Dawn or Fait Accompli?

Post-*Time* case law signifies a multifiduciary model of governance that begins to enact "a clear and reasonably enforceable scheme of responsibilities" (Berle 1931:1049). The repercussions of this transition are notable. Among corporations, the day-to-day practice of governance deteriorates. Legal scholars, noting the ambiguity that *Time* thrust on directors and shareholders, advise caution (Stilson 1995), reappraisal (Werkheiser 1995; Clark 1995), or renunciation (Fink 1995; Taylor 1996; Van der Weide 1996). More ominously, shareholders contest precedents that rule their primacy is neither absolute nor inviolate. Perhaps more than any other condition, the burst of shareholder litigation foreshadows the themes of future case law. Recall from our earlier discussion that Chancery's rulings at transition points in governance formulated the precedents that allow change to be sanctioned in subsequent rulings. Thus, the hundreds of breach of fiduciary cases awaiting resolution are leading indicators of

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

soon-to-be-developed case law. Their resolution will create a body of case law that will ultimately sanction or reject the multifiduciary model, as happened to the natural entity model in the mid-1800s, the property model in the 1930s, and the contractarian model in the 1960s.

Is it reasonable to anticipate the eventual sanction of the multifiduciary model? The historical evolution of governance suggests that it is, if the norms of the proposed scheme resonate with the norms of society. Jackson and Carter (1995:886) note that the "rhetoric must reflect the prevailing ideology if it is to be acceptable and effective." More precisely, a governance model is sustainable only to the degree that it reflects broad sociopolitical values of accountability, responsibility, and authority. In effect, there must be commensurability between the governance of a corporation and the governance of society. Roe (1991) supports this conjecture, reasoning that the Berle and Means property model was not "an inevitably natural consequence" of the economic and technological forces that shaped modern capitalism. Rather, Roe (p. 10) argues that the "the public corporation is as much a political adaptation as an economic or technological necessity." So given, the philosophical virtues of Berle and Means's property model resonated with the populist rhetoric of the 1930s that called for limiting the scale and scope of financial institutions via political fiat. Absent this particularized context, Roe (1991), Coffee (1991), and Pound (1993) suggest that the corporation probably would have evolved into an organizational form that relied on the normative merits of the relational governance model (see Table 1, column 6). The property model, they add, would have served the function that the relational governance model has since then, namely, that of theoretical strawman.

Thus, at issue is whether the normative code of the multifiduciary model reflects the normative code of society. Sentiment and evidence suggest yes. Regarding the former, America's long-running suspicion of the faceless management of large public corporations persists. Editorials in 1877, speeches in 1940, and commentary in the 1990s all testify to America's enduring leeriness of corporations. As Grundfest (1990:89–90) observed:

> America seems not to trust her capitalists. For more than a half-century, state and federal governments have limited investors' influence over the governance of publicly traded corporations. Investors' ability to monitor corporate performance, and to control assets that they ultimately own, has been subordinated to the interests of other constituencies, most notably corporate management.

Admittedly, capitalists aggravated this anxiety with their harsh moves in the 1980s and opportunistic behavior in the 1990s. Above all, their actions supported the assertion that directors, not shareholders, held decisive power (Coffee 1991; Allen 1993).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Finally, a cursory glance of political and society pageants finds normative ideals that endorse the diversity, enfranchisement, and humanitarianism suppositions of the multifiduciary model. For example, over the past few years, Van der Weide (1996:32) notes, "most states' corporation statutes have set forth a new paradigm for managerial decision making by expressly permitting directors to take into account the interests of other corporate constituencies." Moreover, as of 1997, 16 states have amended their GCLs expressly to permit directors to consider interests other than those of the firm's shareholders before deciding on a fundamental corporate change. Broader evidence is also apparent.[7] The American Law Institute's Principles of Corporate Governance (1994:§ 6.02(b)1) codified a weak form of the multifiduciary model in its policy statement: "The board may . . . have regard for interests or groups (other than shareholders such as employees, suppliers, customers, creditors, and the community) with respect to which the corporation has a legitimate concern if to do so would not significantly disfavor the long-term interests of shareholders" (Dooley 1992). Finally, consider the sentiment of Chancellor Allen (1995:4) in his conjecture:

> When corporate directors act with integrity and independence, they also satisfy a broader non-legal duty that their position imposes: a duty to all of the people and communities that are affected by the corporation, and to the nation. It is the opportunity to satisfy this broader, civic duty that, in the end, brings special dignity and special promise to this board service.

In sum, there seems to be a broad symmetry between the governance norms of the multifiduciary model and the populist fears and social ideals of America. Thus, the assertion that the multifiduciary model must resonate with the values revered by society finds general support. We believe more specific support or rejection will eventually be found in the resolution of the growing backlog of breach of fiduciary duty cases awaiting the Chancery's attention. The resolution of these disputes will largely determine the practical durability of the multifiduciary scheme. Their resolution, one way or the other, will affirm the Chancery's long-standing record as the court of innovation in corporate law (Romano 1987)

[7] See Fla. Stat. Ann. § 607.0830(3) (West 1993); Ga. Code Ann. § 14-2 202(b)(5) (1994); Ill. Comp. Stat. Ann. ch. 805, § 5/8.85 (West 1993); Iowa Code Ann. § 491.101B (West 1991); Me. Rev. Stat. Ann. tit. 13-A, § 716 (West Supp. 1995); Mass. Gen. Laws Ann. ch. 156B, § 65 (West 1992); Minn. Stat. Ann. § 302A.251(5) (West Supp 1995); Neb. Rev. Stat. § 21-2035(1) Chancery) (1991); N.Y. Stat. Ann. § 14A:6-1(2) (West Supp 1995); N Y. Bus. Corp. Law § 717(b) (McKinney Supp. 1996); Ore. Rev. Stat. Ann. § 60.i57(5) (Supp. 1994); 15 Pa. Cons. Stat. Ann. §§ 1715-1716 (1995); Tenn. Code Ann. § 48- 103-204 (1995); Wyo. Stat. § 17-16-830(e) (1995).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Conclusion

The Chancery's ruling in *Time* catalyzed the current crisis in corporate governance. Granted, some credit the court with halting a contractarian model that was veering out of control (Bratton 1992; Millon 1993). However, the Chancery's rulings opened up lines of debate about governance that, for the first time in more than 30 years, did not take their cue from the hostile takeover offer. Still, a consensus has proven problematic and cries of crisis are now commonplace. An eclectic range of scholars champions various models to resolve the crisis. Expectedly, each scholar forcefully contends that his or her ideal is the superior governance model.

We have tried to develop this debate by putting it into historical perspective and grounding its rhetoric in the pragmatism of the Chancery. Post-*Time* case law shows the Chancery reorienting the dialectic of governance toward a multifiduciary model that replaces liberty with justice as the touchstone governance norm. From a historic point of view, this is a predictable swing of the pendulum. Recall that in the mid-1800s, the court nullified the norm of justice that had girded the communitarian model since colonial times by sanctioning norms of governance that accented liberty. The mid-1930s saw a similar reversal as the norms of liberty gave way to those of justice (albeit justice narrowly defined in the context of the primacy of the small, faceless shareholder). Chancery opinions in the mid-1960s signified yet another reversal as the gradual affirmation of the contractarian model reemphasized norms of liberty. The fascinating ebb and flow of justice versus liberty through these eras brings to mind Voltaire's aphorism that "Any virtue taken to an extreme becomes a vice."[8] Thus, we are intrigued, but not astonished, by the pendulum's return from the utilitarian excesses of contractarianism in the 1980s to the magnanimous norms of justice that underlay the unfolding multifiduciary model.

Transition in paradigms inevitably elicits resistance from those unwilling to accept new realities. The burst of breach of fiduciary duty suits testifies to shareholders' objection to multifiduciary norms. Thus far, though, neither society nor the Chancery has been overly sympathetic to shareholders' self-interested pleas to protect their exalted position. Some contend that the absolute power of their pleas must ultimately prevail: Public companies are brought into existence by shareholders, and they alone should have inalienable fiduciary rights. Nonetheless, we do not anticipate circumstances that would bring about a reversal to sanctify the primacy of shareholders. At the minimum, shareholders are battling the apparently ascending ideal of justice as

[8] William Shakespeare, *Romeo and Juliet* act 2 scene 3.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

the quintessence of this era of governance. Moreover, disgruntled shareholders are contesting the effort of an elite, powerful judiciary to preclude directors' prerogative to take actions that maximize shareholders' narrow interests at the expense of the "community of interests that the corporation represents." Therefore, we see the Chancery sanctioning a multifiduciary governance model that is animated by a conception of human connection, accountability, and responsibility.

Implications for Managers

Aside from academic merits, the current governance crisis significantly shapes executive behavior. Consider that pivotal actions of management—such as questions of business judgment, conflict of interest, the nature of ownership, issues of fraud, standards of fairness—are occasionally challenged by shareholders and others as not serving the interests of the corporation. Uncertainty over sanctioned standards of governance translates into uncertainty in the top management teams over issues including but not limited to what powers belong to the board, what directors' duties are and for whom must they be performed, how directors and officers can be found liable for breaches of their duties, what limitations can be placed on directors' compensation, and what kinds of self-interested transactions may directors legally reach. In principle, *Time* releases management from the threat of a takeover by a majority of like-minded shareholders provided agents have a convincing strategy that stands to benefit owners in the long term. The price of such freedom, subsequent case law shows, is directors' greater accountability to a broader set of more empowered constituents. The implications for shareholders, we believe, are manifest in their expression via the burst of breach of fiduciary duty suits. The implications for managers are less clear-cut. Nonetheless, trends are evident.

Allen's forewarning in *Simons v. Cogan* (1987:791) that the "tide has no doubt long run away from a world of hard and fast rules with predictable outcomes and toward some world in which it is common for courts to evaluate specific behavior in the light cast by broadly worded principles" has proven true. The Chancery's post-*Time* expansion and contextualization of the fiduciary construct, by accentuating the ambiguity of directorial duty, underscores this peril. Moreover, Gilson and Kraakman's (1989) supposition that a good lawyer can construe a hostile bid as unduly impinging on the corporation's long-term strategy raises the possibility that the very act of alleged mismanagement is itself contextual. Consequently, ambiguity over governance principles thrusts managers into a vacuum (Pound 1992:93). Organization theorists note that political, opportunistic, or self-interested behaviors occur more often in situations marked by ambiguity or

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

lacking clear rules. More precisely, if managers have a multifiduciary duty to the "community of interests that the corporation represents," then they may have an easier means to rationalize or obscure self-dealing (Van der Weide 1996).

More optimistically, current Delaware law grants executives the freedom to pursue a long-term strategy with less concern for the narrow, short-term interests of shareholders. In effect, the unfolding multifiduciary model reduces the burden on management to placate a displeased shareholder's self-interested challenge of its strategic vision—consider, for example, Kirk Kerkorian's recent battle with Chrysler's board of directors to reduce the company's cash holdings and raise the dividend payout rate at the expense of long-term liquidity. Thus, management will find it legally easier to justify certain actions or decisions that may appear to dampen shareholders' short-term returns but that promise greater long-term gains. It will be intriguing to see if managerial pursuit of broad stakeholder interests, rather than slavish devotion to stockholders concerns, will improve the overall productivity of corporate America (Lipton & Rosenblum 1991).

Post-*Time* case law will also compel directors to revisit their notions of external relations. The multifiduciary model gives heretofore distinct segments of the community an incentive to exercise the notion "United we stand, divided we fall." That is, managers must anticipate the development of integrated relationships within and among the various groups and interests of the corporation.

For example, consider the changing status and strategies of organized labor. Ostensibly, the deunionization of the labor force limits workers' capacity to influence management's strategic choices. However, a multifiduciary model opens up novel lines of exchange and influence. In the least, changing standards of the fiduciary duties of care, candor, and loyalty fortify labor's class action suits. Moreover, labor's visible membership within the "community of interest that the corporation represents" gives their concerns strong credibility. We see labor duly repositioning itself. For example, the Investor Responsibility Research Center reported that in 1994 the International Brotherhood of Teamsters filed 16 shareholder resolutions, compared with 6 filed by CalPERS, a leading shareholder advocate (Silverstein 1994). Moreover, we see labor repackaging its concerns from narrowly defined demands for wage or job concession to inclusive governance initiatives that resonate with the agenda of the larger community of interest. Consider that in April 1995 the alliance of the International Brotherhood of Teamsters, CalPERS, and TIAA-CREF challenged Philip Morris's nominee slate of 14 directors for its board. Noted Richard H. Koppes, deputy executive officer and general counsel for CalPERS, "This is a symbolic act, and

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

we're trying to send a message" (New York Times 1995). Other moves by labor, the *Economist* (1995) reasoned, suggest that "many unions have discovered that disguising their efforts as corporate governance initiatives means that they are more likely to win support from other investors." The unfolding body of post-*Time* case law suggests forthcoming success for new governance alliances. Therefore, researchers and managers should anticipate similar initiatives from the diversity of constituents that make up a corporation's particular community of interest.

Just as labor has rethought its rhetoric and strategy, managers operating within a multifiduciary context may need to rethink their actions. To some degree, we see evidence of corporations executing proactive programs by improving their responsiveness to the "community of interests." Most notably, recall General Motors's recent call for a radical redesign of the composition, role, and duties of a board of directors. GM has created a de facto standard of a well-designed board by stipulating that independent directors nominate new directors, directors must have access to all top managers, and outside directors have regularly scheduled private meetings (Dobrzynski 1994).

Finally, we anticipate that the transition to a multifiduciary model will continue to trigger new sources of uncertainty for directors and managers. Inevitably, various members of the team may become more influential due to their ability to reduce uncertainty for the organization, mediate with the community of interests, or possibly exploit the situation. Determining what top management team behaviors are appropriate or inappropriate will be difficult as norms of appropriate behavior in a multifiduciary context are unclear at present. The distribution of power within the top management team may be affected, suggesting an increasingly important relationship between a corporation's governance policy (perhaps suggested by its choice of state of incorporation) and top management team turnover and composition. The premise, if events confirm, will encourage fine-tuning our understanding of the upper echelon of management. Likewise, the need for legal filters and buffers may make legal counsel or the individual with greater sociolegal sensitivities a more influential member of the top management team.

References

Alchian, Armen A., & Harold Demsetz (1972) "The Property Rights Paradigm," 33 *J. of Economic History* 16–27.

Allen, William T. (1990) "Competing Conceptions of the Corporation in American Law," Rocco Tresolini Lecture in Law, Lehigh University, 29 Oct. (reprint on file with *Delaware J. of Corporate Law*).

——— (1993) "Contracts and Communities in Corporation Law," 50 *Washington & Lee Law Rev.* 1395–1407.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

——— (1995) "The Evolution of Corporate Boards," *Corporate Board,* p. 1 (July-August).

Alva, Curtis (1990) "Delaware and the Market for Corporate Charters: History and Agency," 15 *Delaware J. of Corporate Law* 885–919.

Astley, W. Graham, & Andrew H. Van de Ven (1983) "Central Perspectives and Debates in Organization Theory," 28 *Administrative Science Q.* 245–73.

Ballam, Deborah A. (1993) "The Evolution of the Government-Business Relationship in the United States: Colonial Times to Present," 31 *American Business Law J.* 553–640.

Berger, Peter L., & Thomas Luckman (1966) *The Social Construction of Reality.* New York: Doubleday Anchor.

Berle, A. A., Jr. (1931) "Corporate Powers as Powers in Trust," 44 *Harvard Law Rev.* 1049–74.

——— (1932) "For Whom Corporate Managers Are Trustees: A Note," 45 *Harvard Law Rev.* 1365–72.

Berle, A. A., Jr., & Gardiner C. Means (1932) *The Modern Corporation and Private Property.* New York: Macmillan.

Bishop, Matthew (1994) "Watching the Boss: A Survey of Corporate Governance," *Economist,* pp. 3–5 (29 Jan.).

Black, Bernard (1994) "Institutional Investors and Corporation Governance: The Case for Institutional Voice," 6 *J. of Applied Corporate Finance* 19–32.

Block, Dennis J., Stephen A. Radin, & Michael J. Maimone (1992) "Chancellor Allen, the Business Judgment Rule, and the Shareholders' Right to Decide," 17 *Delaware J. of Corporate Law* 785–842.

Bok, Derek C. (1993) *The Cost of Talent.* New York: Free Press.

Bratton, William W. (1989) "The New Economic Theory of the Firm: Critical Perspectives from History," 41 *Stanford Law Rev.* 1471–1527.

——— (1992) "The Economic Structure of the Post-Contractual Corporation," 87 *Northwestern Univ. Law Rev.* 180–215.

Burrough, Bryan, & James Helyar (1990) *Barbarians at the Gate: The Fall of RJR Nabisco.* New York: Harper & Row.

Cannon, T. (1966) *Corporate Responsibility.* London: Pittman.

Chandler, Alfred DuPont (1977) *The Visible Hand: The Managerial Revolution in American Business.* Cambridge: Harvard Univ. Press, Belknap Press.

Clark, Jeffrey J. (1995) "Compaq Computer Corporation. v. Horton: A Straightforward, Clarifying, Statutory Interpretation of Section 220(b) and (Chancery)," 20 *Delaware J. of Corporate Law* 622–34.

Clark, Robert (1986) *Corporate Law.* Boston: Little, Brown.

Coase, R. H. (1937) "The Nature of the Firm," 4 *Economica* 380–405.

Coffee, John C. (1984) "Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance," 84 *Columbia Law Rev.* 1145–1296.

——— (1991) "Liquidity versus Control," 91 *Columbia Law Rev.* 1277–1386.

Davis, Gerald F., & Tracy A. Thompson (1994) "A Social Movement Perspective on Corporate Control," 39 *Administrative Science Q.* 141–71.

DiMaggio, Paul (1988) "Interest and Agency in Institutional Theory," in L. G. Zucker, ed., *Institutional Patterns and Organizations: Culture and Environment.* Cambridge, MA: Ballinger.

Distefano, Joseph, & Stephen Chrzanowski (1996) "Delaware Lets Corporations Write Their Own Laws," *News J.* (Gannett), p. A1 (20 March).

Dobrzynski, Judith H. (1994) "An Inside Look at CalPERS' Boardroom Report Card," *Business Week,* p. 196 (17 Oct.).

Dodd, E. Merrick, Jr. (1932) "For Whom Are Corporate Managers Trustees?" 45 *Harvard Law Rev.* 1145–63.

Donaldson, Thomas, & Lee E Preston (1995) "The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications," 20 *Academy of Management Rev.* 65–92.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Dooley, Michael P. (1992) "Two Models of Corporate Governance: Analysis of the American Law Institute's Principles of Corporate Governance," 47 *Business Lawyer* 461–527.

Dooley, Michael P., & Norman Veasey (1989) "The Role of the Board in Derivative Litigation: Delaware Law and the Current ALI Proposals Compared," 44 *Business Lawyer* 503–42.

Douglas, William O. (1940) "Democracy and Finance," in J. Allen, ed., *The Addresses and Public Statements of William O. Douglas as Member and Chairman of the Securities and Exchange Commission.* New Haven, CT: Yale Univ.

Drexler, David, Lewis Black, & A. Gilchrist Sparks (1995) *Delaware Corporation Law and Practice,* Release No. 7. New York: Matthew Bender.

Durkheim, Emile (1949 [1893]) *The Division of Labor in Society.* Glencoe, IL: Free Press.

Easterbrook, Frank H., & Daniel R. Fischel (1991) *The Economic Structure of Corporate Law.* Cambridge: Harvard Univ. Press.

Economist, The (1993a) "Return of the Active Shareholder," *Economist,* p. 18 (30 Jan.).

——— (1993b) "A Fund in Wolf's Clothing," *Economist,* p. 68 (30 Jan.).

——— (1993c) "Of Paramount Importance," *Economist,* p. 60 (18 Dec.).

——— (1995) "Frisky Shareholder," *Economist,* p. 87 (29 April).

Felsenthal, Edward (1995) "Liability of Directors," *Wall Street J.,* p. B4 (7 July).

Fink, Steven J. (1995) "The Rebirth of the Tender Offer? Paramount Communications, Inc. v. QVC Network, Inc.," 20 *Delaware J. of Corporate Law* 133–81.

Fletcher, William M. (1987) *Fletcher's Cyclopedia of the Law of Private Corporations.* Perm. ed. rev. Deerfield, IL: Callaghan & Co.

Fligstein, Neil, & Robert Freeland (1995) "Theoretical and Comparative Perspective on Corporate Organization," 21 *Annual Rev. of Sociology* 21–44.

Friedman, Lawrence M. (1985) *A History of American Law.* New York: Simon & Schuster.

Gilson, Ronald, & Reinier Kraakman (1989) "Delaware's Intermediate Standard for Defensive Tactics: Is There Substance for Proportionality Review?" 44 *Business Law* 247–74.

——— (1991) "Reinventing the Outside Director: An Agenda for Institutional Investors," 43 *Stanford Law Rev.* 863–906.

Gordon, Charles (1991) "Government Rationality: An Introduction," in G. Burchell et al., eds., *The Foucault Effect.* London: Harvester.

Grundfest, Joseph A. (1990) "Subordination of American Capital," 27 *J. of Financial Economics* 89–114.

——— (1993) "Just Vote No: A Minimalist Strategy for Dealing with Barbarians inside the Gates," 45 *Stanford Law Rev.* 857–937.

Gruson, Lindsey (1986) "Tiny Delaware's Corporate Clout: A Little Known but Powerful Bench Tells Business How to Behave," *New York Times,* p. A-6F, sec. 3 (1 June).

Hall, Kermit L. (1989) *The Magic Mirror: Law in American History.* New York: Oxford Univ. Press.

Hawley, James, & Andrew Williams (1996) *Corporate Governance in the United States: The Rise of Fiduciary Capitalism.* Brussels: Organization for Economic Cooperation and Development, 31 Jan.

Henriques, Diana B. (1995a) "Cinerama v. Technicolor: A Suit That Has Wall Street's Attention," *New York Times,* p. D-8 (23 May).

——— (1995b) "Top Business Court under Fire," *New York Times*, pp. D1–D2 (23 May).

Hirsch, Paul M. (1986) "From Ambushes to Golden Parachutes: Corporate Takeovers as an Instance of Cultural Framing and Institutional integration," 91 *American J. of Sociology* 800–837.

Horwitz, Morton J. (1985) "Santa Clara Revisited: The Development of Corporate Theory," 88 *West Virginia Law Rev,* 173–224.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Hovenkamp, Herbert (1991) *Enterprise and American Law, 1836–1937.* Cambridge: Harvard Univ. Press.

Hughes, Jonathan R. T. (1991) *The Governmental Habit Redux: Economic Controls from Colonial Times to the Present.* Princeton, NJ: Princeton Univ. Press.

Jackson, Norman, & Pippa Carter (1995) "Organizational Chiaroscuro: Throwing Light on the Concept of Corporate Governance," 48 *Human Relations* 875–90.

Jensen, Michael C. (1993) "Presidential Address: The Modern Industrial Revolution, Exit, and the Failure of Internal Control Systems," 48 *J. of Finance* 831–80.

Jensen, Michael C., & William H. Meckling (1976) "Theory of the Firm: Managerial Behavior, Agency Costs, and Capital Structure," 3 *J. of Financial Economics* 305–60.

Johnson, Jonathan, Catherine Daily, & Alan Ellstrand (1996) "Boards of Directors: A Review and Research Agenda," 22 *J. of Management* 409–39.

Klein, Michael R., et al. (1990) "Skewered Shareholders: Roundtable on the Time Warner Deal," *Directors & Boards,* pp. 30–37 (Winter).

Knight, Jack, & Lee Epstein (1996) "On the Struggle for Judicial Supremacy," 30 *Law & Society Rev.* 87–120.

Labaton, Stephen (1989) "Profile: Judge William T. Allen: Delaware Chancery Court," *Los Angles Daily J.,* p. A-1 (7 July).

Lerner, Jonathan (1990) "Did the Time Decision Torpedo the Hostile Bid?" *Mergers and Acquisitions,*, p. 41 (Jan.-Feb.).

Lipton, Martin, & Steven A. Rosenblum (1991) "A New System of Corporate Governance: The Quinquennial Election of Directors," 58 *Univ. of Chicago Law Rev.* 187–253.

Manning, Bayless (1962) "The Shareholder's Appraisal Remedy: An Essay for Frank Coker," 72 *Yale Law J.* 223–65.

Manne, Henry G. (1965) "Mergers and the Market for Corporate Control," 73 *J. of Political Economy* 110–20.

Massey, Stephen (1992) "Chancellor Allen's Jurisprudence and the Theory of Corporate Law," 17 *Delaware J. of Corporate Law* 683–783.

Mergers & Acquisitions (1992) "Endangered Species of the M&A," Market. *Mergers & Acquisitions,* pp. 25–26.

Millon, David (1990) "Theories of the Corporation," 1990 *Duke Law J.* 201–62.

——— (1993) "Communitarians, Contractarians, and the Crisis in Corporate Law" (Symposium: New Directions in Corporate Law), 50 *Washington & Lee Law Rev.* 1373–93.

Millstein, Ira (1993) "Who's Watching the Watchers?" 30 *Across the Board* 23–28.

Monks, Robert A. G., & Nell Minow (1991) *Power and Accountability.* New York: Harper Business. (Excerpted http://www.wp.com/corpgov/cgbibiography.html.)

——— (1996) *Watching the Watchers: Corporate Governance in the 21st Century.* New York: Blackwell Publishers. (Excerpted http://www.wp.com/corpgov/cgbibiography.html.)

Nelson, Ralph L. (1959) *Merger Movements in American Industry, 1895-1956.* Princeton, NJ: Princeton Univ. Press.

New York Times (1877) "Distrust of Corporate Management," *New York Times,* 4 (2 Feb.).

——— (1995) "CalPERS Will Oppose Nominees for Philip Morris Board," *New York Times,* p. D2 (14 April).

North, Douglass C. (1990) *Institutions, Institutional Change, and Economic Performance.* New York: Cambridge Univ. Press.

O'Barr, William M., John M. Conley, & Carolyn Kay Brancato (1992) *Fortune and Folly: The Wealth and Power of Institutional Investors.* Homewood, IL: Richard D. Irwin, Inc.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Orts, Eric W. (1992) "Beyond Shareholders: Interpreting Corporate Constituency Statutes," 61 *George Washington Law Rev.* 14–135.

Palmer, Ian, & Richard Dunford (1996) "Conflicting Uses of Metaphors: Reconceptualizing Their Use in the Field of Organizational Change," 21 *Academy of Management Rev.* 691–718.

Pound, John (1992) "Beyond Takeovers: Politics Comes to Corporate Control," *Harvard Business Rev.*, pp. 83–92 (March-April).

——— (1993) "The Rise of the Political Model of Corporate Governance and Corporate Control," 68 *New York Univ. Law Rev.* 1003–71.

——— (1995) "The Promise of the Governed Corporation," *Harvard Business Rev.*, pp. 89–99 (March-April).

Quillen, W. T., & M. Hanrahan (1992) *A Short History of the Delaware Court of Chancery. In the Court of Chancery of the State of Delaware, 1792–1992.* Wilmington: Historical Society for the Court of Chancery of the State of Delaware.

Rao, Ramesh K. S., David Simon Sokolow, & Derek White (1996) "Fiduciary Duty a la Lyonnais: An Economic Perspective on Corporate Governance in a Financially-Distressed Firm," 22 *J. of Corporation Law* 53–78.

Roe, Mark (1991) "A Political Theory of American Corporate Finance," 91 *Columbia Law Rev.* 10–67.

——— (1994) *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance.* Princeton, NJ: Princeton Univ. Press.

Roll, Richard (1986) "The Hubris Hypothesis of Corporate Takeovers," 59 *J. of Business* 197–216.

Romano, Roberta (1987) "The State Competition Debate in Corporate Law," 8 *Cardozo Law Rev.* 709–57.

——— (1993) "Public Pension Fund Activism in Corporate Governance Reconsidered," 93 *Columbia Law Rev.* 795–853.

Scott, W. Richard (1995) *Institutions and Organizations: Structural Complexity and Individualism.* Thousands Oaks, CA: Sage Publications.

Scott, W. Richard, & John W. Meyer (1994) *Institutional Environments and Organizations.* Thousands Oaks, CA: Sage Publications.

Schmitt, Richard B. (1993) "Legal Beat: Court Holds Directors to Higher Legal Standard," *Wall Street J.* p. B6:1 (1 Nov.).

Shapiro, Irving (1988) *Report of the Committee on the Court of Chancery.* Wilmington: State of Delaware (21 Dec.).

Silverstein, Ken (1994) "Pension Funds Increase Presence in Corporate Boardrooms," *Pension World,* pp. 4–5 (May).

Smith, Michael (1996) "Shareholder Activism by Institutional Investors: Evidence from CalPERS," 50 *J. of Finance* 227–53.

Stilson, Ann E. Conaway (1995) "Reexamining the Fiduciary Paradigm at Corporate Insolvency and Dissolution: Defining Directors' Duties to Creditors," 20 *Delaware J. of Corporate Law* 1–122.

Sweeny, Paul (1993) "How CalPERS Can Ruin a CEO's Day," 7 *Global Finance* 34–39 (Feb.).

Tamanaha, Brian Z. (1996) "The Internal/External Distinction and the Notion of "Practice" in Legal Theory and Sociological Studies, 30 *Law & Society Rev.* 163–204.

Taylor, B. Ellen (1996) "New and Unjustified Restrictions on Delaware Directors' Authority," 21 *Delaware J. of Corporate Law* 837–94.

Tinker, T. (1986) "Metaphor or Reification: Are Radical Humanists Really Libertarian Anarchists?" 23 *J. of Management Studies* 363–84.

Useem, Michael (1996) *Investor Capitalism: How Money Managers are Changing the Face of Corporate America.* New York: Basic Books.

Van der Weide, Mark E. (1996) "Against Fiduciary Duties to Corporate Stakeholders," 21 *Delaware J. of Corporate Law* 27–86.

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Werkheiser, Gregory W. (1995) "Delaware's New Mandate in Class Action Settlements: Expanding the Scope and Intensity of Settlement Review," 20 *Delaware J. of Corporate Law* 496–534.
——— (1996) "Defending the Corporate Bastion: Proportionality and the Treatment of Draconian Defenses from Unocal to Unitrin," 21 *Delaware J. of Corporate Law* 103–32.
Wilburn, Elizabeth A. (1995) "Beyond Aronson: Recent Delaware Cases on Demand Futility," 20 *Delaware J. of Corporate Law* 535–63.
Williams, Mary (1984) "Delaware's Sedate Chancery Court Is a Major Corporate Battleground," *Wall Street J.*, p. 34 (10 May).
Williamson, Oliver E. (1979) "Transaction-Cost Economics: The Governance of Contractual Relations," 22 *J. of Law & Economics* 233–61.

Cases

A C Acquisition Corp. v. Anderson Clayton & Co., 519 A.2d 103 (Del. Ch. 1986).
Allen v. Stewart, 7 Del. Ch. 287 (1895).
Aronson v. Lewis, 473 A.2d 805 (1984).
Arnold v. Society for Sav. Bancorp, 678 A.2d 533 (1996).
Bennett v. Breuil Petroleum Corp., 99 A.2d 236 (1953).
Blair v. F. H. Smith Co., 156 A. 207 (1941).
Blasius Indus. v. Atlas Corp., 564 A.2d 651 (1987).
Brophy v. Cities Services Co., 70 A.2d 5 (1949).
Cahall v. Lofland, 114 A. 224 (1911).
Campbell v. Loew's Int'l, 134 A.2d 852 (1957).
Cede & Co. v. Technicolor Inc., 634 A.2d 345 (Del. 1993).
Cinerama, Inc. v. Technicolor, (1988–96); see note 5 for all rulings.
City Capital Associates v. Interco, 551 A.2d 787 (Del. Ch. 1988); Civil Action 10,105 (1988).
Colbert v. Sutton, 5 Del. Ch. 294 (1880).
Compaq Computer Corp. v. Horton, 631 A.2d 1 (1993).
Credit Lyonnais Bank N.V. v. Pathe Communications Corp., Civil Action 12,150 (1991).
Edelman v. Phillips Petroleum Co., Civil Action 7899 (1985).
Ellis v. Penn Beef Co., 80 A. 804 (1911).
Equity Linked Investors v. Genta, Inc., Civil Action 13,984 (1997).
Eshman v. Keenan, 181 A.2d 655 (1935).
Exchange Comm'n v. Chancery Corp., 318 U.S. 80 (1943).
Gans v MDR Liquidating Corp., Civil Action 9,630 (1990).
Geyer v. Ingersoll Publishing Co., 621 A.2d 784 (1992).
In re Gulla, 115 A. 317, 13 Del. Ch. 23 (1921).
Guth v. Loth, Inc., 5 A.2d 503, 510 Del. Ch. (1938).
Hariton v. Arco Electronics, 188 A.2d 22 (1962).
Harned v. Beacon Hill Real Estate Co., 9 Del. Ch. 232, 80 A. 805 (1911).
Ivanhoe Partners v. Newmont Min. Corp. (533 A.2d 585) (1986).
In re J. P. Stevens & Co. Inc. Shareholder Litigation, Civil Action 9,634 (1988).
Kahn v. Roberts, 638 A.2d 1119 (1993).
Kass v. Eastern Air Lines, Inc., Civil Action 8,700, 8,701, & 8,711 (1986).
Katz v. Plant Indus., Civil Action 6407 (1981).
Katz v. Oak Indus., Inc., 508 A.2d 873 (1984).
Kidde Indus., v. Weaver Corp., 593 A.2d 563 (1991).
Lewis v. Aronson, Civil Action 6919 (1985).
Lieberman v. First Nat'l Bank of Wilmington, 8 Del. Ch. 229, 40 A. 382 (1898).
Marhart, Inc. v. Calmat Co., Civil Action 11,820 (1992).
Martin v. D. B. Martin Co., 10 Del. Ch. 211, 88 A. 612 (1913).
McClary v. Reznor, 3 Del. Ch. 445 (1870).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press

Mendel v. Carroll, 651 A.2d 297 (1994).
Mills Acquisition Co. v. MacMillian, Inc., 559 A.2d 1261 (Del. 1989).
Millstein v. Arcade Cafeteria, 2 A.2d 158 (1938).
Orzeck v. Englehart, 195 A.2d 375 (1963).
Paramount Communications v. Time Inc., 571 A.2d 1140 (1989).
Paramount Communications v. Time Inc., 571 A.2d 1145 (Del. 1990).
Pogostin v. Rice, 480 A.2d 619 (1984).
QVC Network v. Paramount Communications, 637 A.2d 1245 (1993).
Rales v. Blashand, 634 A.2d 927 (1993).
Revlon, Inc. v. MacAndrews & Forbes Holdings, 506 A.2d 173 (Del. 1986).
Richards v. Seal, 3 Del. Ch. 266 (1861).
Ringling v. Ringling Bros., 49 A.2d 603, 29 Del. Ch. 318 (1946).
Rosenmiller v. Bordes, 607 A.2d 465 (1991).
Rothschild Int'l. Corp. v. Liggett Group, 474 A.2d 133 (1985).
Schnell v. Chris-Craft Indus., 85 A.2d 437 (1971).
Shenandoah Life v. Valero Energy Corp., Civil Action 9,032 (1988).
Simons v. Cogan, 542 A.2d 785, 791 (1987).
Smith v. Van Gorkom, 488 A.2d 858 (1985).
Sparks v. Farmers Bank, 3 Del. Ch. 274 (1869).
Stahl v. Apple Bancorp, 579 A.2d 1115 (1990).
Stroud v. Grace, 606 A.2d 75 (1992).
Trans World Airline v. State, 183 A.2d 174 (1962).
In re TriStar Pictures, Inc. Litigation, 634 A.2d 319 (1993).
In re Unitrin, Inc. Shareholder Litigation, 651 A.2d 1361 (1995).
Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (1985)
In re USA Cafes L.P. Litigation, 600 A.2d 43 (1991).
Walter v. Peninsula Cutstone Co., 82 A. 689, 9 Del. Ch. 348 (1912).
Weinberger v. UOP, Inc., 457 A.2d 701 (1983).
In re Wheelabrator Technologies Inc. Shareholder Litigation, Civil Action 11,495 (1995).
Wolfensohn v. Madison Fund, 253 A.2d 72 (1969).
Yaw v. Talley, Civil Action 12,882 (1993).
Zirn v. VLI Corp., 621 A.2d 773 (1993).

https://doi.org/10.2307/3053985 Published online by Cambridge University Press