on the supremacy of state law in regulating internal affairs and in assembling the substantive attributes of corporate stock, the court refused to read section 19(c) as a blank check for the SEC to alter that "tradition."[248]

Finally, the court observed that although the attribute of equal voting rights may be "an important part of the background"[249] against which Congress acted, nowhere is there evidence that one of the purposes of the federal securities laws is "preservation of the one share/one vote principle."[250] In these few words, the court captured a simple but stubborn fact about federal securities law, i.e., its utter beholdenness to state law for sculpting the contours of the commodity it regulates. And that cogent recognition extinguished the last embers of a persistent but failed effort to make federal law do more than it was ever designed to do.

IV. SHOULD CORPORATE STOCK BE REJUVENATED?

In one sense it seems odd that there was ever any doubt as to whether a federal law almost sixty years old did or did not usurp control over a key corporate subject. But the question of which legal regime (state or federal) governs an area never arises, or is of any interest, in the abstract. Rather, that debate is fueled by disagreement over specific issues that may develop long after the legal machinery is in place. Eventually, social, political or economic change leads to the emergence of conflicting beliefs on concrete matters. In a political system founded on principles of federalism, over time the merits of the dispute evolve to crystallize around two positions, i.e., continuation of state practices or a federal override. The result is a turf battle.

The supposed points of conflict between federal and state law described in this article would have been meaningless sixty, fifty, forty, or even thirty years ago. Only chronic spoliation of state law, coupled with the acute emergence of the hostile takeover phenomenon and the increasingly sophisticated responses to it, produced this clash. One's beliefs about the relative value of those two transshaping

248. *Business Roundtable*, 905 F.2d at 412 (noting that "[a]t least one Commissioner shared this view, stating '[s]ection 19c does not provide the Commission *carte blanche* to adopt federal corporate governance standards through the back door by mandating uniform listing standards'" (quoting Final Rule, 53 Fed. Reg. at 26,395/1) (Grundfest, Comm'r, concurring).

249. *Business Roundtable*, 905 F.2d at 413.

250. *Id.*

developments generally control whether one prefers state or federal law. Thus, if the drift of corporate law over the past several decades is disturbing, some would look to market forces such as hostile takeover activity as remedies. In this simplistic view, markets are decontextualized into extra-legal phenomena that benevolently constrain corporate law and eventually correct its ills. Yet, if nurturing *market* forces requires a *regulatory* presence in the form of a federal override (via claims that state law is preempted or violates the commerce clause) or federal intervention (via new legislation), some are unwilling to contravene state authority.[251] Others, however, might be willing to pay that political price to revitalize market activity, while still others are less enamored of hostile takeovers generally and would deal with undesirable developments in corporate law through other means. The underlying issues should be tackled openly and not dodged by various artful claims that existing federal law has very much to say about them, precisely because they generate such heated discussion and disparate responses.[252] What are those issues, and who should address them?[253]

A. The Direction of State Corporation Law

Disturbed as he was in 1974 at the weakened position of shareholders in public corporations, compared to their status in 1990, Professor Cary should have been elated. Especially over the past six years, state corporation law has severely shackled shareholder influence over corporate affairs. This dampening of shareholder say is a direct result of hostile takeovers. This trend is evidenced by both corporate statutes and, after a brief flirtation with shareholder preeminence, current judicial review of defensive measures as well. Whether one focuses on the proliferation of insuperable antitakeover

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251. Professor Romano, for example, is disturbed by antitakeover statutes but reluctant to advocate federal intervention. *See* Romano, *supra* note 150.

252. *See* Johnson, *supra* note 7, at 868. *See also id.* at 868 nn.11, 12 & 869 n.17 (referring to works treating various facets of the takeover controversy).

253. In another context, Professor Stanley Fish has recognized the importance of addressing who gets to decide answers to legal questions:

> After all, the crucial question, which returns the original problem to center stage, still has to be asked: Who gets to make the rules? And once that question is answered, another question (it is really the same) waits behind it: Who gets to say who gets to make the rules?

Fish, *Force*, 45 WASH. & LEE L. REV. 883, 884 (1988).

laws or the Delaware Supreme Court's recent *Paramount Communications, Inc. v. Time Inc.*[254] decision, the emphasis on expanded managerial prerogative is unmistakable. Today, the scope of this prerogative is far greater than that critiqued by Professor Cary. It now extends to the market for corporate control thought by Ralph Winter and others to be both the missing ingredient in Cary's misguided call for federal action and the unsung vehicle by which shareholder power would be reclaimed. The two prongs of state corporate law have adroitly outflanked believers in this brand of market medicine for corporate ills. By empowering corporate management to short-circuit market mechanisms, state law has now effectively neutralized the capital market antidote for its earlier failings.

One can easily launch a searing indictment of this development.[255] In addition to betraying shareholders, states are accused of sheltering parochial interests and of pandering to corporate management. Besides a massive erosion in shareholder influence, the results are said to be a substantial diminution of shareholder wealth, depressed share prices, externalization of costs, throttling of competitive market forces, reduction in the efficiency with which corporate resources are used, loss of international competitiveness, absence of genuine protection for local interests, retrograde corporate governance, and a serious lack of managerial accountability.[256]

The responses to these allegations are well-known.[257] One claim still heard, although less frequently than in the past, is that shareholders are now better off because of state law. This claim has both a descriptive and a normative dimension. Descriptively, this refrain is a managerial apologist's ironic variation on a theme sung by market advocates: the current status of law must be beneficial to shareholders because, over the long run, corporate law itself is the

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254. 571 A.2d 1140 (Del. 1989).

255. After Pennsylvania added several new wrinkles to its already formidable antitakeover law in 1990, Senator Vincent Fumo labeled it the "Fat Cat Protection and Shareholder Rip-off Act of 1989." Elias, "*Turning Up the Heat on the Top*," Insight, July 23, 1990, at 8, 9. *See generally id.* (providing other criticisms of Pennsylvania's new law).

256. *See* Cann, *Toward The Depoliticization of Takeover Theory: Creation Of An Innovation Factor*, 40 SYRACUSE L. REV. 1167, 1172-77 (1989) (summarizing many of these arguments). *See also* Prentice & Langmore, *Hostile Tender Offers and the "Nancy Reagan Defense": May Target Boards "Just Say No"? Should They be Allowed To?*, 15 DEL. J. CORP. L. 377 (1990).

257. *See, e.g.*, Cann, *supra* note 256, at 1177-81; Prentice & Langmore, *supra* note 256. *See also supra* note 13.

product of a bargain of sorts. Given institutional shareholder complaints about the status of state law, either the description is wrong or the parties have yet to "renegotiate" their bargain. The normative thrust is that if management's defensive power is so awesome, then it should be deployed to extract higher premiums from hostile bidders. However appealing that normative justification of positive law was when management could delay (but not flatly rebuff) hostile overtures, current law so heavily fortifies management that event-driven auctions, restructurings, and other investor wealth-enhancing measures[258] seem increasingly unlikely. Today, the claim that these statutory and case law developments therefore are visibly advantageous for shareholders rings hollow.

Moving away from a shareholder-centered standard of appraisal, state law developments are sometimes applauded for curbing an unhealthy and destabilizing use of debt to finance corporate acquisitions, freeing corporate management from an excessive focus on short-run stock price performance (thereby enabling it to manage enterprises for the longer term), increasing international competitiveness, slowing foreign purchases of American companies, protecting various noninvestor interests, and, in general, "throwing some sand" into the gears of the takeover mechanism.[259]

One obvious problem in seeking to settle these conflicting claims is disagreement over the proper criterion (or criteria) for evaluation. Using the orthodox metric of shareholder well-being, state corporation law regulating hostile takeovers fails the grade. Likewise, when strict management accountability is the calculus. When efficiency in resource use is the measure, however, the evidence is mixed.[260] Some

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258. Prentice & Langmore, *supra* note 256. *See also supra* note 13.

259. The phrase "throwing some sand" is Professor Tobin's. Plender, *Throw Sand in the Takeover Machine*, Fin. Times (London), July 24, 1990, at 18. Concern over foreign investment in America found expression in the Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988. Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988). As summarized by Joseph Reece, the amendment "gives the President the power to suspend, prohibit or dismantle mergers, acquisitions and takeovers of United States companies by foreign investment which threaten 'national security.'" Reece, *Buyer Beware: The United States No Longer Wants Foreign Capital to Fund Corporate Acquisitions*, 18 DEN. J. INT'L L. & POL'Y 279, 281 (1990). As of mid-1990, President Bush had followed the advice of the Committee on Foreign Investment in the United States, a high-level inter-agency panel, on each of the occasions when a formal inquiry over the "national security" aspects of a takeover has been held. Riddell & Kehoe, *Sale of U.S. Chip Group to Japanese Wins Backing*, Fin. Times (London), July 18, 1990, at 3.

260. *See* Johnson, *supra* note 7, at 869 n.20, & 884-88.

economists positively crow about takeovers (and thus against state law obstacles) while others are highly skeptical of efficiency claims. As to exorbitant levels of debt, conventional finance wisdom emphasizes caution in reliance on leverage, yet Professor Michael Jensen asserts that too little debt is the real culprit.[261] On the role of takeovers in enhancing long-run competitiveness, again both sides claim victory. With respect to protection for noninvestor interests as a justification for antitakeover laws, concededly such interests remain subject to incumbent management discretion and enjoy no fully-developed legislative program for their protection.[262] But, at the same time, those interests regularly join the clamor for protection from hostile bids[263] and appreciate the fact that facing a rifle with one bullet (managerial latitude) is better than facing one with two (hostile bidders as well).

Thus, there is not only a difference of opinion over how the evidence stacks up in agreed categories, but a deeper sparring over standards for assessment. The former quarrel can be resolved empirically within the limits of social measurement. The latter dispute cannot for it represents a rejection of the conventional shareholder-welfare, management-accountability prism for viewing corporate issues in favor of a more heterodox, less easily quantifiable outlook. It is as if one of two neighbors, who have long tended a plot of ground together, suddenly decides to farm by organic principles while the other remains wedded to high doses of herbicides and pesticides. One claims to value sustainability of the soil while the other cherishes a higher yield. At this level of controversy, there is no palpably "right" answer because incommensurable standards are at work. However important it is that each side remain open to, respectful of, and instructed by the other's views, it is futile to try to shoehorn the arguments and data of one party into the normative scheme of the other.

Today, however tentatively and fumblingly, state law expresses serious reservations about the social utility of hostile takeover activity. In doing so, the law mirrors the doubts of society at large, a proper role of law, corporate or otherwise.[264] Part of the regulatory fallout is adversity for shareholders. But that fact, however disturbing when

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261. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323, 324 (1986).

262. *See* Cox, *supra* note 13, at 203-14.

263. *See* Millon, *supra* note 16.

264. Johnson, *supra* note 7, at 934.

viewed in isolation, clinches nothing, either for social policy or corporate law, when set into a larger matrix of considerations. Thus, the claim that in 1991 state corporation law is not fully responsive to shareholder concerns is not denied, it is duly noted and met with a "yes, but . . . ."

B. Responses to State Corporation Law

Only by appreciating a couple of basic points can one answer the question of what, if anything, should be done about the current condition of state corporation law. First, empirically, much is still unknown about the overall effects of hostile takeover activity. Second, a significant number of responsible persons are saying "yes, but . . . ." Failure to acknowledge these facts will lead to calls for one or more of the misguided courses of action described in the three subparts below.

1. Continued Constitutional Challenges to State Antitakeover Legislation

Like the quest for nuclear fusion, state legislatures feverishly continue their search for a truly invincible form of antitakeover legislation. Control share acquisition and business combination statutes, now *de rigueur*, are joined by a remarkable panoply of other innovative laws. These baroque laws authorize,[265] and sometimes require,[266] directors to consider noninvestor interests in forming corporate responses to hostile bids; make explicit that shareholder interests are not the primary or controlling factor in managerial decision making;[267] require bidders to honor trade union contracts and make substantial severance payments to discharged employees;[268] authorize corporations to insulate directors from liability;[269] make it clear that directors may refuse to redeem poison pill plans;[270] and oblige shareholders, who have held twenty percent or more of a company's voting

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265. *See, e.g.*, MINN. STAT. ANN. § 302A.251, subd. 5 (West 1990); OHIO REV. CODE ANN. § 1701.59D (Anderson Supp. 1989).

266. *See* CONN. GEN. STAT. ANN. § 33-313(e) (West 1990).

267. IND. CODE ANN. § 23-1-35-1(f) (Burns Supp. 1990); 1990 PA. LAWS 36, §§ 2, 4 (amending 15 PA. CONS. STAT. §§ 511(e), 1721(f)(3) (Supp. 1990)).

268. 1990 PA. LAWS 36, § 6 (adding §§ 2581-2583, 2585-2588 to 15 PA. CONS. STAT.).

269. DEL. CODE ANN. tit. 8, § 102(b)(7) (1974 & Supp. 1988); 1990 PA. LAWS 36, § 2 (amending 15 PA. CONS. STAT. § 512).

270: 1990 PA. LAWS 36, § 4 (amending 15 PA. CONS. STAT. § 1721(F)(1)).

stock for less than two years, to disgorge to the corporation any profit on shares sold within eighteen months after the shareholder first became a twenty percent or more owner.[271] Only the limits of corporate lawyers' imaginations constrain yet additional legislation.

These latest enactments have caused considerable handwringing among, and have been harshly criticized by, academic commentators, shareholder advocacy groups, and the recently-resigned General Counsel of the SEC.[272] Moreover, the new chairman of the SEC, Richard Breeden, has lambasted these laws and asserting a compelling federal interest in a national market for stocks, menacingly indicating the SEC may challenge them on constitutional grounds.[273] At least one corporate scholar believes that a challenge on constitutional grounds will be successful.[274] Tough talk is the prerogative of a new administrative chief.[275] But whatever the chairman's beliefs about the substantive flaws of this legislation, one can only hope his threat of legal action, issued before the SEC's drubbing in the one-share, one-vote case, will be reconsidered as a waste of time and a lost cause. Failure to do so can only signify an almost conscious blindness to the fact that, for good or bad, states possess the constitutional power to pluck attributes of stock to the point that the shareholder is virtually impotent. The real row should not be over whether they now have that power, but whether it should be taken from them.

2. Imposition of One Share, One Vote by Self-Regulatory Organizations

Invalidation of Rule 19c-4 may lead to voluntary adoption of a one-share, one-vote pre-condition to trading by the NYSE, AMEX and NASD. Although the NYSE ignited the voting rights furor in the first place by proposing to rescind its longstanding policy, it retained its own one-share, one-vote rule after promulgation of Rule

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271. 1990 PA. LAWS 36, § 6 (adding §§ 2571-2575 to 15 PA. CONS. STAT.).

272. *See* Elias, *supra* note 255; *States Acting in Takeover Arena Says SEC General Counsel*, Fed. Sec. L. Rep. (CCH) No. 1389, at 4 (Apr. 18, 1990).

273. *Chairman Breeden Addresses Takeovers and Shareholders' Rights*, Fed. Sec. L. Rep. (CCH) No. 1392, at 4-6 (May 7, 1990).

274. Professor Ronald Gilson of Stanford University Law School has stated that "state regulation of publicly held domestic corporations conflicts with the commerce clause." Elias, *supra* note 255, at 15. *See also* Sidak & Woodward, *supra* note 150.

275. Day, *Tough Cop at the SEC; Chairman Richard Breeden, in Office a Year, Aggressively Seeks to Expand Agency's Authority*, Wash. Post, Oct. 14, 1990, at H1.

19c-4. Moreover, although the NYSE is understandably concerned about competitors refusing to adopt such a rule in an effort to capture listings, the NASD Board of Governors recently adopted a one-share, one-vote rule.[276] If the AMEX goes along, it would appear that the whole voting rights upheaval could be expeditiously resolved and the 1926-1988 era of corporate suffrage be restored. For two reasons, this would be an unsatisfactory outcome.

First, in light of the one-share, one-vote decision it is far from clear that a one-share, one-vote rule adopted by self-regulatory organizations will have the force of federal law, as opposed to the status of a rule imposed by any voluntary association, be it a country club, fraternal organization or self-regulatory securities organization. The court rejected the SEC's claim that it had authority to promulgate the rule under the "otherwise in furtherance of the purposes of this title" language of section 19(c) of the 1934 Act.[277] Section 19(b) of the Act provides that self-regulatory organizations must file their proposed rules with the SEC.[278] It further provides that the SEC shall approve the rule, presumably thereby according it the same legal status as a rule promulgated under section 19(c), if it makes a finding that the proposal is "consistent with the requirements of [the Act]."[279] If the SEC cannot make such a finding, it shall disapprove the proposed rule.[280]

While the language of section 19(b) differs somewhat from section 19(c), it seems likely that if an agency-initiated rule is not in "furtherance of the purposes of this title," then the same self-regulatory organization-initiated rule is not "consistent with the requirements of this title." Under this reading, the SEC must disapprove such an SRO-sponsored rule. If, on the other hand, such a rule is "consistent" with the "requirements" of the Exchange Act because "consistent" is more neutral and less demanding than "furtherance," then all kinds of rules are "consistent" with that Act. In that case, the SEC could "approve" the rule but the effect of its action on

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276. On July 25, 1990, the NASD filed with the SEC a proposed rule change whereby Part III, Section 5 of Schedule D of the NASD Bylaws would be amended to adopt the same prohibitions as were contained in vacated SEC Rule 19c-4. 55 Fed. Reg. 31,465 (1990). The proposed change does not apply to all issuers on NASDAQ, but only those larger issuers whose stocks are in the NASDAQ National Market System. *Id.* at 31,465 n.5.

277. *Business Roundtable*, 905 F.2d at 407.

278. 15 U.S.C. § 78s(b)(1) (1982).

279. *Id.* § 78s(b)(2).

280. *Id.*

the status of the rule under federal law is unclear, and would seem to be different than approval under the "furtherance" standard of section 19(c).

By bringing rules of the SROs under SEC authority, as it did by enacting section 19(b), one might argue that Congress has forbidden SROs to impose and enforce rules that are not "consistent with the requirements of this title." Otherwise, it is not clear what SEC approval is supposed to add to the rules of voluntary associations. The inability of the SEC to approve an SRO-proposed one-share, one-vote rule may mean more than simply regarding SRO rules as mere policies or conventions that, while lacking the force of federal law, still must be complied with by issuers. It might mean that those rules which cannot be approved lack force of any kind. Even if approved, the status of such rules under federal law is murky.

Were section 19(b) construed otherwise than as argued, SROs could do voluntarily under that section far more than the SEC could mandate under section 19(c). For example, they could condition trading privileges on the agreement of issuers to opt out of antitakeover statutes or to rescind poison pill plans. Those conditions would invade state corporation law as deeply as the SEC's one-share, one-vote rule. Perhaps Congress meant either to "leave" such power in the hands of SROs (if not the SEC) or to "confer" such power on SROs notwithstanding the clear aim of drawing those bodies under the federal regulatory mantle.[281] But it is also a possibility that in leaving corporate governance with the states, Congress denied dominion over such fundamental matters to SROs as well as the SEC.[282]

Second, states have pruned the alienability and voting attributes of corporate stock because they believe that unfettered exercise of those powers causes deleterious effects on other important interests. The states may be dead wrong. But should their collective legislative decisions be overborne by the views of self-regulatory organizations? Officials of SROs, like the SEC, may conceive of the one-share, one-vote issue as simply a matter of restoring integrity to corporate

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281. Moreover, the *collective* exercise of this power by the SROs might raise an antitrust issue. *Compare* Silver v. New York Stock Exch., 373 U.S. 341 (1963) (no implied revocation of antitrust laws by Exchange Act) *with* Gordon v. New York Stock Exch., 422 U.S. 659 (1975) (implied revocation of antitrust laws by Exchange Act); Finnegan v. Campeau Corp., 915 F.2d 824 (2d Cir. 1990) (same).

282. In the one-share, one-vote decision, the court briefly digresses to take up the § 19(b)—§ 19(c) anomaly. *Business Roundtable*, 905 F.2d at 414-15. This author finds its treatment enlightening but not persuasive.

stock and, therefore, like apple pie, an unquestioned good. Lacking multiple constituencies or the democratic processes of legislatures, they may not view erosion of shareholder power as a necessary, albeit draconian, means to the end of quelling perceived abuses of takeover practices. Such officials may wonder "What abuses? Takeovers raise trading volume." Debate over problems underlying perceived abuses never gets started because the vast body of people adversely affected by corporate activities have no input into the deliberations of stock trading associations. Even if they did, the decision-making criteria of those organizations center solely upon facilitating capital exchanges and enhancing investor protection. Yet, exaggerated emphasis on those qualities, however laudable in proper portions and in context, may be the very instrument by which the alleged disruption wrought by takeovers is accomplished. In this respect, the range of stock exchange considerations is as narrow as many prescribe for corporate law.[283] Finally, ordinary citizens cannot register disapproval of the potentially enterprise-shaking actions taken by these officials because these officials are not elected.

At bottom, corporate suffrage in the 1990s is not a dull, obscure subject to be gratefully consigned to those stock exchange officials who can stomach it. Voting power, and the control over corporate activity it entails, is inextricably tied to the need of society at large for a clearer assessment of hostile takeovers and their broader socio-economic ramifications. It is tied, as well, to the need for extended discussion of the strength and reach of the claims of capital providers on corporate activity in a modern society. Consequently, decisions about voting rights should not be in the hands of those whose livelihood depends on high levels of trading activity in corporate stock. The issue should be in the spotlight. It belongs in a legislative forum.

3. Federal Intervention

There is little question that, by virtue of the commerce and supremacy clauses, Congress has the constitutional authority to override state corporation law. Proposals for federal intervention into corporate governance have been made from time to time throughout the twentieth century.[284] Occasioned by the recurring belief that state

283. *See supra* text accompanying note 7.

284. *See* Boyer, *Federalism and Corporation Law: Drawing the Line in State Takeover Regulation*, 47 OHIO ST. L.J. 1037, 1041-56 (1986).

law has sunk to new depths, these calls have ranged from modest tinkering with state law to proposals for a wholesale federal incorporation act.[285] They have always failed. Most recently, the 1987 decision of the Supreme Court upholding state antitakeover statutes[286] set off a new clamor for federal action, this time in the form of recommendations for express preemption of state antitakeover laws.[287] That effort fizzled as well. Now, unless SROs voluntarily act, the one-share, one-vote decision will rekindle pleas for federal law mandating equal voting rights.[288]

From the vantage point of corporate law orthodoxy, such appeals seem compelling and uncontroversial. Who in a political democracy can demur to equal voting rights, more vibrant corporate governance, stricter accountability and a reaffirmation of shareholders as the sheet anchor of corporate life? Framed that way, only a shameless apologist for despotic managers could dissent. But like other takeover-related legal issues, the two sides of this specific issue serve as rallying points for beliefs about the pros and cons of that larger phenomenon. Those with honest misgivings about the overall value of high levels of hostile takeover activity are not in principle opposed to equal suffrage, accountability, and shareholder welfare. They do not, however, assess those virtues in isolation or regard them as static abstractions. Consequently, they are unwilling to commit unreservedly to those concepts if doing so is not demonstrably, and by some widely acclaimed measure, the superior course of action in light of the exigencies of a specific social phenomenon. This reluctance is nothing more than a desire to keep matters open for discussion until wider consensus is reached or, short of that, until the source of disruption (here,

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285. *Id. See supra* text and accompanying note 85.

286. *See supra* text and accompanying notes 200-16 (discussing the holding of CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69 (1987)).

287. "'There are lots of people who would like to pre-empt these state [takeover] statutes, but the majority of them are law professors and economists. . . . That's not a large enough constituency to encourage strong federal pressure to overturn what are about 40 state laws.'" Sontag, *After Ruling, Stricter Law on Mergers?*, Nat'l L.J., July 10, 1989, at 24, col. 4 (quoting Professor John Coffee of Columbia University School of Law). In 1988, Congress considered preemption, but intense lobbying by labor unions, the Business Roundtable, and other groups quashed the subject. *See id.*

288. *See* S. 1314, 99th Cong., 1st Sess. (1985) and H.R. 2783, 99th Cong., 1st Sess. (1985) (two recently proposed one-share, one-vote bills). Recently, Professor Seligman has renewed the argument for federal minimum corporate-law standards. Seligman, *The Case for Federal Minimum Corporate Law Standards*, 49 MD. L. REV. 917 (1990).

takeover activity) calms down and can be assayed with less passion. In short, it is a strategy for resolving conflict by prolonging rather than stifling full-bored debate. Thus it celebrates a proliferation and diversity of voices and rejects calls for prematurely closing the book and imposing uniformity of practice.

This strategy, of course, is the strategy of federalism and it exists by design, not accident.[289] Accepting that with liberty comes both a continual disruption of established practices and an understandable quarrelling over how to reorder affairs in light of that disruption, it resists forced adherence to enlightened orthodoxy (from whatever point on the political spectrum) and instead encourages experimentation while expecting (and tolerating) errors.[290] Unless one believes that the machinery of state governments has simply broken down, one can view developments in state corporation law in this fashion. Certain of these laws do offend venerable precepts and engage in a bit of overkill, while others are just downright puzzling. Moreover, if, as appears to be the case, takeover activity does subside, a mechanism for withdrawing (or reconsidering) those provisions which were inspired by, and aimed specifically at, takeovers is sadly lacking. Now being law, they may remain so for quite some time, and with implications unrelated to the dislocations caused by hostile takeovers. Acknowledging these defects, state law should not be displaced, unless particular corporate governance notions, however seemingly crucial, are so fundamental as to be more important than preservation of state government as a forum for differentiated responses to contemporary problems (not to mention a viable counterforce to the awesome power of the federal government). Moreover, within corporate law there is strong evidence of a genuine, if episodic and incomplete, grappling with notions that once seemed settled. This struggling would truly be academic and futile were federal law first to brand state lawmaking as deviant and renegade, and then to quash it.

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289. This subpart has been influenced by John Kincaid's recent article on federalism. *See* Kincaid, *Federalism and Community in the American Context*, 20 PUBLIUS 69 (1990).

290. Alexis de Tocqueville noted the frustration that attends deference to local governments: "A very civilized society finds it hard to tolerate attempts at freedom in a local community; it is disgusted by its numerous blunders and is apt to despair of success before the experiment is finished." 1 A. TOCQUEVILLE, DEMOCRACY IN AMERICA 62 (J. Mayer ed. 1969). A better statement of frustration over the devolution of political power in today's Soviet Union would be hard to find.

Rethinking of core corporate law ideas is taking place by academics, practicing lawyers, business persons, and government officials, all of whom deserve an initial presumption of acting in good faith. At the same time, as the legal pendulum swings toward expansive managerial prerogative, these persons must be prepared to say how shareholders and noninvestors can be assured that such prerogative will be exercised responsibly. Bearing in mind this latter challenge, I list but a small sampling of intriguing ideas now afoot in corporate law:

1. Perhaps product and service markets in an increasingly international economy constrain and discipline corporate management more reliably than the market for corporate control.

2. Perhaps takeovers do not invariably create more efficient enterprises.[291]

3. Perhaps share prices do not represent intrinsic enterprise values or accurately predict acquisition outcomes.[292]

4. Perhaps greater managerial accountability to shareholders does not yield better corporate performance or international competitiveness.[293]

5. Perhaps managerial accountability to shareholders is not as important as sometimes thought.[294]

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291. Extensive evidence in both the United States and the United Kingdom casts doubt on the efficiency outcomes of hostile acquisitions. *See* Prentice & Langmore, *supra* note 256, at 448-51 nn.362-71 (U.S. data); Fortier, *Hostile Takeovers and the Market for Corporate Control*, Econ. Persp., Jan.-Feb. 1989, at 2, 12 ("Research does not provide clear support for the hypothesis that there are real efficiency gains from takeovers. . . . Only with additional research can the social and economic welfare implications and policy directives regarding hostile takeovers be more precisely drawn.") John Plender describes the United Kingdom experience: "A recent Department of Trade and Industry study also highlighted the consistency with which academic work found either that takeovers failed to generate efficiency gains or that the evidence was inconclusive." Plender, *supra* note 259, at 18.

292. *See, e.g.*, Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value, and Corporate Law*, 99 YALE L.J. 1235 (1990).

293. SEC Commissioner Philip R. Lochner, Jr. recently stated that an assumption which needs to be examined is that "shareholder accountability equals good management." *Commissioner Lochner Raises Questions Concerning Proxy Reform*, Fed. Sec. L. Rep. (CCH) No. 1400, at 1 (June 21, 1990). Commissioner Lochner also questioned the factual basis for assertions that increased corporate democracy will enhance international competitiveness. *Id.* at 2.

294. *Id.* at 1-2; Coffee, *supra* note 7 (bilateral view of corporate governance ignores interests of stakeholders).

6. Perhaps electing corporate directors only every five years will lead to better financial performance.[295]

7. Perhaps hostile takeovers should be banned or subjected to merit review.[296]

8. Perhaps other criteria for evaluating the usefulness of hostile takeovers are needed.[297]

9. Perhaps shareholder primacy is a less commanding concept today than earlier.[298]

10. Perhaps other organizational, governance and ownership structures will evolve and flourish.[299]

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295. Lipton, *An End to Hostile Takeovers and Short-Termism: Corporate Governance*, Fin. Times (London), June 27, 1990, at 21 (arguing that the present system forces corporate management to focus on short-term performance and results, and that a "five-yearly system would permit corporations to pursue long-term planning without fear that investment in research and development, plant and equipment, expanding markets and similar short-term depressants on earnings would result in a takeover"). *Id.*

296. *Trevor, Hostile Takeovers: A U.S. Falkland Islands Where the Argentines Always Win*, in HOSTILE TAKEOVERS: ISSUES IN PUBLIC AND CORPORATE POLICY 16 (D. McKee ed. 1989) (proposing Abolition of Tender Offers Act); Morrissey, *Safeguarding the Public Interest in Leveraged Buyouts*, 69 OR. L. REV. 47 (1990) (proposing merit review of leveraged buyouts by SEC). These two proposals are interesting but require federal intervention of a kind this author believes to be both unnecessary and fraught with the usual dangers of reliance on solutions from a central authority.

297. *See* Cann, *supra* note 256, at 1209 (advocating innovation as the key criterion).

298. *See supra* note 7.

299. Worker ownership of businesses, especially through Employee Stock Ownership Plans (ESOPs), is one such arrangement that has generated recent interest. *See* Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749 (1990). The question of share ownership is a key issue in the privatization of state-owned enterprises in Central and Eastern Europe. In August 1990, this author travelled to Hungary, Czechoslovakia, and Poland with a delegation of American securities lawyers to meet with government officials of those countries about this transformation of ownership. At this time, the plan is to convert state-owned enterprises into joint stock companies. This step is relatively uncontroversial. The next step is to sell or otherwise distribute the shares of stock in those companies. How this will be done is somewhat controversial. In Czechoslovakia, for example, officials at the Federal Ministry of Finance are considering a plan whereby every citizen of the federation will receive the opportunity (via voucher) to be given one share of stock. Conversation with Jan Tauber, adviser to the Czechoslovakia Federal Ministry of Finance, August 27, 1990. At the end of the process, the citizenry at large will own 20% of the capital stock of the formerly state-owned enterprises, and transfers of that stock will be prohibited for a period of time (perhaps one year). *Id.* In Poland, by way of contrast, current plans call for distributing up to 20% of the state-owned enterprises (as converted into joint stock companies) to the employees of those companies. Conversation with Dr. Gregory Domanski, Professor of Law, Warsaw University, August 29, 1990.

Calls for federal intervention to overturn (or preempt) one or more provisions of state law (whether allowance of unequal voting rights or other practices) are claims that certain matters are settled and that uniformity of practice is a must. The "opening" of corporate law to deal with the several ideas listed above suggests those claims are more wishes than descriptions of fact. Today, those claims also often contrast the patchwork of American corporation law (as well as securities, insurance, and banking law) with European movement toward greater coordination and economic, and possibly political, unification.[300] From a comparative perspective, the suggestion seems to be that European nations will continue to relinquish "sovereignty" over vast areas of commercial activity, including sole control over currencies. The clear implication is that Western Europe is progressing while America is caught in a retrograde time warp. Alarmed by the specter of slippage in world stature, Americans are urged to heed the call for commercial and regulatory uniformity as an indispensable plank in the platform for economic well-being, even survival.[301]

This comparison is beguiling but naive. Although the United States is a mere youth compared to older European nations, we are considerably more advanced in our experience with wide scale free enterprise and capitalism. There is no reason to think the answers to certain economic questions (here, precisely what attributes should attach to corporate stock) will be the same in mature capitalist societies as in those just getting under way.[302] Ironically, the Western capitalism that Europe strives to emulate may be softening at the edges, not because we do not still believe in it, but because we have had longer experience with it. This irony is born of experience, however, not ideology, and so it adds a distressing tincture for those who like their legal and political doctrine pure.

The workers will have the option to buy additional shares at a 50% discount for a period of one year. *Id.* The Polish Parliament may also issue vouchers to the citizenry at large, thereby entitling each citizen to acquire stock, whether or not an employee of the particular enterprise. *Id. See also* Bobinski, *Poles Will be Given Large Share of State Industries*, Fin. Times (London), Sept. 7, 1990, at 6.

300. SEC Chairman Richard Breeden recently compared what he called the "balkanization" of American regulatory law with European efforts to eliminate barriers to cross-border transactions. *Supra* note 273, at 5-6. *See also supra* notes 9-10.

301. *See supra* notes 9-10.

302. *See supra* note 299 (proposed share ownership plans in Central Europe).

That demands on corporations are increasing in this country, and thereby tempering shareholder claims, is a sign that mature market economies (and the institutions operating within them) are complex and must take seriously the social, environmental and moral boundaries (and failings) of markets.[303] So doing is not to understate the enormous value of lively markets and capitalism in unleashing human potential but is to attend more consciously to checking their shortcomings and excesses. This may lead to a rethinking and whittling back of certain conventions, but it does not signify a deviation from the capitalist path. It represents a healthy examination of private ownership as an evolving, flexible notion with an irrepressible social and moral dimension.[304] It sees competition itself as a banded or "encapsulated" phenomenon having free reign within a province the size and shape of which is demarcated by shifting laws, normative values and social bonds.[305]

To encourage rethinking of current practices is, of course, to run the risk of mistakes and to live with an untidy eclecticism. But the alternative is imposition of drab conformity by a central authority. Even when sweetened by the better-sounding names of consistency and harmony, and even when done to achieve unfettered markets, the imposition of standard behavior from on high, so as to override inferior governments, may weaken state bodies as suppliers of competing legal regimes and stifle them (and other civic associations) as mediators between a powerful central government and the individual.[306] Paradoxically, by invoking the legal monopoly power of the

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303. *See* Etzioni, *Encapsulated Competition*, 7 J. POST-KEYNESIAN ECON. 287 (1985) (describing how ethical precepts, social bonds, and government support work together to "encapsulate" competition within socially set limits). This article appears in somewhat modified and expanded form in A. ETZIONI, THE MORAL DIMENSION: TOWARD A NEW ECONOMICS (1988).

304. If centrally-planned command economies of the kind seen in the Soviet Union and Eastern Europe truly are relics of the past, new attention to the moral dimension of their polar opposite, capitalistic market-driven economies, can be expected and should be welcomed. *See* Johnson, *The Capitalism & Morality Debate*, 1 FIRST THINGS 18 (1990) (providing one view of this vital issue). Discussion of this issue is just getting under way in Great Britain as well. Longley, *The Business of Investing in Faith*, The Times (London), Mar. 17, 1990, at 12 (describing recent exchanges about the moral dimension of capitalism between business and Church of England leaders).

305. *See* Etzioni, *supra* note 303.

306. Professor Nisbet uses the term "intermediation" to describe the role of those groups intermediate to the individual and central governmental authority. Nisbet, *The Present Age And The State Of Community*, Chronicles (June 1988) at 11, 17.

highest governmental authority, the craving for uniform market solutions to *economic* problems rids the *political* arena of competition. This paradox haunts Ralph Winter's analysis and all models that hold market activity to be somehow truly independent of public action. Moreover, the disdain for messy, democratic, decentralized responses to the complexities of social transformation marks this craving as countermajoritarian in its impulses.

Furthermore, when the rhetoric is punctured, one sees that the nations of Europe are also debating some of the same issues.[307] True, directives lowering trade barriers in the EC are spilling out of Brussels at a fast clip in the run-up to 1992. But progress on currency reform has stalled, and serious debate on what political unification really means, viz, a genuinely supra-national government is farfetched, has hardly begun. As to corporate law matters, the European Commission, after seventeen years, passed breakthrough merger legislation.[308] But with less fanfare than some of the exciting border-dropping measures, the European Commission is also now working on several directives comprising the social charter of worker rights,[309] including that well-known feature of the European corporate landscape workers' councils.[310] With strong social democratic traditions, not to mention markedly different institutional arrangements for share ownership,[311] it can be expected that free movement of capital will not trump all other interests and that European nations will be as alert to the social

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307. *See, e.g.*, A. COSH, A. HUGHES, A. SINGH, J. CARTY & J. PLENDER, TAKEOVERS AND SHORT-TERMISM IN THE UK (Industrial Policy Paper 3, Institute for Public Policy Research 1990).

308. *See supra* note 10.

309. The first of these directives are now being released. *See, e.g.*, *Commission Proposes Regulation of Working Hours*, Common Mkt. Rep. (CCH), Aug. 16, 1990 at 2. Soon, the EC Commission will issue a plethora of proposals. *See, e.g.*, Buchan, *The European Market; EC Set to Renew the Battle Over Social Policy*, Fin. Times (London), Sept. 3, 1990, at 4. *See generally* Bercusson, *The European Community's Charter of Fundamental Social Rights of Workers*, 53 MOD. L. REV. 624 (1990); Hepple, *The Implementation of the Community Charter of Fundamental Social Rights*, 53 MOD. L. REV. 643 (1990).

310. Kellaway, *Brussels Directive Would Force EC Employers to Consult Workers*, Fin. Times (London), Dec. 5, 1990, at 3, cols. 1, 2.

311. In France and Italy, for example, the state still owns many business enterprises. In West Germany, banks own large blocks of stock in many companies. This structural pattern of ownership will, by itself, dampen the market for corporate control.

ramifications of cross-border acquisitions as any state in this country.[312] In the mixed economy of West Germany (and Japan in Asia), now the envy of other countries, hostile takeovers are virtually unknown, so they can hardly be viewed as the *sine qua non* of prosperity. And if the European Community is broadened to include countries of yet different traditions, such as the massive liberal welfare states of Scandinavia (not to mention the countries of Central Europe) the resistance to pure capital market directives will further stiffen. The precise blending of free enterprise capitalism and social democratic practices is yet to unfold. But that it will be a blending there can be little doubt.

V. CONCLUSION

For both European nations and the United States, corporate law issues such as equal voting rights are inescapably bound up with larger social currents. Notions like investor confidence, efficiency, and liquidity, because they have been somewhat downgraded by states, must be assessed in a markedly broader and richer context, particularly as institutional investors reassert their voice in corporate affairs and talk turns to federal proxy reform. Historical, as well as cross-cultural, practice is one useful, but not dispositive, guide in this fledgling effort. As things now stand, however, one thing is clear: states occupy the position they have held all along in our country. They are sovereign over corporate stock. It is the furor caused by their exercise of that enduring sovereignty that, in the 1990s, has provoked renewed attention to fundamental matters. Now is the time to sustain that awareness, not shut it off.

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312. Rice, *EC Mergers Policy; Importance of Social Policy Criteria Unclear*, Fin. Times (London), Sept. 21, 1990, at 4.