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THE UNANIMITY NORM IN DELAWARE CORPORATE LAW

*David A. Skeel, Jr.**

INTRODUCTION

OVER the last several decades, the Justices of the United States Supreme Court have issued an increasing number of separate opinions. It is not at all uncommon for there to be three or more opinions in a single case, particularly when controversial issues are decided. Nor is this tendency limited to the Supreme Court.¹ One sees similar, though less dramatic, trends in appellate courts throughout the country.

Things were not always this way. In the early years of the Supreme Court, John Marshall quite deliberately rejected the English tradition of issuing *seriatim* opinions and helped to establish a practice of producing a single opinion in each case.² Many observers believe that speaking with a single voice greatly

*Associate Professor of Law, Temple University. I am grateful to Michael Dooley, Mike Klarman, Saul Levmore, Jim Lindgren, Geoff Miller, Ed Rock, Max Stearns, and Ted White for helpful comments and conversations, and owe special thanks to Chief Justice Norman Veasey, Justice Randy Holland and Delaware Supreme Court Administrator Steve Taylor for extremely helpful discussions on the workings of Delaware's supreme court. They of course should not be seen as endorsing any of the views I set forth in the Article. I would also like to thank the Olin Foundation for generous funding during a semester visitorship at the University of Virginia School of Law and Temple Law School for generous summer funding.

¹ Throughout the Article, I capitalize "Supreme Court" and "Court" when referring to the United States Supreme Court, and I use lower case when referring to the Delaware "supreme court" in order to minimize confusion. Likewise, I capitalize "Justice" when referring to members of the Supreme Court, and use the lower case "justice" when referring to members of the supreme court.

² See, e.g., Herbert A. Johnson, Introduction: The Business of the Court, in 2 *The Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15*, at 373, 380-81 (Paul A. Freund ed., 1981); Meredith Kolsky, Note, Justice William Johnson and the History of the Supreme Court Dissent, 83 *Geo. L.J.* 2069, 2073-75 (1995).

enhanced the credibility of a Court that had previously been dismissed as ineffectual and blatantly political.³

Although the strong pattern of unanimity had weakened somewhat by the end of Marshall's tenure as Chief Justice,⁴ the writing of separate opinions was discouraged on many appellate courts throughout the nineteenth century and into the early twentieth century. Only if a judge felt extraordinarily strongly about an issue was he likely to write separately. By the 1940s, the picture looked entirely different, with judges authoring separate opinions almost as a matter of course, particularly in cases that raised controversial issues.⁵ Thus, when the Supreme Court made a point of issuing unanimous decisions in several important desegregation cases,⁶ the Court's unanimity seemed all the more striking.

³ See Kolsky, *supra* note 2, at 2075-76 (reviewing commentators).

⁴ Justice William Johnson is often cited as having reintroduced nonunanimity in the Supreme Court. Johnson was appointed by President Jefferson, who strongly opposed the Supreme Court's practice of unanimity, and who urged Johnson to write separately. *Id.* at 2078-79; see also Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), in 12 *The Works Of Thomas Jefferson* 246, 249-50 (Paul L. Ford ed., 1905) (contending that seriatim opinions are far more effective at holding judges individually accountable, because judges can hide behind the façade of unanimous opinions).

⁵ There is no obvious explanation as to why the urge for unanimity disappeared. At the Supreme Court level, it seems likely that the increasing complexity of the issues that made their way to the Court may have been one factor, and that the decline and eventual rejection of natural law theories was another. See, e.g., Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 *Cornell L.Q.* 186, 202-03 (1959) (suggesting that a side effect of Holmes' role in the "destruction of the myth of judicial certainty" was the creation of the idea that each judge's view of a case is equally plausible, which encouraged the proliferation of separate opinions). For evidence of the magnitude of the shift in the Supreme Court, see *id.* at 205 tbl. I (showing that only 11% of the Court's opinions in 1930 were nonunanimous, but that this percentage rose to well over half by 1943, and was over 70% for most of the 1950s).

⁶ In *Brown v. Board of Education*, 347 U.S. 483 (1954), Chief Justice Warren succeeded in persuading all of the members of the Court to join his opinion reversing the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896). And, in *Cooper v. Aaron*, 358 U.S. 1 (1958), the Justices issued a coauthored, unanimous opinion reaffirming their commitment to *Brown* in the face of overt resistance in Arkansas. The Justices viewed unanimity as crucial to underscoring their commitment to desegregation, and to heading off the risk that recalcitrant Southern states would seize on a dissent as a means of continuing their opposition. Perhaps the best account of Chief Justice Warren's efforts to insure unanimity in *Brown*, and of the perceived importance of presenting a united front, is Richard Kluger, *Simple Justice*:

The proliferation of separate opinions has produced a great deal of hand-wringing in some quarters. Critics of the apparent fragmentation insist that writing separately tends to undermine the collegiality of a court and, at its worst, can erode the legitimacy of the court's pronouncements.⁷ Other commentators, although emphasizing the need to maintain judicial civility, have defended the value of separate opinions. These critics argue that dissenting and concurring opinions force the majority to sharpen its focus, and can signal both the limitations of the majority's analysis and the likelihood that the decision will, or at least may, be overruled at a later date.⁸

What neither the critics nor the proponents of writing separately have noticed is that an important state supreme court stands in striking contrast to the current pattern. The Delaware supreme court, which has long been recognized as our preeminent authority on state corporation law, rarely issues separate opinions. Even on deeply controversial issues, such as those that arose during the takeover wave of the 1980s, Delaware's justices almost invariably speak with a single voice.

Although it is perhaps understandable that Supreme Court scholars have not noticed the Delaware supreme court's penchant for unanimity, corporate law scholars seem not to have picked up on it either. Corporate law commentators have analyzed and debated Delaware's role in corporate law for decades,

The History of *Brown v. Board of Education* and Black America's Struggle for Equality 679-99 (1975). For another example of Supreme Court unanimity in addressing a sensitive issue, see *United States v. Nixon*, 418 U.S. 683 (1974) (Nixon tapes case).

⁷ See, e.g., Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash. L. Rev. 133, 138-45 (1990) (suggesting that United States judges should exercise more restraint before writing separately); Richard A. Posner, The Federal Courts: Crisis and Reform 236-43 (1985) (arguing that although it would be "a great error to suppress" separate opinions, in some cases, separate opinions can "communicate a sense of the law's instability that is misleading"); ZoBell, *supra* note 5, at 211-14 (suggesting judges should consider the undesirable effects of dissenting as well as the reasons for dissent); *id.* at 203 n.98 (citing other literature on the "problem" of separate opinions).

⁸ See, e.g., William J. Brennan, Jr., In Defense of Dissents, 37 Hastings L.J. 427 (1986); Edward McGlynn Gaffney, Jr., The Importance of Dissent and the Imperative of Judicial Civility, 28 Val. U. L. Rev. 583 (1994); Kolsky, *supra* note 2, at 2082-87; see also Kevin M. Stack, Note, The Practice of Dissent in the Supreme Court, 105 Yale L.J. 2235 (1996) (arguing that the practice of dissent is justified not in terms of the rule of law, but in terms of ideals of deliberative democracy).

yet none has fully accounted for this crucial component of the judicial process.⁹

My purpose in this Article is to explore in detail the implications of the Delaware supreme court's tendency to issue unanimous opinions—a practice I will refer to as Delaware's "unanimity norm."¹⁰ Given the absence of prior commentary on the unanimity norm, I begin, in Part I, by showing the extent to which Delaware's decisions are in fact overwhelmingly unanimous. I then describe the practices that seem to make unanimity possible in Delaware in an era when so few other modern courts are characterized by a unanimous decisionmaking process.

Part II explores the effects of unanimity on the development of Delaware corporate law doctrine. My initial assessment emphasizes what on the surface appears to be a particularly troublesome consequence of the unanimity norm, as compared to a nonunanimity regime. Drawing from the extensive recent literature on social choice, I argue that unanimity magnifies the likelihood of "cycling" and cycling-like effects—that is, of shifts by the supreme court from one doctrinal approach to another.¹¹ I illustrate this concern with an example based on, and in many respects exemplified by, a series of unanimously decided Delaware takeover cases. My conclusion that unanimity magnifies the risk of cycling raises the question of why, given its effects, the unanimity norm is likely to have evolved and survived. The obvious answer, that Delaware's unanimity norm reinforces the credibility of the supreme court, does not seem especially help-

⁹ I am aware of only one law review article that even mentions Delaware's tendency to speak with a unanimous voice. See Jeffrey N. Gordon, *Corporations, Markets, and Courts*, 91 *Colum. L. Rev.* 1931, 1968-69 (1991) (alluding to the fact that Delaware's takeover cases have been consistently unanimous).

¹⁰ I use the term "norm" somewhat advisedly, given the burgeoning literature on norms in legal scholarship. In describing an aspect of Delaware supreme court decisionmaking as a norm, I employ the term more broadly than those who treat norms as necessarily nonlegal in nature. For an excellent introduction to the current legal literature on norms, see Symposium, *Law, Economics, & Norms*, 144 *U. Pa. L. Rev.* 1643 (1996).

¹¹ The problem of cycling also is referred to as the "Condorcet Paradox," after the French mathematician and philosopher Marquis de Condorcet, who was one of the first scholars to identify and explore the paradox. For a detailed description of the cycling problem, see *infra* Part II.

ful by itself. Although unanimity does have this effect, it does not seem necessary in order to reinforce Delaware's stature in corporate law in the same way as the Marshall Court may have needed unanimity to reinforce its statute in constitutional law.

In Parts III and IV of the Article, I consider two alternative explanations. In Part III, I explore an interest group account that suggests an important purpose of unanimity may be to benefit Delaware's corporate bar. After concluding that this explanation is plausible but incomplete in several important respects I consider, in Part IV, whether unanimity reinforces a moral dimension of the Delaware case law.¹² Only by taking the supreme court's role as moral arbiter of directorial behavior into account is it possible to fully appreciate the role of unanimity on the court. Moreover, attending to the moral dimension of the cases reduces some of the concerns about the perverse effects of unanimity. I argue in particular that, even when the court's doctrine is unstable, the outcome in the cases often is more predictable.

As this brief overview suggests, I focus throughout the Article on the role of unanimity in the development of corporate law. As I hope will be obvious, however, the analysis also is generalizable in many respects, and offers useful insights on broader questions as to the costs and benefits of unanimous and nonunanimous judicial regimes.

I. THE ROAD TO UNANIMITY: HOW DELAWARE GETS THERE

Delaware's norm of unanimity differs markedly from the decisionmaking practices of other high courts. Aside from occasional, high-profile exceptions and a brief attempt at unity during the Marshall Court era, the Justices of the Supreme Court, as noted above, have always issued multiple opinions in a significant percentage of their cases.¹³ State high courts have gen-

¹² Ed Rock has provided the most systematic account of this underappreciated moral role of Delaware decisionmaking. See Edward B. Rock, *Saints and Sinners: The Peculiar Mechanisms of Delaware Corporate Law* (Mar. 5, 1996) (unpublished manuscript, on file with the Virginia Law Review Association).

¹³ My focus in this paper is on high court decisionmaking, but it is perhaps worth noting that intermediate courts of appeal also are characterized by a multiplicity of opinions, though to a lesser extent. Ginsburg, *supra* note 7, at 147. In addition,

erally been less divided than the Supreme Court, perhaps in part because they spend less of their time resolving particularly contested issues. Yet most state high courts also issue a significant number of separate opinions. In California, to take a relatively dramatic example, the high court issued multiple opinions in more than seventy percent of its reported decisions in 1995. Even the high court of the less obviously heterogenous state of Indiana was divided nearly thirty-five percent of the time.¹⁴

The Delaware supreme court could hardly be more different. Delaware's justices write separately in only three percent of the court's reported cases. The percentage is even lower when considering the court's whole docket.¹⁵ The minuscule number of separate opinions is particularly noteworthy given that the supreme court, unlike many state high courts, is the national arbiter of an important and often controversial area of law.¹⁶

appellate judges routinely issue separate opinions in the cases they hear en banc.

¹⁴ These percentages are derived from a series of WESTLAW searches I conducted on the high courts of several states. For detailed search parameters, see Appendix A. With respect to California, I counted 69 nonunanimous decisions—49 with at least one dissent, and 20 with concurrences alone—out of roughly 106 reported decisions in 1995. (I defined reported decisions for the purposes of my searches to exclude rulings on certiorari and pro forma decisions, even if they were included in a reporter). For Indiana, my search revealed 58 nonunanimous decisions (42 with dissents, 16 with concurrences alone) out of 167 in 1995, or 34.7%.

¹⁵ I give a more detailed breakdown in Appendix A, which analyzes the output of the supreme court from 1960 to 1996. A statistical analysis of this data done by Jim Lindgren using logistic regression in SPSS 7.5 made clear that the Delaware supreme court has maintained a consistent commitment to uniformity over the entire time period I considered. Professor Lindgren used the year of the case as the predictor variable and whether there was a separate opinion as the response variable. The positive trend was so tiny ($B=.0081$; $R=.0000$) that there was no meaningful trend in the data. If these data had been a sample rather than the entire population, the results would not have been statistically significant. My thanks to Professor Lindgren for the statistical help.

¹⁶ Of the 20 or so states I looked at, only Rhode Island (four in 1995) and New Hampshire (five in 1995) were comparably stingy to Delaware in issuing separate opinions. Because these states, like Delaware, are geographically small and have small (five-member) high courts, one might initially be tempted to conclude that smallness of state and of court are the principal determinants of how frequently a state high court is likely to issue separate opinions. Yet a quick look at comparable states immediately complicates the picture.

The high courts of geographically small states often are not cohesive. For instance, the Connecticut high court was divided 44 times in 1995, while the New Jersey high court was divided 29 times. Small court size can also be misleading. The North Dakota and South Dakota high courts, both of which (like Delaware) have five members, had 60 and 54 nonunanimous opinions respectively in 1995. And, as noted

Two facets of the Delaware judicial system serve as a starting point for understanding the supreme court's ability to speak with a unified voice. The first is Delaware's selection process. Many states popularly elect their high court judges. In Delaware, by contrast, the Bar Association plays a central role in determining who will sit on the supreme court, much as it does in proposing changes to Delaware's General Corporate Law.¹⁷ A nominating commission, one of whose members is appointed by the Executive Committee of the Delaware Bar Association, does all of the initial screening, then submits a list of appropriate candidates to the governor.¹⁸ Although the governor has the final say as to who serves on the court, he or she chooses from a short list prepared by the commission.¹⁹

earlier, Indiana's five-justice high court had 58. See *supra* note 14. Even the combination of a small state and a small court is far from foolproof as an indicator, as evidenced by the fact that Vermont's five-member supreme court issued 26 nonunanimous decisions in 1995. Thus, although I discuss the significance of Delaware's small court further below, see *infra* text accompanying notes 22-26, small court and small state only begin to explain Delaware's unanimity norm. I suggest several additional factors, each of which plays a crucial role, in the analysis that follows.

¹⁷ In the legislative context, the corporation law section of the Delaware Bar Association does nearly all of the work in developing and drafting proposed amendments to the corporation law. Although the two houses of the Delaware General Assembly formally enact the amendments, the General Assembly has tended (except on one or two high-profile occasions) simply to rubberstamp the proposals forwarded by the corporation law section. For a useful account of Delaware's legislative process, see Curtis Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 *Del. J. Corp. L.* 885, 903-16 (1990); see also David A. Drexler, *The Growth of Corporate Law, in The Delaware Bar in the Twentieth Century* 583, 594 (Helen L. Winslow, Anne E. Bookout & Patricia C. Hannigan eds., 1994) [hereinafter *The Delaware Bar*] (noting an unwritten tradition, as of the 1960s, that Delaware's General Assembly never considered a proposed corporate law amendment unless the Bar Association had recommended it).

¹⁸ In addition to the Bar Association representative, the commission includes eight members selected by the governor, four of whom must be members of the Delaware supreme court bar and four of whom cannot be members of any bar. See *Del. Exec. Order No. 3*, Mar. 29, 1993 § 1 (on file with the Virginia Law Review Association). The importance of the local bar's role was underscored by a subsequent executive order that makes clear that the commission can disclose confidential information to the Bar Association's Committee on Judicial Appointments. See *Del. Exec. Order No. 10*, Aug. 20, 1993 § 1 (amending *Del. Exec. Order No. 3* § 6) (on file with the Virginia Law Review Association).

¹⁹ The commission is required to submit not less than three nominees unless the entire commission agrees to submit fewer. See *Del. Exec. Order No. 3*, *supra* note 18, § 7. The bar's influence was particularly striking when Justice Andrew Moore's 12-

Judicial nominations do alternate between the two political parties,²⁰ but as the discussion thus far suggests, the process is largely divorced from party politics in practice and is in that sense apolitical. Moreover, the local bar—and through it the nominating commission—is acutely aware of Delaware's traditional prominence in corporate law, and of the value of preserving that prominence. Not surprisingly, the commission is careful to propose individuals who share the same perspective.²¹ As a result, Delaware's supreme court justices are far more likely to be of like mind on the general goals of corporate law than are the members of other high courts.

A second factor contributing to the tendency towards unanimity is the size of the supreme court. Delaware's supreme court comprises only five justices, as compared to the high courts of many other states, which have seven or more members, and the nine-member Supreme Court.²² It was comprised

year term expired in 1994. Rather than a list of multiple qualified candidates, the nominating commission excluded Moore and submitted exactly one name to the governor—Vice Chancellor Carolyn Berger. See Richard B. Schmitt, *Delaware Governor Picks Trial Judge For Supreme Court*, *Wall St. J.*, May 26, 1994, at B7. I discuss the bar's opposition to Justice Moore further *infra* note 91 and accompanying text.

²⁰ See Del. Const. art. IV, § 3.

²¹ Of course, not all of the supreme court's cases are corporate law cases. Roughly one half of the court's cases are criminal, and corporate cases comprise a minority of the civil cases. See Administrative Office of the Courts, 1995 Annual Report for the Delaware Judiciary 31 [hereinafter *Delaware Annual Report*] (207 dispositions in criminal appeals and 249 in civil appeals for fiscal year 1995). But the corporate law cases have an obvious prominence due to the importance of corporation-based income to Delaware's economy. Corporation cases also differ somewhat from cases on criminal and tort law issues due to Delaware's two-tier judicial system. Cases on corporate and commercial law are heard in the chancery court, a court of equity. Other cases are heard in Delaware's superior court in the first instance.

²² No state has fewer than five members on its highest court; six states have nine members on their highest court, twenty-six states have seven, and eighteen states (including Delaware) have five. *Want's Federal-State Court Directory* 125-77 (Robert S. Want ed., 1994). Several corporate law commentators have pointed to the small size of Delaware's judiciary, which consists of the five chancery judges who comprise the lower equity court, together with the five-member supreme court, as an important factor in its decisionmaking process in corporate law cases. Most prominently, Roberta Romano suggests that the small size of the judiciary increases the certainty of Delaware's case law, and thus enhances Delaware's attractiveness for corporations. Roberta Romano, *The Genius of American Corporate Law* 40 (1993) [hereinafter *Genius*]; Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 *J.L. Econ. & Org.* 225, 277 (1985).

of three justices²³ until 1978, when the court's burgeoning caseload forced it to expand to five justices.²⁴ And, in a sense, the expansion was only partial; the supreme court continues to hear cases in three-justice panels, rather than (as most other state high courts do) *en banc*.²⁵ Thus, the supreme court functions in some respects as if it were even smaller than it is.

The implications for unanimity of the supreme court's small size are clear: Having fewer decisionmakers reduces the likelihood that factions among the justices will undermine the court's commitment to speaking with a unanimous voice. Yet selection process and small size almost certainly can not by themselves ensure unanimity. One can easily imagine that an interest in judicial reputation or simply differing views on important issues could cause one or more justices to write separately with some regularity.²⁶ That a justice must be reappointed after twelve years mitigates the desire to write separately, but the reappointment check is at most a limited one.²⁷

To more fully explain the court's success in consistently issuing unanimous decisions, we need to consider a third factor: the

²³ The three-justice court was instituted in 1951. Prior to 1951, Delaware had no permanent supreme court justices. It employed a "leftover judge" system, pursuant to which lower court judges who had not been involved in a given case constituted the "supreme court" for the purposes of resolving an appeal. See Paul Dolan, *The Supreme Court of Delaware, 1900-1952*, 56 *Dick. L. Rev.* 166, 166 (1952).

²⁴ Henry R. Horsey & William Duffy, *The Supreme Court After 1951: The Separate Supreme Court*, in *The Delaware Bar*, *supra* note 17, at 384, 384-85 (noting that as case filings tripled between the 1960s and 1970s, Chief Justice Hermann called for an expanded court, which was eventually provided by the legislature in November, 1978).

²⁵ *En banc* hearings are required in certain circumstances. See Del. Sup. Ct. R. 4(d); Del. Sup. Ct. Internal Op. P. VII(1)-(7). I discuss the particular requirements *infra* note 31 and accompanying text.

²⁶ Notice the contrast with a nonunanimity regime. Under unanimity, justices have an ongoing incentive to write separately, and to free ride on the other justices' collective commitment to unanimity. Nonunanimity regimes are likely to be more stable because they do not present similar opportunities for free riding.

²⁷ See, e.g., Del. Exec. Order No. 3, *supra* note 18, at § 11 ("Sitting judges who are willing to be reappointed shall not be denied recommendation by the Commission except upon the affirmative vote of at least two-thirds of the members.").

Another factor that seems likely to enhance consensus, at least on the margin, is that the Delaware supreme court does not have certiorari powers, and thus does not select cases with an eye to developing the case law.

court's internal operating procedures.²⁸ Under the court's internal procedures, the justices ordinarily do not discuss cases until after oral argument.²⁹ Further, cases are assigned with an eye to discouraging the development of specialties.³⁰ Both practices tend to encourage the kind of consensus that is reflected in the court's opinions.

The most remarkable feature of the court's internal procedures, however, is that they impose a significant cost on dissenting from a panel opinion. Both the Supreme Court Rules and the Internal Operating Procedures provide for an automatic en banc hearing in the event of any panel disagreement.³¹ Thus, a justice can write separately only if he or she is willing to force a full court hearing and continues to adhere to his or her original position. In consequence, a dissent is likely to emerge only under extraordinary circumstances.

In short, almost every aspect of the evolution of Delaware supreme court decisionmaking—from the selection of justices, to the court's small size, to its rules and internal operating proce-

²⁸ The principal sources of the court's practices are the Delaware Supreme Court Rules and its Internal Operating Procedures. Until 1994, the Internal Operating Procedures were simply informal norms of practice that the court employed. The procedures were codified in 1994, after two new justices joined the court. Telephone Interview with Chief Justice E. Norman Veasey (June 1996) [hereinafter *Veasey Interview*].

²⁹ Del. Sup. Ct. Internal Op. P. IX(1). It is interesting to note that jurors in both civil and criminal trials operate under similar strictures against discussing a case outside of the formal decisionmaking process. As with the supreme court, it seems likely that one effect of the practice is to encourage consensus.

³⁰ Del. Sup. Ct. Internal Op. P. VI(2). Given that the chief justice has ultimate responsibility for overseeing the panel assignment process, see *id.* VI(1), the effect of the policy against specialization obviously depends on how the chief justice wields his or her authority.

³¹ Del. Sup. Ct. R. 4(d); Del. Sup. Ct. Internal Op. P. VII (cases unable to garner a unanimous opinion move automatically to en banc consideration). The rationale for requiring that divided opinions be heard en banc is that a split opinion does not reflect the votes of a majority of the five-member court. *Veasey Interview*, *supra* note 28. Other cases that present grounds for an en banc hearing include cases that will possibly overturn a Delaware precedent, capital cases, and cases that two justices vote to hear en banc. Del. Sup. Ct. Internal Op. P. VII.

Interestingly, the supreme court does not tell the parties or otherwise make clear the reason why it is rehearing a case en banc. *Veasey Interview*, *supra* note 28. This suggests that if the full court later issues a unanimous opinion, as it often does, observers may not know whether it was the prospect of disagreement or of overruling prior precedent that precipitated the full court's review.

dures—reinforces the court's tendency to speak with a single voice.

II. UNANIMITY AND DOCTRINAL CYCLING

Identifying the tendency toward unanimity, and the factors reinforcing it, raises a crucial question: What difference does unanimity make, as compared to an alternative regime? The obvious answer is that unanimity may stabilize the case law, since it eliminates the possibility that fragmentation will cast doubt on the court's reasoning in a given area.

Yet unanimity can have almost precisely the opposite effect. The suggestion that unanimity may undermine the clarity of a court's decisions is not new,³² but previous commentators have tended simply to note this without exploring it in any systematic way. My goal in the analysis that follows is to use the insights of social choice theory to provide a much more detailed assessment of the effects of unanimity.³³

Because I am primarily concerned with unanimity in Delaware corporate law cases, I focus on Delaware's takeover cases³⁴ and use an illustration based loosely on these cases to demonstrate (among other things) how unanimity may magnify the risk of doctrinal cycling. In addition to showing the effects of unanimity, my analysis helps to explain an enduring irony of Delaware corporate law: the fact that, while stability is often recited as one of the reasons for Delaware's success in attracting corporations, Delaware's doctrine in several crucial areas appears, at

³² See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 *Harv. L. Rev.* 802, 810 & n.23 (1982) (suggesting that the continental tradition of unanimity is characterized by short, platitude-filled opinions that provide little guidance).

³³ For useful analyses of other corporate law issues in social choice terms, see William J. Carney, *Does Defining Constituencies Matter?*, 59 *Cin. L. Rev.* 385, 420-22 (1990) (detailing perverse effects of "other constituency" statutes); Jeffrey N. Gordon, *Shareholder Initiative: A Social Choice and Game Theoretic Approach to Corporate Law*, 60 *U. Cin. L. Rev.* 347 (1991) (suggesting that cycling concerns may justify absolute delegation rule that prevents shareholders from initiating most corporate decisions); see also David A. Skeel, Jr., *Some Corporate and Securities Law Perspectives on Student-Athletes and the NCAA*, 1995 *Wis. L. Rev.* 669, 679-82 (reviewing social choice effects of student-athlete representation in NCAA decisionmaking).

³⁴ Every one of the hostile takeover cases I discuss was unanimous.

least on initial inspection, to be remarkably *unstable*.³⁵

A. *Social Choice and Delaware Takeover Law*

In order to set the stage for the social choice analysis that follows, I begin by briefly describing the doctrinal developments that will serve as the basis for our exploration of the unanimity norm. In the mid-1980s, the dramatic increase in takeovers gave rise to a series of cases that posed a particularly difficult dilemma for Delaware judges. In the face of a hostile bid, or a contest between friendly and hostile bidders, the directors of a target corporation often took measures to prevent the hostile bidder from acquiring control. For instance, target company managers adopted or refused to remove "poison pill" devices³⁶ that were designed to make acquisition prohibitively expensive, or added supermajority voting requirements. Bidders responded by alleging that these efforts violated target directors' fiduciary duty to their shareholders.

The dilemma for the Delaware supreme court was that target directors' actions in the takeover context did not fit neatly within either of the traditional categories used in addressing fiduciary duty issues.³⁷ Target managers have an obvious conflict

³⁵ Professors Macey and Miller have suggested an interest group explanation for the occasional elements of uncertainty in Delaware law. Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 *Tex. L. Rev.* 469, 498-509 (1987) (suggesting that Delaware law is uncertain enough to allow interest groups such as the corporate bar to obtain rents, but not so uncertain as to give corporations an incentive to incorporate elsewhere). But they do not address the significance of the supreme court's tendency toward unanimity. For a more detailed consideration of interest group issues, see *infra* Part III.

³⁶ Poison pills take a variety of forms, most of which involve a promise by the target corporation to give stock or other securities to the firm's shareholders, or sell them at a bargain price, in the event of an acquisition of a specified portion of the target's stock. See Randall S. Thomas, *Judicial Review of Defensive Tactics in Proxy Contests: When is Using a Rights Plan Right?*, 46 *Vand. L. Rev.* 503, 510-11 (1993).

³⁷ Oversimplifying somewhat, directorial duties fall into two general categories: the duty of care and the duty of loyalty. The duty of care is, as the name suggests, an obligation that directors exercise appropriate care in making decisions for the firm. The business judgment rule acts as a presumption in most cases that a director has in fact satisfied this obligation. See, e.g., *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984) (defining business judgment rule presumption). The duty of loyalty, which comprises a variety of related obligations, applies if the director has a conflict of interest, as when she enters into a transaction with the corporation. For a good introduction to directorial duties, see Robert C. Clark, *Corporate Law* 123-89 (1986).

of interest in the takeover context, because they frequently will be replaced in the event of a takeover. Thus, the traditional deference that the duty of care and business judgment rule provide for directors who do not have a conflict of interest did not seem in order. Yet the cases also were not classic duty of loyalty cases, which are subject to aggressive review, because the directors' conflict of interest, though very real, was much less direct than in a traditional duty of loyalty case.

Delaware's response was to attempt to articulate an intermediate standard of review in the takeover cases. The supreme court has suggested in a series of decisions spanning the last decade that it will apply scrutiny that is greater than in most contexts, but not so searching as in true duty of loyalty cases.³⁸

For the purposes of our analysis of unanimity, assume that Delaware has three justices,³⁹ that the takeover cases have just arisen, and the justices' positions on the issue are as follows. Hypothetical Justice Alden believes that target managers face a severe conflict of interest and should therefore be subject to significantly enhanced scrutiny. That is, these cases are much more

³⁸ In the two most prominent early cases, *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946 (Del. 1985) and *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986), the court held that the directors' use of defensive measures must be a reasonably proportionate response to a reasonable belief that a hostile bid constitutes a threat, *Unocal*, 493 A.2d at 955, and that if it becomes clear that the target is "in play," the directors must focus solely on obtaining the best price for shareholders, *Revlon*, 506 A.2d at 184 n.16. These cases call for an intermediate level of scrutiny, and thus correspond roughly to the "Enhanced Scrutiny" standard I describe below.

The court has subsequently engaged in several striking shifts. Most prominently, the court appeared to emphasize director discretion in *Paramount Communications v. Time, Inc.*, 571 A.2d 1140 (Del. 1989) [hereinafter *Time-Warner* for short form case citations], only to shift once again to an approach loosely analogous to the position I describe below as "Shareholder Prerogative," in *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1993). I discuss these shifts, and the possibility that they may amount to cycling, further *infra* note 75. The other important cases in this doctrinal line are *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361 (Del. 1995), *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261 (Del. 1988), and *Ivanhoe Partners v. Newmont Mining Corp.*, 535 A.2d 1334 (Del. 1987).

³⁹ As noted earlier, see *supra* text accompanying notes 23-25, Delaware's supreme court hears cases in three-justice panels, but the entire court hears the case in some circumstances. I assume three justices in order to simplify the exposition, but the analysis that follows will hold true any time the justices hold three or more positions, no one position is held by a majority, and any coalition comprising the justices holding two of the three positions would garner a majority.

like duty of loyalty than duty of care cases and the court should therefore conduct a substantive review of every transaction the directors either approved or stymied. I will refer to this approach as "Enhanced Scrutiny."

Hypothetical Justice Baker, by contrast, thinks a better approach is to focus on the shareholders of the target. In order to ensure that shareholders rather than directors ultimately retain control over the decision whether to accept a takeover bid, given the directors' conflict of interest in this context, Baker would forbid the directors from using defensive measures against a hostile bid except in two circumstances: (1) to facilitate an active auction;⁴⁰ or (2) if the shareholders would retain effective control of the corporation even after the directors thwarted a hostile bid and facilitated a merger with another, favored bidder.⁴¹ Otherwise, the directors would not be permitted to interfere with any tender offer or otherwise wrest control of the takeover decision from the shareholders.⁴² I will refer to this view as "Shareholder Prerogative."

Finally, hypothetical Justice Clark believes that target directors should be given substantial discretion, both because Delaware has long emphasized directors' authority to manage the corporation,⁴³ and because the directors do not face a true conflict of interest in the takeover context. This position I will call "Director Discretion."

⁴⁰ The rationale for permitting the directors to exercise control for the limited purpose of conducting an auction is that an auction will generally increase the takeover premium that shareholders receive, and shareholders are not well-positioned to conduct the auction themselves.

⁴¹ Baker's second exception assumes there is less cause for concern if the shareholders retain ultimate control, and thus can reverse any transaction of which they disapprove. See, e.g., *QVC*, 637 A.2d at 45 (emphasizing the fact that the target shareholders would not retain control after the proposed transaction).

⁴² Baker's view is thus a variation of Easterbrook and Fischel's "passivity thesis," which contends that directors should be prohibited from defending against a hostile bid in any way. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981). Unlike the passivity thesis, Baker's position would allow the directors to use defensive measures, but only in the narrow circumstances described in the text.

⁴³ See, e.g., *Pogostin v. Rice*, 480 A.2d 619, 624 (Del. 1984) ("The bedrock of the General Corporation Law of Delaware is the rule that the business and affairs of a corporation are managed by and under the direction of its board.").

Continuing the example, assume further that if the court did not select Enhanced Scrutiny, Alden would prefer that the justices choose Shareholder Prerogative rather than Director Discretion, due to her strong opinion that managers cannot be trusted with the takeover decision. Baker's second choice, after Shareholder Prerogative, would be Director Discretion, because she believes that courts are not well situated to engage in a substantive review of corporate decisionmaking. Although she is skeptical of managers' motives, she would rather have them making the decision than a court, if the Shareholder Prerogative approach is to be rejected. As for Clark, based on her view that directors rather than shareholders should be the principal decisionmakers, she would opt for Enhanced Scrutiny as her second choice after Director Discretion.

The justices' rankings of the three approaches would therefore look like this:⁴⁴

	ALDEN	BAKER	CLARK
1	Enhanced Scrutiny	Shareholder Prerogative	Director Discretion
2	Shareholder Prerogative	Director Discretion	Enhanced Scrutiny
3	Director Discretion	Enhanced Scrutiny	Shareholder Prerogative

The problem here is that the justices' preferences⁴⁵ are unstable. If the justices were to hold a series of pairwise votes among

⁴⁴ As the description in the text suggests, my analysis focuses on the justices' varying doctrinal approaches—that is, their views on alternative legal “rules.” Professor Kornhauser has argued that courts should and do focus solely on the “results” of previous cases for stare decisis purposes, rather than on the legal rule that is applied in a given context. Lewis A. Kornhauser, *Modeling Collegial Courts I: Path-Dependence*, 12 *Int'l Rev. L. & Econ.* 169, 173-77 (1992) [hereinafter, *Collegial Courts I*]; Lewis A. Kornhauser, *Modeling Collegial Courts II: Legal Doctrine*, 8 *J.L. Econ. & Org.* 441, 443-44 (1992). Because this contention seems notably inaccurate as a description of Delaware supreme court decisionmaking, given the important (though somewhat misleading, as we will see in Part IV) role that doctrinal rules play in the Delaware cases, I put it to one side. For a similar criticism of Kornhauser's characterization of the nature of stare decisis, see Bruce Chapman, *The Rational and the Reasonable: Social Choice Theory and Adjudication*, 61 *U. Chi. L. Rev.* 41, 47 n.11 (1994).

⁴⁵ In using the term “preference” here and elsewhere in the analysis, I do not mean to suggest that the justices base their decisions on their personal perspectives, rather

the preferred approaches, Enhanced Scrutiny would prevail over Shareholder Prerogative, and Shareholder Prerogative would defeat Director Discretion, but Director Discretion would then prevail against Enhanced Scrutiny.⁴⁶ Thus, the justices not only lack a clear first place choice among the approaches, but their preferences among the three also seem inconsistent, because Enhanced Scrutiny loses to a position (Director Discretion) that would itself lose to a position (Shareholder Prerogative) that Enhanced Scrutiny defeats. Stated differently, no matter which approach the justices select, there will always be an alternative approach that a majority of them actually prefers.

It is this dilemma—the inability to make a stable choice among three or more options—that social choice theorists refer to as “cycling” or the “Condorcet Paradox.”⁴⁷ Kenneth Arrow generalized the insight with his famous theorem demonstrating that it is impossible to guarantee that a collective decisionmaking process will both satisfy a short list of fairness requirements,⁴⁸ and maintain rationality, which Arrow defined as the

than attempting to make objective judgments. See Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 *Yale L.J.* 82 (1986) (distinguishing judgment and preference-based adjudication, and arguing that adjudication tends to be judgment-based). Rather, in keeping with convention in the social choice literature, I use the term solely to distinguish the justices' differing views on the fiduciary duty issue. See, e.g., Gordon, *supra* note 33, at 362 n.35 (noting and adopting this usage).

⁴⁶ This is because Alden and Clark prefer Enhanced Scrutiny to Shareholder Prerogative; Alden and Baker prefer Shareholder Prerogative to Director Discretion; and Baker and Clark prefer Director Discretion to Enhanced Scrutiny.

⁴⁷ Game theorists use still another label, defining the problem as decisionmaking with an “empty core.” See, e.g., Varouj A. Aivazian & Jeffrey L. Callen, *The Coase Theorem and the Empty Core*, 24 *J.L. & Econ.* 175 (1981). It is important to emphasize that a cycling problem only arises if the justices' views include at least three perspectives that cannot be arranged on a single-peaked curve—that is, if the justices' views are multi-peaked. For useful discussions of these requirements, see Dennis C. Mueller, *Public Choice II*, at 81, 393 (1989); William H. Riker, *Liberalism Against Populism: A Confrontation Between the Theory of Democracy and the Theory of Social Choice* 123-28 (Waveland Press 1988) (1982). If the justices had differing views of just two approaches, or if they had similar views about the decisionmaking framework, their preferences would not cycle. On the other hand, unanimity can cause somewhat related problems even in the absence of cycling. I discuss this, and the question whether supreme court justices are likely to have multi-peaked preferences, *infra* Section II.B.

⁴⁸ Kenneth J. Arrow, *Social Choice and Individual Values* (1951). The most important of the “fairness” requirements for the analysis that follows are “range” and

ability to aggregate the preference rankings of three or more voters in a transitive fashion.⁴⁹

Although the existence of cyclical preferences might otherwise pose serious problems for supreme court decisionmaking, the judicial process counteracts this risk in several important ways. First, in those contexts where the justices do have cyclical preferences, outcome voting tends to disguise the existence of a cycle by forcing the justices to reach a decision on the case as a whole. Whatever they may think of the legal rule, the justices have no choice but to decide whether or not the target directors have violated their fiduciary duty.⁵⁰

"independence of irrelevant alternatives." The range postulate requires that no possible individual preference ordering be off-limits. Independence requires that each decisionmaker adhere to her actual ordinal ranking of the alternatives, rather than, for instance, altering her choice with an eye to a subsequent vote for strategic reasons. The remaining requirements include universality, which requires that no collective preference ordering be precluded; unanimity, or the Pareto postulate, which requires that the process honor any preference that every individual would agree to; and nondictatorship, which prohibits any individual's preferences from trumping those of other individuals. Different commentators have tended to compile the list, which subsequent writers have distilled from Arrow's original analysis, slightly differently. Maxwell Stearns gives useful summaries of the postulates in each of the articles cited *infra* note 50, based on terms first developed in William Vickrey, *Utility, Strategy, and Social Decision Rules*, 74 Q.J. Econ. 507 (1960). See also Mueller, *supra* note 47, at 385 (following Vickrey's restatement in compiling list); Riker, *supra* note 47, at 116-19 (compiling list without reference to Vickrey).

⁴⁹ Transitivity requires that if X defeats Y, and Y defeats Z, X must also defeat Z. See Mueller, *supra* note 47, at 385. The problem faced by collective decisionmaking bodies, and illustrated by the cycle described in this Article, is that even if each voter can rank her own preferences transitively, it may not be possible to aggregate the individual voters' views to produce a transitive outcome.

⁵⁰ See, e.g., Maxwell L. Stearns, *The Misguided Renaissance of Social Choice*, 103 Yale L.J. 1219 (1994) (arguing that the obligation to reach an outcome distinguishes courts from legislatures and forces the adoption of rules that do not reveal cyclical preferences) [hereinafter *Misguided Renaissance*]; Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 Cal. L. Rev. 1309 (1995) (same) [hereinafter *Standing Back*]; Maxwell L. Stearns, *Standing and Social Choice: Historical Evidence*, 144 U. Pa. L. Rev. 309 (1995) (same) [hereinafter *Historical Evidence*]. The effect of case-by-case decisionmaking is to limit appellate courts to one of two principal choices in most cases—to affirm or reverse. Because there are only two options, cycling cannot occur within the case at hand, although the effect may be to mask cyclical preferences across the underlying issues.

One of the costs of the case-by-case approach is that it may allow, and even cause, inconsistent treatment of the issues that underlie the result. In view of this, several commentators have argued that courts should abandon case-by-case voting, at least in some cases. See, e.g., Lewis A. Kornhauser & Lawrence G. Sager, *The One and the Many: Adjudication in Collegial Courts*, 81 Cal. L. Rev. 1, 30-33, 57 (1993)

Second, *stare decisis* reduces the likelihood of cycling through time. Because it establishes at least a presumption against reconsidering a rule or outcome that was rejected in a previous case, *stare decisis* reduces the likelihood of intertemporal cycling.⁵¹ This second context, the possibility of intertemporal cycling, is where the unanimity norm may actually have a *destabilizing* rather than a stabilizing effect on doctrinal development as compared to a less unified approach. In order to appreciate this, consider how our hypothetical justices might address a specific dispute under the unanimity norm, as compared to a regime where they more frequently issued separate opinions.

Assume that Target has recently signed a preliminary merger agreement with Friendly Corp. pursuant to which Target shareholders will receive stock of Friendly currently worth \$50/share in return for their shares of Target. No single shareholder holds more than 1% of Target's stock, but Manager, the chief executive officer of Friendly, holds 70% of Friendly's stock and would hold 40% of the combined company. Shortly after the prelimi-

[hereinafter *The One and The Many*] (advocating "metavote" as to whether to employ case-by-case or issue-by-issue voting). However, not only would such approaches entail a significant change from current practice, but they also would introduce problems that could prove more troublesome than the ones they address. See, e.g., Maxwell L. Stearns, *How Outcome Voting Promotes Principled Issue Identification: A Reply to Professor John Rogers and Others*, 49 *Vand. L. Rev.* 1045 (1996).

⁵¹ For instance, in the example we have been considering, if a prior case had established Enhanced Scrutiny as the proper approach over Shareholder Prerogative, *stare decisis* would limit the justices' ability to revisit Shareholder Prerogative in a subsequent case. In Arrovian terms, *stare decisis* limits the "range" of available decisions (because it eliminates an option), and in doing so prevents the justices from engaging in enough pairwise votes to reveal a cycle. It thus serves much the same function as a prohibition against reconsidering rejected motions in the legislative context. See Stearns, *Standing Back*, *supra* note 50, at 1356-57; Stearns, *Historical Evidence*, *supra* note 50, at 319 & n.38.

The cost of the stability provided by *stare decisis* is that it creates path dependence and the possibility of path manipulation. In the example just given, for instance, if a subsequent case pitted Enhanced Scrutiny against Director Discretion, Director Discretion (which Baker and Clark prefer to Enhanced Scrutiny) would emerge as the rule, even though other sequences of cases would lead to Enhanced Scrutiny or Shareholder Prerogative. Yet standing and related justiciability requirements reduce the threat of path manipulation. See, e.g., Stearns, *Historical Evidence*, *supra* note 50, at 335-37. But see Easterbrook, *supra* note 32, at 820 (arguing that *stare decisis* should be relaxed or abandoned in constitutional law cases in order to reduce path dependence).

nary merger becomes public, Hostile Bidder launches a tender offer promising to pay \$70/share for all of Target's stock.⁵² Target's directors use defensive measures to thwart the tender offer, contending both that Target and Hostile Bidder would be a poor fit and that Hostile Bidder's offer is highly uncertain. Hostile Bidder then sues Target's directors, alleging that the decision to thwart the tender offer violated their fiduciary duty to Target's shareholders.⁵³

Under these circumstances, Alden would argue that Target's directors should be subject to Enhanced Scrutiny, and would almost certainly conclude that the directors breached their duties by refusing even to consider the higher bid. Under Baker's preferred approach, Shareholder Prerogative, the case is somewhat closer, since Target's shareholders theoretically could oust the directors of the combined company after the merger or entertain a future takeover bid. Because Manager will hold 40% of the stock, however, shareholders' voting power would be more theoretical than real after a merger, so Baker too might conclude that Target's directors should have considered Hostile Bidder's offer.⁵⁴ In contrast to Alden and Baker, Clark would apply a Director Discretion approach, and might well be inclined to uphold the directors' actions absent extraordinary factors calling their judgment into question.

Although the justices would hold that the Target directors breached their fiduciary duties under both nonunanimity and unanimity regimes, the opinions reflecting this conclusion would

⁵² The illustration is thus something of a hybrid between *Paramount Communications v. Time, Inc.*, 571 A.2d 1140 (Del. 1989), where no shareholder of the friendly bidder (Warner) would have a significant stake in the combined company, and *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1993), where the chief executive officer of the friendly bidder (Viacom) was to hold nearly 70% of the combined company's stock. See *QVC Network v. Paramount Communications*, 635 A.2d 1245, 1247, 1251 (Del. Ch. 1993).

⁵³ In most of the takeover cases, both the hostile bidder and a group of nonbidder shareholders have filed suits seeking to enjoin the target directors. The Delaware courts generally have consolidated the cases and addressed them together. See, e.g., *QVC*, 637 A.2d at 36; *Time-Warner*, 571 A.2d at 1142.

⁵⁴ In *Unitrin, Inc. v. American Gen. Corp.*, 651 A.2d 1361 (Del. 1995), one of Delaware's most recent takeover cases, the supreme court's decision takes the former approach—and emphasizes the (somewhat debatable) possibility that a group of manager-shareholders that had practical control could be unseated in a proxy contest. *Id.* at 1382-83.

differ dramatically. In a nonunanimity regime, their decision would almost certainly entail two separate opinions, and perhaps even three. Thus, Baker might join an opinion by Alden holding that the directors breached their duties, or perhaps write separately to emphasize her view that the court should apply a Shareholder Prerogative approach.⁵⁵ Clark on the other hand, might write a dissenting opinion insisting that the court should employ Director Discretion in takeover cases, and that Target's directors did not breach their duties.

Under a unanimity norm, by contrast, the justices would need to reconcile all three different perspectives in a single opinion. In view of this, what we might expect to see is a single opinion that attempts to bring all three positions to bear. Thus, Alden might draft an opinion emphasizing the need for Enhanced Scrutiny in the takeover context, yet also suggesting that Shareholder Prerogative is a crucial factor and that the analysis is wholly consistent with Delaware's traditional commitment to Director Discretion.⁵⁶

As a quick look at almost any of Delaware's recent takeover decisions shows, this is precisely the form many of the supreme

⁵⁵ Baker's decision whether to join the Alden opinion presumably would depend on Alden's willingness to recognize Shareholder Prerogative as a consideration in the analysis. Thus, Baker might adopt Enhanced Scrutiny as the court's approach, but suggest that courts should consider the effect on shareholders as a factor bearing on the fairness issue.

Notice that Enhanced Scrutiny would become the prevailing rule if Baker joined Alden's opinion. If Baker only concurred in the judgment, on the other hand, the case would not establish a clear approach, since none of the options would garner two votes. See generally Kornhauser & Sager, *The One and the Many*, *supra* note 50, at 8 n.14 (distinguishing between "true" concurrences that reject the majority's rationale but concur in the judgment and "two cents" concurrences that join the majority but add the justice's own thoughts on the case). Moreover, even if Baker joined the opinion, her Shareholder Prerogative view could influence subsequent case law to the extent it was seen as a useful way of understanding the majority opinion. See Ken Kimura, Note, *A Legitimacy Model for the Interpretation of Plurality Decisions*, 77 *Cornell L. Rev.* 1593 (1992) (suggesting precedential authority of plurality opinions should vary with type); Igor Kirman, Note, *Standing Apart to be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 *Colum. L. Rev.* 2083 (1995) (suggesting a two-part inquiry for determining when a concurrence should be deemed to have precedential value).

⁵⁶ See generally Kirman, *supra* note 55, at 2099 (Supreme Court justices will add to, or "deliberately cloud," their analysis to obtain necessary votes).

court's decisions take.⁵⁷ In a very real sense, the decisions suggest not a choice *among* approaches, but *of* all of them. In striking contrast to a nonunanimous regime, the unanimity norm encourages the justices to adopt a combined approach that is acceptable to all three, rather than articulating their differing views on the appropriate doctrinal approach.⁵⁸

It is this tendency to cover all bases that can exacerbate the risk of cycling in a unanimity regime. The effect can take either of two forms. First, the unanimity norm may create the possibility of a doctrinal cycle that would simply not occur if the justices issued separate opinions. In the example we have just considered, a joint opinion by Alden and Baker that emphasized Enhanced Scrutiny and Shareholder Prerogative, and that rejected Director Discretion, would, under ordinary principles of *stare decisis*, limit the court's ability to shift to Director Discretion in a subsequent takeover case. To the extent this held true, it would prevent the court's takeover doctrine from cycling over a series of cases in a nonunanimity regime. The single opinion issued in a unanimity regime, on the other hand, would do nothing to prevent doctrinal cycling. Because the combined initial decision would not rule out any of the three approaches, the

⁵⁷ In *QVC*, for instance, the court states that "[i]n the sale of control context, the directors must focus on one primary objective—to secure the transaction offering the best value reasonably available for the stockholders." *QVC*, 637 A.2d at 44, an Enhanced Scrutiny standard. The court then articulates the directors' obligations in a fashion that emphasizes director discretion: "[A] court should not ignore the complexity of the directors' task.... The board of directors is the corporate decisionmaking body best equipped to make these judgments." *Id.* at 45. It also suggests that the shareholders' loss of voting power is a key factor by emphasizing "the threatened diminution of the current stockholders' voting power" and "the traditional concern of Delaware courts for actions which impair or impede stockholder voting rights." *Id.*

⁵⁸ Unanimity could also be seen as encouraging the justices to "cardinalize" their preferences—that is, to take intensity of preference into account—and, for justices who disagree, to accede to the wishes of the other justices unless they feel particularly strongly about their views. This perspective is consistent with several justices' suggestion to me that the Delaware process is designed to produce unanimity unless a justice feels especially strongly about his or her disagreement. For further discussion, see *infra* note 80.

Failure to take intensity of preference into account is a frequent criticism of Arrow's theorem and the subsequent social choice literature. See, e.g., Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 Colum. L. Rev. 2121 (1990).

court could continue to shift among them in subsequent cases.⁵⁹

Doctrinal cycling could, and does, occur in nonunanimity regimes, of course, and this might well be the case in the hypothetical we have been considering.⁶⁰ Yet even where doctrinal cycling is inevitable in both regimes, unanimity magnifies its effect in a second way. The issuance of a single opinion appealing to all three approaches tends to disguise the possibility of a cycling problem, and thus provides significantly less information to future litigants as to the status of takeover doctrine. The issuance of separate opinions, or even a series of close votes on the merits of particular cases, signals that the doctrine in question may be unstable.⁶¹ By contrast, a unanimous opinion is much less likely to provide a useful signal, and can obscure the possibility that the court may dramatically shift directions in a subsequent case.⁶²

⁵⁹ Kornhauser contends that differing views as to doctrinal rule cannot lead to a cycle in the absence of *stare decisis*. Kornhauser, *Collegial Courts I*, *supra* note 44, at 178 (criticizing Easterbrook, *supra* note 32). This argument seems to ignore the possibility that nondoctrinal factors—here, the justices' views on the appropriate outcome in each given case, as seen through the lens of their preferred doctrinal approach—can have an effect on doctrinal development. As suggested by the hypothetical in the text, these factors clearly can produce a true majority cycle.

⁶⁰ Most obviously, *stare decisis* acts only as a presumption of adherence to an established approach, and it will only counteract cycling to the extent it is in fact applied. Moreover, if Baker concurred only in the judgment, the *stare decisis* effect of Alden's opinion would be limited, because the opinions would preserve one vote for each of the three positions. Cycling-like effects due to shifts in the justices' views over time, discussed *infra* at notes 67-69 and accompanying text, are distinct from those due to concurrences. For a debate about the merits of *stare decisis*, compare Lewis A. Kornhauser, *An Economic Perspective on Stare Decisis*, 65 *Chi.-Kent L. Rev.* 63 (1989) (arguing that *stare decisis* is difficult to justify from an economic perspective) with Jonathan R. Macey, *The Internal and External Costs and Benefits of Stare Decisis*, 65 *Chi.-Kent L. Rev.* 93 (1989) (arguing that *stare decisis* benefits both litigants and judges "by altering the nature of litigants' demands for judicial services").

⁶¹ Commentators have made similar points in assessing U.S. Supreme Court decisionmaking. See, e.g., Easterbrook, *supra* note 32, at 810, 817 (multiple opinions provide additional information); Richard L. Revesz & Pamela S. Karlan, *Nonmajority Rules and the Supreme Court*, 136 *U. Pa. L. Rev.* 1067, 1105-06 (1988) (noting that repeated 5-4 splits in the Supreme Court indicate an existing precedent may be unstable); Kolsky, *supra* note 2, at 2085-86 ("Knowing the number of Justices who dissent from an opinion and how they disagree will inform people's views about the legitimacy and force of the opinion.").

⁶² Notice that this is a problem in unanimity regimes whenever the justices hold diverging views, even if their preferences do not actually cycle.

The Supreme Court's decisionmaking under the securities laws—the one corporate law context where it, rather than the Delaware supreme court, is the leading source of judicial review—offers a striking illustration of the informational difference between unanimity and nonunanimity regimes. Whereas shifts in the Delaware supreme court have often come as a surprise, due at least in part to the effects of the unanimity norm,⁶³ the tendency of U.S. Supreme Court Justices to write separately provides a much more pronounced warning that the existing doctrine is unstable. In the insider trading context, for example, the Justices' internecine disputes have made clear to even casual observers that the current approach—which predicates liability on the existence of a duty of the defendant to a corporation whose stock the defendant purchases or sells based on inside information—could be displaced by the broader misappropriation theory.⁶⁴ The justices do not eliminate the instability by signal-

⁶³ In addition to the takeover cases we have been considering, another much-discussed example of such doctrinal shifting came in the context of subsidiary or "freezeout" mergers, pursuant to which a parent corporation merges a subsidiary into itself and eliminates minority shareholders. In *Singer v. Magnavox Co.*, 380 A.2d 969 (Del. 1977), the supreme court shifted from its traditional scrutiny to a much stricter approach, requiring that the parent show there was a "business purpose" for effecting the freezeout. The court almost immediately retreated from this standard in *Tanzer v. International Gen. Indus.*, 379 A.2d 1121 (Del. 1977). It has subsequently abandoned its emphasis on business purpose, and has focused on whether an effective independent special committee negotiated on behalf of the subsidiary. See *Kahn v. Lynch Communication Sys.*, 638 A.2d 1110 (Del. 1994); *Weinberger v. UOP, Inc.*, 457 A.2d 701 (Del. 1983); see also Frank H. Easterbrook & Daniel R. Fischel, *The Economic Structure of Corporate Law* 134-36 (1991) (discussing these doctrinal shifts).

⁶⁴ *Chiarella v. United States*, 445 U.S. 222 (1980), interpreted the principal insider trading prohibitions, § 10(b) of the Securities Exchange Act of 1934 (codified at 15 U.S.C. § 78j(b) (1994)) and SEC Rule 10b-5 thereunder (codified at 17 C.F.R. § 240.10b-5 (1996)), as requiring the government to prove the defendant was under a duty to a corporation whose stock the defendant bought or sold. Chief Justice Burger argued in dissent that the government need only show that the defendant misappropriated information, that is, purloined it from *someone*. *Chiarella*, 445 U.S. at 240 (Burger, C.J., dissenting). Justice Blackmun argued for a still broader view, under which any trader who had inside information could be held liable, regardless of whether she acquired the information in an inappropriate fashion. *Id.* at 245-46 (Blackmun, J., dissenting). Justice Powell's majority opinion left the misappropriation theory open because it had not been raised below. *Id.* at 236. The Court later divided 4-4 in a case that squarely presented the misappropriation issue. See *Carpenter v. United States*, 484 U.S. 19 (1987).

The patent instability in the Supreme Court's insider trading jurisprudence has not

ling its existence through separate opinions, although they do reduce it to the extent they adhere to *stare decisis*.⁶⁵ Nonetheless, the opinions forewarn future parties, and enable them to adjust their behavior accordingly.⁶⁶

Thus far, I have assumed that the justices' preferences remain stable through time. The unanimity norm can produce additional instability if the justices' preferences change over time. Suppose, for instance, that three of Delaware's justices initially viewed Enhanced Scrutiny as the best approach, one preferred Shareholder Prerogative, and one Director Discretion.⁶⁷ Although Enhanced Scrutiny commands a clear majority, the court's opinion might also incorporate Shareholder Prerogative and Director Discretion into the analysis in order to maintain unanimity. Because the opinion preserves all three perspectives, even a change of heart by one of the Enhanced Scrutiny justices when the next case comes along, or a change in the composition of the court in the interim, could introduce the possibility of a subsequent cycle-like shift among the approaches.⁶⁸

been lost on litigants. The SEC continues to argue misappropriation, and the circuit courts are now split. The Second, Seventh, Ninth, and (arguably) Third Circuits accept the misappropriation theory. See *United States v. Newman*, 664 F.2d 12 (2d Cir. 1981), cert. denied, 464 U.S. 863 (1983); *SEC v. Cherif*, 933 F.2d 403 (7th Cir. 1991), cert. denied, 502 U.S. 1071 (1992); *SEC v. Clark*, 915 F.2d 439 (9th Cir. 1990); *Rothberg v. Rosenbloom*, 771 F.2d 818 (3d Cir. 1985), cert. denied, 481 U.S. 1017 (1987). The Fourth and Eighth Circuits reject misappropriation. *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995); *United States v. O'Hagan*, 92 F.3d 612 (8th Cir. 1996), cert. granted, 117 S. Ct. 759 (1997).

The Supreme Court has recently granted certiorari in *O'Hagan*, and thus promises to address the misappropriation theory directly this term.

⁶⁵ This is reflected in the Court's continued failure, after nearly two decades, to adopt a settled approach to Rule 10b-5.

⁶⁶ See, e.g., Revesz & Karlan, *supra* note 61, at 1106 (suggesting that evidence of doctrinal instability diminishes a party's incentive to rely on the existing approach and encourages litigants to challenge the approach).

⁶⁷ Recall that the supreme court ordinarily hears cases in three justice panels. As discussed earlier, if one justice indicated an intention to dissent at the panel level, the prospect of a dissent would automatically trigger an en banc hearing. See *infra* notes 23-25, 31 and accompanying text.

⁶⁸ In social choice terms, the justices need not engage in "principled voting"—that is, because they are not on record (in an opinion) as supporting a particular approach, they are much less constrained by their original ordinal ranking than would otherwise be the case. On the role of opinions in promoting principled voting, see Stearns, *Standing Back*, *supra* note 50, at 1349-50.

Notice that, with cases decided by three-justice panels, even changes in panel composition could lead to doctrinal shifts.

Moreover, the court would have no need to announce that such a shift had occurred, because the initial opinion left open the option of moving to a different approach.⁶⁹

B. How Often Will Cycling Occur?

Having argued in the last Section that unanimity regimes are significantly more prone to cycling than nonunanimous ones, we now must address a closely related issue: How frequently will cycles of the sort we have considered actually occur?⁷⁰

There are several important curbs on doctrinal cycling in Delaware corporate law. Most importantly, several of the factors that make unanimity possible—the court's small size and the tendency to select justices with a similar perspective on corporate law⁷¹—greatly reduce the likelihood that the justices will have multi-peaked preferences. Delaware justices can be expected to be sympathetic to publicly held corporations and their managers, for instance, rather than having the wide range of perspectives one sees on the Supreme Court and many other collegial courts.⁷² To the extent the justices' perspectives are single-peaked as a result, cycling will simply not occur.⁷³

Even if the justices have relatively similar views as to the general goals of corporate law, however, their preferences may nevertheless prove to be multi-peaked.⁷⁴ Particularly with con-

⁶⁹ It is interesting to note in this regard that none of the takeover cases we have been discussing were heard en banc. This suggests that the justices did not view any of the cases as reconsidering existing law, see Del. Sup. Ct. Internal Op. P. VII(2) (requiring en banc hearing of case that could modify or overrule established case law), despite the shifts in the cases, as detailed *infra* note 75, a fact that is arguably attributable to the malleability of the opinions.

⁷⁰ This question is a frequent and important one in the social choice literature. For reviews of the literature considering the factors that magnify or reduce the likelihood of cycling, see Mueller, *supra* note 47, at 81-82; Riker, *supra* note 47, at 123-28.

⁷¹ See *supra* notes 17-25 and accompanying text.

⁷² For an argument that the Supreme Court has become increasingly multi-peaked in its preferences in recent decades, and that it has used the doctrine of standing to counteract the risk of strategic manipulation by ideological litigants, see Stearns, *Historical Evidence*, *supra* note 50, at 349-85.

⁷³ Riker, *supra* note 47, at 124.

⁷⁴ For a similar point about the risk of cycling among shareholders were they given the authority to initiate corporate decisions on their own, see Gordon, *supra* note 33. Gordon argues that even if all of a firm's shareholders were interested principally in wealth maximization, they could easily have multi-peaked preferences on the issue of

troversial issues, and given that court composition or justices' perspectives may shift over time, the multi peakedness necessary to precipitate a cycle or cycle-like effect can easily arise.

The takeover cases reviewed in Section II.A are an excellent example. Even if the justices shared a similar view of the general role of directors in corporate law, the difficulty of assimilating the takeover cases into Delaware's existing fiduciary duty framework could easily lead to the kinds of multi peaked views that can produce doctrinal cycling. In fact, although we considered the cases in hypothetical form, they come quite close to embodying an unacknowledged cycle.⁷⁵

Moreover, in a sense, it does not matter whether or not Delaware corporate law has in fact cycled in any given area.⁷⁶ An incomplete cycle, or a doctrinal shift in a context where the

how best to achieve that goal. *Id.* at 359-85. Interestingly, this point may be even stronger with respect to the justices of the supreme court, since their views on corporate law are unlikely to distill to a single perspective like wealth maximization. On the other hand, the justices obviously comprise a dramatically smaller group, which would tend to reduce the likelihood of multi peaked preferences.

⁷⁵ To see this, we need only focus on the initial takeover cases, *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946 (Del. 1985), and *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986), and the two most prominent later cases, *Paramount Communications v. Time, Inc.*, 571 A.2d 1140 (Del. 1989), and *Paramount Communications v. QVC Network*, 637 A.2d 34 (Del. 1993). *Revlon* and *Unocal* announced the Enhanced Scrutiny standard, but also can be read as acknowledging the importance of Shareholder Prerogative and Director Discretion. *Revlon*, 506 A.2d at 180-81; *Unocal*, 493 A.2d at 954-56. The first two cases thus resemble Alden's preferences (ES/SP/DD).

In *Time-Warner* the supreme court shifted dramatically, and emphasized Director Discretion. *Time-Warner*, 571 A.2d at 1153. It also made gestures toward Enhanced Scrutiny and Shareholder Prerogative. *Id.* at 1150, 1154. *Time-Warner* thus resembles Clark's preferences (DD/ES/SP).

Finally, the court shifted to a much greater focus on Shareholder Prerogative in *QVC*—emphasizing the fact that the proposed transfer of the target would eliminate the shareholders' voting authority within the firm. *QVC*, 637 A.2d at 42-45. *QVC* therefore looks somewhat like Baker's preference profile (SP/DD/ES).

Thus, the four key takeover cases can be seen as embodying something like the cycle we considered in the last Section. I hesitate to make this claim too strongly, because one could quibble with several aspects of this characterization. Although the supreme court repeatedly highlighted the effect of the proposed merger on shareholders in *QVC*, see, e.g., *supra* note 57 (quoting statements from the opinion emphasizing shareholders' plight), it is not clear that the case can be said to have adopted Shareholder Prerogative (or a variation on this perspective) as its principal approach. What is clear, however, is that the cases come quite close to a cycle under any characterization, and thus underscore the possibility that a cycle could occur.

⁷⁶ See *supra* note 62 and accompanying text.

justices' preferences are actually unipeaked rather than multi-peaked, can produce the same kinds of doctrinal opaqueness as might be caused by a true cycle.⁷⁷ In short, unanimity appears to contribute in important respects to doctrinal instability, both by exacerbating the risk of cycles and by otherwise clouding the development of corporate law doctrine.

We have focused throughout this Part, and will continue to do so hereafter, on the effect that unanimity has on doctrinal development through time—that is, we have focused on sequences of cases, rather than on a single case. Nevertheless, it is important to note that just as unanimity can increase doctrinal instability when the justices' preferences are unipeaked as well as when they are multi-peaked, unanimity also may alter the justices' decisionmaking process within any given case.

This becomes immediately clear if we briefly consider the median voter theorem. The median voter theorem predicts that if decisionmakers' preferences are unipeaked, the outcome in a majority voting regime will gravitate toward the preferences of the median voter, since this individual's vote is necessary to secure a majority.⁷⁸ Under unanimity, by contrast, the need to bring even outlying voters within the fold suggests that the median voter's perspective will not control. As a rough approximation, we might predict that unanimous voting will gravitate toward the mean of the justices' views.⁷⁹

⁷⁷ See Gordon, *supra* note 33, at 363 (similar point in the context of shareholder initiation).

⁷⁸ See Mueller, *supra* note 47, at 64-66 (describing median voter theorem in both intuitive and quantitative terms). For an application to bankruptcy, see David A. Skeel, Jr., *The Nature and Effect of Corporate Voting in Chapter 11 Reorganization Cases*, 78 Va. L. Rev. 461, 480 n.69 (1992) (chapter 11 voting rules focus influence on residual owner, which is analogous in some respects to the median voter).

⁷⁹ I am grateful to Saul Levmore for suggesting this point to me in conversation. Perhaps the best way to appreciate this distinction between unanimous and nonunanimous regimes is through an illustration based on our takeover hypothetical. Assume that, rather than including three different approaches, the justices' views entail only two: Enhanced Scrutiny and Director Discretion. (Although I use two approaches for simplicity, the analysis could hold true even with three approaches, so long as the approaches could be arrayed on a single-peaked curve. Single-peakedness is described in detail and shown graphically in Riker, *supra* note 47, at 124-28; see also Saul Levmore, *Parliamentary Law, Majority Decisionmaking, and the Voting Paradox*, 75 Va. L. Rev. 971, 987 & n.47 (1989) (describing single-peakedness)). But the justices are nevertheless divided as to the appropriate

any particular judge's preference into account in the decision-making process.⁸⁰

Unanimity thus has a significant effect on the nature of judicial review, both in any given case and across a court's case law. Most dramatically, unanimity can increase doctrinal instability. Recognizing this leads us to yet another crucial question: Why has Delaware supreme court decisionmaking not only evolved toward unanimity, but also retained this attribute, despite its apparently problematic implications?

I attempt to sort this out in the Parts that follow, and in doing so suggest that the doctrinal instability encouraged by unanimity is not quite so problematic as it first appears. We will see by the time we complete Part IV that the outcomes in the cases are less unpredictable than the supreme court's doctrinal pronouncements.

III. WHAT LAWYERS HAVE TO DO WITH IT: AN INTEREST GROUP EXPLANATION

Given the historical uses of unanimity, the most obvious explanation for Delaware's unanimity norm might be judicial credibility. Just as Chief Justice Marshall fostered unanimity to enhance the standing of the early Supreme Court,⁸¹ Delaware's unanimity norm could perhaps be explained as a means for the court to solidify its standing as the nation's leading arbiter of corporate law issues. This might be part of the explanation, but as a full account, it is unsatisfying in many respects. It does not explain, for instance, why Delaware's supreme court, unlike the

⁸⁰ To the extent this is true, the justices would in effect be cardinalizing their preferences, and thus relaxing their adherence to the "independence of irrelevant alternatives" postulate. See *supra* note 48 and accompanying text (describing Arrow's postulate). My suspicion is that something like this, which is analogous to logrolling in some respects, takes place to a certain extent in most collegial courts, and that unanimity magnifies the effect, given the added holdup power such a regime gives to an outlying judge. But even in a unanimity regime, it seems likely to come into play only on the margin. See generally Stearns, *Misguided Renaissance*, *supra* note 50, at 1225-26 n.18 (criticizing suggestion by Lynn Stout that judges can and should engage in logrolling). It is interesting to note that the Delaware supreme court's practice of prohibiting discussion among the justices about a case until immediately after oral argument, see Del. Sup. Ct. Internal Op. P. IX(1), reduces even the appearance of vote trading of the sort that takes place in legislatures.

⁸¹ See *supra* notes 2-4 and accompanying text.

U.S. Supreme Court, has retained its unanimity norm even after having fully established its preeminence in corporate law.

My goal in the remainder of this Article is to provide a more nuanced explanation of the unanimity norm. I begin, in this Part, by considering what the interest group branch of public choice theory might have to say about the significance of unanimity.⁸² Because the interest group perspective ultimately proves incomplete, I add a very different perspective in the following Part, one which will return us to a variation on the issue of judicial credibility.

For our purposes, the central insight of interest group theory is that concentrated interest groups often can secure favorable legislation at the expense of more diffuse groups, due to diffuse groups' relative inability to organize effectively even when they have a great deal at stake.⁸³ As the heading of this Part suggests, our eventual focus will be on the role of the Delaware bar (as well as on the justices themselves). To appreciate the relationship between the bar and unanimity, however, we must first consider the interest group dynamic in corporate law more generally.

The interest group that appears to have most clout in the corporate law context is corporate managers, due to the fact that they usually choose the firm's state of incorporation.⁸⁴ Although

⁸² A brief word on terminology at the outset. Many writers, particularly in the legal literature, treat the terms "public choice" and "interest group theory" as synonymous, and as distinct from, though related to, "social choice." I use "public choice" in its broader sense, as an umbrella term encompassing a variety of specific perspectives such as interest group theory and social choice. This accords with the fact that each of the specific perspectives offers insights into the nature of "public" or multi-party decisionmaking. For a detailed discussion of these definitional issues and of public choice generally, see David A. Skeel, Jr., *Public Choice and the Future of Public Choice-Influenced Legal Scholarship*, 49 *Vand. L. Rev.* (forthcoming Apr. 1997) (reviewing Maxwell L. Stearns, *Public Choice and Public Law: Readings and Commentary* (1997)).

⁸³ Classic articles in the development of interest group theory include Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *Q.J. Econ.* 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J.L. & Econ.* 211 (1976); and George J. Stigler, *The Theory of Economic Regulation*, 2 *Bell J. Econ. & Mgmt. Sci.* 3 (1971). Macey and Miller were the first to apply a sophisticated interest group analysis to corporate law. Macey & Miller, *supra* note 35.

⁸⁴ For similar reasons, the corporate lawyers who advise a firm also are key players

commentators continue to dispute whether states generally, and Delaware in particular, are effective regulators of corporate law,⁸⁵ nearly everyone agrees that Delaware, and other states interested in keeping or attracting corporations, respond to managers when legislating on corporate law.

For Delaware, the spoils of victory are the significant direct and indirect payments a firm makes for the privilege of being incorporated in Delaware.⁸⁶ Like the effort to attract corporations, the decision how to divide the benefits of charter competition success may also be affected by interest group competition.⁸⁷ This is where Delaware's lawyers come into the picture. One of the indirect benefits of Delaware's charter competition

in the incorporation decision. Macey & Miller, *supra* note 35, at 486. Although the managers' and lawyers' choice ordinarily is subject to shareholder approval, the choice is almost always approved. Commentators differ as to whether this reflects collective action problems in shareholder decisionmaking, or a perception by the shareholders that the choice is in their best interests. Compare Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 *Colum. L. Rev.* 1549, 1575-76 (1989) (describing ways managers take advantage of shareholders' collective action problem) with Roberta Romano, *Answering the Wrong Question: The Tenuous Case for Mandatory Corporate Laws*, 89 *Colum. L. Rev.* 1599, 1606-13 (1989) (questioning severity of the collective action problem).

⁸⁵ The charter competition debate stems, in its recent incarnation, from William Cary's contention that states' efforts to lure corporations into the state produce a "race-for-the-bottom," see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *Yale L.J.* 663 (1974), and Ralph Winter's response that market forces impel states to enact generally efficient laws. See Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 *J. Legal Stud.* 251 (1977). For a review of the debate, and an application of similar insights to corporate bankruptcy regulation, see David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 *Tex. L. Rev.* 471 (1994).

⁸⁶ The most obvious direct payment is the franchise taxes corporations pay to Delaware. Roberta Romano has persuasively argued that Delaware's dependence on these taxes, which represent more than 15% of Delaware's tax revenues, see Romano, *Genius*, *supra* note 22, at 6-8 (compiling data from 1960-1990), effectively holds Delaware hostage, *id.* at 38-39, committing it to continued sensitivity to the interests of corporations.

⁸⁷ In the interest group literature, the distinction between the interest groups that compete for legislation, and those that provide it, is often characterized in demand-supply terms. The groups that compete for legislation comprise the "demand" side. Those who provide the legislation and/or participate in the rents obtained from demand-side interest groups, such as Delaware's legislature and the Delaware bar, comprise the "supply" side. See Macey & Miller, *supra* note 35, at 471 (describing Delaware corporate law in these terms); Fred S. McChesney, *Rent Extraction and Interest-Group Organization in a Coasean Model of Regulation*, 20 *J. Legal Stud.* 73 (1991).

success is legal work for its corporate bar. Delaware's bar clearly is an extraordinarily powerful group, and many observers believe that the bar parlays its influence into legal rules that maximize firms' use of Delaware lawyers.⁸⁸

Notice that the analysis thus far suggests only that Delaware's legislative process may benefit both out-of-state corporate managers and (more importantly for our purposes) Delaware lawyers. The unanimity norm, on the other hand, is a characteristic of Delaware's judicial process, and it is not immediately clear whether the interests of the Delaware bar are also likely to influence the state's supreme court.

Although judges obviously are more isolated from interest group influences than legislators, Delaware's justices are likely to reflect the interests of the corporate bar. The most obvious source of sympathy is the judicial selection process. As described earlier, the Delaware bar plays a central role in selecting justices, and it can be expected to recommend individuals who have a natural affinity to the corporate bar.⁸⁹ This natural inclination is amply borne out by even a cursory look at who is ordinarily selected to sit on the supreme court. Nearly all of the justices, both currently and as a historical matter, were members of the Delaware bar before donning judicial robes.⁹⁰

A much-reported recent incident involving the selection process reinforces the point that Delaware's justices have reason to be sympathetic to the interests of local lawyers. Delaware's justices are typically reappointed as a matter of course. However, when Justice Andrew Moore's twelve-year term came to an end in early 1994, the nomination committee declined to submit his name to the governor as an acceptable choice. It was

⁸⁸ See, e.g., Macey & Miller, *supra* note 35, at 506-09; Larry E. Ribstein, Delaware, Lawyers, and Contractual Choice of Law, 19 Del. J. Corp. L. 999, 1009-10 (1994). An obvious constraint on franchise taxes and on indirect taxes such as rules maximizing firms' use of Delaware lawyers is, as Macey and Miller point out, that Delaware's primacy in corporate law requires that the total costs of Delaware incorporation not become so great as to encourage firms to look elsewhere. See Macey & Miller, *supra* note 35, at 505.

⁸⁹ See *supra* notes 17-19 and accompanying text.

⁹⁰ See Macey & Miller, *supra* note 35, at 502 ("The members of the Delaware Supreme Court are drawn predominantly from firms that represent corporations registered in Delaware.").

widely believed that the refusal to renominate Moore had little to do with the quality of his decisionmaking—which was, and is, seen as highly competent—and everything to do with his frequent belittling of the lawyers who appeared before him.⁹¹

Assuming that Delaware's judicial process might tend to benefit the Delaware bar, the next question is whether unanimity itself has this effect. From at least one perspective, it clearly does.⁹² As we have seen, the unanimity norm can create doctrinal uncertainty, manifested most dramatically in the possibility of cycling. Uncertainty tends to benefit lawyers by increasing the amount of litigation (more litigation means more work for lawyers),⁹³ and by increasing the need to retain lawyers for advisory purposes, even in the absence of litigation.⁹⁴

Yet even if the unanimity norm enhances the value of lawyers' services, this does not by itself assure that unanimity will benefit *Delaware's* lawyers. In order for the supreme court's decisionmaking process to favor the local bar, the litigation not only must be filed in Delaware rather than elsewhere, but out-of-state shareholder (or corporate) plaintiffs and out-of-state director defendants⁹⁵ must rely to an appreciable extent on Dela-

⁹¹ See, e.g., Richard B. Schmitt, Delaware Governor Picks Trial Judge for Supreme Court, Wall St. J., May 26, 1994, at B7 (noting allegations that the law firm of Skadden, Arps, Slate, Meagher & Flom influenced the outcome, and stating that "the main case against [Justice Moore] appeared to be that he was sometimes verbally abusive to lawyers and insensitive to their needs in scheduling hearings.").

It is important not to overgeneralize from the Moore experience, however. I do not mean to suggest, for instance, that Delaware's justices consciously take the bar's interests into account. Rather, the principal point is that the selection process will generally lead to justices who already tend to share the bar's perspective. Neil Komesar makes a similar point, which he refers to as the "irrelevance of motive," with respect to the legislative process. See Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* 58-65 (1994).

⁹² This is not to say that the interest group analysis persuasively describes why the unanimity norm has developed. I take up that issue, and express several doubts, at the end of this Part.

⁹³ The amount of litigation need not be enormous in absolute terms to generate a significant benefit in Delaware, which has a relatively small bar. A few high-profile cases each year can be expected to have a crucial impact.

⁹⁴ See Macey & Miller, *supra* note 35, at 504.

⁹⁵ I assume that both the shareholder plaintiffs and director defendants are likely to be out-of-state because only a small minority of the shareholders and directors (and other relevant interest groups, such as employees) of publicly held Delaware corporations actually reside in Delaware. See, e.g., Romano, *Genius*, *supra* note 22,

ware counsel (rather than, say, engaging local counsel solely for the purpose of signing pleadings).⁹⁶ On inspection, various aspects of Delaware's judicial process—including, at least at first glance, the unanimity norm—can be seen as satisfying both of these prerequisites.

As for the decision where to file a lawsuit, the Delaware legislature and judiciary have taken numerous steps that encourage the parties to bring litigation in the state. For instance, Delaware makes it extremely easy to establish personal jurisdiction over any director of a Delaware firm,⁹⁷ and Delaware is notably generous in awarding fees to plaintiffs' attorneys.⁹⁸ Moreover, the judicial system as a whole—with a separate chancery court to address business issues and immediate appeal to the supreme court—is structured to assure judicial expertise and a streamlined decisionmaking process.⁹⁹ In the fast-paced takeover battles of the 1980s, Delaware's judges developed a norm of hearing and deciding even the most complex cases in a remarkably expedited fashion—an obvious attraction to the plaintiffs in time-sensitive disputes.¹⁰⁰

The remarkable degree of collegial interaction between Delaware's supreme court justices and the local bar gives out-of-state litigants an incentive to rely on Delaware lawyers much more than they otherwise might. It usually pays to retain a lawyer who knows, and is known and respected by, the supreme

at 60 (noting that most Delaware firms are located outside of Delaware).

⁹⁶ Ribstein, *supra* note 88, at 1011.

⁹⁷ Under Del. Code Ann. tit. 10, § 3114 (Supp. 1994), Delaware directors are deemed to consent to personal jurisdiction in Delaware. Section 3114 was drafted days after the Supreme Court struck down the prior jurisdictional provision as unconstitutional in *Shaffer v. Heitner*, 433 U.S. 186, 214-17 (1977). See Drexler, *in* *The Delaware Bar*, *supra* note 17, at 597 (describing the change in method of obtaining jurisdiction).

⁹⁸ See, e.g., Rock, *supra* note 12, at 67 & tbl.2 (discussing Delaware fee awards in the management buyout cases).

⁹⁹ See, e.g., Romano, Genius, *supra* note 22, at 39-40.

¹⁰⁰ In particularly prominent cases, the Delaware supreme court often announced its decision and issued an order explaining the result shortly after oral argument, then issued a full written opinion thereafter. See, e.g., *Paramount Communications v. QVC Network*, 637 A.2d 34, 36 n.1 (Del. 1993) (oral argument and initial order issued on Dec. 9, 1993; written opinion issued Feb. 4, 1994). Delaware's judicial efficiency is not limited to high profile corporate law cases. Delaware's justices disposed of their cases within an average of 24.9 days after submission in fiscal year 1995. Delaware Annual Report, *supra* note 21, at 29.

court.¹⁰¹ The unanimity norm magnifies the value of the local bar. Because of the doctrinal uncertainty the norm creates, it is even more difficult than it might otherwise be for an out-of-state lawyer to gain an adequate sense of what the justices are up to simply by reading supreme court opinions.

In a very real sense, the local bar, together with several prominent New York law firms that have made a similar ongoing investment in Delaware law, has become a discrete community of interpreters of Delaware corporate law.¹⁰² Even a cursory glance through the prominent takeover cases underscores this. Time after time, one sees the same firms representing parties before the supreme court.

In short, the interest group theory of regulation suggests that the unanimity norm may have evolved, or at least survived, because unanimity benefits the Delaware bar, and the Delaware supreme court has an incentive to respond to the bar's interests. Given that both it and the bar have a strong stake in Delaware's continued primacy in corporate law, the court is unlikely to adopt measures that are sufficiently costly to corporations as to give them reason to reincorporate elsewhere.¹⁰³ But unanimity does not seem likely to have such an effect, and thus the interest group explanation may apply.

While the interest group theory rings true in many respects, it does not by itself explain the unanimity norm. First, the benefits of the unanimity norm to the bar are not enormous, and the practices that foster unanimity entail significant costs to the jus-

¹⁰¹ There is a similar dynamic in the Supreme Court, where a relatively small Supreme Court bar trades on its expertise and familiarity with the Justices. As in Delaware, litigants have a strong incentive to turn to a member of this informal bar, rather than to use an outside attorney with little or no experience in the Supreme Court. Due to factors such as those suggested in the analysis below, however, the incentive to use members of the Delaware bar is even stronger than with the Supreme Court bar. For a fascinating study and discussion of the Supreme Court bar, see Kevin T. McGuire, *The Supreme Court Bar: Legal Elites in the Washington Community* (1993).

¹⁰² One way in which this dynamic has manifested itself in recent years is in firms' use of "client memos" both to characterize the Delaware decisions, and to indicate in not so subtle terms the firm's particular expertise on Delaware corporate law. See, e.g., Memorandum from Martin Lipton of Wachtell, Lipton, Rosen & Katz to Clients, Ten Questions Raised by *Paramount* (Feb. 7, 1994) (on file with the Virginia Law Review Association).

¹⁰³ See Macey & Miller, *supra* note 35, at 505.

tices. As we have discussed, Delaware supreme court justices spend significantly more time on an individual case than would be required if separate opinions were the norm. Given that the justices could, and in the view of some commentators do, look after the corporate bar in other ways at much lower cost,¹⁰⁴ it seems unlikely that solicitude for the bar offers the final word on the unanimity norm.

Second, in addition to the workload costs just mentioned, unanimity imposes another kind of cost on Delaware's justices—it limits each justice's opportunity to develop an individual reputation. It is much more difficult for a justice to establish an individual voice when she has few opportunities to speak separately.¹⁰⁵ Together these cast significant doubt on the suggestion that unanimity developed, or has survived, primarily to benefit Delaware's corporate bar.

Thus, we still lack a complete explanation of the unanimity norm. To move closer to this goal, we need to consider another important, and underappreciated, characteristic of Delaware supreme court decisionmaking.

¹⁰⁴ An example commentators frequently point to is *Smith v. Van Gorkom*, 488 A.2d 858 (Del. 1985), and other cases that have emphasized the importance the court places on directors having received expert advice from lawyers and investment bankers. Macey & Miller, *supra* note 35, at 517-19. Although it is debatable how far the interest group explanation goes in explaining even these statements—after all, legal and investment banker opinions presumably do improve directors' decisionmaking process—the statements cost the court little and provide obvious benefits to professionals.

¹⁰⁵ This point assumes that judicial reputation is an important motivating factor for judges, as I believe it is—particularly on a national court of last resort such as the Supreme Court or, for corporate law issues, the Delaware supreme court. Judge Posner has suggested that "ordinary" judges (such as most federal circuit judges) are motivated less by reputation or even prestige than by a taste for voting and by the utility they gain from their role as engaged "spectators" of a case. Richard A. Posner, *What Do Judges and Justices Maximize?: (The Same Thing Everybody Else Does)*, 3 *Sup. Ct. Econ. Rev.* 1 (1993). This seems debatable as a characterization even of "ordinary" judges. But it is interesting to note that unanimity would seem to reduce the utility of voting to the extent it limits a judge's ability to fully express his or her voting preferences. Thus, the defection concerns I discuss below would be relevant even for Posner's model.

IV. THE MORAL DIMENSION OF DELAWARE CORPORATE LAW

Under the standard view of Delaware judicial decisionmaking, which I have assumed in the analysis to this point, the unanimity norm has troubling consequences for the consistency of corporate law. The standard view suggests that lawyers and commentators should focus on the rules that the supreme court announces in its cases, and should attempt to reconcile the court's seemingly inconsistent doctrinal pronouncements.¹⁰⁶ On this view, the unanimity norm is anything but benign, since it appears to exacerbate the instability of the Delaware case law—an instability which makes it all but hopeless to shoehorn the supreme court's doctrinal pronouncements into a single coherent account.

Yet it is far from clear that the traditional perspective accurately describes what Delaware's justices are doing when they decide a corporate law dispute. A closer look suggests a different perspective on Delaware corporate law, one which gives rise to a richer and more benign account as to why the unanimity norm evolved in the supreme court.

As Edward Rock has pointed out (in part through a careful analysis of the Delaware cases involving management buyouts), Delaware opinions have several striking characteristics that are largely ignored in the traditional account.¹⁰⁷ First, the court's

¹⁰⁶ For a few of the more prominent recent efforts to make sense of corporate takeover law, see Lawrence A. Cunningham & Charles M. Yablon, *Delaware Fiduciary Duty Law After QVC and Technicolor: A Unified Standard (and the End of Revlon Duties?)*, 49 Bus. Law. 1593 (1994) (arguing that Delaware is moving toward a unified standard in all fiduciary duty cases); Lyman Johnson & David Millon, *The Case Beyond Time*, 45 Bus. Law. 2105 (1990) (focusing on directors' authority to take nonshareholder constituencies into account); Marcel Kahan, *Paramount or Paradox: The Delaware Supreme Court's Takeover Jurisprudence*, 19 J. Corp. L. 583 (1994) (contending that the cases emphasize a "contingent allocation of power" to the directors of a corporation). Not surprisingly, none of these efforts can fully explain the cases.

¹⁰⁷ Rock, *supra* note 12; see also Edward B. Rock, *Preaching to Managers*, 17 J. Corp. L. 605 (1992) (reviewing Louis Lowenstein, *Sense and Nonsense in Corporate Finance* (1991)). Elsewhere, I have argued for a somewhat analogous approach to Delaware law. See David A. Skeel, Jr., *Saul and David and Corporate Takeover Law* (July 1995) (unpublished manuscript on file with the Virginia Law Review Association). The analysis of the *Time-Warner* and *QVC* decisions that follows is drawn in part from, and further develops, a similar discussion in that article.

opinions are remarkably narrative in form, and tend to include an extended account of the events that gave rise to the parties' dispute. For our purposes, the extended narrative and the elaborate doctrinal analysis are particularly noteworthy given the tendency for courts in other unanimity regimes to evolve toward short, per curiam opinions that offer only the most general reasons for the decision.¹⁰⁸ Second, the court's narratives leave little doubt as to which parties have or have not acted appropriately—that is, of whom the court does and does not approve.

I refer to these tendencies throughout this part as the "moral dimension" in Delaware corporate law.¹⁰⁹ In focusing on the moral dimension, I do not mean to suggest that doctrine is irrelevant to the supreme court's decisionmaking process. Rather, I contend that doctrine is subsumed by, and in some respects subordinated to, the supreme court's quasi-moral, narrative assessments of whether the directors of a corporation have or have not generally honored their directorial obligations.¹¹⁰

There is evidence of the moral characteristics I have described in almost every takeover case. The *Time-Warner*¹¹¹ and *QVC*¹¹² cases offer particularly striking illustrations. In order to

¹⁰⁸ See, e.g., Easterbrook, *supra* note 32, at 810 n.23 (unanimity in continental courts tends to "reduce[] the opinion to a string of homilies"); Ginsburg, *supra* note 7, at 134 (noting the French practice of issuing a single, unanimous opinion, and stating that those opinions are written in a "formal, impersonal, concise, stylized manner.").

¹⁰⁹ One might also speak in terms of the "narrative dimension" of the Delaware case law. I use "moral" rather than "narrative" in order to emphasize the quasi-moral tone of the supreme court's factual narratives.

¹¹⁰ My account of the moral dimension in the Delaware case law calls to mind the "literary" model of judging developed by Martha Nussbaum, who suggests that judges should act as ideal "spectators," conducting a particularized, yet appropriately detached, examination of the parties' circumstances. See, e.g., Martha C. Nussbaum, *Equity and Mercy*, 22 *Phil. & Pub. Aff.* 83 (1993); Martha C. Nussbaum, *Poetic Justice: The Literary Imagination and Public Life* 72-77 (1995); Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 *U. Chi. L. Rev.* 1477 (1995). One difference between my analysis and Nussbaum's approach is that Nussbaum has tended to focus exclusively on the parties in the case at hand, rather than on the instructive value of a court's opinion for future parties. As will become clear below, I believe the Delaware supreme court decisions take both current and future parties into consideration.

¹¹¹ 571 A.2d 1140 (Del. 1989).

¹¹² 637 A.2d 34 (Del. 1993).

more fully appreciate the moral dimension in the Delaware case law, and the insights it offers into the unanimity norm, it is useful to consider the cases in slightly more detail.

A. Time-Warner and QVC from a Moral Perspective

As suggested earlier, *Time-Warner* and *QVC* seem to mark a dramatic shift in Delaware's takeover jurisprudence.¹¹³ In *Time-Warner*, Time's directors had investigated possible merger partners, including Paramount, for several years before concluding that Warner Brothers was the most promising fit.¹¹⁴ Extensive negotiations between Time and Warner led the companies to propose a stock-for-stock merger. Before Time's shareholders could vote on the proposal, however, Paramount made an eleventh-hour bid for Time at a much higher price than the Time-Warner merger offered. After Time's directors refused to consider the Paramount bid, and restructured the transaction with Warner to eliminate Time's shareholders' right to vote,¹¹⁵ Paramount and a group of Time shareholders sued, alleging that Time's directors violated their duties under *Revlon* and *Unocal*.¹¹⁶

The Delaware supreme court upheld the Time directors' actions. In addition to concluding that the directors' *Revlon* duties were never triggered, the court adopted an expansive view of the "threats" that would justify directors' use of defensive measures to stymie an unwanted takeover bid under *Unocal*. The court concluded that a Paramount takeover was a threat to Time's "culture." This, coupled with the possibility that Time's shareholders would be misled by the bid, were adequate reasons for the directors to stonewall Paramount.¹¹⁷

¹¹³ See supra note 75 (describing supreme court as shifting in *Time-Warner*, then shifting again in *QVC*).

¹¹⁴ *Time-Warner*, 571 A.2d at 1143-44 (directors considered Warner Bros., Disney, 20th Century Fox, Universal, Paramount, Columbia, M.G.M., M.C.A., and Orion).

¹¹⁵ The directors silenced Time's shareholders by restructuring the transaction from a stock-for-stock merger, which would have required a shareholder vote under New York Stock Exchange rules, to a tender offer by Time to acquire Warner's stock. *Id.* at 1148-49.

¹¹⁶ For a brief overview of these duties, see supra notes 37-38 and accompanying text.

¹¹⁷ Under the original transaction, Warner shareholders would have held 62% of

On the surface at least, the facts of *QVC* seem remarkably similar to those of *Time-Warner*. Like their counterparts at Time, the Paramount directors had decided to pursue a combination with Viacom as part of a long-term plan for the future of Paramount.¹¹⁸ When *QVC* responded to the Paramount-Viacom transaction by making its own bid for Paramount, Paramount's directors quickly rejected the *QVC* bid and refused to remove the takeover defenses that precluded Paramount's shareholders from considering the bid. Rather than blessing these actions, as it did in *Time-Warner*, the Delaware supreme court held that Paramount's directors violated their fiduciary duties by refusing to consider the *QVC* bid.¹¹⁹ The *QVC* court repeatedly emphasized that a consummated Viacom transaction would give Viacom's chief executive a controlling interest in the combined company, thereby eliminating Paramount's shareholders' voice in corporate affairs.¹²⁰

From a doctrinal perspective, *Time-Warner* and *QVC* are extremely difficult to reconcile.¹²¹ As a result, most commentators view *QVC* as embodying a doctrinal shift. If we focus on the supreme court's quasi-moral narrative accounts of the directors' performance in the two cases, however—that is, on the moral dimension of the cases—the divergent outcomes seem less sur-

the stock of the combined company, and thus a controlling interest. Even so, the court held that this was not enough to trigger *Revlon* duties. *Time-Warner*, 571 A.2d at 1149-54.

¹¹⁸ *QVC*, 637 A.2d at 38. One of the ironies of *Time-Warner* and *QVC* is that Paramount not only was involved in both cases, first as the hostile bidder and then as the target, but that it also lost in the supreme court both times.

¹¹⁹ *Id.* at 48-50. Whereas the court held in *Time-Warner* that Time's directors never became subject to Delaware's stringent *Revlon* duties, *Time-Warner*, 571 A.2d at 1150-51, it held that both *Revlon* and *Unocal* applied in *QVC*, and that Paramount's directors failed to satisfy their obligations under these cases. *QVC*, 637 A.2d at 49.

¹²⁰ See, e.g., *QVC*, 637 A.2d at 42-43.

¹²¹ The most persuasive attempt to do so, in my view, is Marcel Kahan's characterization of the takeover cases as entailing a "contingent allocation of authority" to the directors of a corporation. See Kahan, *supra* note 106. But even this view must stretch to reconcile *Time-Warner* and *QVC*. Thus, to explain the success of Time's directors and failure of Paramount's, the approach emphasizes the fact that Time's shareholders theoretically could have received a takeover premium even after the Time-Warner merger, whereas Paramount's shareholders would have lost any chance of a subsequent takeover premium once Sumner Redstone of Viacom took control. *Id.* at 596. This is true, but the prospect of a subsequent change in control with Time-Warner was much more theoretical than real, given the size of the combined company and its enormous debt load.

prising even in the face of doctrinal instability.

Consider how different *Time-Warner* and *QVC* begin to look if we put doctrine to the side and focus on the moral dimension of the opinions. In *Time-Warner*, Time's directors' refusal even to consider the Paramount bid clearly was problematic, but it was a single aberration in what the supreme court characterizes as the directors' otherwise admirable performance of their duties. For instance, the directors had considered several other firms carefully, including Paramount, before choosing Warner. As the court underscores, their consideration was given long before Paramount made its last minute bid.¹²²

Though superficially similar, the actions of Paramount's directors are portrayed very differently in *QVC*. Chief Justice Veasey's opinion in *QVC* leaves no doubt that Paramount's decisionmaking process was largely a charade, designed to disguise the directors' failure to honor their responsibilities as directors. For instance, although Paramount's directors characterized their merger with Viacom as part of a long-term plan, the supreme court points out that the negotiations had a relatively recent genesis.¹²³ Moreover, Paramount's directors *never* seriously considered whether a combination with QVC would make sense. Quite to the contrary, a chief objective of their actions seemed to be to exclude QVC from the process at all costs.¹²⁴ The Paramount directors' abdication of their responsibilities required the supreme court to step in, in contrast to the deference it accorded Time's directors in the *Time-Warner* case.

Focusing on the moral dimension of Delaware decisionmak-

¹²² The court begins by noting that "[a]s early as 1983 and 1984 [six years before the transaction with Warner was finalized], Time's executive board began considering expanding Time's operations into the entertainment industry." *Time-Warner*, 571 A.2d at 1143. The court then proceeds to describe the committee and full board meetings that eventually led the directors to Warner. *Id.* at 1143-46.

¹²³ *QVC*, 637 A.2d at 38 ("Although Paramount had considered a possible combination of Paramount and Viacom as early as 1990, recent efforts to explore such a transaction began . . . on April 20, 1993.").

¹²⁴ Thus, the opinion emphasizes the repeated efforts by Martin Davis, Paramount's chief executive, to dissuade QVC from making a bid. See, e.g., *id.* at 38 (Davis "told [QVC's chief executive] Diller . . . that Paramount was not for sale."). The opinion further emphasizes that Paramount's directors never made a serious effort to evaluate the QVC bid. *Id.* at 41 (board members were given a "document summarizing the 'conditions and uncertainties' of QVC's offer.").

ing thus provides a much more satisfying account of the decisions in *Time-Warner* and *QVC* than doctrine alone. It also raises an important question: Is my emphasis on the supreme court's role as moral arbiter simply another way of saying that the justices decide what they think the outcome should be and slant the facts to support their conclusion?¹²⁵ Could not the court have reached different results in *Time-Warner* and *QVC* by simply shifting its characterization of a few of the facts? Perhaps by emphasizing Time's directors' refusal to consider the Paramount bid in *Time-Warner*, for instance, and Paramount's careful negotiations with Viacom in *QVC*?

Given the fact-sensitive nature of the takeover cases, Delaware's justices clearly could do just this. Yet it is also clear that the justices see themselves as doing much more than playing games with facts. If the justices were principally concerned with defending an intuitive conclusion, they could easily achieve this with a brief, selective presentation of facts together with an application of takeover doctrine. The opinions take an altogether different tack. As I have already noted, they provide a remarkably detailed narrative of the events surrounding each dispute, so that the case becomes an extensive story about the parties' interactions.¹²⁶ The clear implication is that the story of the case is intended to be instructive, to illustrate what appropriate or inappropriate directorial behavior "feels" like.¹²⁷

¹²⁵ The court's decisionmaking has in fact been criticized in precisely these terms. See, e.g., Dennis J. Block, Stephen A. Radin & Myrna S. Levine, *The Business Judgment Rule in Shareholder Derivative and Takeover Litigation*, in *Twentieth Annual Institute on Securities Regulation* 891, 963 (Charles M. Nathan, Harvey L. Pitt & Stephen R. Volk eds., 1988); Douglas M. Branson, *The Chancellor's Foot in Delaware: Schnell and its Progeny*, 14 J. Corp. L. 515 (1989).

¹²⁶ Another possible explanation of the court's detailed narratives is that lengthy factual accounts are a means of disguising differences of opinion among the justices in a difficult case, much as convoluted doctrinal accounts can disguise different views as to the appropriate doctrinal structure (as we saw in Part II). Although this explanation strikes me as plausible and probably partially accurate, my own view is that the court's factual narratives tend, on balance, to increase the instructive value of its opinions; that is, they counteract rather than contribute to the doctrinal instability we considered earlier.

¹²⁷ In another article, I use the Biblical accounts of Saul and David to explore in more detail the benefits of an extended narrative, as compared to a more economical description of background facts, in providing guidance for similarly situated parties in the future. See Skeel, *supra* note 107, at 30-32. The Delaware supreme court's use of

The unmistakably moral tone of the supreme court's opinions strongly reinforces this conclusion.¹²⁸ The *QVC* opinion provides a vivid illustration. At the end of the opinion, the court added a separate addendum for the sole purpose of chastising Joe Jamail, the attorney for one of Paramount's directors, for his behavior at a deposition in connection with the case.¹²⁹ The addendum announces in no uncertain terms that the Delaware supreme court sees itself as having an important moral role in corporate law.¹³⁰

extended narrative, and its emphasis on telling details, are key components of what Judge Posner characterizes as the "style" of the opinions. See Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. Chi. L. Rev. 1421, 1422-23 (1995).

An obvious concern with this approach is that it may appear to disguise the contested nature of any account of the factual circumstances underlying a dispute by suggesting that the justices can distill the parties' behavior to a single, objective narrative. Even if the narrative is debatable in its particulars, however, presenting a single authoritative account provides far more guidance to future parties than a more hedged, openly uncertain one would. In view of this, so long as the court's account is generally accurate, as clearly is true of Delaware supreme court opinions, the use of an authoritative narrative may prove especially valuable even if it appears to gloss over factual uncertainties in some respects. Notice that the same point can be made in connection with the legal storytelling movement. Although proponents of legal storytelling have been appropriately criticized for adopting a postmodern skepticism toward truth, while at the same time implying that their own narratives are "true," see, e.g., David A. Skeel, Jr., *Practicing Poetry, Teaching Law*, 92 Mich. L. Rev. 1754, 1769 & n.56 (1994) (book review) (citing Jane B. Baron, *Resistance to Stories*, 67 S. Cal. L. Rev. 255 (1994)), the narratives may have obvious instructive value even if they are to some extent inaccurate.

¹²⁸ See *supra* notes 107-110 and accompanying text.

¹²⁹ *QVC*, 637 A.2d at 51-57. After declaring that "[o]ne particular instance of misconduct during a deposition in this case demonstrates such an astonishing lack of professionalism and civility that it is worthy of special note here as a lesson for the future—a lesson of conduct not to be tolerated or repeated," *id.* at 52, the supreme court quotes several of Jamail's off-color outbursts in the deposition. The addendum is all the more remarkable given that Jamail had not been admitted *pro hac vice* in the case, and thus, the supreme court had no jurisdiction over him. *Id.* at 52.

¹³⁰ Delaware's judges also have emphasized the moral dimension of corporate law outside of the judicial context. See, e.g., William T. Allen, *Independent Directors in MBO Transactions: Are They Fact or Fantasy?*, 45 Bus. Law. 2055, 2061, 2063 (1990) (Delaware Chancellor describing the importance of independent directors' "sense of duty").

B. *Unanimity and the Moral Dimension*

Reconceptualizing corporate law in moral terms has several important implications for our analysis of Delaware's unanimity norm. The first is that it suggests doctrinal cycling may not be so grave a concern as might otherwise be the case. Once we recognize that the supreme court's principal focus is on whether the target directors have faithfully performed their responsibilities, rather than on doctrine alone, the cases are more coherent than they initially appear. Although *Time-Warner* and *QVC* are perhaps the most striking illustrations of this, the moral perspective has similar explanatory power in each of the supreme court's prominent takeover cases.¹³¹

Recognizing the moral dimension of the Delaware cases has a second crucial implication: It helps to explain why Delaware decisionmaking has evolved toward unanimity. Far more than a regime characterized by separate opinions, unanimity reinforces the supreme court's effectiveness as moral arbiter—that is, in illuminating how directors ought to act. If the court regularly issued separate opinions, the justices' internal disagreements would dilute the impact of the court's pronouncements, and suggest uncertainty as to the parameters of appropriate directorial behavior.¹³² By speaking instead with a single voice, the justices send a very different message, one that suggests that the full authority of the court stands behind the conclusions that they reach as to appropriate and inappropriate directorial behavior.¹³³

¹³¹ For an extended analysis of the Delaware supreme court's (and chancery court's) management buyout cases in these terms, see Rock, *supra* note 12.

¹³² Given the norm of unanimity, the issuance of a separate opinion has a powerful signalling effect, since it hints at deep disagreement on the court in those few cases where a justice does write separately. This is particularly true if the separate opinion challenges the majority's factual narrative, rather than simply registering a disagreement on a procedural or doctrinal point. See generally Paul Gewirtz, *Narrative and Rhetoric in the Law*, in *Law's Stories: Narrative and Rhetoric in the Law* 2, 11 (Peter Brooks & Paul Gewirtz eds., 1996) (multiple opinions containing divergent factual narratives undermine the credibility of any particular account of reality). For a rare illustration in the Delaware case law, see *Smith v. Van Gorkom*, 488 A.2d 858, 893-98 (1985) (McNeilly, J., dissenting) (extended recharacterization of facts underlying decision where majority held directors to have breached their duty of care).

¹³³ This does not mean that the supreme court's standards emerge instantly. As

Notice that the importance of unanimity to the court's role as moral arbiter may also help to explain why the Delaware supreme court, unlike the United States Supreme Court, has continued to maintain unanimity long after having established its preeminence in corporate law. Even if the court's legitimacy is clear, unanimity remains important to the moral dimension in the Delaware cases.

Moreover, Delaware's justices may not be as certain of their status as I have suggested. Although Delaware has long been recognized as the *de facto* national regulator of corporate law, there is an obvious irony in the fact that the five justices of the supreme court of one of our smallest states wield control over the nation's largest corporations. Delaware's justices are aware both of the irony of their status, and of the continual threat that much or all of corporate law could be federalized at any time.¹³⁴

This perspective suggests that both the unanimity norm and the moral dimension in Delaware law may be responses to the justices' understandable concerns about judicial legitimacy.¹³⁵ By staking out a position as moral arbiter, and speaking with a single voice, the court reinforces its authoritative status in corporate law. Thus, unlike the Supreme Court, whose credibility is sufficiently well-established that the Justices need speak with a unanimous voice only on particularly controversial issues, Delaware's justices maintain unanimity as part of an ongoing effort to preserve the court's legitimacy.

Interestingly, this judicial legitimacy story appears to draw support from a marked increase in the prominence of the moral dimension in the Delaware cases in recent years. To the extent

Rock has shown in the management buyout context, the supreme court often develops its norms of conduct over time when a new issue emerges. See Rock, *supra* note 12. Rather than suggesting unchanging standards, the point is that the supreme court is likely to be unanimous in its pronouncements at each step along the way. The standards may evolve, but the court's commitment to unanimity does not change.

¹³⁴ Chief Justice Veasey's almost apologetic conclusion to the *QVC* decision can be seen as an evidence of this. *QVC*, 637 A.2d at 51 ("It is the nature of the judicial process that we decide only the case before us The holding of this case . . . should provide a workable precedent . . .").

¹³⁵ See generally Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. Chi. L. Rev. 1371, 1372 (1995) ("modern judges write opinions . . . to reinforce our oft-challenged and arguably shaky authority to tell others what to do."). My thanks to Ed Rock for suggesting that I pursue this line of inquiry.

judicial insecurity has contributed to the moral tone of the cases, one would expect the moral dimension to be strongest in a time of particular concern about credibility. This in fact appears to be true. The moral dimension in the Delaware case law became most pronounced in the takeover decisions we have been considering, starting in the mid-1980s. The 1980s were a time of particular concern for Delaware, in view of the repeated calls for a federal response to the takeover phenomenon.

When we combine the analysis of this Part with the analysis of the previous Parts, what emerges is a complex picture of the role that unanimity plays in Delaware corporate law.¹³⁶ The interest group analysis, though problematic, partially explains the emergence of the unanimity norm. But in order to more fully explain the norm, we need to consider the moral dimension in Delaware corporate law, and the importance of unanimity to the court's role in fostering appropriate directorial behavior. However persuasive the account I have developed may be, it is also important not to forget a far more basic factor—Delaware's justices shoulder the added costs of unanimity because they take their responsibilities as justices very seriously, and because the legal culture in Delaware reinforces this.¹³⁷

¹³⁶ As the complexity of the norm suggests, Delaware's penchant for unanimity is neither obviously efficient or obviously inefficient. The recent literature on norms suggests that efficient norms are likely to emerge in groups that are characterized by repeated interaction and which internalize the effects of a norm, see, e.g., Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. Pa. L. Rev. 1643, 1657-64 (1996), whereas the ability to externalize costs and factors such as cognitive distortions can lead to inefficient norms, see, e.g., Eric A. Posner, *Law, Economics and Inefficient Norms*, 144 U. Pa. L. Rev. 1697, 1711-25 (1996). Although Delaware's dependence on attracting corporations suggests that the court must internalize the consequences of the unanimity norm, there is likely to be sufficient slack to enable it to benefit Delaware constituencies, as we saw in Part III.

¹³⁷ This was repeatedly emphasized to me in my conversations with several Delaware justices.

CONCLUSION

The literature on Delaware corporate law is enormous, and includes both a prominent theoretical debate on Delaware's status as the leading state of incorporation, and ongoing efforts to make sense of the Delaware supreme court's pronouncements on corporate law. It therefore comes as a surprise that so few of these commentators have so much as noticed the remarkable regularity with which the supreme court decides its cases by a unanimous vote.

As we have seen, Delaware's unanimity norm sheds important light on the nature of Delaware corporate law. First, focusing on unanimity and the effect it may have on doctrinal cycling helps to explain why the Delaware case law, which commentators repeatedly characterize as stable and certain, has at times appeared to be anything but stable and certain. Our consideration of why Delaware's supreme court has maintained a unanimity norm offers additional insights, suggesting that the unanimity norm provides some support for a lawyer-centered perspective, and much more support for a moral perspective on Delaware corporate law.

More generally, the analysis has highlighted some of the effects of unanimity on judicial decisionmaking. In addition to magnifying the likelihood of doctrinal cycling, and producing analogous effects even in the absence of a true cycle, unanimity is likely to significantly alter the decisionmaking process within any given case. The analysis underscores just how differently unanimous and nonunanimous courts behave, both within each case and across doctrines such as those that have been the focus of this Article.

APPENDIX A:
DELAWARE SUPREME COURT DECISIONMAKING

Year	Dispos- itions ^a	Rep'd decisions	Cases with dissents ^c	Cases with concur's	Total with separate opinions	% with separate opinions
1960	51	51	1 ^b	0	1	2.0
1961	46	46	1 ^b	0	1	2.2
1962	52	52	1	0	1	1.9
1963	61	61	2	0	2	3.3
1964	62	62	2	0	2	3.2
1965	75	75	1	0	1	1.3
1966	58	58	2 ^b	0	2	3.4
1967	87	87	0	0	0	0
1968	88	88	1	0	1	1.1
1969	98	98	4 ^b	0	4	4.1
1970	90	90	0	0	0	0
1971	102	102	5 ^b	0	5	4.9
1972	112	112	3	1	4	3.6
1973	114	114	1	1	2	1.8
1974	108	86	2	0	2	2.3
1975	214	131	2	0	2	1.5
1976	201	80	2	2	4	5.0
1977	242	87	3	2 ^b	5	5.7
1978	266	78	2	2	4	5.1
1979	325	128	2 ^b	1	3	2.3
1980	269	112	3	2 ^b	5	4.5

Year	Disposi- tions ^a	Rep'td decisions	Cases with dissents ^c	Cases with concur's	Total with separate opinions	% with separate opinions
1981	266	88	5 ^b	3	8	9.1
1982	331	100	2	3 ^b	5	5.0
1983	339	99	0	0	0	0
1984	303	63	2	0	2	3.2
1985	353	71	3 ^b	1	4	5.6
1986	360	60	1	1 ^b	2	3.3
1987	323	56	0	0	0	0
1988	407	73	1	0	1	1.4
1989	482	89	3	0	3	3.4
1990	382	69	2 ^b	2	4	5.8
1991	410	64	0	0	0	0
1992	490	71	1	0	1	1.4
1993	448	68	0	0	0	0
1994	406	54	0	1	1	1.9
1995	471	69	4 ^b	0	4	5.8
1996	467	90	2 ^b	1	3	3.3
Total	8959	2982	66	23	89	3.0

^a Only reported decisions were available from 1960-73.

^b One of these was a corporate law decision. The court issued separate opinions in 15 corporate cases overall.

^c Several cases included both concurrences and dissents. I have treated these as dissents.

The data used in compiling these charts was obtained by running several searches in WESTLAW's DE-CS data base. The number of total dispositions in a year was obtained by running the search "Co(high) & DA(19xx)," where 60-95 were substituted for "xx" in consecutive searches. The number of published decisions in a year was obtained by adding to each total disposition search the qualifier "% ((table /6 published) (table /2 captioned))." This search eliminated nearly all of the unpublished decisions. Remainders were eliminated by browsing the search results in "CI" mode. The number of dissents and concurrences in a year was obtained by adding to each total disposition search the qualifier "& dissent! concur!." The search results were then browsed to confirm that each was in fact a concurrence or dissent. Each case where a concurrence or dissent did in fact appear was loosely categorized by type of case at this time.