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Conflicts in the Regulation of Hostile Business Takeovers in the United State and the European Union

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I. INTRODUCTION

It is striking how the efforts of the European Union to harmonize the laws of its different member nations in order to create uniform European Union laws repeat the struggles of the United States to do the same, in the early years of the American union. There were a number of iterations of “harmonization” 200 years ago in the course of founding the U.S. and a civil war was fought 150 years ago over what Europeans today would call the subsidiarity issue. The American federal power sought to dominate areas which seemed to states to be of more local concern. Though the Civil War itself ended

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1 Articles of Federation and US constitution.
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nearly 150 years ago, the tension between Federal control and States’ rights has never truly disappeared.

Today in the United States, individual views about subsidiarity or “states’ rights” often reflect attitudes towards those currently in power at the federal level. For example, many who in the U.S. would be characterized as politically “conservative” were, for years, the strongest advocates of states’ rights, at a time when the federal government was dominated by individuals with more progressive (“liberal”\(^2\)) political orientation and agenda. When, however, conservatives achieved federal power during the Reagan-Bush years, the conservatives felt no restraint in applying federal force to assert their own political perspectives over states with differing opinions.

These experiences suggest that efforts to develop a European Union might glean some lessons from the U.S. experience. It is important to make note, however, of one dimension of European nations that makes their circumstances different and therefore might lead to different results. European nations have deeper separate histories than the American states, and

\(^2\) “Liberal” in the United States sense, i.e., more to the political left as opposed to Liberal in the European sense, i.e., more to the political right.
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therefore more profoundly different cultures.

This essay will focus on hostile business takeovers to illustrate the significance that cultural differences among nations can play in developing a harmonized European Union law. The European Union has made several (so far unsuccessful) efforts to develop a uniform regulation of these activities. Cultural differences among the several Union nations may have helped to thwart those efforts.

Hostile takeover regulation can serve as an interesting example of the impact of cultural diversity, illustrating the differences and similarities between U.S. Federal and State laws (both statutory and judicial) and the struggles that the current European Community now faces in developing its own rules and regulations. It is generally believed among scholars and policy-makers that as nations increase their economic participation internationally, so will their economic laws and policies take on an international scope. The received view is that those internationalizing nations' laws will each evolve and in so doing, will naturally gravitate towards one another and result in uniform international standards. The reasoning is that economic forces will cause each nation to de-

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velop laws along efficient lines and as a result each nation’s laws will ultimately meet each other with the same (efficient) standards. Furthermore, not only will these separate efficiency processes generate uniform legal standards across those nations, but the standards evolved will be also the ones that are the most efficient for the international context. As significant attention already has been given academically, judicially and legislatively to the subject of hostile takeovers in the U.S. in the 1980’s and the results are now viewed as essentially settled law, it seems quite natural for current European analysts to look to U.S. conclusions when considering the EU’s and its member nations’ efforts to address the matter for themselves. Indeed many European scholars and policy-makers have done so.

In the summer of 2001, however, a Hostile Takeover Directive was put before the EU’s European Parliament for approval, a proposal that was widely regarded as the successful culmination of a 12-year collaborative effort to effectuate a common ground on the regulatory treatment of hostile takeovers within the EU countries, based on principles similar to the

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United States. The Directive was defeated, which was the first time since the EU’s inception that a Directive of this magnitude did not succeed. It was defeated in a deadlock tie, in large part because of the influence of Germany. One of Germany’s major companies had fallen victim to an international hostile takeover by a British company less than two years earlier. The economic importance of the two companies was so great that the takeover itself was the largest in history. Some of the German company’s vulnerability was due to differences in Germany’s “economic structure” and “social contract” and lack of takeover regulations as compared with Britain, the home of the hostile raider. Clearly finding common ground among 15 nations (which are now expanding to 25, with perhaps more to join\(^5\)), even regarding a well-defined topic such as hostile takeover regulation, is difficult to achieve and even more difficult to sustain.

The purpose of this essay is to raise a number of questions about “received theory” regarding the evolution of transnational uniform business law. First, a closer look at history will challenge the view that nations will naturally gravitate towards a uniform law. Second, review of the practicalities will question whether a

\(^5\) Frank Bruni, “10 Countries Sign to Join European Union,” *N.Y. Times*, April 17th 2003
transnational uniform law in all its aspects is indeed necessary to have efficiency. Third, a look at actual cases suggests that the experience of the United States has not always yielded the most “efficient” solutions, at least with regard to economic matters, when applied to European circumstances.

II. HOSTILE TAKEOVERS - THE UNITED STATES’ EXPERIENCE

A. Evolution of Hostile Takeover Regulation

A hostile takeover occurs when an individual or corporation - the raider - seeks to obtain ownership of enough shares to control another corporation - the target (Revlon v. McAndrews, 1986). What renders the activity hostile is when the target’s management (and perhaps some of the current owners) resist the raiders’ efforts to acquire the firm. For what purpose the raider plans to apply his control of the target company will vary but it is almost always motivated by the raider’s financial gain. Some goals have been to break-up a conglomerate target to sell its component parts at a profit, to streamline and run a more profitable component, to replace an inefficient management or, more prevalently recently, to incorporate the target’s

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complementary assets into the raider’s own for greater productivity and future profits. Though the purpose may vary, the method is the same. The raider announces publicly an offer to buy shares from current shareholders at a price greater than the share’s current stock market price (the tender offer or bid). The method of payment may vary: cash, stock in the raider’s company, bonds, etc., and the terms of the tender may vary: for example, purchase will be exercised only on the condition that enough of the outstanding shares are offered to the raider to give it majority control in the target company. Each of the current shareholders then must decide whether to tender his or her particular shares to this bid offer.\footnote{Ronald J. Gilson & Bernard S. Black, \textit{The Law and Finance of Corporate Acquisitions}, (2d ed. 1995).}

What makes the situation “hostile” is not the bid for the shares, but whether the management (and perhaps significant minority shareholders) of the target company is against this change in control. In the U.S., the Board of Directors has sole power to run the corporation. The shareholders’ power is in their right to determine the members of the Board through voting-rights based on shares owned. A typical target company, however, is a stock exchange-listed firm whose owners by and large constitute a diffuse number of shareholders who are mostly
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inattentive to issues of management and unlikely to act concertedly if bothering to vote at all. As a result, the current incumbent management usually has default control over the Board's membership and has had so for some time. Sometimes the management in such situations is referred to as the "entrenched" management. Unless the articles of incorporation or bylaws preclude otherwise, if a majority shareholder (one who owns over 50% of the voting shares) now emerges from the takeover efforts, then that shareholder can choose at least the majority, if not all, of the members of the Board and through them control the firm.

It is most likely that the raider, upon successful acquisition of above 50% of the voting shares, will replace the incumbent Board with members of the raider's choosing to pursue the raider's plans for the company. Thus an incentive arises for the incumbent Board to use its powers to thwart the success of the raider's tender offer. Though this is not always the reason for management's resistance to external acquisition of its firm, it is one that is often proffered, at least by the acquiring raider. Other arguments the defending management often gives for resisting the takeover is that the company will be more profitable remaining with the incumbent management or that the raider is not offering sufficient money for the shares. Though the arguments vary on both sides, the arguments
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begin when the attempt at acquisition becomes hostile rather than friendly.

With the rise in the number of takeovers in the United States came a greater interest in the legal question of whether it was lawful for the Board to prevent its company’s shareholders from accepting a tender offer bid at a premium price. Early on, the courts concluded that despite the possible entrenchment incentives of management, if their predominant motive was in the best interest of the company, the management’s action would be upheld. ⁸ Of course this raised the legal and economic question of what constituted acting in the best interest of the company and what was persuasive evidence of it.

As hostile takeover attempts increased, the question of permissible activity intensified. Both raiders and incumbent managements developed techniques and strategies to thwart each other, many of which ended up in court for review when the affected party complained. Some strategies used by management were “shark repellants” (rendering the company preemptively undesirable to some potential raider, e.g., by selling off valuable assets or putting in place some restrictive voting requirements),

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“white knights” (finding another company to outbid the raider but who was friendly to the incumbent management) and “greenmail” (authorizing the use of company assets to buy the raider’s stakehold of target’s shares at a significant premium on the condition of the raider’s withdrawal.) Some techniques used by raiders were pre-emptive announcements of offers (to prevent management time to react), short time frames for bid offers (to force current shareholders to decide quickly) and two-tiered offers (giving a high price to the first shares tendered and a sub-par price for the last shares in a subsequent forced sale after the takeover’s success and merger with target).

The thrusts and parries of strategies were tested over time in the courts, forcing the courts to define more clearly what was in the best interest of the corporation. The “best interests of the corporation” evolved into the “maximization of (current) shareholder value” and the courts’ subsequent evaluations of actions were based on that criteria: (Did the nature of the offer coercively force the shareholder to sell or to sell prematurely against his or her best long term interests? Was the management defense unwarrantedly preclusive of the shareholder’s opportunity to exercise his or her own judgment as to what was the most valuable course of action?) Statutes at both federal and state levels imposed rules and regulations to affect the course of a
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hostile takeover effort in order to maximize current shareholder value (disclosure rules, mandatory minimum durations of offers, withdrawal of tenders by shareholders permitted (so as to accept better offers elsewhere)) and the "best price rule" (all shareholders receive the same best price regardless of changes in bid price to solicit more tenders).) (Williams Act and various state takeover statutes.)

The denouement was the development of rights plans ("the poison pill") which were amendments to corporate charters that automatically triggered a dilution of a company's shares if a prelude to a hostile effort occurred. The effect was to make any hostile attempt prohibitively expensive but also gave control to management to revoke "the pill" before it was triggered. This forced any prospective raider to negotiate directly with the target's management and reach a settlement before making any tender offer could begin. Tested in the courts, "the poison pill" was found lawful as long as the management used it to maximize shareholder value (Moran v. Household Int'l, 1985), for example, to secure a better bid from another company. These poison pills have sometimes been seen as contributing to the slowdown in hostile takeovers in the early 1990's though studies
have indicated otherwise (Coates IV, 2000). Today approximately 85% of the companies listed on exchanges have adopted some form of rights plan. Though it is often suggested that managements have used the pill to extract some protection or compensations for themselves once a takeover is proposed, numerous studies indicate that regardless, the rights plans have increased significantly the premium the departing shareholders receive.

B. Hostile Takeover Regulation in the United States Today

The issues debated in the U. S. today revolve around whether current regulations, statutes and court rulings adequately insure maximization of shareholder wealth while permitting the market forces to discipline firms into maintaining economic efficiency. Generally, hostile takeovers are viewed as playing an important role in disciplining the participants in the marketplace to be efficient. The underlying thread of all the hostile takeover debates is that given its expense and the offer of above-market-price

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premium to current shareholders, a hostile takeover effort would not arise if there were not significant economic efficiency gains (and therefore profits) to be made by the acquirer which are not being exploited by current management. Particular attention is paid to the impediments of the poison pill towards that end and how the courts permit its use. Additional questions are whether the current statutory regulations unduly burden potential acquirers, inhibiting their ability to move efficiently in taking over a firm when indeed it is economically warranted.

C. Federal vs. State Control

In effect - legislatively and jurisprudentially - the United States has evolved a standard for the regulation and review of hostile take-over activity that is largely uniform across the states, though the impact of the variations that do exist among the states’ takeover statutes are still the subject of debate. At the federal level, the Williams Act of 1968 amended the Securities Exchange Act of 1934, creating federal regulation of hostile takeover activity by both the acquiring and the target firms. The Act focuses on maximizing the information to and the ability of the

current shareholders faced with tender offers to make the best decisions with regard to the value of their shares. Subsequent to the passage of the Williams Act, a wave of state level statutes were passed to give directors of target companies powers of resistance to hostile bids beyond the Williams Act. After those statutes were declared by various courts to be unconstitutional on the grounds that they interfered either with interstate commerce or with the federal supremacy of the Williams Act, the U.S. Supreme Court nevertheless paved the way for a second wave of state statutes to achieve similar results, by allowing states to couch the provisions empowering target managers in terms of the states’ powers to regulate corporate governance. It is these variations among the states and their regulatory impact that remain the subject of debate as to whether there is a need for more circumscribing federal regulation.

More notably, for the concerns of the European Union, regardless of the extent that there are explicit federal rules and jurisprudence as compared with state laws and court decisions, the issue of the impact of hostile takeovers on a particular state’s well-being in

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the U.S. has played little role in any legislation or court opinions. Significant court decisions at the state level, (most notably Delaware) have had a persuasive impact on other state courts' decisions with regard to business law matters, and the conclusions of these courts emphasized maximizing the current shareholders' wealth, whether or not the shareholders were residents of the state. Little concern was given to the impact that a takeover may have on the welfare of the community in which the business resides. Takeovers can sometimes lead to the closure of local plants and layoffs, thereby altering the daily life of the community. Though some court decisions stated that Boards of Directors could consider as a factor the impact on the community in its decision to as whether to forestall a takeover offer (sometimes referred to as "stakeholder rights"), the effect of such statements was relatively small. Ultimately, the maximization of the wealth of the current shareholders was the standard that held primacy in the evaluation any of the players' activities in takeover struggles.

Since maximizing current shareholders' value in the corporation disregards any community impact and there is no causal or economic link between the shareholders' welfare and the community's welfare (except to the extent, in the rare event, that the shareholders themselves are residents), when shareholders decide and
are able to accept (if the withdrawal of a poison pill is required) an acquirer’s offer to purchase their shares at a premium above the market price, the struggle is finished. The current shareholders walk away with the proceeds from their sale, the acquirer takes over the firm to its own advantage and the consequences to the employees and community in which the firm resides fall where they might.

During the 80’s, in the heyday of the hostile takeovers in the U.S., news organizations and show business media spotlighted attention on the community fallouts from the waves of mergers and acquisitions. Acquirers were often portrayed as voracious greedy vultures picking on firms in a manner that destroyed a valuable company and/or valued ways of community life and doing so solely for the purpose of making money. One merely needs to think of popular movies on the subject produced at the time to have a sense of public perception: Big Business (1988, Comedy, Lily Tomlin, Bette Midler - a corporate struggle over whether to close down a factory that will also destroy a southern town’s way of life); Other People’s Money (1991, Comedy, Danny DeVito - corporate raider’s efforts to acquire a local company that is the lifeblood of a New England community); and the most notorious, Wall Street (1987, Drama, Michael Douglas, Charlie Sheen, Martin Sheen - young ambitious stock broker learns that his idol, a major corpo-
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rate raider, is really and can only be greedy and unscrupulous in order to be successful.) Even in Pretty Woman (1990, Julia Roberts, Richard Gere), the hero, a successful, albeit ethically questionable, corporate raider, is psychologically redeemed when he decides to keep one corporate acquisition intact and build it up further instead of selling off its component parts for profit. These movies and others like them mirrored the sentiments held by the United States public at large regarding the disruption to corporations' and people's lives that the waves of corporate acquisitions and mergers had caused. News media gave similarly heart-rendering stories of families' and communities' lives in upheaval as a result of shifts in corporate winds.

Despite the popular sentiment of hostility towards (and fascination with) the corporate raiders and the concern for the disruption that such activities were perceived to cause, court decisions and legislative efforts to regulate hostile takeover activity did very little to address them. Roberta Romano, a leading U.S. scholar in takeover activity, found little or no evidence that state lobbyists or legislators were ever concerned for the negative impact on their communities or employment as a result of takeover activity. Indeed, their focus seemed to be solely on empowering the incumbent management with the capacity to forestall the success of tender-offer bids, a move she notes has the poten-
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tial to benefit the incumbent management, who are local and operate in concert, at the expense of shareholders who tend to be dispersed and loosely if at all organized.\textsuperscript{17} Ultimately, the poison pill and similar impediments to shareholder acceptance force the potential acquirer to negotiate with management as to the terms of the acquisition. Management usually suggests that this secures the best price for shareholders, but there is also suspicion that management uses these tools to extract benefits for itself (for example, lucrative severance benefits or promises to keep the management on). It is the extent to which the various state statutes regulating hostile takeovers empowers the incumbent management to thwart shareholders from accepting tender offer bids and effectively extracting compensation for themselves that are the subject of scholarly and policy debates.\textsuperscript{18}

\textsuperscript{17} Roberta Romano, "Competition for Corporate Charters and the Lesson of Takeover Statutes," 61 Fordham L. Rev. 843, 854-56 (1993). She suggests that most state takeover statutes were lobbied for by the management of firms who were either the target or potentially a target for an acquisition bid. She also noted that the local bar (of attorneys) of each state typically supported such legislation as well and she makes the point that once a takeover occurs, the acquirer continues to rely on its own legal counsel and not the ones of the target.

\textsuperscript{18} For example, see the articles presented at the University of Chicago 2002 Symposium on Executive Compensation and Takeover which continue the discussion. See, in particular: Jennifer Arlen, "Designing Mechanisms to Govern Takeover Defenses: Private Contracting, Legal Intervention, and Unforeseen Contingencies," 69 U. Chi. L. Rev. 917; Lucian Bebchuk, "The Case Against Board Veto in Corporate Takeovers," 69 U. Chi. L. Rev. 973; Marcel Kahan & Edward B. Rock, "How I Learned to
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Nevertheless, but for the issue of management compensation, it is the use of the maximization of current shareholder value as the benchmark for review that renders regulation of takeover activity essentially uniform across the United States, regardless of whether one looks at federal or state regulation.

III. THE EUROPEAN EXPERIENCE

A. The Advent of Cross-Border Hostile Takeovers

Hostile takeovers were not a focus in Europe until 1987 when the Italian entrepreneur Carlo De Benedetti sought to acquire Belgium’s crown jewel of business: Société Générale de Belgique. Since then, the incidents of takeovers have increased dramatically\(^\text{19}\) not only in crossing national boundaries but in increasing in financial significance as well. The largest takeover in history was the acquisition by UK’s Vodafone of Germany’s Mannesmann in 1999.

Interestingly, the rise of hostile takeovers in Europe coincides with the EU’s effort to harmonize company law throughout its member nations. As a result, considerable attention has focused on hostile takeover regulation not only by scholars but by legislators and policy-makers among the European nations and within the European Union itself. As noted earlier, despite efforts from many quarters, the EU’s Takeover Directive was voted down after 12 years of what appeared to be extremely successful negotiations among member nations, reflecting the divergence of opinion among the nations as to how they want to protect and facilitate their companies’ activities. As already stated, it was clear that Germany’s experience of the takeover of Mannesman by British Vodaphone had a major impact on the vote on the EU directive.

What is important to appreciate is that when a company is taken over by another in an international context, the new owners of the target company are usually not natives of the country of residence of the acquired company. So now Mannesmann, a German company, is no longer German owned, it is owned by a British company. It still employs Germans, it still resides in Germany, but it is now owned by foreigners. Société Generale de Belgique was not only one of the most significant companies in the Belgium economy but it was also a source of national pride. Though De Benedetti’s efforts
were thwarted, ultimately Société Générale through the defensive tactic of finding a White Knight now has French owners.

B. The Economic Goals of the EU and Takeover Regulation

1. The Goals in General

One of the oldest economic theories that has driven most modernizations of economies is that freedom of trade produces economic gains for all participants, whether they are individuals, companies, or nations; that each participant to a freely negotiated transaction comes away better off than before.\(^\text{20}\) Furthermore, the enhancement of the well-being of some ultimately translates into the enhancement of well-being of many as the increases in income increases purchases from others thereby increasing their income.\(^\text{21}\) This leads to economic growth and is considered a hallmark of the benefits of economic efficiency.

One of the underlying motives of the EU has been to create a larger union consisting of member nations, so they can take advantage of

\(^{20}\) This goes back as far as Adam Smith's invisible hand theory in his "Wealth of Nations" (Modern Library Edition, 1937).

\(^{21}\) This is the famous "multiplier effect" first promulgated by John Maynard Keynes in General Theory of Employment, Interest and Money (1936).
the economic power and growth this could generate and improve all member nations' economies and well-being. The founders of the EU recognized from the beginning that in order to be successful in their goals, they would need a free flow of capital, goods, services and people among the member nation states, and they included these principles in the agreements signed.22 The European nations have long been the subject of criticism for their legal and structural impediments to the free movement of economic forces that would take advantage of these potential economic gains.23 The European nations each had their own restrictions on the flow of resources, goods and services through tariffs, import-export quotas, rules on the structures of companies and immigration laws among other aspects. To overcome the effect of these obstacles, efforts to harmonize of laws among the several nations of the EU also included the goal of reducing the barriers to trade among the member nations.

2. The Takeover Friction

Along with the reduction in barriers to
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trade also came the reduction in impediments to hostile takeovers that crossed national boundaries. The effect of this on national psychology may not have been adequately anticipated. Different nations now within the EU, as a result of feeling "invaded" by other countries' corporate entrepreneurs, have taken to questioning whether indeed they want to remove all barriers to the free flow of productive resources. Part of what enabled Société Generale de Belgique to fend off the Italian entrepreneur De Benedetti's efforts to acquire shareholder control was the willingness of French executives and officials to join forces with Société Generale because of their own anger at Italian in-roads into ownership of French companies. In the end, $3 billion was spent collectively by all sides in this takeover war, resulting in De Benedetti's defeat and French ownership of the company. Société Generale itself was only worth about half that amount according to share market prices.

Though the effect of the hostile takeover efforts regarding Société Generale made it clear that the European nations needed to put in place rules and regulations regarding such activities (the UK was at the time the only nation that had any effective regulation of takeover activity), it also made clear that the inherent structure of companies themselves needed to be re-examined, nation by nation, because the structures themselves often prohibited free
movements of resources that would serve to "discipline" existing corporations into becoming more efficient. Issues such as the percentage of company ownership that is closed and not publically traded, the degree of leverage (i.e., the extent the corporation is financed through loans rather than equity), the extent to which large institutional banks finance companies giving them tremendous control over market forces, and regulations limiting shareholders' right to vote, are among the many factors of company structure that are seen to limit the free flow of trade and the concomitant forces of market-induced efficiency in inducing companies to be more productive.

But what is also clear is that national pride has served to introduce new factors for consideration in addition to the goal of achieving unfettered (or at least "less fettered") market dynamics. Making the company structure more liquid and more mobile also introduced it to vulnerability to hostile takeovers. Examining Germany's actions prior to the European Parliament's vote on the EU Directive for regulating Hostile takeovers and Germany's decisions after the vote failed to adopt the directive are instruc-

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24 The prevailing view as to why Société Generale became a target to a hostile take-over is that it was poorly run with inefficient management. See Jonathan Kapstein et al., How Di Benedetti Botched the "Battle of Belgium", Bus. Wk., Mar. 7, 1988, at 44-46.
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tive, particularly when compared to United States state takeover statutes in conjunction with the United States Williams Act.

3. The Case of Germany and the Failure of EU Takeover Directive

Upon the aftermath of the Vodaphone takeover of Mannesman in 1999, Germany decided to implement mandatory takeover regulation which had not been in place before. Most of the proposed law had goals similar to the Williams Act in the United States. It sought to make information available to shareholders, to give them reasonable time to decide and other measures. Most of the design was to follow the principle of maximizing current shareholder value. However, one area that was in controversy was the extent to which the target boards could adopt defensive measures in face of a hostile bid. Though the German advisory commission for the act leaned heavily towards restricting board actions to maintaining positions of neutrality during a takeover bid, German politicians, trade associations and members of industry objected fairly strenuously and wanted the scope of the board’s powers greatly enlarged to enable them to resist hostile bids. Ultimately a compromise position was adopted which enabled target boards to adopt defensive measures under some limited restrictions and with the caveat that if the measures fell within the scope
of authority of the shareholders, the measures had to be approved by the current shareholders. However, these measures could be adopted in advance of any particular bid, allowing the board to take pre-emptive defensive actions and outside the context of an potentially attractive tender offer.

Simultaneously, Germany also focused on what was transpiring regarding takeovers at the level of the European Union. Germany proposed a measure to be included in the discussions forming the European Union's own Takeover Directive. Like Germany's statute, the EU's Takeover Directive was also developing along United States lines in that the provisions were oriented towards the maximizing of shareholder value. The measure Germany proposed was to permit target boards broad latitude in adopting defensive measures. The proposal was introduced in the latter stages of the EU Conciliation Proceedings but was ultimately rejected. Even though the EU draft had adopted 15 amendments to allow for national differences, it maintained its strongly held position that target boards behave neutrally in the face of a hostile bid. Hence while Germany was developing its own takeover statute that granted powers to target boards to take defensive measures in the face of a hostile bid, the EU was developing a takeover directive under the principle of board neutrality, rejecting suggestions of giving boards
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more latitude.

Ultimately when the EU Takeover Directive was put before the European Parliament on July 4 2001, the Parliament came to a deadlock decision, Germany being one of the negative votes cast. In the meantime Germany's own Takeover Act, which allowed for defensive tactics by target boards, was passed in the German legislature on November 2001 and came into force in January, 2002.

Currently, there is no EU Takeover Directive in force and a new proposal for the EU is being developed. This proposal still maintains the same basic approach of constraining the target board to neutrality. The one exception to the rule of neutrality the new proposal introduces is that target boards can take defensive measures but only upon shareholder approval and only after a bid has been made and the shareholders are fully apprised of its nature. This gives little teeth to the power of the board to resist offers. It basically rests on whether the shareholders as a voting group want to reject the current offer and believe that the current board can some how do better for them, either in securing a better offer or managing the company to yield greater profits. Whether this revised proposal will succeed remains to be seen. It will
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probably not be put before a formal vote until the year 2005.25

IV. EU’S HARMONIZATION VS. SUBSIDIARITY CONTRA U.S. FEDERAL VS. STATES RIGHTS: TAKEOVER REGULATION

Ironically, the direction of the EU Takeover Directive is precisely consistent with the preferences of the American critics of the current U.S. system. Many U.S. scholars feel the state-level takeover statutes that empower boards of directors to resist offers are not only self-serving for the board at the cost of shareholder wealth but also economically inefficient for the economy as a whole. Such board powers interfere with the market discipline of corporate management: the threat of hostile takeovers induce management to run the company more efficiently or face the possibility of being pushed out. This is at the heart of the criticism of the state takeover statutes among the states of the United States and it is the heart of the orientation of the EU Directives in favor of board neutrality.

However, as noted in the beginning of this

25 For an overview comparison of the German Takeover Statute with the EU Takeover Directive and their respective histories, see Daniela Favoccia, Recent Developments in German M&A Transactions, 1347 PLI/Corp 955 (2002).
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essay, when the criticism is raised with regard to the United States and the various states' takeover statutes, any concern for protection from owners of another state does not loom very large on the radar screen of considerations. Though some bemoan the loss of a way of life, the concerns for the lost culture or community, seem to fade rather easily. In the United States, these cultures and communities do not have centuries of history behind them. On the other hand, among the European nations, the free flow of resources, services and people often means an invasion by peoples from one culture by ownership of enterprises in another culture. And in this instance the cultures are identities that go back very far.

It is not clear what the fallout of a potential melting pot of such diverse and longstanding cultures will be. Based on economic efficiency arguments, the members of the EU may have to make a choice in the trade-off between more economic well-being and the preservation of national and cultural identity. There is some evidence that countries are indeed willing to sacrifice some economic gains for the preservation of a way of life. Certainly Germany's current takeover regulations empowering the boards of directors to resist hostile bids reflect that choice. But in doing so, they not only risk some loss of economic advances but also the potential for boards to use these powers for their own eco-
nomic gain.26

IV. HOSTILE TAKEOVER LAW IN THE FUTURE

A. Varying perspectives

Although shareholder wealth maximization is the most widely held paradigm for promoting maximum economic growth and efficiency, it is not altogether clear that it is the only one that will achieve economic ends. Certainly the underlying principle of unfettered markets has over time been modified with constraints to deal with a number of social values such as: preventing pollution, preserving natural habitats, avoiding destructive goods such as (now illegal) drugs, providing health care, a high level research, education, armed services, regulation of communications, securities, private property, public goods, and criminal activity. Though the criticisms of interference in the market-place tend to hold up the paradigm of unfettered markets in the abstract, it is clear that in the reality, no one believes in truly unregulated market places. Which constraints one

26 Despite Mannesmann's strenuous fight against Vodafone's takeover, ultimately its CEO, Klaus Esser, recommended that the shareholders accept Vodafone's increased offer. However, Esser was promised 30 million Euros from the new combined entity (1 Euro is roughly $1 depending on the exchange rates of the moment.) Charles M. Nathan & Michael R. Fischer, "An Overview of Takeover Regimes in the United Kingdom, France And Germany," 1347 PLI/Corp 1163, 1195 (2002).
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might support may vary with the political perspective of the individual, but perfect unregulated markets are not in fact held as the ideal path to the best social and economic welfare. This probably holds, in particular, for optimal takeover regulation.

Certainly, there is still enough support for deviations from the perfect shareholder maximization model.27 Various analyses focusing on global aspects of takeover regulation span the spectrum of whether the shareholder maximization model will naturally predominate an ultimate universal model28 or whether structural and political differences will determine different (sub-optimal) outcomes.29 Some assert that Europe (and the world) will inevitably gravitate to the U.S. model,30 while others assert that the initial differences in different economies will perpetuate differences even as nations evolve

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A number of studies have examined differences in economic structure: the degree of shareholder diffusion compared with concentrated blocks of controlling coalitions or the liquidity of a nation’s securities markets and its relationship to concentration of ownership. Some examine the differences in corporate governance: the role shareholders play in direct decision making, the role financial intermediaries play and the role unions play. Some look at political and governmental institutions: the im-

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impact of EU activities, the reach of U.S. laws abroad and comparisons of different nations’ regulations of takeovers or the impact of law itself in providing protection and disruptions. Some analyses consider the transportability of statutory regulation across nations and whether transplants of legal and structural features from one political and economic culture to another will yield success.

Debates range over which industrial regimes are superior to others, strong financial intermediaries versus liquid stock market, high

concentration versus diffuse ownership, protection of management versus facilitation of raiders. The views as to what forms and contexts are superior have changed over time as once flourishing countries such as Japan and Germany, whose corporate regime was far more institutionally controlled than the U.S., have subsequently fallen are harder times while the U.S.’s economy began to bloom again. With the economic rise and fall and rise again of different countries’ economies, each under a different regulatory and structural environment, it is now clear that it is not unambiguous that one model of corporate governance and economic structural environment is superior to another. Furthermore, this conclusive non-conclusion arises especially in the context of evaluating success in purely economic wealth-maximizing terms.

B. The questions that need to be asked

It is important to recognize the possibility that a multiplicity of economic contexts can co-exist internationally without interfering with


44 Edward F. Greene, Andrew Curran, & David A. Christman, “Toward a Cohesive International Approach to Cross-border
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overall global efficiency. Furthermore it is quite plausible that this co-existing multiplicity of economic regimes may also possess the flexibility to incorporate other social values in conjunction with economic measures of the nation's welfare and to do so without compromising its economy's efficiency to compete internationally. Certainly the suggestions of a number of authors at the very least do not preclude that possibility.45 On a practical level, it is evident that these other social values play a significant role in determining policy, not only among the several nations of the EU but within the EU itself. Global economic policy considering hostile takeovers will have to take European sensibilities into account.
